When Freedom of the Press and Privacy Collide: Reconciling Conflicts between Fundamental Democratic Values

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ABSTRACT

After *Florida Star v. B.J.F.* in 1989 applied a constitutional privilege for truthful publications of lawfully obtained information on matters of public significance, some scholars suggested *Florida Star* signaled the end of the disclosure tort, and perhaps other areas of privacy law. One legal scholar, however, warned that the Court's creation of narrow privileges in *Florida Star* and its progeny threatened "to erode both press freedom and the public's right to know." Such debate clarified that privacy torts addressing emotional harms resulting from publication directly conflict with the First Amendment right to publish.

This dissertation analyzed if and how state high courts and federal appellate courts have reconciled free press values and privacy values when those sets of values conflicted in post-*Florida Star* privacy tort cases. It examined cases involving two publication- or publicity-based privacy torts—disclosure of private facts and appropriation—to identify how courts have attempted to reconcile these two sets of values considered fundamental in our democratic society.

The analysis found that most rulings did not discuss clashes between free expression and privacy rights because the appeals were simply based on claims that lower courts erroneously applied the elements of the torts. And only about half of the rulings did discuss or imply at least one democratic value undergirding free expression or privacy rights.

If courts attempted to reconcile clashes between press freedom and privacy, they typically sought to identify the boundary between categories of privileged disclosures and categories of tortious disclosures and determined whether the facts at issue fell into the category of privileged publications or into the category of invasions of privacy. In those cases, courts typically found published information was protected under privileges for matters of public interest associated with audience-based free expression values.

In fact, courts only ruled in favor of plaintiffs in cases involving non-media defendants when at least one privacy value was harmed and no free expression values were promoted. This dissertation concluded that the U.S. Supreme Court should establish a broader constitutional privilege for publications of matters of public interest by individual communicators as well as by the news media.

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CHAPTER 1

Press freedom and privacy both serve values considered fundamental for American democratic society.[1] Free expression and privacy rights even serve some of the same values, such as autonomy.[2] Despite those underlying similarities, the press's First Amendment rights occasionally conflict with privacy rights recognized by state common law and statutory torts[3] that protect individuals' privacy interests against invasions by individuals or private entities.[4] The U.S. Supreme Court first addressed the potential collision between the press's right to publish information and individuals' privacy rights in *Time, Inc. v. Hill* in 1967.[5] In that ruling, a narrow majority of the Warren Court emphasized the importance of protecting speech and press freedom under the

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[1] GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE 3-4 (1992). *See also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 119 (1992). Smolla wrote:

> Privacy, like freedom of expression, has both an individual and a collective dimension. Laws protecting privacy are the means through which the collective acknowledges rules of civility that are designed to affirm human autonomy and dignity. If conscience and consciousness are the roots of free expression, they are also the roots of privacy.

[2] C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of The First Amendment*, 21 SOC. PHIL. & POL'Y 215, 220-21 (2004). The U.S. Supreme Court first recognized an autonomy-based constitutional right to privacy in *Griswold v. Connecticut* in 1965. Thomas I. Emerson, *The Right of Privacy and Freedom of The Press,* 14 HARV. C.R.-C.L. L. REV. 328, 328 (1979) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

[3] For the sake of clarity, the term common law torts will be used to refer to privacy torts recognized under state common law and statutory laws throughout this dissertation.

[4] Emerson, *supra* note 2, at 330-31.

[5] 385 U.S. 374, 381, 387-89 (1967).

circumstances of that case.[6] That was the first of six Supreme Court rulings in cases involving complaints that media defendants' publications violated plaintiffs' tort-based rights to privacy.[7] In most cases, the Court handed down narrow, fact-specific rulings, providing limited guidance to state and federal courts tasked with reconciling future conflicts between press and privacy rights.[8]

Scholars have suggested the Court's failure to create clear guidelines has a potentially chilling effect on the press's freedom to publish. Bruce Sanford, author of a leading treatise on privacy and libel law, summarized the case law as "laden with fact-intensive cases in which results are of limited precedential value."[9] In *Libel and Privacy Law*, published in 1999, Sanford suggested those rulings implied that "slight alterations in material or in newsgathering" could convert "provocative, enterprising journalism" into a tortious invasion of privacy.[10] Thus, he described editors as tending to be "fearful"

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[6] Writing for a five-member majority, Justice Brennan reasoned: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." 385 U.S. at 388.

[7] The other five cases are *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Zacchini v. Scripps-Howard Broad. Co*., 433 U.S. 562 (1977); *Cox Broad. v. Cohn*, 420 U.S. 469 (1975); *Cantrell v. Forest City Publ'g*, 419 U.S. 245 (1974).

[8] *See* Florida Star v. B.J.F., 491 U.S. 524, 530 (1989) ("The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years. . . . [A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context."). *See also* Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO. L. J. 2103, 2104 (2000) ("[E]ach of the pertinent Supreme Court rulings concerning press versus privacy is intensely fact-specific, carefully limited to the particular circumstances, and an ad hoc weighing of the competing privacy and free speech concerns under those specific circumstances.").

[9] BRUCE W. SANFORD, LIBEL AND PRIVACY § 11.1 (rev. 2d ed. Supp. 2004)(1999).

[10] *Id.*

of invasion of privacy lawsuits during the twentieth century.[11] Twenty-seven years earlier, Don R. Pember, an expert on mass communication law, had asserted, "[T]he newsman is affected every day, many times a day, as he prepares his record of contemporary events. Each news story, each advertisement, and each picture poses the threat of a possible lawsuit."[12] In 2004, David Anderson, a scholar of tort and First Amendment law, warned that uncertainty about the constitutional limitations on torts, in general, threatened to chill press freedom and that the lack of precision in defining restrictions on expression could cause "excessive deterrence," dissuading the media from publishing non-tortious, as well as tortious, content.[13] A 2007 publication by the Reporter's Committee for Freedom of the Press described the right to privacy as an evolving area of law in which "many legal questions remain unsettled" in most jurisdictions and advised journalists that they need to know "how the law in their jurisdiction balances" individuals' interests in privacy against the interests of the press and public.[14] The uncertainty, of course, cuts both ways, making it difficult for individuals to know when they have legitimate privacy invasion claims against the media.

Legal scholars have suggested the Supreme Court's narrow, fact-tied rulings have favored free expression and provided little clarity on privacy rights.[15] In 1992, Ken

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[11] *Id.*

[12] DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT vii (1972).

[13] David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 761-65 (2004). Anderson also commented that the Supreme Court's approach for identifying the constitutional limitations for privacy torts that target the content of publications "does not yet appear to be solidified." *Id.* at 758.

[14] *A primer on Invasion of Privacy*, 31 NEWS MEDIA & L. 2, 2 (Fall 2007).

[15] *See, e.g.,* Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1207 (1989) ("The Court in Florida Star made a choice. It decided that when the violation of

Gormley, a scholar of constitutional law, claimed that the Court's rulings on privacy torts resulted in "state privacy tort actions [being] effectively squashed in nearly every instance when they have come into conflict with the constitutional guarantee of free press."[16] In contrast, in 1991, Jane Kirtley, then head of the Reporter's Committee for Freedom of the Press, claimed "concern for personal privacy" posed one of the greatest threats to the First Amendment.[17] Kirtley suggested courts' approaches to the conflict had allowed privacy values to limit press rights. She warned that the common law right to privacy had "helped to create exceptions to and carve-outs of constitutional principles that threaten to erode both press freedom and the public's right to know."[18]

While legal scholarship has indicated the Supreme Court's decisions in privacy cases primarily have been narrow and fact-tied and have not created unnecessarily broad constitutional principles, those scholars have not examined whether lower courts are making ad hoc decisions or whether they are attempting to reconcile the competing free expression and privacy values present in the disputes. The purpose of this dissertation is to analyze if and how state high courts and federal appellate courts have weighed free

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privacy involves publication of private information about an individual, free speech wins; everything is newsworthy, and nothing is private."); Emerson, *supra* note 2, at 336 ("The constitutional basis for the privacy tort thus remains largely an open question."); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1387-88 ("[S]tate privacy tort actions have been effectively squashed in nearly every instance when they have come into conflict with the constitutional guarantee of free press."); Irwin R. Kramer, *The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 CARDOZO ARTS & ENT. L.J. 113, 116-17 (1990) ("While this conflict can only properly be resolved through a first amendment analysis that accommodates both interests, a recent line of Supreme Court cases declined to take this approach, disregarded the trial participant's privacy interests, and granted the press what amounts to an absolute First Amendment privilege.").

[16] Gormley*, supra* note 15, at 1387-90 (1992) (citing Time, Inc. v. Hill, 385 U.S. 374 (1967); Cantrell v. Forest City Publ'g Co. 419 U.S. 254 (1975); Cox Broad. v. Cohn, 420 U.S. 469 (1975)).

[17] Jane Kirtley, *Freedom of the Press: The Most Serious Threat Is . . . The Cloak of Privacy*, 30 COLUM. JOURNALISM REV. 46 (1991).

[18] *Id.*

press values and privacy values when those sets of values conflict in privacy tort cases. Specifically, this dissertation examined cases involving two publication- or publicity-based privacy torts—disclosure of private facts and appropriation—in an effort to identify how courts have attempted to reconcile these two sets of values considered fundamental in our democratic society.

Most states have recognized at least one of the four privacy torts: intrusion upon seclusion,[19] appropriation of another's name or likeness to one's own benefit,[20] disclosure of private facts,[21] and placing another in a false light.[22] Courts generally do not view claims that media defendants intruded on individuals' seclusion as directly conflicting

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[19] The RESTATEMENT (SECOND) OF TORTS § 652B (1977) states, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Bruce Sanford explained that intrusion is similar to trespass, but intrusion addresses a "highly offensive invasion of personal privacy" that "need not be a physical trespass." SANFORD, *supra* note 9, at §11.2.

[20] The RESTATEMENT (SECOND) OF TORTS § 652C (1977) declares, "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."). Only twelve states have not recognized the privacy tort of appropriation. Those states are Colorado, Delaware, Idaho, Indiana, Iowa, Minnesota, New Hampshire, South Carolina, South Dakota, Vermont, Washington, and Wyoming. SANFORD, *supra* note 9, at § 11.5 n.217. Most states have recognized the right to privacy under common law appropriation torts. Most states, however, have not recognized a statutory right of publicity. California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin have recognized a right of publicity under statutory law. THOMAS PHILLIP BOGGESS, 31 CAUSES OF ACTION § 47 (2d ed. 2008).

[21] The RESTATEMENT (SECOND) OF TORTS § 652D (1977) states, "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." Most jurisdictions have recognized the publication of private facts tort via common law. Only Hawaii, Illinois, Nebraska, Virginia, Montana, New York, North Carolina, North Dakota, and Utah have not. SANFORD, *supra* note 9, at §11.3 & n.65.

[22] The RESTATEMENT (SECOND) OF TORTS § 652E (1977) states, "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." False light invasion of privacy claims are viable under the common law of many states and the District of Columbia.

with First Amendment rights because the intrusion tort addresses harms to one's solitude that result from an invasive action rather than from publication or publicity.[23] In contrast, courts in eleven states have rejected the false light tort, with some suggesting the tort overlaps with the defamation tort without providing sufficient constitutional safeguards.[24] The disclosure and appropriation torts address emotional harms resulting from publication, and thus directly conflict with the First Amendment right to publish information—the focus of this dissertation.[25]

The purpose of this dissertation is to identify how federal appellate courts and state high courts, without much guidance from the Supreme Court, reconciled free press and privacy values in cases involving two widely accepted common law privacy torts involving publication or publicity. A key step in this process is reviewing the literature to identify and explicate the values underlying the rights to freedom of expression and

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[23] Melville B. Nimmer, *The Right to Speak from* Time*s to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968). Intrusion is considered a "law of general applicability" that does not conflict with the press's First Amendment right to publish news. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1126-28 (1999).

[24] Colorado, Florida, Massachusetts, Minnesota, Missouri, New York, North Carolina, Texas, Virginia, Washington, and Wisconsin have rejected the tort. SANFORD, *supra* note 9, at § 11.4. *See also* Judith Crown, *Florida High Court Rejects 'False Light' As a Cause of Action*, INSIDE COUNSEL 75, 75 (Jan. 2009).

[25] *E.g.*, Emerson, *supra* note 2, at 331-32 (1979) ("At most points the law of privacy and the law sustaining a free press do not contradict each other. . . . There, are, however, two major areas where an accommodation must be developed. One concerns the privacy tort, where the privacy right comes into sharp contrast with the right to publish. The other involves the right of the press to obtain information from the government"); Diane L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 722-24 (1992) (suggesting that making the appropriation of a name or likeness for a commercial use actionable challenges the First Amendment right to publish information); Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 363, 364 (1989); Diane L. Zimmerman, *Requiem For a Heavyweight: Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 292, 293 (1982) (asserting that no matter how courts or legislatures formulate a tort that addresses the disclosure of true information, as a disclosure tort or appropriation tort, such a law "cannot coexist with constitutional protections for freedom of speech and press").

privacy. First, however, the following section provides a brief overview of the development of the common law privacy torts.

Section A reviews the development of the disclosure of private facts and appropriation torts. Section B, the literature review, synthesizes legal scholars' definitions for key free expression values, identification of key privacy values, assertions that publication-based privacy torts protect key privacy values, suggestions for reconciling conflicts between free expression and privacy values, and arguments that defenses have provided a means of balancing individual and societal values at stake when free expression and privacy collide. Section C identifies the research questions addressed by this dissertation. And Section D outlines the method and limitations.

A. Background

Legal commentators generally recognize an 1890 *Harvard Law Review* article as the origin of laws that protect individuals from media invasions of privacy in the United States.[26] In that article, "The Right to Privacy," Samuel D. Warren and Louis D. Brandeis called on judges to extend the common law to protect the "inviolate personality," or inner person, from unwanted public exposure likely to result from keyhole journalism.[27] Warren and Brandeis, attorneys in Boston, argued that judges should develop common

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[26] *E.g.*, Baker, *supra* note 2, at 215 (describing the legal right of informational privacy as "the great modern achievement often attributed to the classic Samuel Warren and Louis Brandeis article); John H. Fuson, Comment, *Has The Promise Of The Free Press Failed?*, 148 U. PA. L. REV. 629, 646 (1999) (calling the article "history's most influential law review article"); Jesse A. Mudd, Note, *Right to Privacy v. Freedom of Speech: A Review and Analysis of* Bartnicki v. Vopper, 41 BRANDEIS L. J. 179, 179 (2002) (noting that the article "created an entirely new field of law)*;* Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 966, 970 (2003) ("The tort of public disclosure originates from an 1890 article by Samuel Warren and Louis Brandeis.").

[27] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194-96 (1890).

law to protect individuals from the emotional distress resulting from unwanted public disclosures of personal information "as part of a more general right to immunity of the person."[28] More than a quarter of a century before Brandeis joined the Supreme Court in 1916, he and his law partner observed that newspaper reporters and amateur photographers were intruding on private affairs to collect personal information and powerful images that would lure readers to purchase newspapers.[29]

> Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[30]

Their arguments for a common law right to privacy were published when the yellow press, which one journalism historian described as "a product of a lusty, fiercely competitive, and intolerant time," published sensational details about individuals.[31] Many Americans desired respite, reserve, and secrecy as an unprecedented surge in urban populations, as well as newspaper circulations, challenged the physical and social boundaries that traditionally allowed individuals to protect their intimate lives from public scrutiny.[32] At that time, Americans' conception of privacy related to a desire for

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[28] *Id.*

[29] *Id.* at 195.

[30] *Id.*

[31] W. JOSEPH CAMPBELL, YELLOW JOURNALISM 8 (2003).

[32] *E.g.*, MICHAEL SCHUDSON, DISCOVERING THE NEWS 88-106 (1978); Louis F. Nizer, *The Right of Privacy: A Half Century's Developments* 39 MICH. L. REV. 526, 528-29 (1941).

protection against emotional distress caused by loss of control over personal information and public image.[33]

Over the next seventy years, hundreds of law review articles cited the Warren and Brandeis article as a foundation for common law remedies addressing invasions of privacy.[34] By 1939, a number of courts also had recognized the right to privacy,[35] inspiring members of the American Law Institute — attorneys and legal scholars responsible for drafting and approving official reports on trends in American law[36] — to recognize the right of privacy in the *Restatement of Torts*.[37] The original *Restatement*

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[33] *E.g.*, Hyman Gross, *The Concept of Privacy*, 42 N.Y.U.L. Rev. 33, 36 (1967); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 376-78 (2003).

[34] *E.g.,* Elbridge L. Adams, *The Right of Privacy, And Its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905) (describing the article as "one of the most brilliant excursions in the field of theoretical jurisprudence"); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1134 (1992) (explaining that the attorneys' article "presented the idea of privacy as it should be understood); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 963-64 (1964); Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 611 (1968); Ruth Gavison, *Too Early for a Requiem*, 43 S. CAROLINA L. REV. 437, 438-39 (1992) (stating that "the article is supposed to be the most influential law review article ever written, an essay that single-handedly created a tort and an awareness of the need for legal remedies for invasion of privacy. It is a classic, a pearl of common-law reasoning . . .."); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1204, 1254 (1976); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 703-04 (1990); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1995); Nizer, *supra* note 32, at 527; Robert C. Post, *Rereading Warren and Brandeis*, 41 CASE W. RES. L. REV. 647, 649-53 (1990); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Fred R. Shapiro, *The Most Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1545 (1985); Zimmerman, *Requiem*, *supra* note 25, at 291.

[35] Kramer, *supra* note 34, at 718.

[36] The American Law Institute was formed after a committee of attorneys, legal scholars, and judges found that the complexity and uncertainty of American law were its primary flaws. The Institute asked lawyers and scholars to synthesize legal judgments to provide specific rules in a series of texts called *Restatements of the Law*. One commentator proposed that the *Restatements* have become "the pinnacle of this process of deliberative synthesis, so much so that they themselves take on the weight of binding authority, displacing the earlier material from which they have drawn their conclusions." Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C.L. REV. 709, 713 (1996). *See also* MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 52-53 (2003) (asserting the work published in the *Restatements* "is perhaps more persuasive in the courts than any other secondary material. Courts may sometimes even adopt *Restatement* provisions as correct statements of each law").

section declared, "[A] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[38] Several decades later, William Prosser, the great twentieth century American tort scholar,[39] found more than 300 court rulings had recognized four distinct privacy torts:

> 1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2) Public disclosure of embarrassing private facts about the plaintiff. 3) Publicity which places the plaintiff in a false light in the public eye. 4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[40]

Professor Edward Bloustein, a philosopher and expert on tort law, criticized Prosser's reduction of the common law invasion of privacy into torts that "involve violations of 'four different interests,' none of which, it turns out, is a distinctive interest in privacy."[41] Nonetheless, the American Law Institute added each of those torts to the *Restatement (Second) of Torts* in 1977.[42]

Just over a decade after Prosser published his landmark article, Don R. Pember provided one of the most significant analyses of privacy law for professional journalists.[43] Pember's 1972 book, *Privacy and the Press: The Law, The Mass Media,*

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[37] Kramer, *supra* note 34, at 718.

[38] RESTATEMENT OF TORTS § 867 (1939).

[39] Bloustein, *Privacy as an Aspect of Human Dignity*, *supra* note 34, at 962 (observing that "Dean Prosser is by far the most influential contemporary exponent of the tort").

[40] Prosser, *supra* note 34, at 389.

[41] Bloustein, *supra* note 34, at 965 & n.14 (suggesting that the four torts proposed by Prosser involve "the interest in freedom from mental distress," "the interest in reputation," and "the proprietary interest in name and likeness").

[42] RESTATEMENT (SECOND) OF TORTS § 652 A-E (1977).

[43] PEMBER, *supra* note 12.

and The First Amendment, traced the evolution of the legal right to privacy through invasion of privacy suits filed against media defendants in the United States. He identified three types of media actions that led to privacy suits: "1) The use of an individual's name or photograph in an advertisement without his consent; 2) the publication of private information about an individual; and 3) the publication of nondefamatory falsehoods about a person."[44]

That study provided an important foundation for scholarship examining how state and federal courts had reconciled common law invasion of privacy rights with the First Amendment right of freedom of the press. Pember's book suggested that state courts had recognized the inevitable collision between press and privacy rights for decades. At the time the U.S. Supreme Court had ruled on only one tort-based invasion of privacy case that involved a media defendant.[45] Since then, the Supreme Court, federal appellate courts, and many state high courts have handed down scores of rulings involving the press and privacy torts requiring publication.

State courts and legislatures started to address statutory and common law privacy rights almost two decades before the U.S. Supreme Court announced that the First Amendment applied to the states via the Fourteenth Amendment in 1925.[46] The Court's ruling in that case, which involved the constitutionality of a conviction under a state

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[44] *Id.* at 233.

[45] Time, Inc. v. Hill, 385 U.S. 374 (1967).

[46] The Supreme Court first applied the First Amendment to the states in *Gitlow v. New York*, 268 U.S. 652 (1925). The earliest recorded privacy case was *Roberson v. Rochester Folding Box Co*., 64 N.E. 442 (N.Y. 1902), in which the New York Court of Appeals refused to recognize a common law right of privacy. That case led to enactment of the New York Civil Rights Law, making appropriation of an individual's likeness for commercial purposes a misdemeanor and allowing civil suits for damages and injunctions. N.Y. CIVIL RIGHTS LAW §§ 50, 51 (1909). In 1905, the Georgia Supreme Court became the first state high court to recognize a common law right of privacy in *Pavesich v. New England Life Ins. Co*., 50 S.E. 68 (1905).

criminal anarchy statute, provided the foundation for constitutional defenses to limit common law and statutory claims.[47] In 1964, the U.S. Supreme Court first applied the First Amendment via the Fourteenth Amendment to state tort actions in *New York Times v. Sullivan*, a defamation case filed by a Montgomery, Alabama, commissioner.[48] Three years later, in *Time Inc. v. Hill*, the Court handed down its first ruling on First Amendment press rights and state privacy torts, extending the actual malice rule created in *Sullivan* to false light invasion of privacy cases involving discussion of matters of public concern.[49] Since that time, Daniel Solove, Marc Rotenberg, and Paul Schwartz, leading legal experts on privacy, have argued that the privacy torts have "exist[ed] in an uneasy tension with the First Amendment."[50]

Privacy law is relatively new, only a little more than 100 years old, and still evolving.[51] Since Dean Prosser's landmark article was published, most states have recognized at least one of the four types of privacy tort actions that he identified. As state and federal appellate courts have considered what legal standards should be applied in their jurisdictions, they have examined the relatively short history of the common law privacy torts as well as the short list of U.S. Supreme Court cases involving privacy tort

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[47] G. Edward White, *The First Amendment Comes of Age: Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 332 (1997).

[48] 376 U.S. 254 (1964).

[49] 285 U.S. 372 (1967).

[50] DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 132 (2d ed. 2006).

[51] *See* Edelman, *supra* note 15, at 1195 (1990) (stating Warren and Brandeis called for recognition of a legal right to privacy "in their classic article."); Zimmerman, *False Light*, *supra* note 25, at 365 ("The common law right of privacy was conceived in the late nineteenth century by the fertile intellects of Samuel Warren and Louis Brandeis").

conflicts with the First Amendment. Courts and commentators are still sorting out how to reconcile the privacy and free press values that collide in such cases. The literature review discusses key values that courts might consider when weighing privacy and press rights.

B. Literature Review

In order to analyze if and how state high courts and federal appellate courts have weighed free press values and privacy values when those sets of values conflict in privacy tort cases, it is necessary to identify and explicate the key values served by press and privacy rights. This section reviews three broad categories of scholarly literature. The first section explores key values underlying freedom of expression, including freedom of the press, theories and categorizes those values under two models: the individual liberty model and audience-based, communitarian model.[52] The second section reviews important privacy values and theories and categorizes those under individual or social models. The third section explains how First Amendment and privacy scholars have proposed courts should weigh those conflicting values.

Free Press Values: The Liberty Model

The liberty model is based on an individual's right to communicate, which includes the right to publish information, and is associated with key overlapping values often identified as autonomy, self-fulfillment, and self-realization. The model also serves other values—allowing individuals to participate in the search for and discovery of truth

[52] A recent note on privacy and the First Amendment divided theories of First Amendment protection into "collectivist" and "autonomy-based" approaches. Ryan Kilkenny, Note, *Why* Bartnicki v. Vopper *Disserves the Right of Privacy and the First Amendment*, 4 OHIO ST. L.J. 999, 999 (2003).

and the social and political decision-making process. While the liberty model firmly emphasizes the individual's right to communicate, it recognizes this individual right can also have societal benefits—helping all of society find truth, facilitating communal decision-making and promoting change with stability. Unlike the audience model, which will be discussed in the next part, the liberty model sees social benefits as corollaries to the individual values that result from protecting the liberty to communicate free of impediments from government and society. The liberty model holds that freedom of expression serves the ultimate good of society by promoting values that primarily benefit individuals.[53] Free expression theory relevant to this model recognizes a broad right for individuals to communicate.

In "Scope of the First Amendment Freedom of Speech," published in the *UCLA Law Review* in 1977, C. Edwin Baker contended that a broad "liberty model" would provide "the most coherent theory" of freedom of expression, grounding First Amendment rights in the autonomy value recognized by social contract doctrines.[54] Baker asserted that those doctrines require the community to respect "the dignity and equal worth" of individual members for the community "legitimately to expect individuals to respect collective decisions."[55] His liberty model emphasizes the importance of protecting individuals' free expression rights against governmental or societal restrictions that limit individual autonomy.[56] Under that model, the First

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[53] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1977).

[54] *Id.* at 964, 990-92. *See also* FREDERICK SCHAUER, FREE SPEECH PRINCIPLE 71 (1982) ("In order for the argument from autonomy to hold up, it must be rooted in social contract theory").

[55] Baker, *supra* note 53, at 991.

[56] *Id*.

Amendment requires that a speaker have the freedom to choose the content of his or her speech.[57] That aspect of personal agency, or control over one's decisions and actions, is essential for the liberty model to serve its key values—self-fulfillment and individual participation in change.[58] The scope of protection tied to those values is limited to nonviolent, noncoercive activity that "fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."[59] That freedom of expression model, then, would allow governors to limit only expression that harms other individuals, thereby violating the social contract. Baker supported that limitation by quoting the nineteenth century philosopher John Stuart Mill's argument that "'[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent *harm to others*.'" [60]

In 1972, Thomas Scanlon, a legal philosopher, had also drawn on what he termed the "Millian principle" to propose an individual liberty model of freedom of expression, which he said was grounded in the Kantian notion of autonomy: "[A] legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents."[61] Scanlon identified two types of harms to individuals that, under an autonomy principle, could not justify restricting expression.

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[57] *Id*.

[58] Baker explained, "The emphasis on 'self' in self-fulfillment requires the theory to delineate a realm of liberty for self-determined processes of self-realization. The participation in change value requires the theory to specify and protect activities essential to a democratic, participatory process of change." *Id*.

[59] *Id.* at 966.

[60] *Id.* at 1013 (quoting JOHN STUART MILL, ON LIBERTY 13 (1956)).

[61] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972).

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consist merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[62]

Both types assign some degree of agency for the resulting harms to the injured individuals themselves—not solely to the communicator. Both involve individuals' formation of beliefs, a process that must remain within the control of any individual who values autonomy and self-realization.[63]

Thomas I. Emerson, a major First Amendment scholar, also connected the underlying values of freedom of expression to the development of personal autonomy, which he asserted was essential for the development and maintenance of a well-functioning democratic society.[64] Emerson's book, *The System of Freedom of Expression*, published in 1969, linked four key functions, or values, of freedom of expression, to serving both individual and communal interests.[65] He described the first function of freedom of expression as encouraging self-fulfillment, or self-realization. [66]

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[62] *Id.* at 213.

[63] *Id.* at 214-15.

[64] THOMAS I. EMERSON, SYSTEMS OF FREEDOM OF EXPRESSION 6-9 (1969).

[65] *Id.* It is important to note that Baker referred to Emerson's functions as values because he defined values as purposes. Baker, *supra* note 53, at 990-91.

[66] EMERSON, *supra* note 64, at 6. It is also important to note that Professor Martin H. Redish later argued that "the constitutional guarantee of free speech ultimately serves only one true value," which Redish called "individual self-realization." That value encompasses "development of the individual's powers and abilities" and "the individual's control of his or her own destiny through making life-affecting decisions." Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 592, 604 (1981). *Cf.* Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. 139, 159

Emerson proposed that the ability to express ideas, without fear of censorship or unwarranted punishment, is essential to develop one's personal dignity and to affirm one's sense of self, personal autonomy, and independence—all of which are essential for self-fulfillment.[67] Emerson's other functions of freedom of expression serve both individual and social interests. The second function, the attainment of truth, suggests individuals' ability to discover truth through discussion and debate is essential to the ultimate good of society.[68] Emerson's third function recognizes freedom of expression as necessary for individuals to participate in social and political decision-making.[69] As Baker recognized, that function depends on individuals' ability to assert opinions as autonomous individuals and as members of society.[70] Emerson also contended that freedom of expression is essential to promoting orderly change within a society.[71] That function envisions freedom of expression as somewhat of a safety valve, a mechanism through which individuals can discuss matters that might foster anger, violence, or other antisocial behavior if left unaddressed.[72] Emerson considered each of those functions integral parts of a well-functioning system of freedom of expression, which includes the right to speak, to publish, and to receive information.[73]

(2003) (arguing that the value of self-fulfillment underlying the right to speak "is utterly hollow if there is no audience.").

[67] EMERSON, *supra* note 64, at 6.

[68] *Id.* at 6-7.

[69] *Id.* at 7.

[70] Baker, *supra* note 53, at 992.

[72] EMERSON, *supra* note 64, at 7.

[73] *Id.*

The autonomy value, which assigns each communicator the agency to determine the content of his or her communications, has been applied to press freedom as well as speech freedom. In several law review articles, Randall Bezanson, a prominent First Amendment scholar, has tied the First Amendment freedom of the press to editorial autonomy—the right of the press to publish information free from laws that impose government suppression or result in self-censorship.[74] Professor Bezanson identified two principles necessary for the press to serve its key functions.[75] The first principle means that government regulations cannot provide the press with "special treatment."[76] As an example Bezanson discussed *Cox Broadcasting v. Cohn*, in which he said the U.S. Supreme Court applied the neutrality principle when it struck down a Georgia statute that sanctioned the press for publishing the name of a rape victim that was first reported in court documents.[77] Bezanson noted the statute did not prevent individuals from discussing or publishing that information; thus "the statute effectively singled out the press for regulation."[78] Bezanson declared, "[W]e may surmise that the statute would not have offended the first amendment if it had also prohibited public, as well as press," from revealing the identity of rape victims in order to protect the victim's privacy.[79]

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[74] Randall P. Bezanson, *Means and Ends and Food Lion: The Tension between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); Randall P. Bezanson, *supra* note 34, at 1153; Randall P. Bezanson, *Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press*, 72 IOWA L. REV. 1359 (1987); Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977).

[75] Bezanson, *New Free Press Guarantee*, *supra* note 74, at 732, 761; Bezanson, *Means and Ends, supra* note 74, at 897-899, 927 n.22.

[76] Bezanson, *New Free Press Guarantee*, *supra* note 74, at 734.

[77] *Id.* at 762 (1977) (citing 420 U.S. 469, 495-96 (1975).

[78] *Id.*

Under Bezanson's second principle, the principle of independence, the First Amendment prevents the government from influencing the content of the press.[80] For instance, Bezanson wrote that in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute that required newspapers to provide political candidates with space to respond to opponents' criticism.[81] The Court held that it was "unconstitutional for the state to compel a newspaper publisher to print replies by candidates for public office who have been assailed in the press."[82] That ruling declared the First Amendment protects the press's right to editorial autonomy "with regard to public issues or matters pertaining to public officials."[83] Thus, Bezanson connected the scope of press freedom to the institutional press's agency, or autonomy, its editorial freedom to determine the content of what it communicates.

Although the self-fulfillment and self-realization values of freedom of expression may seem inapplicable to the institutional press, even the earliest free expression theorists, John Milton and John Stuart Mill, associated those values with freedom to publish. Milton's *Areopagatica*, published in 1644, provided a foundation for the model that emphasizes personal liberty and freedom from censorship.[84] The English poet and

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[79] *Id.* at 763 (citing Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); noting that the U.S. Supreme Court's rulings on access to prisons "support the propriety of such a neutral ban on access to sources of information under governmental control").

[80] *Id.*

[81] Bezanson, *New Free Press Guarantee*, *supra* note 74, at 757 (citing Miami Herald v. Tornillo, 418 U.S. 241, 257-58 (1974)).

[82] 418 U.S. at 257-58.

[83] Bezanson, *New Free Press Guarantee*, *supra* note 74, at 757 (citing 418 U.S. at 257-58).

[84] JOHN MILTON, AREOPAGATICA: A SPEECH TO THE PARLIAMENT OF ENGLAND, FOR THE LIBERTY OF UNLICENSED PRINTING 3 (Cambridge" Chadwyck-Healey, 1999) (1644). He wrote:

philosopher suggested that censorship and licensing, which at that time were required prior to publication, threatened individuals' abilities to discover the religious truth necessary for personal salvation, an aspect of self-realization and self-fulfillment.[85] Just over two centuries later, in 1859, Mill's *On Liberty* specifically addressed liberty of the press. Mill contended that government actions that suppress expression, whether by individuals or the press, undermined the ultimate development of humanity by hindering individuals from debating the merits of opposing opinions, a process that can benefit both the individual and society.[86] Emphasizing the benefit to individuals, Mill said liberty of expression is intricately connected to that sphere of life in which "society, as distinguished from the individual, has, if any, only an indirect interest."[87] That sphere comprises 1) "the inward domain of consciousness," 2) "liberty of conscience, in the most comprehensive sense," 3) "liberty of thought and feeling," and 4) "absolute freedom of opinion and sentiment on all subjects."[88] Although freedom to speak and publish can

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> If ye be thus resolv'd, as it were injury to thinke ye were not, I know not what should withhold me from presenting ye with a fit instance wherein to shew both that love of truth which ye eminently prosesse, and that uprightnesse of your judgement which is not wont to be partial to your selves; by judging over again that Order which ye have ordain'd to *regulate Printing*. *That no* B*ook pamphlet*, *or* [*p*]*aper shall be henceforth Printed*, *unless* t*he same be first approv'd and licen*c't *by such*, or at least one of such, as shall be thereto appointed. (emphasis added).

[85] *Id*.

[86] JOHN STUART MILL, ON LIBERTY 28 (David Bromwich & George Kateb, eds., Yale Univ. Press 2003) (1859). Mill offered the utilitarian rationale that individuals would need to pit truth against falsehoods if they wished to find "the clearer and livelier perception of truth." He wrote:

> [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

[87] *Id.* at 26.

[88] *Id*.

affect others and society in general, Mill described those liberties as "being of almost as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."[89] Mill's concept of free expression provides individuals with freedom "without impediment from our fellow-creatures, so long as what we do does not harm them."[90] For Mill those liberties, based on individual autonomy and its reciprocal values of self-realization and self-fulfillment, were necessary for any society to remain free from tyranny by governors or society at large.[91]

In summary, scholars have recognized several key liberty values served by freedom of expression. In a democratic society grounded in social contract theory, freedom of speech and of the press serves the individual's needs for autonomy, self-fulfillment and self-realization, as well as enabling the individual to discover truth and participate in social and political decision-making. While the focus of the liberty value is on the individual, proponents also recognize that freedom of speech and press inevitably results in societal and communal benefits, facilitating the democratic decision-making process overall, creating a marketplace of ideas in which society as a whole can discover truth, and helping create a balance between change and stability. While these latter societal benefits are some of the same identified with the audience-based, communitarian model discussed below, the crucial difference is that the liberty model grounds freedom of expression in the value of autonomy, emphasizing the rights of individuals under the social contract. That theoretical framework limits governments' abilities to impose

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[89] *Id.* at 82-83.

[90] *Id.* at 83.

[91] *Id*. at 73-74.

sanctions that would interfere with individuals' self-determination absent direct harm to others. As Scanlon and Baker noted, under a liberty model, even expression that results in others acquiring "false beliefs"[92] or acting on those beliefs cannot be sanctioned.[93] The general autonomy-based principles of this model can also apply to the institutional press, protecting the press against government censorship, licensing, or other actions that interfere with the press's autonomy or control over the content it publishes.[94]

Free Press Values: The Audience Model

While the liberty model recognizes both individual and societal interests served by each communicator's freedom of expression, the "audience model" focuses solely on the societal interests, the values expression serves for its audience. The audience-based values most often discussed in the literature are enabling effective self-governance, providing a check on government, creating a marketplace of ideas, facilitating a balance between societal stability and change, and fostering toleration. Some of those values overlap with values associated with the liberty model, but whereas the liberty model associates those values with the right to communicate and disseminate information, the audience model connects those values to individuals' and society's rights to receive

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[92] Scanlon, *supra* note 61, at 217.

[93] *Id*. *See also* Baker, *supra* note 53, at 1028-29. Baker wrote:

> By protecting substantively valued conduct from abridgement by general prohibitions, the liberty model provides for a process of public decision making and a search for, or creation of, truth that avoids the problems and improper assumptions of both the market models. Thus, the liberty model better promotes the key value that justified the classic marketplace of ideas theory of freedom of speech: the value of furthering the search for truth or best premises, a value that, due to a failure of assumptions, the classic theory could not adequately serve.

[94] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975); Bezanson, *New Free Press Guarantee*, *supra* note 74, at 762.

information or right to know.[95] The audience model grounds freedom of expression in audience members' rights to receive information.[96]

In 1948, Alexander Meiklejohn, a prominent philosopher who advocated for First Amendment freedoms, provided the foundation for theories that associate the scope of First Amendment coverage with the rights of message recipients.[97] Meiklejohn's seminal treatise, *Free Speech and Its Relation to Self-Government*, connected freedom for citizens to discuss government actions to American citizens' moral obligation to participate in self-governance and in public life.[98] He posited that the founding fathers protected freedom of speech and press to ensure that American citizens received the information necessary to cast informed votes.[99] Meiklejohn's self-governance rationale, while similar to Emerson's participation in decision-making value, provides narrower protection for free expression.[100] Meiklejohn proposed the First Amendment was intended to provide absolute protection for speech on matters of governing importance, matters that contribute to citizens' understanding of matters they need to know to remain sovereign

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[95] Gerald J. Baldasty & Roger A. Simpson, *The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment*, 56 WASH. L. REV. 365 (1981); Thomas I. Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U. L.Q. 1; James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29; Michael J. Hayes, *What Ever Happened to 'the Right to Know'?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111 (2007); William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303; David M. Obrien, *The First Amendment and the Public's 'Right to Know*,' 7 HASTINGS CONST. L.Q. 579 (1979).

[96] *Id.*

[97] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[98] *Id.* at 33.

[99] *Id.*

[100] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963) (describing freedom of expression as a "method of securing participation by the members of society in social, including political, decision-making").

over their governors.[101] He called that type of speech public speech and argued that all other types of speech, which he called private speech, fell under the protection of the Fifth Amendment's due process clause.[102] Under that rationale, the First Amendment right to publish would cover only the publication of information that promoted self-government.

Another prominent First Amendment theorist, Harry Kalven, Jr., also connected freedom of speech to the necessity for individuals to receive information in a democratic society. [103] In 1964, Kalven contended that the Warren Court's unanimous ruling in *New York Times v. Sullivan* established a "central meaning" for the First Amendment: "a core of protection of speech without which democracy cannot function, without which, in [James] Madison's phrase, 'the censorial power,' would be in the Government over the people and not 'in the people over the Government.'"[104] Kalven explained that allowing speech to be sanctioned for government criticism would dissuade some speakers from making true, critical statements about the government. [105] That, in turn, would extinguish the political freedom that defines a democratic society.[106]

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[101] MEIKLEJOHN, *supra* note 97, at 25-26. Responding to criticism that his original view was too narrow, Professor Meiklejohn later expanded his definition of political speech to include many forms of communication "from which the voter derives the knowledge, intelligence, sensitivity to human values," that inform voting. He said education, "achievements of philosophy and the sciences," "literature and the arts," and "the spreading of information and opinions" related to public issues. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.

[102] MEIKLEJOHN, *supra* note 97, at 36-40.

[103] Kalven, *The New York Times Case: A Note on "The Central Meaning of The First Amendment,"* 1964 SUP. CT. REV. 191, 208 (citing 376 U.S. 254, 273-276 (1964)).

[104] *Id.*

[105] *Id.* at 212-13.

[106] *Id.* at 205.

In 1971, Judge Robert H. Bork agreed that the First Amendment is central to "democratic organization" but proposed a much more restricted arena of protected speech, "expressly political" speech.[107] Bork said the First Amendment protects "speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering, and propaganda."[108] But, among other things, it would exclude speech "advocating forcible overthrow of the government or violation of law"[109] because such speech would not lead to the discovery and spread of political truth.[110]

Closely related to the self-government value is what commentators have referred to as the "checking value" or "watchdog function" of the press. This theory began to gain prominence after the Vietnam War and Watergate, when pessimism and distrust of "public power" underscored the necessity for an independent press to serve as a check on misconduct by powerful institutions.[111] Unlike the other values, which can be applied to both individual speech and the press, this value focuses directly on the Press Clause of the First Amendment. In a key 1974 law review article, Supreme Court Justice Potter Stewart acknowledged the social need for an autonomous press free to criticize and question government.[112] He said, "[T]he primary purpose of the constitutional guarantee

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[107] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

[108] *Id.*

[109] *Id.* at 29-30.

[110] *Id.* at 28-31.

[111] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 522, 541-42 (warning "if modern government were ever to gain complete control of the channels of mass communication or to incapacitate its professional critics in some other way, there would be no effective check on official misconduct").

of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[113] That conception of press freedom acknowledges that the press protects the public's interest in learning about matters of public concern, which is essential for the participation in political decision-making value.[114]

In an influential law review article published in 1977, "The Checking Value in First Amendment Theory," Professor Vincent Blasi described that value of freedom of the press as "the checking value," the value of the press serving as a check on the government and other powerful institutions.[115] The press was provided with freedom to serve as a watchdog that would warn citizens about threats to the balance of powers essential in a democracy. Like the self-government value, the checking value focuses on the audience's need to receive information.

The audience model of freedom of expression has led several scholars to assert the First Amendment protects a "right to know," a concept that emphasizes a right for citizens to receive information that promotes government accountability.[116] In 1976,

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[112] Stewart, *supra* note 94, at 632.

[113] *Id.* at 634.

[114] *Id.* at 636.

[115] Blasi, *supra* note 111, at 541-42.

[116] Thomas I. Emerson, *Colonial Intentions and the Current Realities of the First Amendment*, 125 U. Pa. L. Rev. 737, 754-56 (1977); Emerson, *supra* note 95, at 2; O'Brien, *supra* note 95, at 590; Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEORGE WASH. L. REV. 1 (1957). *But see* David M. O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 8 (1980) (claiming proponents of a constitutional right to know "confuse the political ideal of freedom of information and an informed public with a directly enforceable right to know under the first amendment.")

Professor Emerson proposed that concept is an "integral part" of a well-functioning system of freedom of expression:

> Reduced to its simplest terms the concept includes two closely related features. First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate.[117]

Emerson suggested the concept could make the greatest contribution to society when asserted as a right of the public to obtain information stored, collected, or created by government actors, especially to obtain information "necessary or proper for the citizen to perform his function as ultimate sovereign."[118] That concept ultimately serves as a composite of rights associated with the self-governance and checking values of freedom of expression.

As mentioned in the discussion of the liberty value above, the discovery of truth value has both an individual and societal dimension. The audience-based variation is often referred to as the marketplace of ideas value. Many twentieth-century theorists, [119] as well as the Supreme Court, have claimed that freedom of expression leads to a

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[117] Emerson, *supra* note 95, at 2.

[118] *Id.* 17.

[119] *E.g.,* Redish, *supra*, note 66, at 617-19 (1981) ("[I]f viewed as merely a means by which the ultimate value of self-realization is facilitated, the concept may prove quite valuable in determining what speech is deserving of constitutional protection."); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 394-96 (2008) (explaining that the theory "has been enormously influential in both free speech theory and jurisprudence."); SCHAUER, *supra* note 54, at 19-20 (explaining the marketplace concept as a "process of discussion" through which truth emerges); SMOLLA, *supra* note 1, at 8 ("While the marketplace of ideas is far from perfect, in the long run it is overwhelmingly superior to a system of regulated expression, and is by itself enough to make the case for a preferred position in an open culture."). *But see* Baker, *Scope*, *supra* note 53, at 974-81 (asserting that the marketplace model relies on faulty assumptions); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7-8 ("On the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind, yet this faith stands as a foundation block for most recent free speech theory.").

marketplace in which the audience benefits by having access to all manners of information and ideas.[120] Justice Oliver Wendell Holmes, Jr., first applied this concept to the First Amendment in his 1919 dissenting opinion objecting to the conviction of self-proclaimed "revolutionists" charged with espionage for printing leaflets encouraging resistance to the United States' war efforts.[121] Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.[122]

Rodney Smolla, a major First Amendment scholar, suggested the ultimate benefit of the marketplace metaphor is its emphasis on the ongoing process of searching for and testing truth. The theory assumes that society benefits from a free flow of information that fosters public debate and allows speech to remedy harms caused by other speech.[123]

Some scholars have debated whether the marketplace theory is fundamentally flawed.[124] Proposing that the ultimate value served by the First Amendment is individual

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[120] *E.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 483 (1987) (O'Connor, J., dissenting) (asserting that the marketplace metaphor "has become almost as familiar as the principle that it sought to justify."); Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 171 (1978) (Blackmun, J., concurring); Pac. Gas & Elec. Co. v. Pub.Utils. Comm'n of Cal., 475 U.S. 1, 8 (1985) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1964) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

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

[122] *Id.* at 630.

[123] Baker, *supra* note 53, at 965-66; Melville B. Nimmer, *supra* note 23, at 955.

[124] *E.g.*, Baker, *supra* note 53, at 965-66; Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1966).

autonomy, Baker criticized key assumptions underlying the marketplace theory. He argued that the theory, based on laissez-faire economics fails in a society, where individuals lack equal access to media channels.[125] He suggested that media monopolies, the wealthy, and powerful control access to national media, which could limit the range of viewpoints available from other sources. Baker criticized the market metaphor's assumptions about the quality of information provided and received, as well as the assumptions about the breadth of information available for public debate. He claimed that the theory erroneously assumed that the people providing and receiving information are capable of rational and rich debate.[126] Martin Redish, another theorist, acknowledged that Baker's criticism would be valid if the ultimate goal for freedom of speech is to discover truth.[127] Yet, Redish claimed that Baker's criticism "becomes irrelevant" when the marketplace theory is considered a means of facilitating another value, such as "self-realization."[128]

Professor Emerson argued that freedom of expression also benefits audiences by facilitating a balance between societal stability and change.[129] That value overlaps with the marketplace and participation in public decision-making values. All three suppose that a free flow of information benefits society by ensuring that audiences receive information that enriches discussion and debate. Unlike the other values, however, the

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[125] Baker, *supra* note 53, at 965-66.

[126] *Id.* at 966.

[127] Redish, *supra* note 66, at 619.

[128] *Id*.

[129] EMERSON, *supra* note 64, at 7.

stability and change value could be compared to a safety valve. The theory assumes that suppression of discussion could lead to violence and weaken the social foundation essential for community building. Emerson described the value as "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[130] In other words, freedom of expression encourages individuals to discuss and adapt to change rather than to resort to secrecy and violence. Emerson proposed that "suppression of discussion makes a rational judgment impossible, substituting force for reason." He continued, "[S]uppression promotes inflexibility and stultification."[131] Under the safety-valve value, freedom of expression benefits society, allowing individuals to resolve conflicts, promote progress, and strengthen community.[132]

The final societal value, toleration, was articulated by Professor Lee C. Bollinger, who criticized mechanistic theorists for defining the scope of free speech in terms of political functions.[133] Bollinger suggested that a system of free speech should serve broad intellectual values by encouraging individuals to share and to receive diverse opinions. He claimed that toleration is the key value for free speech: "Through toleration . . . we create the community, define the values of that community and affirm a commitment to and confidence in those values."[134] Toleration, which encourages individuals to listen to unpopular, as well as favored, messages, helps prepare individuals to participate in social

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[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 438 (1983).

[134] *Id.* at 460.

and political decision-making. Listening to extreme viewpoints that may contradict their own beliefs may even help individuals to evaluate the truth of minority and majority views and promote stable change.[135] While individuals clearly can benefit from the toleration value of freedom of expression, Bollinger asserted, "[T]he ultimate aim of the First Amendment is the advancement of the public or collective good and not that of any single individual."[136] Thus, the toleration value, like the other values associated with the right to receive information, primarily benefits society as a whole.

In summary, leading legal theorists have suggested that a right to receive and right to know information are important parts of a well-functioning system of free expression. Under an audience model, the broad right to receive information serves five primary communal values: effective self-governance, the checking value, creation of a marketplace of ideas, societal stability and change, and toleration. The right to know primarily serves the societal values of effective self-governance and the checking value. All five values associated with an audience model benefit society as a whole because free speech fosters community building and democratic governance as members of society remedy harms through discussion and debate, rather than violence.

The audience model and the liberty model noticeably serve some of the same values considered essential to a well-functioning democratic society. The aforementioned scholarship has provided a foundation for those values to be assigned to an audience model when the underlying values are described as societal benefits associated with the receipt of information, or to the liberty model when the underlying values are described

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[135] *Id.*

[136] *Id.* at 439.

primarily as benefits resulting from an individual's communication. Of course, Professor Emerson clarified that those models and their underlying values are part of the larger system of freedom of expression protected by the First Amendment.[137] Distinctions among those values and models, however, are essential to considering how much weight to assign to expression-based rights that conflict with privacy rights. For instance, Professor Meiklejohn assigned speech that effectuates self-governance that falls under the audience-based model absolute protection, which would allow free speech to trump privacy.[138] On the other hand, Professor Scanlon's "Millian principle," which falls under the liberty-model, limits protection for expression to expression that does not harm another individual.[139] In parallel, Professor Emerson suggested the societal right to receive information should yield to individual privacy interests that protect the autonomy of the individual.[140] The following section explores how scholarship has defined autonomy and other key values for privacy.

Defining the Values of Privacy

As is the case with freedom of expression, there is no single theory for privacy.[141] Nor is there a bright line distinction between the individual and societal values

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[137] Emerson, *supra* note 95, at 2-3.

[138] MEIKLEJOHN, *supra* note 97, at 25-26.

[139] Scanlon, *supra* note 61, at 214.

[140] Emerson, *supra* note 95, at 22.

[141] *See, e.g.,* Bloustein, *Privacy As an Aspect of Human Dignity*, *supra* note 34, at 966 ("[I]f [Dean Prosser] is right, the social value or interest we call privacy is not an independent one, but is only a composite of the value our society places on protecting mental tranquility, reputation, and intangible forms of property."); Charles Fried, *Privacy [A Moral Analysis]*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 205 (Ferdinand David Schoeman ed., 1984) ("It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust."); Gormley, *supra* note 15, at 1339 ("[L]egal privacy consists of four or

underlying privacy. By its very nature, privacy is more clearly an individual rather than a societal value; still some values serve society as well as individuals. Part one of this section examines how the literature has presented privacy values as primarily individual, primarily societal, and both individual and societal. Part two explores how key literature connects those values to the mass-publication-based privacy torts identified in the *Restatement (Second) of Torts*.

Defining the Individual and Societal Values of Privacy

Scholarship from law, philosophy, sociology, and psychology has addressed privacy as a condition,[142] space,[143] or claim[144] for individuals to enjoy a physical and emotional realm where they can flourish as autonomous individuals, a realm where they may be free from social or political pressure.[145] Fred C. Cate, a communication law expert, has claimed that it is important to explicate privacy values because "privacy is not

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five different species of legal rights which are quite distinct from each other and thus incapable of a single definition, yet heavily interrelated as a matter of history, such that efforts to completely sever one from another are (and have been) disastrous."); Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 272 (Ferdinand David Schoeman ed., 1984) ("Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.").

[142] *See*, *e.g.*, Gross, *supra* note 33, at 36 (describing privacy as "the condition of human life" in which a person limits her acquaintance with another person and limits the other person's knowledge of her personal affairs.); W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 306 (1983) (defining privacy as "the condition of not having undocumented personal information about oneself known by others.").

[143] Bezanson, *The Right to Privacy*, *supra* note 34. Bezanson argued that the legal right to privacy rested, "at its core, on the need of the individual for a space free from the demands of the larger social order in which to develop beliefs, attitudes, and behavioral norms."

[144] ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.").

[145] *Id.* at 32-33; Jonathan Kahn, *supra* note 33, at 372.

an end in itself but rather an instrument for achieving other goals."[146] In a case book published in 2007, privacy law expert Anita Allen suggested that one meaningful way for theorists to advance privacy scholarship is to "clearly explicate the costs, benefits, and values associated with whatever 'privacy' is intended to denote."[147] Several important scholarly explications of privacy values are grounded in sociologist Erving Goffman's theory on the presentation of self,[148] psychoanalyst Sidney M. Jourard's theory on privacy,[149] and sociologist Alan F. Westin's theory on privacy in modern democratic societies.[150] While theorists have explored connections between some types of privacy and key individual and societal values, this section demonstrates that scholarship has suggested relationships exist between all of the key privacy values and at least one of the publication-based privacy torts.

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[146] FRED CATE, PRIVACY IN THE INFORMATION AGE 23 (1997).

[147] ANITA ALLEN, PRIVACY LAW & SOCIETY 3 (2007).

[148] ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 4 (1959) ("[W]hen an individual appears in the presence of others, there will usually be some reason for him to mobilize his activity so that it will convey an impression to others which it is in his interests to convey."). *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 962-64 (1989) (quoting Erving Goffman, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 47, 47, 56, 77, 84-85, 90-91 (1967)); Daniel J. Solove, *Virtues, supra* note 26, at 1037 (citing GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959)); WESTIN, *supra* note 144, at 33, 35.

[149] Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROBS. 307, 307 (1966).

> Privacy is an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future. The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others' perceptions and beliefs vis-à-vis the self-concealing person.

See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 448-49 (1979); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1106 (2002).

[150] WESTIN, *supra* note 144, at 7. *See* CATE, *supra* note 143, at 22-28; Gavison, *supra* note 149, at 412 n.1 ("The best general treatment of privacy is still [Westin's] PRIVACY AND FREEDOM."); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 261-63 (1977).

This section first addresses how one's core identity, or core self, is the fundamental individual privacy value, recognizing that value is integrally related to other key individual privacy values: autonomy,[151] liberty,[152] emotional release,[153] personal growth and self-evaluation,[154] and psychic self-preservation.[155] This section then explicates the key societal privacy values of promoting civility and community,[156] fostering human relationships,[157] and encouraging participation in a democratic society.[158]

Key Individual Privacy Values

Scholarship from sociology, philosophy, and law has described an essential individual value for privacy as personhood or selfhood, or, alternately, the integrated values of personality, dignity, independence, individuality, and identity.[159] The Warren and Brandeis article, considered the metaphorical seedling for privacy law, blasted

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[151] WESTIN, *supra* note 144, at 33-34. *But see* C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 4 (1983). Boone contended viewing privacy as protecting autonomy is "commonplace" and "plausible" but not always applicable: "[S]ocial norms as well as legal statutes require that some 'private' acts not be performed in public . . .. [T]he implementation of some 'private rights' are, by collective fiat, restricted to specified contexts, and thus are forms of social control over behavior.") Boone defined privacy as "the state of limited access by others—most of the time voluntary, but sometimes imposed—to certain modes of being in a person's life." *Id.* at 6.

[152] Gavison, *supra* note 149, at 438-39; Jourard, *supra* note 149, at 308.

[153] WESTIN, *supra* note 144, at 34-35.

[154] Gavison, *supra* note 149, at 445; WESTIN, *supra* note 144, at 36-37.

[155] Gavison, *supra* note149, at 442; WESTIN, *supra* note 144, at 37-38.

[156] Gavison, *supra* note 149, at 442.

[157] *Id.* at 442; Fried, *supra* note 141, at 205-207; James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323, 326-29 (1975).

[158] Gavison, *supra* note 149, at 421.

[159] *E.g.*, Bloustein, *supra* note 34, at 971; Kahn, *supra* note 33, at 377; Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 272 (Ferdinand David Schoeman ed., 1984); WESTIN, supra note 144, at 34-38.

newspaper journalists and photographers for intruding in individuals' personal affairs and harming individuals' "inviolate personality."[160] That article called for the law to protect the right of individuals to be let alone, suggesting that privacy would protect individuals against intrusions by society and the demands of collective life.[161] More than 70 years later, Professor Bloustein described Warren and Brandeis' vision for privacy law as a mechanism for protecting an "individual's independence, dignity and integrity."[162] Suggesting that privacy was a shield for individuals' interest in human dignity, Bloustein proposed that the key privacy value of personhood "defines man's essence as a unique and self-determining being."[163] More recently, in 2003, Jonathan Kahn, a legal and historical scholar of identity, suggested that maintaining and developing one's sense of dignity and integrity are key aspects of identity, a key underlying principle for privacy.[164] As such, the personhood value protects each individual's ability to define her own identity, or self, as she perceives herself as being distinct from other members of society.[165]

The core self, or personhood, value and the autonomy value are both grounded in Goffman's suggestions that an individual desires to control others' perceptions of

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[160] Warren & Brandeis, *supra* note 27, at 205.

[161] *Id*. at 195-96.

[162] Bloustein, *supra* note 34, at 971.

[163] *Id.*

[164] Kahn, *supra* note 33, at 377 ("The harm to dignity caused by invasions of privacy ultimately implicates the integrity of individual identity.").

[165] *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 761 (1989). Criticizing the vagueness of the personhood value for constitutional privacy, Rubenfeld proposed that an individual could consider any act to be self-defining. He claimed, "The premise of such freedom is an individualist understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do apart from society."

himself.[166] He claimed that each individual attempts to influence social conceptions of his identity by concealing personal attributes that would contradict social expectations for context-specific conduct or otherwise taint others' perceptions of his social identity. Westin observed, "Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality."[167] Jourard, a psychoanalyst, explained that adults are expected to perform certain social roles. When an adult's behavior noticeably deviates from the pattern of socially expected conduct, the nonconforming adult may be socially sanctioned.[168] Yet, an adult who strives to constantly conform to social expectations, suppressing contradictory desires, risks "self-alienation," which undermines one's physical and mental health.[169] Privacy provides each individual with opportunities to experience and to reflect on her uniqueness as a human being without exposing her core self to society.

The desire to protect one's individuality is integrally related to the value of autonomy.[170] Whereas the personhood value of privacy emphasizes one's essence as a unique person, the autonomy value stresses one's independence of judgment and one's ability to choose whether to resist pressures to conform to social norms.[171] Westin

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[166] GOFFMAN, PRESENTATION OF SELF, *supr*a note 148, at 4 ("[W]hen an individual appears in the presence of others, there will usually be some reason for him to mobilize his activity so that it will convey an impression to others which it is in his interests to convey."); WESTIN, *supra* note 144, at 33.

[167] WESTIN, *supra* note 144, at 33.

[168] *Id.*

[169] Jourard, *supra* note 149, at 309.

[170] Professor Gerety defined privacy as "autonomy or control over the intimacies of personal identity." Gerety, *supra* note 150, at 236.

described autonomy as "the desire to avoid being manipulated or dominated wholly by others."[172] In an article published in 1979, Gavison asserted, "Autonomy requires the capacity to make an independent moral judgment, the willingness to exercise it, and the courage to act on the results of this exercise even when the judgment is not a popular one."[173] More than twenty years later, Jeffrey Rosen, a privacy scholar, suggested that the autonomy value of privacy presumes that each individual is capable of realizing "a self-actualized individual self," a self who chooses to assert her uniqueness as an individual and a member of her community.[174] According to those conceptions, privacy helps individuals exercise self-determination and make independent judgments.[175]

The value of autonomy also is related to the third individual value of privacy—liberty.[176] While conceptions of privacy as control over information about oneself or access to oneself may relate to autonomy or personhood, some scholars have claimed that those conceptions relate more precisely to a liberty value of privacy.[177] In 1968, Charles Fried, a legal scholar, suggested that privacy allows individuals to do or say things that would be scorned or scrutinized by members of the general public without "fear of disapproval or more tangible retaliation."[178] Fifteen years later, W.A. Parent, a legal

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[171] Gavison, *supra* note 149, at 449-50; WESTIN, *supra* note 144, at 34.

[172] WESTIN, *supra* note 144, at 33.

[173] Gavison, *supra* note 149, at 449.

[174] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2124 (2001).

[175] Gerety, *supra* note 150, at 266.

[176] Gavison, *supra* note 149, at 448-49.

[177] Fried, *supra* note 141, at 202; Parent, *supra* note 142, at 316.

[178] Fried, *supra* note 141, at 202-03.

philosopher, argued that such conceptions of privacy as control over information about oneself ultimately relate to personal freedom, or liberty.[179] He asserted, "Whenever one person or group of persons tries to deprive another of control over some aspect of his life, we should recognize this as attempted coercion and should evaluate it as such, under the general concept of freedom-limiting action."[180] Gavison labeled that value "liberty of action," which incorporates the individual values of freedom from censure or ridicule, promotion of autonomy, and promotion of mental health.[181] The key underlying principle of the liberty value is that liberty insulates individuals from authoritarian interferences, such as government restraints or societal pressures, and allows individuals to challenge social norms in private free from pressures to conform in public.[182]

The fourth individual value of privacy, emotional release, has two key functions for individuals.[183] The first function allows an individual to escape the stress and tensions that result from one's performance of various social roles "depending on his audience and behavioral situation."[184] That function enables individuals to relax and drop their social personas, which is essential for physical and emotional health.[185] Westin compared the second function of the emotional release value to a safety valve that primarily benefits individuals, whereas the safety valve function of freedom of speech primarily benefits

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[179] Parent, *supra* note 142, 328.

[180] *Id.*

[181] Gavison, *supra* note 149, at 448-49.

[182] *Id.* at 448.

[183] WESTIN, *supra* note 144, at 34-35.

[184] *Id.* at 34.

[185] Gavison, *supra* note 149, at 448-49; Jourard, *supra* note 14, at 309-310; WESTIN, *supra* note 144, at 34-35.

society. He suggested that privacy allows individuals to voice anger and frustration at authority figures to friends or family "without fear of being held responsible for such comments."[186] That venting helps individuals process emotions in a safe context, reducing the risk that individuals will spout off harmful statements in a context likely to violate their professional or broad social roles.[187] Both functions of the emotional release value ultimately benefit individuals' mental and physical health.[188]

Freedom to process one's thoughts and to reflect on one's emotions is also essential for the personal growth and self-evaluation value of privacy.[189] Westin claimed that privacy helps each individual find opportunities to process the deluge of information encountered during daily life and "to integrate his experiences into a meaningful pattern."[190] Reflecting on one's experiences is necessary for individuals to grow through self-discovery and self-criticism.[191] Evaluating one's thoughts, attitudes, and beliefs is also essential for individuals to practice and prepare how and when to present themselves to the general public.[192] The process of self-evaluation, then, ultimately helps each person feel confident in herself as an autonomous being.[193]

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[186] WESTIN, *supra* note 144, at 35.

[187] *Id.*

[188] *Id*. at 36. *See also* Jourard, *supra* note 149, at 309 ("Enactment of any social role appropriate to one's sex, age, or occupation calls upon one to suppress inappropriate action and to repress inappropriate experience. These praxes culminate in physical sickness or 'role-check-outs' (mental illness).").

[189] CATE, *supra* note 146, at 25; WESTIN, *supra* note 144, at 36.

[190] WESTIN, *supra* note 144, at 36.

[191] JOSEPH H. KUPFER, AUTONOMY AND SOCIAL INTERACTION 135 (1990).

[192] CATE, *supra* note 146, at 26; KUPFER, *supra* note 191, at 135; WESTIN, *supra* note 144, at 34.

[193] KUPFER, *supra* note 191, at 135; WESTIN, *supra* note 144, at 34.

The final individual value for privacy, self-preservation and emotional health, is closely related to the individual values of personal autonomy, self-evaluation, and emotional release. For example, Westin described a function of limited and protected communication as "the means of psychic self-preservation for men in the metropolis."[194] In other words, individuals use reserve and discretion to decide which conduct and communications to share only within the parameters of trusted relationships because exposure to the general public would cause psychological pain. The value of psychic-self preservation has been associated with privacy for more than a century. When Warren and Brandeis called for a legal right of privacy, they asserted, "[M]odern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."[195] They argued that the underlying value for individual privacy, which allowed individuals to prevent the press from disclosing their information, is "peace of mind."[196]

In sum, privacy is instrumental for individuals to achieve numerous personal goals.[197] The primary individual values of privacy are personhood, autonomy, liberty, emotional release, self-evaluation, and psychic self-preservation. Several of those values are synergistically related, and, at times, may even overlap. Nonetheless, each value has at least one unique primary attribute. For example, one's conception of oneself as a

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[194] WESTIN, *supra* note 144, at 38.

[195] Warren and Brandeis, *supra* note 27, at 196.

[196] *Id.* at 200.

[197] Gavison, *supra* note 149, at 441 ("The best way in which to understand the value of privacy is to examine its functions. This approach is fraught with difficulties, however. These justifications are instrumental, in the sense that they point out how privacy relates to other goals."); Solove, *supra* note 149, at 1145 ("[A]long with other scholars, I contend that privacy has an instrumental value—namely, that it is valued as a means for achieving certain other ends that are valuable.").

unique human being defines one's core identity or personhood.[198] Self-determination is a critical element for autonomy.[199] Freedom to act without interference by authorities is a key attribute of liberty.[200] The emotional release value serves two key functions: enabling individuals to express strong emotions without repercussions and allowing individuals to release the tensions experienced when donning their social personas.[201] Self- reflection and self-criticism are essential for the self-evaluation value.[202] The final value of psychic self-preservation promotes one's psychological well being.[203] As mentioned previously, no bright lines separate those individual values.

Key Societal Privacy Values

While the privacy values of personhood, autonomy, liberty, and psychic self-preservation primarily benefit individuals, those values also have secondary benefits for society at times. Likewise, the privacy torts may serve communitarian values that contribute to the wellbeing of modern democratic society as well as the individual privacy values. Scholars have identified those societal privacy values as maintaining civility and community in society,[204] fostering human relationships,[205] and encouraging evaluative decision-making and participation in a democratic society.[206]

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[198] Reiman, *supra* note 159, at 272; Bloustein, *supra* note 34, at 971.

[199] Gavison, *supra* note 149, at 449-50; WESTIN, *supra* note 144, at 34.

[200] Parent, *supra* note 142, 328.

[201] WESTIN, *supra* note 144, at 34-35.

[202] CATE, *supra* note 146, at 25; WESTIN, *supra* note 144, at 36.

[203] WESTIN, *supra* note 144, at 38.

[204] Gavison, *supra* note 149, at 442.

In *The Limits of Privacy*, published in 1999, philosopher Amitai Etzioni claimed that no society could remain free for long without privacy.[207] Although Etzioni's book primarily focused on the constitutional right to privacy, the underlying philosophy for her work also is applicable to privacy recognized by the common law and statutory torts. Etzioni grounded her arguments in communitarian social philosophy, which presumes that "a good society crafts a careful balance between individual rights and the common good."[208] Under some circumstances, she suggested, privacy helps individuals follow social norms, making sure their conduct is consistent with social virtues that promote the good of society.[209] Similarly, Professor Allen noted that scholarship has argued that "privacy makes us more fit for our social responsibilities and participation in group life."[210]

Several legal scholars have connected privacy to the societal goals of promoting civilized communities.[211] In an article examining the significance of the Warren and Brandeis article between 1890 and 1990, Professor Bezanson said that the nineteenth-century conception of privacy "protected the individual's right to enjoy an identity forged

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[205] *Id.*, at 442; Fried, *supra* note 141, at 205-07; James Rachels, *supra* note 157, at 326-29.

[206] Gavison, *supra* note 149, at 421; Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1664-70 (1999).

[207] AMITAI ETZIONI, THE LIMITS OF PRIVACY 1 (1999).

[208] *Id.* at 5.

[209] *Id.* at 196.

[210] ALLEN, *supra* note 147, at 7-8.

[211] *E.g.,* Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1427-28 (2000) ("Informational privacy, in short, is a constitutive element of a civil society in the broadest sense of the term."); Gavison, *supra* note 149, at 455; Post, *supra* note 148, at 957.

by the existing social institutions of family and community, which embodied chosen social standards and morality."[212] Bezanson suggested that the nineteenth-century conception of privacy was based on communitarian values, and the right was asserted to protect the social institutions of family and community from pressures imposed by the culture of nineteenth-century mass media and society.[213] In *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, published in 1989, Robert Post proposed that modern privacy law "safeguards the rules of civility" that define the social norms, or standards of propriety, each community member is expected to follow.[214] Post claimed that privacy law generally addresses violations of social rules that cause psychological injuries, including mental anguish or dignitary harms. He described the latter type of harms, dignitary injuries, as degradations of individuals and society that arise when one community member fails to extend to another a basic form of respect that standards of decency, which are social standards that may vary from community to community, suggest any member of a community deserves.[215] Such displays of disrespect demean the individuals involved and society by defying the fundamental level of moral treatment essential for individuals to coexist in a community that values personal growth, autonomy, and meaningful human relationships.[216]

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[212] Randall P. Bezanson, *supra* note 34, at 1133.

[213] *Id. at* 1138-39 ("The concept of privacy represented an attempt to protect the functioning of those discrete social institutions from the monolithic, impersonal, and value-free forces of modern society by channeling that which is personal to these discrete institutions and foreclosing it to society at large.").

[214] Post, *supra* note 148, at 963.

[215] *Id.* at 967.

[216] Fried, *supra* note 141, at 475 ("It is my thesis that an essential part of the morality which underlies these realizations is the constraint of respect for the privacy of all, by the state and citizen alike."); Gavison, *supra* note 148, at 445; Post, *supra* note 148, at 985 ("The civility rules which delineate information

Several scholars also have connected the value of promoting and maintaining human relationships to a well functioning civil society, as well as to the mental health and personal growth of individuals.[217] Westin claimed, "The greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew or felt at all times. The havoc done to interpersonal relations by children, saints, mental patients, and adult 'innocents' is legendary."[218] Fried has argued that privacy is a means of promoting fundamental human relations of respect, love, friendship, and trust. He wrote, "[W]ithout privacy they are simply inconceivable."[219] He suggested that privacy is a condition necessary for individuals to create and maintain levels of intimacy—sharing information about one's conduct, beliefs, thoughts, or feelings—that facilitates trust, respect, and the relations essential for civil interactions and, in turn, promotes the individual values of personhood, psychic self-preservation, and personal development. [220]

The final societal privacy value is encouraging participation in the democratic

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preserves must therefore be understood as forms of respect that are integral to both individual and social personality. They comprise an important part of the obligations that members of a community owe to each other.").

[217] Fried, *supra* note 141, at 475; Gerety, *supra* note 150, at 245; Rachels, *supra* note 157, at 326; WESTIN, *supra* note 144, at 37.

[218] WESTIN, *supra* note 144, at 37.

[219] Fried, *supra* note 141, at 477.

[220] *Id.* at 477-78. *See* Rachels, *supra* note 157, at 326 ([P]rivacy is necessary if we are to maintain the variety of social relations with other people that we want to have."). *But see* Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFFAIRS 26, 34-35, 38-44 (1976). Reiman criticized Rachels' definition of intimacy. Reiman argued that one's willingness to share information is only one aspect of intimacy. Sharing information is dependent on the condition of caring unique to each relationship. For Reiman, privacy is a social ritual that enables individuals to choose whether to share information with others. He proposed that privacy is a right "because it enables me to make the commitment that underlies caring as *my* commitment uniquely conveyed by *my* thoughts and witnessed by *my* actions." *Id.* at 44.

process, which includes discussion of political issues and voting.[221] Professor Emerson argued:

> In its social impact a system of privacy is vital to the working of the democratic process. Democracy assumes that the individual citizen will actively and independently participate in making decisions and in operating the institutions of the society. An individual is capable of such a role only if he can at some points separate himself from the pressures and conformities of collective life.[222]

Ken Gormley said that the first vision of privacy law in America, which related privacy to maintaining control over information about oneself, was essential for democratic society.[223] Gormley explained, "[C]ontrol of information about oneself is critical in determining how and when (if ever) others will perceive us, which is in turn essential to maintaining our individual personalities."[224] That is essential for maintaining the American democratic society's emphasis on individuality, autonomy, and liberty.[225]

In a law review article published in 2004, Solove wrote that much important discussion of political matters occurs within the bonds of trusted relationships, which allow individuals to frankly state and evaluate their opinions without fear of reprisal from the general public.[226] In an article published in 2006, Solove argued that privacy, which enables individuals to act anonymously, enables individuals to vote according to their

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[221] EMERSON, *supra* note 64, at 546; Gavison, *supra* note 149, at 444; Daniel J. Solove, *Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 514 (2006) ("Anonymity and pseudonymity protect people from bias based on their identities and enable people to vote, speak, and associate more freely by protecting them from danger of reprisal.").

[222] EMERSON, *supra* note 64, at 546.

[223] Gormley, *supra* note 15, at 1356-57.

[224] *Id.* at 1356.

[225] *Id.* at 1356-57.

[226] Solove, *supra* note 26, at 993-94.

consciences without fearing retaliation from individuals with other political biases.[227] Such arguments recognize that privacy enables individuals to act autonomously, allowing each person to reflect on the democratic process, evaluate conflicting opinions, and vote on political matters.[228] Thus, when privacy serves the societal privacy value of participation in self-government, privacy also facilitates the individual privacy values of autonomy and liberty.

In sum, privacy serves the key societal goals of maintaining civility and community in society, fostering human relationships, and encouraging evaluative decision-making and participation in a democratic society. Applying Etzioni's communitarian philosophy, privacy primarily serves those values by stressing the common good of society. In a democratic society that emphasizes the importance of individual autonomy and liberty, some of the societal values of privacy inherently overlap with individual privacy values. For example, the societal goal of maintaining civility and community also promotes the individual value of mental health; promoting relationships also enhances the individual values of mental health and personal growth; and encouraging evaluative decision-making and participation in a democratic society also advances the individual values of personal autonomy and liberty. Although individual and societal values may intertwine at times, privacy theorists have recognized

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[227] Solove, *supra* note 221, at 514.

[228] Gavison, *supra* note 149, at 455. Gavison wrote:

> Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy. Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences. Thus, to the extent that privacy is important for autonomy, it is important for democracy as well.

each as a distinct value worthy of legal protection through the tort of appropriation or disclosure of private facts.

Publication-Based Privacy Torts and Key Values They Protect

This section explores how scholars have indicated the publication-based privacy torts protect the individual privacy values — autonomy, liberty, emotional release, personal growth and self-evaluation, and psychic self-preservation —and the societal privacy values — promoting civility and community, fostering human relationships, and encouraging participation in a democratic society. The publication-based torts that are the subject of this study—disclosure of private facts and appropriation—are discussed individually.

The disclosure of private facts tort protects the individual values of personality, autonomy, liberty, emotional release, mental health, self-evaluation, and reflection. Prosser initially proposed that the disclosure tort protected one's interest in reputation, but Professor Bloustein argued, "The gravamen in the public disclosure cases is degrading a person by laying his life open to public view," which injures a person's individuality and personal dignity.[229] Professor Gerety claimed that Warren and Brandeis intended for privacy law to protect individual autonomy, which would be violated by disclosures of private, true facts "that embarrass or humiliate us."[230] And Professor Post suggested that courts have treated the disclosure tort as a means of redress for "indecent and vulgar" communications that cause a reasonable person to feel emotional distress.[231]

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[229] Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2093 (2001).

[230] Gerety, *supra* note 150, at 291.

[231] Post, *supra* note 148, at 985.

When mass media reports disclose private facts, Professor Gerety claimed the resulting harm makes autonomy and intimacy impossible.[232]

The disclosure tort also enables individuals to relax and to exercise what Westin called the "safety-valve" function of privacy by venting to friends or family members without judgment or retaliation.[233] Westin claimed, "Without the aid of such release in accommodating the daily abrasions with authorities, most people would experience serious emotional pressure."[234] Losing control over the revelation of such information would sear through one's liberty by searing through the insulation that is also necessary for one to experiment, reflect, and develop one's personality without fear of censure.[235]

The disclosure tort also protects each of the societal privacy values. Professor Post suggested that the disclosure tort fosters rules of civility that "delineate information preserves" essential for members of a community to convey forms of respect that represent the basic moral obligations shared by each member of a community.[236] He argued that respecting those social norms, which define contexts in which disclosing private information to a third party would harm the subject of the disclosure, also

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[232] Gerety, *supra* note 150, at 292.

[233] WESTIN, *supra* note 144, at 35-36 ("Most persons need to give vent to their anger at 'the system,' 'city hall,' 'the boss,' and various others who exercise authority over them, and to do this in the intimacy of family or friendship circles . . . without fear of being held responsible for such comments."). *See also* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 130 (2007) ("Privacy permits individuals to express unpopular ideas to people they trust without having to worry how society will judge them or whether they will face retaliation.").

[234] WESTIN, *supra* note 144, at 35.

[235] *See* Gavison, *supra* note 149, at 364 ("In addition to providing freedom from distractions and opportunities to concentrate, privacy also contributes to learning, creativity, and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation.").

[236] Post, *supra* note 148, at 984.

safeguards "the 'ritual idiom' through which such respect finds social expression."[237] Conveying respect for each person is essential for individuals to form meaningful relationships and to willingly participate in society.[238]

The disclosure tort also encourages participation in a democratic society that emphasizes independence, plurality, tolerance, and self-governance.[239] Professor Westin asserted, "Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public."[240] Recognizing social expectations that enable individuals and even groups to shield sensitive information from public disclosure, the tort ultimately helps individuals prepare to participate in public life by participating in political discussions,[241] enables individuals to associate with other persons or groups that share their political ideologies,[242] and

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[237] *Id.* at 984.

[238] Gerety, *supra* note 150, at 266 (stating that individuals need control over their identities and the availability of information about themselves. "Without such control, much that we take as distinctively human—love, reflection, choice—cannot flourish or perhaps even survive in our society.").

[239] WESTIN, supra note 144, at 34 ("This development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals.")

[240] *Id*.

[241] SOLOVE, *supra* note 233, at 131 ("Political discussions often take place between two people or in small groups rather than at public rallies or nationwide television broadcasts. . . . Without privacy, many people might not feel comfortable having these candid conversations.").

[242] Although this dissertation will not address constitutional privacy, it is important to recognize that First Amendment jurisprudence acknowledges a constitutional right of associational privacy. Professor Solove explained:

> The First Amendment protects freedom of association, which is integral to the formation of political views and the execution of political action. Protection against disclosure protects freedom of association, for it enables people to join together and exchange information without having to fear loss of employment, community shunning, and other social reprisals.

Solove, *Virtues*, *supra* note 26, at 994.

increases one's willingness to run for public office.[243]

The *Restatement* describes an invasion of privacy under the appropriation theory as using "the name or likeness of another" for one's own benefit, either commercial or non-pecuniary.[244] A comment on the *Restatement* section on appropriation suggests that the interest protected by appropriation is a person's "exclusive use of his own identity" and that protecting a person "against mental distress is an important factor leading to recognition of the rule."[245] Those interests clearly are related to the individual values of personality or identity, autonomy, and psychic self-preservation or mental health.[246] Bloustein claimed that every person has a right to control whether his name or likeness is used for the commercial benefit of another because "it would be demeaning to human dignity to fail to enforce such a right."[247] Bloustein argued that human dignity, a value

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[243] *E.g.*, Gavison, *supra* note 149, at 421 ("[I]t can be argued that respect for privacy will help a society attract talented individuals to public life."); Solove, *Virtues*, *supra* note 26, at 992 ("In fact, privacy protections against disclosure strongly promote democratic self-governance. . . . Thus, privacy can contribute to a robust public life rather than detracting from it.").

[244] RESTATEMENT (SECOND) TORTS § 652C (1977).

[245] RESTATEMENT (SECOND) TORTS § 652C cmt a (1977).

[246] During the past six decades many appropriation suits have been based on the right of publicity rather than right of privacy. Right of publicity-based appropriation suits conceptualize identity as a property right rather than personal right. The harm claimed by the plaintiff is pecuniary rather than emotional or psychological. *See, e.g.*, Murphy, *supra* note 34, at 2390 (1996) (explaining that the use of another's identity for one's own benefit typically is done for commercial gain); Nimmer, *supra* note 23, at 957-58 ("This right, sometimes called the right of publicity, involves the commercial appropriation of values which, whether or not labeled as 'property,' may not be freely plundered under the banner of the first amendment."); Parent, *supra* note 142, at 324 ("It is a mistake to conceptualize these kinds of cases in terms of privacy for they don't involve the finding out of personal facts about anyone. Most of them have essentially to do with the issue of financial remuneration and consequently should be handled as property cases."). This dissertation is concerned with the ways in which courts balance free expression and privacy values and, thus, does not focus on right of publicity-based cases except to the extent courts address privacy values.

[247] Bloustein, *supra* note 34, at 989.

that overlaps with autonomy, identity, and individuality, is the key value protected by privacy.[248]

The appropriation tort also protects the individual values of mental health and liberty.[249] Bloustein wrote, "The use of a personal photograph or a name for advertising purposes has the same tendency to degrade or humiliate as has publishing details of personal life."[250] Bloustein connected the emotional harms to a loss of liberty as the use of one's identity without one's consent diminishes "personal freedom."[251] In fact, the first state high court ruling to recognize invasion of privacy by appropriation described the harm from misappropriation as a "loss of liberty."[252] Losing control over the social presentation of one's personality, then, may diminish the individual's sense of individuality, identity, autonomy, and liberty.[253]

The appropriation tort also protects forms of respect that are essential for the key societal value of maintaining civility and community.[254] In an article published in 1991, Post suggested that emotional or dignitary harms resulted from misappropriation because the use of another's identity undermined "socialized expectations of respect."[255] As

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[248] *Id.*

[249] *Id.* at 986; Parent, *supra* note 142, at 324 ("If the gravamen of petitioner's complaint is not financial but concerns the preemption of choice—she wasn't asked whether her name or likeness could be used –the right to liberty becomes the focus of attention.").

[250] Bloustein, *supra* note 34, at 986.

[251] *Id.* at 990.

[252] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 220 (1905).

[253] Solove, *Taxonomy*, *supra* note 221, at 549.

[254] Post, *Rereading Warren and Brandeis*, *supra* note 34, at 652.

[255] *Id.*

mentioned previously, expectations of respect are grounded in norms of propriety determined by members of a common community.[256] Post claimed, "Personality is violated when these forms of respect are transgressed."[257] Thus, the appropriation tort helps maintain community "by enforcing norms of propriety," which preserve "the community instantiated by those norms."[258] In 2001, Post clarified that such conceptions of privacy assume that social norms "constitute the decencies of civilization" and "govern" social interactions.[259]

In sum, scholars have argued that the widely accepted mass publication-based privacy torts protect all of the individual and societal values of privacy. Scholarship from law, philosophy, psychology, and sociology suggests the appropriation tort protects most of the individual privacy values—personality, identity, autonomy, mental health, and liberty[260] —as well as one societal value—maintaining civility and community. [261] The literature associates each of the individual privacy values—personality, [262] which overlaps with autonomy [263] and liberty, [264] mental health, [265] and emotional release, [266]

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[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2093 (2001).

[260] Bloustein, *supra* note 34, at 986; Parent, *supra* note 142, at 324; Solove, *supra* note 221, at 549.

[261] Post, *supra* note 34, at 652.

[262] Bloustein, *supra* note 34, at 981.

[263] Gerety, *supra* note 150, at 292.

[264] Gavison, *supra* note 149, at 364

[265] Post, *supra* note 148, at 985.

which can promote self-evaluation and reflection[267]—with the disclosure of private facts tort. The disclosure tort also protects each of the societal privacy values—fostering civility and community,[268] enabling individuals to maintain the mental distance necessary to display the forms of respect essential to form and maintain relationships,[269] and providing individuals with the reserve necessary to participate in public life.[270]

Reconciling Conflicts between Free Expression and Privacy Values

In addition to identifying and explicating the values served by freedom of expression and privacy, scholars have explored clashes between certain First Amendment values and several of the privacy values protected by the appropriation and disclosure torts, suggesting how such conflicts should be resolved. Literature also has examined how courts, especially the U.S. Supreme Court, have reconciled conflicts between press freedom and privacy values. Some of that scholarship suggests court rulings have favored freedom of expression.[271] Yet, as mentioned previously, Jane Kirtley has claimed courts have favored privacy.[272] This section first examines how scholars have suggested courts should weigh privacy and free expression values when they come into conflict. Then it reviews commentators' assessments of courts' applications of the newsworthiness or

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[266] SOLOVE, *supra* note 233, at 130; WESTIN, *supra* note 144, at 35-36.

[267] Gavison, *supra* note 149, at 364.

[268] Post, *supra* note 148, at 984.

[269] *See* Gerety, *supra* note 150, at 292 (stating that after the mass disclosure of private information "neither privacy, nor autonomy, nor intimacy is any longer possible).

[270] Gavison, *supra* note 149, at 421; Solove, *supra* note 26, at 994; WESTIN, *supra* note 144, at 34.

[271] *E.g.*, Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 140; Strossen, *supra* note 8, at 2104.

[272] Kirtley, *supra* note 17, at 46.

public interest defense to privacy invasion claims as a means of resolving conflicts between privacy and freedom of expression.

Weighing Select Free Expression and Privacy Values

Thomas Emerson proposed that conflicts between freedom of expression and privacy should be resolved by examining the values of freedom of expression and privacy in a well-functioning system of freedom of expression.[273] He claimed the system would allow only "a very narrow" exception to the general rule of protection of speech.[274] Emerson said speech that is proscribed by the privacy torts, and thus is outside First Amendment protection, must harm the individual privacy value of "inner personality"[275] by "assaulting the dignity of the individual by depicting matters of a wholly personal and intimate nature . . . ."[276] That type of speech would harm personal autonomy, which the system presumes is essential for the development and maintenance of democratic society. Emerson proposed that in clashes among the societal freedom of expression values—discovery of truth, participation in decision making, and social change—and the individual privacy value of autonomy, the individual privacy value would prevail over the societal free expression values.[277] When the individual expression values of self-fulfillment or discovery of truth conflict with the autonomy value of privacy, Emerson

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[273] EMERSON, *supra* note 64, at 550.

[274] *Id*. at 556.

[275] *Id.*

[276] *Id*. at 562.

[277] Emerson, *supra* note 2, at 341.

claimed "privacy would prevail over freedom of expression."[278] He proposed the "guiding principle would be that the exercise of an individual right which injures another person would not be favored."[279] Still, Emerson said that invasions of privacy that caused only emotional injuries generally would not outweigh First Amendment protection for the expression.[280] Under Emerson's system, privacy would only trump freedom of expression values that clashed with the autonomy value of privacy.[281] In all other instances, free expression values would prevail.

C. Edwin Baker proposed a method for reconciling conflicts between the autonomy value of freedom of expression and privacy. That method is grounded in the presumption that freedom of expression and privacy serve two distinct types of autonomy: meaningful autonomy and formal autonomy.[282] The central premise of meaningful autonomy is that each person should be free to make the choices she desires.[283] That means each individual ought to have opportunities to make choices about her own life without unnecessary interference by others.[284] While meaningful autonomy suggests that each person should have the moral right to control whether her personal information is disclosed, formal autonomy assigns each person the agency to control whether such information is disclosed. Baker said formal autonomy "centers on the agent

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[278] *Id*.

[279] *Id*.

[280] EMERSON, *supra* note 64, at 556.

[281] Emerson, *supra* note 2, at 341.

[282] Baker, *supra* note 2, at 220-225.

[283] *Id.* at 220-23.

[284] *Id.* at 220.

being the final authority over decisions about herself or, in the case of speech, about her speech."[285] He described formal autonomy as the "liberty of choice" that shields each individual from regulations that would prevent an individual from having the ultimate ability to determine what to disclose about herself.[286] While one individual's exercise of meaningful autonomy value may inhibit another person's meaningful autonomy, Baker claimed that one individual's exercise of the formal autonomy value would not inhibit another person's meaningful or formal autonomy. He declared that privacy serves meaningful autonomy and freedom of expression serves formal autonomy. Thus, Baker proposed freedom of expression should prevail over privacy when the autonomy value underlying freedom of speech or press collides with the autonomy value underlying privacy.[287]

Other scholarship has focused on reconciling conflicts between privacy values and the individual freedom of expression value of discovering truth or the societal freedom of expression value of the marketplace of ideas.[288] For instance, Frederick Schauer has claimed the very development of defamation and privacy torts implies that some individual or social interests might outweigh the value of acquiring knowledge, which underlies the freedom of expression values of discovery of truth and the marketplace of ideas.[289] Schauer compared the privacy interest likely to be harmed by a

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[285] Baker, *supra* note 2, at 232

[286] *Id.* at 262.

[287] *Id*. at 215-16, 253-54.

[288] *E.g.*, EMERSON, *supra* note 64, at 556; Emerson, *supra* note 2, at 341.

[289] SCHAUER, *supra* note 54, at 175-76.

disclosure to the public interest likely to be served when audiences receive the information.[290] He noted that disclosures of information about a person's private life likely would harm more than the emotional health of the subject. Such disclosures, he wrote, would infringe on a private person's "interest in controlling certain aspects of his life" and, in turn, would undermine the individual privacy values of autonomy and liberty.[291] The public interest defense, however, recognizes the public benefit from receiving such information about a public figure, such as a celebrity, or a public official, a person elected to public office might override the individual's privacy interests. Schauer suggested that a public official or figure may relinquish some control over his social personality, decreasing his reasonable expectation of privacy "by placing his personality before the electorate for scrutiny" or by otherwise seeking to "benefit from publicity about [his] life."[292] That approach seeks to reconcile the individual privacy values of autonomy and liberty with the societal free expression values of self-governance and the marketplace-of-ideas.

Edward Bloustein published a pragmatic approach for reconciling speech-privacy conflicts. Bloustein asserted that Meiklejohn's audience-based free expression theory would provide a practical framework for reconciling collisions between tort-based privacy claims and the constitutional right of the public to receive information.[293]

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[290] *Id*.

[291] *Id*.

[292] *Id*. at 177.

[293] Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 42 (1974). *See* Lillian BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL .L. REV. 482, 503 (1980) (stating that the principle of representative self-government "does not support the conclusion that the Court's rhetorical

Bloustein relied on Meiklejohn's premise that the First Amendment protects the right of the public to hear information relevant to self-governance. Bloustein wrote, "[T]he weight to be given 'the public interest in obtaining information' should depend on whether or not the information is relevant to the public's governing purposes."[294] That would assign strong First Amendment protection to the disclosure of information about government officials, public issues, or other matters of governing importance.[295] The free expression value associated with society's right to learn information that enhances self-governance then would prevail over individual privacy interests, but the individual privacy value of dignity could trump a speaker's expression of information lacking governing importance.[296]

Another legal commentator, Eric B. Easton, wrote that the Supreme Court has reconciled clashes between freedom of press and privacy by creating tests that suggest audience members' rights to receive matters of "public importance" should trump individual privacy interests.[297] He suggested the Court's rulings in *Cox Broadcasting v. Cohn* and subsequent cases expanded First Amendment protection for the media to cover the publication of truthful information about matters of public significance, which

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affirmations of the values of the public being informed about government and the press's role in bringing such information to the public *ought* to be conceived of as acceptable elaborations of constitutional principle.").

[294] *Id.* at 56.

[295] *Id.* at 46 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 37-38 (1969).

[296] *Id.* at 46. Bloustein explained that under Meiklejohn's theory, the Fifth Amendment protected private speech.

[297] Easton, *supra* note, 66, at 167-68.

includes matters of public importance,[298] "public interest," "legitimate public concern," and "newsworthiness."[299] Easton reasoned, "The public must know what is happening within official quarters, not only to maintain the ability to participate effectively but also for the purifying effect public scrutiny has on the decision-making process . . . ."[300] That public importance standard includes the self-governance, participation in decision-making, and watchdog values of freedom of expression. Easton's proposal suggests those audience-based freedom of expression values could prevail over individual privacy values as long as privacy is not considered essential to preserve freedom of speech and press.[301]

In summary, relevant scholarship has reached some conflicting conclusions as to whether certain free expression values should trump certain privacy values. Baker proposed the freedom of expression values of autonomy, which he associated with liberty and self-fulfillment, should prevail over the privacy value of autonomy.[302] On the other hand, Emerson argued the individual privacy value of personhood or autonomy should prevail over the free expression values of self-fulfillment and discovery of truth.[303] Emerson would allow individual privacy values to outweigh the societal free expression values of participation in decision-making and stability and change, but Bloustein and

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[298] *Id.* (citing 420 U.S. 469 (1975).

[299] *Id.* at 143.

[300] *Id.* at 168.

[301] *Id.* at 174, 196 (explaining a "privacy interest will never prevail when the information is a matter of public importance.").

[302] Baker, *supra* note 2, at 220.

[303] Emerson, *supra* note 2, at 341; Emerson, *supra* note 100, at 22.

Easton claimed that freedom to express matters related to self-governance, or of public importance, should prevail over privacy.[304]

Applying the Newsworthiness or Public Interest Defense

Much of the literature on privacy and freedom of expression focuses on the constitutional defenses developed by U.S. Supreme Court rulings as a means of balancing the individual and societal values at stake. This section briefly examines how scholarship suggests the newsworthiness or public interest defense might resolve conflicts between the values served by free expression and the appropriation or disclosure tort.

In their groundbreaking 1890 law review article, Warren and Brandeis suggested that disclosures of newsworthy information could not be considered actionable invasions of privacy: "The right to privacy does not prohibit any publication of matter which is of public or general interest."[305] Samuel Warren and Louis Brandeis grounded that exemption in the premise that privacy laws should protect individuals in "whose affairs the community has no legitimate concern from being dragged into an undesirable and undesired publicity . . . ."[306] They claimed that privacy laws would not apply equally to those individuals and to "others who, in varying degrees, have renounced the right to live their lives screened from public observation."[307] For example, they suggested that an ordinary individual's "peculiarities of manner and person" would be matters inappropriate to discuss publicly, but those same peculiarities could become "matters of

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[304] Bloustein, *supra* note 293, at 56; Emerson, *supra* note 2 at 341; Emerson, *supra* note 100, at 22, Easton, *supra* note 66, at 174.

[305] Warren and Brandeis, *supra* note 27, at 214.

[306] *Id.*

[307] *Id.* at 215.

public importance" if that person were seeking a political office or other public position.[308] They also suggested that publishing matters related to the proceedings of courts, government bodies, or other organizations formed to serve the general interest of society would be exempted from liability.[309] Those suggestions provided a basis for courts and commentators to recognize a public interest, or newsworthiness, exemption from liability for the appropriation and disclosure torts.

Rodney Smolla contended the First Amendment provides a direct and a derivative right for news organizations to use a person's name or likeness in connection with a newsworthy event. Freedom of speech or press, he said, "overrides the law of torts" that would otherwise make the unauthorized use of one's name or likeness for another person's commercial benefit a tortious invasion of privacy by appropriation.[310] The direct First Amendment newsworthiness exception protects the use of one's identity in connection with a report on a newsworthy event in which members of society are likely to express interest. The derivative First Amendment right extends to a secondary use of that report to advertise the news item or entity. In both instances, the newsworthiness exception would prevent the publisher from being held liable for appropriation and would promote the free flow of information.[311] The free expression value of the marketplace of ideas, then, would prevail over the individual privacy values of autonomy and liberty.

The newsworthiness exception, however, would not exempt a publisher from liability for an exploitative use of one's name or likeness for commercial purposes. For

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[308] *Id.*

[309] *Id.* at 217.

[310] SMOLLA, *supra* note 1, at 141.

[311] *Id.* at 141-44.

example, Smolla proposed the actual malice standard of liability would be applied when a magazine printed a celebrity's picture on its cover in connection with a false news story. If the magazine published the celebrity's image and the associated news report with knowledge or reckless disregard of falsity, the publisher would be liable for invasion of privacy by appropriation. Under those circumstances, the individual privacy values of autonomy and liberty would prevail over the freedom of expression value of the marketplace of ideas.

Several commentators have claimed the U.S. Supreme Court's development of a public significance defense for disclosure of private facts cases has allowed courts to favor press freedom over privacy.[312] They suggested the Court's ruling in *Florida Star v. B.J.F.* in 1989 signaled the inevitable demise of the disclosure tort.[313] The Court held: "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."[314] For example, Peter Edelman claimed that ruling continued the Court's tendency to avoid the collision between press and privacy rights "by finding that the disclosed information was lawfully obtained."[315] He suggested the Court favored a free expression value of liberty in the *Florida Star* ruling and failed to

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[312] *E.g.*, Edelman, *supra* note 15, at 1207-08; Strossen, *supra* note 8, at 2104.

[313] Florida Star v. B.J.F., 491 U.S. 524 (1989); Edelman, *supra* note 15, at 1199 (condemning the Court for "its gradual erosion of the right to privacy in this area. . . ."); Gormley, *supra* note 15, at 1389 (arguing the Court's *Florida Star* ruling "once again flattened the privacy interest under a rubble of First Amendment language . . . ."); Zimmerman, *Requiem*, *supra* note 25, at 303-04.

[314] 491 U.S. 524, 541.

[315] Edelman, *supra* note 15, at 1201.

acknowledge the privacy values protected by the disclosure tort.[316] Edelman proposed the Court should have weighed the public's interest in learning about information held in government records against the privacy values of autonomy, emotional health, and forming meaningful relationships.[317] He and other commentators have even argued that courts' reliance on defenses that favor freedom of expression threatens the viability of the disclosure tort.[318] Communications law scholar Deckle McLean wrote in 2000 that the *Florida Star* ruling "makes success in a public disclosure suit even more unlikely than it was prior to the ruling."[319] McLean concluded that a subsequent Michigan appeals court ruling, which "frankly admitted the importance of balancing privacy interests against First Amendment interests," provided a more effective approach than was provided by the *Florida Star* ruling.[320] Such an approach would encourage courts to give greater consideration to privacy and free expression values.

While scholarship has focused primarily on U.S. Supreme Court rulings, defenses, or legal theory, two articles provided valuable analysis of how select lower court rulings have weighed privacy and free expression values. Those articles, published by Professor McLean and by Professor Dianne Zimmerman, suggest that systematic analysis of lower court rulings may illustrate alternative approaches to reconciling privacy and free speech

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[316] *Id.* at 1198-1204.

[317] *Id.* at 1208.

[318] Geof Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148 (1997); Edelman, *supra* note 15, at 1208; Jacquelin Rolfs, Note, Florida Star v. B.J.F.*: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107. *See also* Kalven, *supra* note 103, at 336 (stating the newsworthiness defense had become "so overpowering" as to virtually "swallow the tort.").

[319] Deckle Mclean, *Lower Courts Point the Way on Press and Privacy Rights*, 22 COMM. & L. 41, 45 (2000).

[320] *Id.* at 54 (citing Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994)).

values.[321] This dissertation provides a systematic review of state high court and federal appellate court rulings to determine if and how courts address free expression and privacy values when deciding cases involving the disclosure of private facts and appropriation torts.

As the above review of the literature has shown, many scholars have identified and described individual and societal values served by both freedom of expression and privacy. How to reconcile the two sets of values when they come into conflict has drawn some, but considerably less, scholarly attention, with a couple authors looking at individual or small samples of cases to describe how courts undertake this difficult task.[322] This dissertation seeks to begin filling a void in the literature by providing a broader, more systematic investigation of judicial efforts to balance free expression and privacy values in two decades of cases involving the publication-based disclosure of private facts and appropriation torts.

C. Research Questions:

The purpose of this dissertation is to analyze if and how state high courts and federal appellate courts have balanced free press values and privacy values when those sets of values have conflicted in privacy tort cases. Specifically, this dissertation examines cases involving two of the two most widely accepted publicity-based privacy torts—disclosure of private facts and appropriation—in an effort to identify how courts

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[321] *Id.*; Zimmerman, *supra* note 25.

[322] *E.g.*, Gerald G. Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759, 778-81 (1978); Solove, *supra* note 26.

have reconciled these two sets of values considered fundamental in our democratic society. To do so, this dissertation addresses the following research questions:

1. In invasion of privacy cases filed under the disclosure of private facts tort, have courts explicitly attempted to balance free expression and privacy values? If so, how?
2. In invasion of privacy cases filed under the appropriation tort, have courts explicitly attempted to balance free expression and privacy values? If so, how?
3. When balancing free expression and privacy values, have courts assigned greater weight to certain types of free expression values?
4. When balancing free expression and privacy values, have courts assigned greater weight to certain types of privacy values?

D. Method and Limitations

This dissertation reviews disclosure of private facts and appropriation cases decided by U.S. Courts of Appeals and state high courts between 1989 and 2009 to determine whether and, if so, how courts identify and attempt to reconcile individual free expression values — autonomy, self-fulfillment, self-realization, discovery of truth, and participation in the social and political decision-making process—societal free expression values—effective self-governance, check on government, marketplace of ideas, balance between societal stability and change, and toleration—and the individual and social privacy values associated with each tort.

Chapter two examines disclosure of private facts cases for discussion of freedom of expression values and the individual privacy values—autonomy, liberty, and

emotional health—and social privacy values —fostering civility and community, helping individuals maintain relationships, and providing individuals with the reserve necessary to participate in public life — associated with disclosure. [323] Chapter three examines appropriation cases for discussion of the individual and social freedom of expression values and the individual privacy values—personality, autonomy, liberty, and emotional health — and the social privacy value—maintaining civility and community — underlying the appropriation tort.[324]

The case analysis focused on state high courts' rulings and U.S. Courts of Appeals' rulings because state high courts have binding authority over all courts within their respective states and federal circuit courts of appeals have binding authority over all courts within their respective circuits. State courts have subject-matter jurisdiction on state law claims such as disclosure of private facts under state common law or appropriation under state statutory law.[325] But federal courts have subject-matter jurisdiction to hear federal issues, including conflicts between the First Amendment and privacy law. Federal courts also have diversity jurisdiction to hear cases involving disputes between residents from different states when the claimed damages exceed $75,000.[326] In any cases that do not involve federal issues, federal courts are constitutionally required to apply and to interpret state law.[327]

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[323] Gavison, *supra* note 149, at 364; Gerety, *supra* note 150, at 266, 292; Post, *supra* note 148, at 984; WESTIN, supra note 144, at 34-35.

[324] Post, *supra* note 34, at 652; Solove, *supra* note 221, at 549.

[325] Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 241 (2006).

[326] *Id.*

[327] *Id.* at 242 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

Cases for analysis were identified by searching the online versions of three reporting services: Westlaw, LexisNexis Academic, and *Media Law Reporter*. Westlaw is a collection of databases in which editors at West Publishing Company organize legal documents for storage and searching by topic. The LexisNexis Academic legal database is organized and maintained by editors at LexisNexis. *Media Law Reporter* publishes and indexes case law and legal news that editors at the Bureau of National Affairs (BNA) consider relevant to mass communication law. All three databases were used to minimize the likelihood of missing relevant cases. Searches were limited to disclosure of private facts cases and appropriation cases reported between June 21, 1989, when the U.S. Supreme Court ruled in *Florida Star v. B.J.F.*, and January 21, 2010. After *Florida Star*, some scholars criticized the Court's method of analysis for focusing on speech interests without adequately considering countervailing privacy interests.[328] For example, Paul Gewirtz wrote: "The Court gives only token recognition to the value of implementing legal protections of privacy. This extreme solicitude for the one and sharply limited solicitude for the other is what should be reversed."[329]

Cases were identified by using the Westlaw Key Number system and Key Cite function. Westlaw editors assign "key numbers" to legal terms or phrases commonly mentioned in the headnote summaries that Westlaw editors add to each case. Appropriation cases were identified by searching the Key Number 379IV(C), "Use of Name, Voice or Likeness; Right to Publicity."[330] Disclosure cases were identified by

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[328] Edelman, *supra* note,15, at 1204; Gewirtz, *supr*a note 271, at 180; Strossen, *supra* note 8, at 2104.

[329] Gewirtz, *supra* note 271, at 180.

searching Key Number 379IV, "Privacy," and Key Number 379IV(B), "Privacy and Publicity." Relevant cases also were identified by performing a Key Cite search, which identified all cases that have cited the *Restatement (Second) Sections* 652C "Appropriation of Name or Likeness" or 652D "Publicity Given to Private Life" Appropriation cases also were identified by performing a Key Cite search for all rulings that cited state appropriation statutes.

Relevant case law was found by using the topic search function in the LexisNexis Academic databases of U.S. Courts of Appeals' rulings and rulings by the highest courts in all states. Appropriation cases were identified by using two search strings. The first is "privacy AND appropriation." The second search string is "(privacy AND ("use of name" OR "use of likeness" OR "use of image"))." Disclosure cases were found by searching for "privacy AND ("public disclosure" OR "public disclosure of private facts")."

The index term of privacy was used to limit the search in *Media Law Reporter*'s indexed weekly case digests online. *Media Law Reporter*'s case annotations were used to identify relevant rulings by U.S. circuit courts of appeals and state high courts.

The aforementioned searches yielded a universe of 691 court rulings involving disclosure of private facts and 297 court rulings involving appropriation. The cases then were read to determine which cases did not actually discuss the disclosure or appropriation tort. Cases that involved freedom of information laws, false light invasion of privacy, or other claims unrelated to disclosure or appropriation were excluded from

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[330] Westlaw categorizes all appropriation cases under this heading. It will be necessary to review each of the high state courts' and federal courts of appeals' rulings to identify the rulings that discuss privacy values.

the sample. That left approximately 70 disclosure cases and 40 appropriation cases for analysis.

Traditional textual analysis was used to assess if and how courts discussed free expression values and/or privacy values when explaining the rationales for their holdings, concurrences, or dissents. Opinions were categorized as 1) discussing free expression values and privacy values; 2) discussing free expression values but not privacy values; 3) not discussing free expression values but discussing privacy values; 4) discussing neither free expression values nor privacy values. When values were discussed in the opinions, those values were categorized as individual or social free expression values or individual or social privacy values found in the literature on free expression and privacy theory.

Identifying discussions of freedom of expression values

The freedom of expression values are autonomy, self-realization or self-fulfillment; attainment of truth; participation in social and political decision-making; self-governance; check on government; marketplace of ideas; stability and change; and toleration. Following are explications of each of those values that will guide the analysis:

The autonomy value is assigned to discussion of an individual's or autonomous press's personal agency or self-determination, individuality, ability to choose what to communicate or publish, or liberty from authoritarian pressure to publish particular information.[331] The self-realization or self-fulfillment value also overlaps with autonomy. Thus, the value of autonomy includes discussion of the individual sphere of life Mill described as 1) "the inward domain of consciousness," 2) "liberty of conscience, in the most comprehensive sense," 3) "liberty of thought and feeling," and 4) "absolute freedom

[331] Baker, *supra* note 53 at 990-92; Scanlon, *supra* note 61, at 214; SCHAUER, *supra* note 54, at 71.

of opinion and sentiment on all subjects."[332] That value also includes writings that tie freedom of speech to personal growth, personal salvation, personal dignity, and the equal worth of individuals.[333]

The individual value of attainment of truth includes discussions tying freedom to communicate to liberty to express opinions, to seek true information, to test one's opinions, or to engage in discussions to seek greater personal understanding.[334] Descriptions that grounded freedom of expression with freedom to discuss or debate information or to seek greater truth or personal understanding are categorized under the individual value of attainment of truth when rulings emphasized the personal benefit to individual communicators.

The individual value of participation in decision-making includes discussions connecting freedom to communicate to one's ability to form judgments about government and society, to evaluate political decisions, and to contribute to culture. As Thomas Emerson explained, the principle also "includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge."[335]

The societal value of the marketplace of ideas includes discussions connecting audiences' freedom to receive information, to listen to discussions, or even to take part in debate that allows individuals to receive multiple points of view. The value also includes

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[332] MILL, *supra* note 60, at 82-83.

[333] Baker, *supra* note 53, at 991.

[334] *Id*. at 965-66; EMERSON, *supra* note 64, at 6-7; Nimmer, *supra* note 23, at 955.

[335] EMERSON, *supra* note 64, at 7.

writings that declare a free flow of information is essential for audiences to receive the information needed for speech to remedy other harmful speech.

The societal value of balance between change and stability includes discussion indicating freedom of expression serves as a safety valve, facilitating stable political or social change, or serves as a general mechanism for society to address matters likely to cause violence or social unrest if not debated or discussed.[336]

The self-governance value is assigned to discussions that connect freedom of expression to the benefits to democracy that result from audiences receiving information necessary to cast informed votes, to evaluate information and opinions about political or public life, or to debate political issues. In other words, this value is assigned to rationales that recognize Alexander Meiklejohn's argument tying freedom of expression to audiences' need to receive speech on matters of governing importance that advance society's sovereignty over its governors.[337]

The checking value, or watchdog value, is applied to references to the role that freedom of speech or press plays in alerting the public to corruption, incompetence, malfeasance or other abuses of power by government or other powerful entities in society.[338]

The final free expression value, toleration, includes discussions tying freedom of expression to message recipients' abilities to respect the equal worth of all individuals, to receive information relevant to a broad range of intellectual values, to encourage societies

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[336] EMERSON, *supra* note 64, at 7.

[337] MEIKLEJOHN, *supra* note 97, at 25-26; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.

[338] Blasi, *supra* note 111, at 541-42

to allow extreme views to challenge social norms, and to consider messages that challenge common fears, biases, beliefs, and assumptions.[339] In other words the toleration value considers freedom of expression, as Lee C. Bollinger explained, as "a social context in which basic intellectual values are developed and articulated, where assumptions about undesirable intellectual traits are offered and remedies proffered."[340]

Identifying discussions of privacy values

The privacy values are autonomy, emotional release or emotional health, liberty, civility and community, forming relationships, and promoting democratic processes. Following are explications of each of those values that will guide the analysis:

References to protection of a person's inner personality, personal identity, individuality, dignity, or integrity are categorized as discussion of the autonomy value of privacy.[341] The privacy value of autonomy also includes references to self-determination, personal agency, individuality, or the ability to avoid being controlled by others.[342]

The emotional health value includes references to an individual's emotional well being, emotional release, and peace of mind. The emotional health value is assigned to descriptions of privacy as a means of facilitating emotional self-preservation, providing opportunities to reflect on emotions, overcoming psychic harms, and growing as an

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[339] Bollinger, *supra* note 133, at 458-60.

[340] *Id*. at 473.

[341] *E.g.*, Bloustein, *supra* note 34, at 971; Jonathan Kahn, *supra* note 33, at 377; Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 272 (Ferdinand David Schoeman ed., 1984); WESTIN, *supra* note 144, at 34-38.

[342] Bloustein, *supra* note 34, at 971.

emotionally mature individual.[343] Emotional release benefits individuals by encouraging relaxation, which includes releasing stress and escaping from social pressures to conform one's conduct or persona to others' expectations. Emotional release also serves a safety valve function that allows individuals to vent strong opinions or emotions in an environment he controls.[344]

The liberty value includes mentions of control over information about one's self and freedom to choose if and how sensitive information is disclosed without undue pressure from government or social interference. Liberty promotes autonomy and mental health, but it is unique because it focuses on the individual's ability to make decisions without fear of censorship or even social pressures intended to coerce individuals to conform to social expectations. That individual value stresses personal freedom.

The civility and community value include discussion of social norms or standards of decency intended to promote harmony and participation in collective life. That value includes discussions of social virtues, such as respect for others as members of a community of individuals, considered essential for individuals to engage in collective life.[345]

A closely related value, forming and maintaining relationships, includes mentions of friendship, intimacy, trust, and respect for individual persons. Whereas the civility and community value emphasizes collective life, the latter value focuses on forming individual relationships with friends, co-workers, or family. The value of forming and

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[343] CATE, *supra* note 146, at 25; Gavison, *supra* note 149 at 448-49; Jourard, *supra* note 149, at 309-310; WESTIN, *supra* note 144, at 34-35.

[344] WESTIN, *supra* note 144, at 34-35.

[345] Bezanson, *supra* note 34, at 1138-39; Post, *supra* note 148, at 963; WESTIN, *supra* note 144, at 37.

maintaining relationships includes references to personal actions or attributes that promote one person's ability to connect with at least one other person in a meaningful, perhaps even intimate, manner.[346]

The final privacy value, promoting democratic processes, includes discussions that tie privacy to individuals' willingness to vote, engage in debates on public issues, discuss political issues, evaluate information relevant to self-governance and public life, or to run for public office.[347]

Of course, the analysis of case law reveals language that at times simultaneously relates to more than one of the aforementioned values. When that occurred in a case, each of the appropriate values is assigned to that case.

Limitations

This dissertation has several limitations. First, the purpose of the dissertation is to examine how courts with binding authority over lower state courts or federal district courts in their circuits have identified free expression and/or privacy values when attempting to reconcile clashes between freedom of speech or press and privacy. Thus, the case analysis excluded cases that involved solely the right of publicity, as opposed to the right of privacy. Publicity is viewed as a property right, the right to profit or not from commercial uses of one's identity and, thus, involves significantly different values than the personal right of privacy.

Second, this dissertation was restricted to cases reported by Westlaw, LexisNexis Academic, or the *Media Law Reporter* using the search tools described above. It is

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[346] Gavison, *supra* note 149*,* at 45; Rachels, *supra* note 157, at 326.

[347] EMERSON, *supra* note 64, at 546; Gormley, *supra* note 15, at 1356-57.

possible that some relevant cases were not included in one of those databases or were not associated with the key numbers assigned to the disclosure or appropriation torts in Westlaw, categorized under the LexisNexis Academic torts database, annotated by LexisNexis editors in a manner that lists privacy as key points of law from each ruling, or connected to the privacy terms indexed by *Media Law Reporter* editors. Also, limiting state cases to those decided by state high courts and federal cases to those decided by the circuit courts of appeals may have resulted in the study missing some significant discussions of how to reconcile competing values by lower courts. The sheer volume of cases, however, precluded including trial courts and state intermediate appellate courts in the analysis.

Third, textual analysis inherently introduced subjectivity into this dissertation. Even though key values were explicated on preceding pages, deciding which language fits in which category requires interpretation and judgment. It is possible that another person who reads the cases analyzed for this study would place language from key cases in different categories.

CHAPTER 2

Writing for a majority of the U.S. Supreme Court in *Florida Star v. B.J.F.*, Justice Thurgood Marshall acknowledged that there is "tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other . . . ."[1] In that opinion, Justice Marshall described privacy and free expression interests as sufficiently sensitive and significant to "counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[2] The Court has refrained from determining whether truthful publication "is automatically constitutionally protected" or whether there is a "zone of personal privacy within which the State may protect the individual from intrusion by the press."[3] When ruling on conflicts between press freedom and privacy, the Court has "without exception upheld the press' (sic) right to publish" by focusing on the conflict "only as it arose in a discrete factual context."[4] This area of law, according to Justice Marshall, remains "somewhat uncharted."[5]

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[1] 491 U.S. 524, 530 (1989).

[2] *Id*. at 533.

[3] *Id*. at 541.

[4] *Id*. at 530.

Again in 2001, the U.S. Supreme Court indicated that "'the sensitivity and the significance of interests presented in clashes between First Amendment and privacy rights'" require case-by-case analysis of those interests.[6] That ruling in *Bartnicki v. Vopper* indicates that important interests may be found "on *both* sides of the constitutional calculus."[7] Nonetheless, the Court refrained from seriously discussing the privacy interests at issue in the case. Rather, the Court stated, "privacy concerns give way when balanced against the interest in publishing matters of public importance."[8] Imposing sanctions on "the publication of truthful information of public concern," according to the Supreme Court, "implicates the core purposes of the First Amendment."[9] Thus, the majority found that the public's interest in learning about a matter of public debate must supersede the privacy interests at issue when information was lawfully obtained and truthfully reported.

Despite lingering constitutional questions about the disclosure tort, most states and the District of Columbia have recognized that branch of invasion of privacy law either under common law or statutory law.[10] During the past two decades, appellate

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[5] *Id*. at 530 n.5 ("The somewhat uncharted state of the law in this area thus contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line of decisions has produced relatively detailed legal standards governing the multifarious situations in which individuals aggrieved by the dissemination of damaging untruths seek redress.").

[6] Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) (quoting *Florida Star*, 491 U.S. at 532-33).

[7] *Id.* at 532.

[8] *Id.* at 534.

[9] *Id*. at 533-34.

[10] Ozer v. Borquez, 940 P.2d 371, 377 (Colo. 1997) (en banc) ("It is generally recognized by a majority of jurisdictions that the right of privacy may be invaded . . . by unreasonable publicity given to another's private life . . . .").

courts in New Hampshire, Minnesota, and Colorado have indicated for the first time that their respective states recognize the disclosure of private facts tort.[11] To prevent confusion about the status of the disclosure tort in Washington, that state's supreme court declared, "[W]e explicitly hold the common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of that right."[12]

On the other hand, the highest courts in three states have either questioned or rejected outright the disclosure of private facts branch of privacy law.[13] Almost a year before the U.S. Supreme Court ruling in *Florida Star*, the North Carolina Supreme Court declined to recognize the tort under state common law.[14] Calling the tort "constitutionally suspect,"[15] the court reasoned that adopting the disclosure branch of privacy law "would add to the existing tensions between the First Amendment and the law of torts and would be of little practical value to anyone."[16] In 1993, the New York Court of Appeals affirmed that its state common law did not recognize a right to privacy and that the state legislature had only recognized misappropriation under the state's statutory law.[17] In

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[11] *Ozer*, 940 P.2d at 379; Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002).

[12] Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998). The First Circuit Court of Appeals also indicated that the state of New Hampshire likely would recognize the tort. Riley v. Harr, 292 F.3d 282, 298 (1st Cir. 2002).

[13] Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (plurality); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993); Hall v. Post, 372 S.E.2d 711, 716 (N.C. 1988).

[14] *Hall*, 372 S.E. 2d at 716.

[15] *Id*.

[16] *Id*. at 715.

[17] *Howell*, 612 N.E.2d at 703 ("[W]e have no common law of privacy. Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature, which in fact has rejected proposed bills to expand New York law . . . .").

1997, a plurality of the Indiana Supreme Court cast considerable doubt on whether Indiana ever has or will recognize the disclosure tort.[18] The plurality said that permitting recovery for the disclosure of true information could conflict with a provision in the Indiana Bill of Rights recognizing truth as a defense to libel.[19] Reasoning that reputation is one of the interests protected by the disclosure tort, and, therefore, "disclosure sometimes serves as an alternative action for truthful defamation," Chief Justice Randall Shepard wrote, "[T]he truth-in-libel provision . . . commands real caution about proposals to recognize a civil cause of action for libel that impose liability for truthful statements."[20]

Approximately seventy state high court and federal appellate court rulings issued after June 1989, when the Supreme Court decided *Florida Star*, involving claims of invasion of privacy by disclosure of private facts were identified by this study.[21] In only one of those cases did the court uphold a ruling that a plaintiff's privacy was invaded by the disclosure of private facts.[22] A few courts reversed trial courts' awards of summary judgment to defendants,[23] and a few decided cases on procedural grounds.[24] Other

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[18] Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (plurality).

[19] IND CONST. art.1, § 10.

[20] *Methodist Hosp*., 690 N.E.2d at 687, 691.

[21] Searches for the key words of "privacy" and "disclosure of private facts" in LexisNexis, Westlaw and the Media Law Reporter found 691 court rulings from June 1989 through December 2009. Most of those rulings are not considered relevant to this study because they were handed down by state courts at the intermediate appellate level, involved other invasion of privacy torts, or involved statutory claims unrelated to the disclosure of private facts tort.

[22] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002)(affirming the award of $2 in compensatory damages and remanding for a new trial on punitive damages.).

[23] *E.g.*, Hoskins v. Howard, 971 P.2d 1135, 1142 (Idaho 1998); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 232 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002); Reid v. Pierce County, 961 P.2d 333, 342 (1998).

appellate courts that addressed the substantive issues crafted narrow rulings, following the U.S. Supreme Court's example of how to handle clashes between privacy and freedom of expression.[25] Slightly more than half of the rulings examined lower courts' summary judgment awards by focusing on the elements of the tort or the newsworthiness defense.[26] Several of the rulings, especially those examining whether the tort is recognized under a state's common law, referred to either individual or societal values underlying freedom of expression.[27] Some opinions also made reference to individual values that the literature has suggested underlie invasion of privacy law.[28]

This chapter examines if and how state high court and federal appellate court decisions filed after the U.S. Supreme Court's *Florida Star* ruling have analyzed clashes between free expression and privacy arising in disclosure of private facts cases. Section A discusses the U.S. Supreme Court's rulings in *Florida Star* and its progeny. Section B explores how courts have defined the elements of the tort and applicable privileges.

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[24] *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 589-91 (8th Cir. 2008)(asserting that Steinbuch had not established personal jurisdiction and Steinbuch failed to state a claim against Home Box Office and Time Warner Cable because no publicity had occurred); Tichenor v. Roman Catholic Church, 32 F.3d 953, 963 (5th Cir. 1994) (finding the disclosure of private facts claim was time-barred); Milam v. Bank of Cabot, 937 S.E.3d 653 (Ark. 1997) ("[T]he Milams do not state which theory of privacy invasion applies to their case. . . . [W]e will not develop this claim for the Milams. That was their responsibility."); Foncello v. Amorossi, 931 A.2d 924, 928 (Conn. 2007) (asserting that the plaintiff's claim on appeal for disclosure of private facts had little to do with the original claims for identity theft and intrusion upon seclusion).

[25] *E.g.*, Alvarado v. KOB-TV, 492 F.3d 1210, 1219-21 (10th Cir. 2007); Doe 2 v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003); Taus v. Loftus, 151 P.3d 1185, 1208-09 (Cal. 2007); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998) (plurality); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); Macon Telegraph v. Tatum, 6 S.E.2d 655, 657 (Ga. 1993); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003).

[26] *See infra* notes 74-127 and accompanying text.

[27] *See infra* notes 131-176 and accompanying text.

[28] *See infra* notes 178-211 and accompanying text.

Section C reviews if and how courts have discussed individual-based free expression values—autonomy, self-realization or self-fulfillment, attainment of truth, and participation in decision-making—or society-based free expression values—marketplace of ideas, balance between stability and change, self-governance, the checking value, and toleration. Section D reviews if and how courts have identified individual-based privacy values—autonomy, emotional health, and liberty—or society-based privacy values—civility and community, forming and maintaining relationships, and promoting democratic processes. Section E discusses how courts sought to reconcile clashes between the two sets of values and is followed by a summary and conclusion.

A. *Florida Star v. B.J.F.* and Its Progeny

In June 1989 in *Florida Star*, the U.S Supreme Court established a constitutional privilege for mass media disclosures of matters of public significance.[29] The Court grounded that privilege with its rationales from three previously decided cases. This section discusses *Florida Star* in relation to that trilogy of cases and a later case in which the Court discussed *Florida Star*. The Court's *Florida Star* ruling, and its subsequent *Bartnicki v. Vopper* ruling,[30] applied a First Amendment principle established in *Smith v. Daily Mail*, which incorporates First Amendment principles from the Court's 1975 ruling in *Cox Broadcasting v. Cohn*[31] and 1977 ruling in *Oklahoma Publishing Co. v. District Court*.[32]

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[29] 491 U.S. 524, 526 (1989).

[30] 532 U.S. 514 (2001).

[31] 420 U.S. 469 (1975).

In 1984, B.J.F., a sexual assault victim, sued the Florida Star, a weekly newspaper, for publishing her full name in its description of crimes reported to the Duval County, Florida, Sheriff's Department.[33] B.J.F. sought damages for the newspaper's violation of a Florida statute that stated, ""No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense.""[34] The newspaper, however, argued that sanctioning the press was unconstitutional because its trainee-reporter had found B.J.F.'s name in an incident report available for public viewing in the sheriff's department.[35] In 1986, in a per curiam opinion, the District Court of Appeals for the First District of Florida found a lower court properly had awarded damages to B.J.F. because "the information published, the rape victim's name, was of a private nature and not to be published as a matter of law."[36] Almost a year later, the Florida Supreme Court declined to review the case.[37]

In 1989, the U.S. Supreme Court disagreed with the trial court's assessment that the statute was constitutional because "it reflected a proper balance between the First Amendment and privacy rights" and was only applied to a sensitive category of criminal offenses.[38] Justice Thurgood Marshall wrote that imposing damages on the Florida Star

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[32] 430 U.S. 308 (1977).

[33] *Id.*

[34] Florida Star v. B.J.F., 499 So.2d 883, 84 n.2 (1098) (quoting Fla. Stat. § 794.03 (1974)).

[35] *Id.*

[36] Florida Star v. B.J.F., 499 So.2d 883, 884 (Fla. Dist. Ct. App. 1986).

[37] Florida Star v. B.J.F., 509 So.2d 1117 (Fla. 1987).

[38] Florida Star v. B.J.F., 491 U.S. 524, 528 (1989).

for publishing B.J.F.'s name violates the First Amendment.[39] He reasoned that the reporter truthfully reported lawfully obtained information relevant to a matter of public significance,[40] a principle that combined key principles from the Court's rulings in *Cox Broadcasting v. Cohn*,[41] *Oklahoma Publishing v. District Court,*[42] and *Smith v. Daily Mail*.[43]

In 1975 in *Cox Broadcasting*, the Court had ruled that a broadcast station could not constitutionally be sanctioned for publishing the name of a deceased 17-year old rape victim when the name was obtained from court records open to public inspection.[44] In that ruling, Justice Byron White recognized the potential for press freedom and privacy to conflict in a disclosure of private facts case. He wrote:

> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.[45]

White continued, "In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."[46] The Court was limited to focusing on the narrow question raised by the controversy at issue in the case—whether a state may sanction a news outlet

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[39] *Id.* at 532.

[40] *Id.*

[41] 420 U.S. 469 (1975).

[42] 430 U.S. 308 (1977).

[43] 443 U.S. 97 (1979).

[44] Cox, 420 U.S. at 471-72.

[45] *Id.* at 489.

[46] *Id*. at 491.

for accurately broadcasting the name of a rape victim when that name was obtained from judicial records open to public inspection. It held that the First and Fourteenth Amendments forbid a state from sanctioning the press for "truthfully publishing information released to the public in official court records."[47] Justice White reasoned that judicial proceedings resulting from the commission of crime "are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[48]

Although *Cox Broadcasting* and *Florida Star* both involved the disclosure of rape victims' names, Justice Marshall indicated in the latter ruling that the facts at issue in those cases were sufficiently distinct to prevent *Cox Broadcasting* from being read as controlling in *Florida Star.*[49] *Cox Broadcasting* involved the broadcast of a deceased rape victim's name when that information was available from judicial records.[50] The information in *Florida Star* was obtained from a law enforcement record reporting the occurrence of a crime.[51] Because B.J.F.'s name was obtained and published before judicial proceedings commenced, Justice Marshall asserted that the rationale for *Cox Broadcasting* that recognized the press served an important function by exposing judicial proceedings to public scrutiny was not applicable to *Florida Star*.[52]

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[47] Cox Broad v. Cohn, 420 U.S. 469, 496 (1975).

[48] *Id.* at 492.

[49] 491 U.S. 524, 532 (1989) (citing 420 U.S. at 494-95).

[50] 420 U.S. at 494-95.

[51] 491 U.S. at 532.

[52] *Id.* (citing 420 U.S. at 494-95).

Two years after *Cox Broadcasting*, the Court relied on that ruling when considering in *Oklahoma Publishing Co. v. District Court* whether the First and Fourteenth Amendments prevented a state court from prohibiting "the publication of widely disseminated information obtained at court proceedings which were in fact open to the public."[53] That case arose after an Oklahoma District Court enjoined members of the news media from publishing or disseminating the name or picture of a minor in connection with a juvenile court proceeding, although an 11- year old boy accused of killing a railroad switchman appeared in a detention hearing journalists were allowed to attend.[54] The Court held that a state court could not enjoin members of the news media from publishing the name or photograph of a juvenile when the information was lawfully obtained and publicly available.[55]

Cox Broadcasting and *Oklahoma Publishing* both shaped the First Amendment principle established in 1979 in *Smith v. Daily Mail Publishing Co.*,[56] the principle that Justice Marshall used to analyze *Florida Star*. In *Daily Mail*, the Supreme Court considered whether a West Virginia statute violated the First and Fourteenth Amendments by allowing the state to impose criminal sanctions on any newspaper that published the name of a youth charged as a juvenile offender, unless the newspaper had obtained the prior written approval of the juvenile court. That case arose after two newspapers published the name of a 14-year-old student accused of shooting and killing a 15-year-old at a junior high school. As was true in *Cox Broadcasting* and *Oklahoma*

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[53] 430 U.S. 308, 309-10 (1977) (citing *Cox Broad*.. 420 U.S. 469, 496 (1975)).

[54] *Id.* at 308-09.

[55] *Id.* at 311-12.

[56] 443 U.S. 97, 102-03 (1979) (citing 420 U.S. at 495 and 430 U.S. 380 (1977)).

Publishing Co., the government had made the identity available to the public prior to the news media's disclosure. In *Daily Mail*, the Court reasoned, "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[57] Thus, the First and Fourteenth Amendments did not allow the government to impose liability for the newspapers' publication of the juvenile defendant's identity.

In *Florida Star*, Justice Marshall asserted that the *Daily Mail* principle required the Court to reverse lower courts' rulings for B.J.F.[58] First, the Court reasoned that neither party contended the newspaper had reported inaccurate information nor did the reporter-trainee violate the law by finding information erroneously made available to the public by the government.[59] And the reported matter pertained to a matter of public significance, meaning the article generally pertained to "a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities."[60] Second, the Court found that imposing liability for violating the Florida statute was not essential for furthering three highly significant interests, which might be considered interests of the highest order in some cases.[61] Finally, Justice Marshall indicated that the state law failed to serve the asserted interest because it was

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[57] *Id*. at 103.

[58] 491 U.S. 524, 531-32 (1989) (citing 443 U.S. at 103).

[59] *Id.* at 536.

[60] *Id.* at 536-37.

[61] *Id.* at 537-38.

underinclusive, targeting only instruments of mass communication.[62] The court held, "[T]hat where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[63]

In a dissenting opinion in which Chief Justice Rehnquist and Justice O'Connor joined, Justice White asserted that neither *Cox Broadcasting*, *Oklahoma Publishing*, nor *Daily Mail* required "the harsh outcome."[64] Justice White argued that *Florida Star* involved the disclosure of a rape victim's name from being released in an incident report,[65] but *Cox Broadcasting* involved the release of a victim's name in judicial proceedings that were open to the public, which "made public disclosure of the victim's name almost inevitable."[66] Second, Justice White argued that *Daily Mail* involved the disclosure of the name of a person accused of committing a crime, which does not raise the same privacy concerns involved when a crime victim's name is released.[67] He asserted that the *Daily Mail* ruling states that "*there is no issue here of privacy*," thus the privacy issue in Flor*ida Star* places that case "outside of *Daily Mail's* "rule.""[68] He argued that the Florida statute did precisely what the Court required in *Cox Broadcasting*—requiring the state to avoid releasing sensitive information to the public

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[62] *Id.* at 541.

[63] *Id*.

[64] Florida Star v. B.J.F., 491 U.S. 524, 543 (1989) (White, J., dissenting) (citing Cox Broad., 420 U.S. 496 (1975); Oklahoma Publ'g, 430 U.S. 308 (1977); and Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).

[65] *Id*. at 546-47.

[66] *Id*. at 543-44.

[67] *Id*. at 545-47.

[68] *Id.* at 546-47.

rather than sanction news media for publishing information the state made available to the public.[69] And he reasoned, "[I]t is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address, and/or phone number."[70]

The dissenting opinion warned that the majority's holding in Florida Star accepts the appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts."[71] Justice White claimed that the majority's conclusion made obliteration of the tort inevitable. He faulted the Court for failing to attempt to balance the right to privacy and "the public's right to know about matters of general concern."[72] Justice White indicated the bright line between disclosures of private information and disclosures of matters of public interest should be drawn in a manner that would protect a rape victim's "peace-of-mind."[73]

Despite that powerful dissent, the U.S. Supreme Court applied the First Amendment principle established in *Florida Star* again in *Bartnicki v. Vopper* in 2001.[74] In that case, which was filed after a radio station broadcasting a recording of an intercepted telephone conversation, the Court limited its focus to the First Amendment protections for the disclosure of truthful information of public concern. The majority held

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[69] *Id.* (citing Fla. Stat. § 794.03 (1983); 420 U.S. at 496).

[70] Florida Star v. B.J.F., 491 U.S. 524, 547 (1989) (White, J., dissenting).

[71] *Id*. at 550.

[72] *Id*. at 551.

[73] *Id*. at 553.

[74] 532 U.S. 514, 528 (2001) (citing 491 U.S. 524 (1089)).

that a radio talk show host could not be held liable for invasion of privacy because the host merely broadcast truthful information on a matter of public import after the host lawfully obtained that information. The Court asserted, "In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance."[75]

Thus, the U.S. Supreme Court has suggested that press freedom and privacy both serve important societal interests.[76] Those rulings have indicated that free expression interests should trump privacy interests when disclosed information pertains to matters of public importance or public significance, which are more stringent standards than the common principle that exempts disclosures of matters of public interest from liability for invasion of privacy. [77] The following section explores how state high courts and federal circuit courts of appeals have applied the elements of the disclosure tort and key defenses.

B. Elements of the Disclosure of Private Facts[78]

During the past twenty years, most state high court and federal circuit courts of appeal rulings on disclosure of private facts cases focused primarily on whether the facts at hand satisfied at least one element of the tort as a matter of law. Analysis of each

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[75] *Id.* at 534.

[76] *Id.* at 533.

[77] *Id.* at 534.

[78] Most state high courts have recognized the disclosure of private facts under state common law, adopting the elements recorded in the RESTATEMENT (SECOND) TORTS § 652D (1977). Most states that have recognized the disclosure tort under statutory law have adopted at least the first three of the four elements described in Section 652D of the Restatement.

element usually was guided by the *Restatement (Second) of Torts* § 652D. The *Restatement* says that a disclosure may be an actionable invasion of privacy when 1) widespread publicity is given to 2) a true, private fact 3) the disclosure of which would be highly offensive to a reasonable person 4) and that is not a matter of legitimate public concern.[79] Most of the rulings turned on the courts' interpretation of one or two elements, implicating privacy values in relation to the publicity and private facts elements and free expression values in relation to the matter of legitimate public interest element.[80]

More than one-fourth of the rulings turned on whether the plaintiff satisfied the requisite level of publicity.[81] The *Restatement (Second) of Torts* states publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[82] In 2000, for example, the Supreme Court of Alabama in *Ex parte The Birmingham News, Inc*. called publicity the threshold element for a disclosure of private

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[79] A few rulings, however, discussed a fifth element: whether the disclosure was reckless. For example the Supreme Court of Colorado has indicated, "A person acts with reckless disregard if, at the time of the publicity, the person knew or should have known that the fact or facts disclosed were private in nature." Ozer v. Borquez, 940 P.2d 371, 379 (Colo. 1997) (en banc).

[80] *See infra* notes 81-127 and accompanying text.

[81] Steinbuch v. Cutler, 518 F.3d 580, 591 (8th Cir. 2008)(stating that Steinbuch failed to state a claim against Home Box Office and Time Warner Cable because no publicity had occurred); Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); Willan v. Columbia County, 280 F.3d 1160, 1162 (7th Cir. 2002); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 313 (6th Cir. 2000); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1236 (10th Cir. 1997), *appeal after remand,* 127 F.3d 879 (10th Cir. 1999); McNewmar v. Disney Store, Inc., 91 F.3d 610, 622 (3rd Cir. 1996); S.B. v. St. James Sch., 959 So. 2d 72, 91-92 (Ala. 2006); Rosen v. Montgomery Surgical Ctr., 825 So.2d 735, 739 (Ala. 2001); *Ex parte* The Birmingham News, Inc., 778 So. 2d 814, 818-19 (Ala. 2000); Johnston v. Fuller, 706 So. 2d 700, 703 (Ala. 1997); *Ozer*, 940 P.2d at 377-79; Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-58 (Minn. 2003); Hadnot v. Shaw, 826 P.2d 978, 986 (Okla. 1992); Burger v. Blair, 964 A.2d 374, 380 (Pa. 2009); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999); Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 558 (Utah 2000).

[82] RESTATEMENT (SECOND) TORTS §652D cmt. a. (1977). *But see* Pontbriand v. Sundland, 699 A.2d 856, 864 (R.I. 1997) (explaining that Rhode Island has adopted the publication standard commonly applied in libel and slander claims).

facts claim.[83] That case arose after a male employee of the newspaper made a comment to the plaintiff about a sexual harassment complaint she had filed that involved another employee. He also made a similar comment to one other employee. The court reasoned, "To comment to the plaintiff about the plaintiff's private life is not to give publicity to her private life; to give publicity to one's private life, a person has to make a communication to third persons."[84] Because the information was not conveyed to the public at large, the court determined, "[w]e need not address the other elements of the tort of invasion of privacy by 'giving publicity to private information' because the absence of the publicity element is dispositive."[85]

Three state high courts considered the vitality of a broader interpretation of the publicity element, which would be met by disclosing a matter to a small number of people who have a special relationship with the plaintiff.[86] The Supreme Court of Minnesota and the Supreme Court of South Carolina rejected that special relationship rationale.[87] A 1997 plurality opinion by the Supreme Court of Indiana, however, applied a "particular relationship" rationale in its evaluation of whether one postal worker's communication of a colleague's HIV status to two people could be an actionable invasion of privacy. [88] The plurality said that none of the facts indicated the plaintiff and a second

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[83] 778 So. 2d at 818-19.

[84] *Id*. at 818-19.

[85] *Id*. at 819.

[86] Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997) (plurality); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553-54 (Minn. 2003); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999).

[87] *Bodah*, 663 N.W.2d at 553-54; S*winton*, 514 S.E.2d at 478-81.

letter carrier, who was previously unaware of the plaintiff's health condition, had "a special relationship . . . such that the disclosure would be particularly damaging."[89] Recognition of the particular relationship rationale hinges on the likelihood that the plaintiff would endure the severe type of emotional harm that typically results from disclosing information to the general public.

A few of the relevant post-*Florida Star* rulings turned on whether the disclosed information was factual.[90] Courts have found that rhetorical hyperbole and falsehoods cannot be considered actionable private facts.[91] For example, in a 1992 ruling the Supreme Court of Delaware treated the true private facts element as dispositive.[92] In *Barker v. Huang*, which arose from a newspaper's publication of false statements originally made during a deposition, the court explained that the appellant's "pleadings complain only of *false* accusations by Huang and therefore fail to state a cognizable claim under the 'unwanted publicity' variety of the tort of invasion of privacy."[93] That ruling affirmed the superior court's award of summary judgment to the defendant.[94]

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[88] *Methodist Hosp.*, 690 N.E.2d at 693 (citing McSurely v. McClellan, 753 F.2d 88, 112-13 (D.C. Cir.); Miller v. Motorola, Inc., 560 N.E.2d 900 (Ill. App. Ct. 1990); and Beaumont v. Brown, 257 N.W.2d 522 (Mich. 1977)).

[89] *Id*.

[90] Campbell v. Lyon, 26 Fed. App'x 183, 186 (4th Cir. 2001)(unpublished per curiam); Barker v. Huang, 610 A.2d 1341, 1350 (Del. 1991); Nazeri v. Missouri Valley Coll., 860 S.W.2d 303, 303 (Mo. 1993) (stating that the plaintiff filed a disclosure of private facts claim, but the disclosed information was not true).

[91] Finebaum v. Coulter, 854 So. 1120, 1129 (Ala. 2003); *Nazeri*, 860 S.W.2d at 303.

[92] *Barker*, 610 A.2d at 1350 (1991).

[93] *Id*.

[94] *Id.*

More rulings discussed whether the disclosure at issue actually revealed private information that included intimate, intensely personal, or embarrassing details of an individual's private life.[95] Two considered whether the disclosed information was so intimate that its disclosure would cause embarrassment, shame, or humiliation.[96] For example, in 1995, the Fifth Circuit Court of Appeals sitting en banc and applying Texas law found that a press release IRS agents sent to newspapers did not include private facts about a man who pleaded guilty to tax evasion. The release included the man's middle name and home address—information often available from public records—which the court did not consider "highly intimate or embarrassing material."[97] In another 2007 ruling, the Supreme Court of California found that information disclosed at an academic conference during discussion of an article on repressed memories of childhood abuse was not private information. [98] That discussion revealed that a woman, who was the unnamed subject in several studies, engaged in destructive behavior and later worked for the U.S. Navy. The court held those facts "were not of an '[i]ntensely personal or intimate'

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[95] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 764 (10th Cir. 2007); Dasey v. Anderson, 304 F.3d 148 (1st Cir. 2002); Johnson v. Sawyer, 47 F.3d 716, 731-33 (5th Cir. 1995)(en banc); Merlo v. United Way of Am., 43 F.3d 96, 104 (4th Cir. 1994); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 719 (4th Cir. 1991); S.B. v. St. James Sch., 959 So. 2d 72, 92 (Ala. 2006); Taus v. Loftus, 151 P.3d 1185, 1208-09 (Cal. 2007); Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho 2002); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 553 (Mont. 2005); Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho, 2002); Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545, 548 (Mass. 1998) (stating that a corporation does not have a right to privacy).

[96] *Johnson,* 47 F.3d at 732-33; *Haynes*, 8 F.3d at 1232-35.

[97] *Johnson,* 47 F.3d at 732-33. The court applied Texas common law, which requires "the plaintiff to prove (1) that the publicized information 'contains highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities.'"

[98] *Taus*, 151 P.3d at 1208-09.

nature."[99] Thus, courts have suggested that private information comprises very personal, sensitive, or intimate details of a person's life.[100]

Other rulings determined whether information was private by focusing on whether the information was available to the public through widespread knowledge or public sources.[101] In 2006, the Alabama Supreme Court found discussions of sexually explicit photographs of female high school students were not private facts.[102] The court reasoned that "knowledge of the photographs was pervasive" among the students and faculty prior to the faculty members' disclosures: thus "the matter was no longer private."[103] Likewise, the Supreme Court of Idaho held in *Steele v. Spokesman Review* that facts readily observable or "readily available from public sources," such as that Edgar J. Steele was a licensed attorney who used a post office box for his representation of the Aryan Nations, were not private information. [104] The court concluded that Steele failed to satisfy the elements of a prima facie disclosure case against the newspaper because the information at issue was not private.[105]

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[99] *Id*. (quoting Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998)(plurality)).

[100] *E.g.*, Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho 2002); Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545, 548 (Mass. 1998).

[101] *E.g.*, Campbell v. Lyon, 26 Fed. App'x 183, 186 (4th Cir. 2001) (unpublished per curiam); Johnson v. Sawyer, 47 F.3d 716, 731-32 (5th Cir. 1995)(en banc); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 719 (4th Cir. 1991); *Steele*, 61 P.3d at 610.

[102] S.B. v. St. James Sch., 959 So. 2d 72, 93 (Ala. 2006).

[103] *Id*. at 93.

[104] *Steele*, 61 P.3d at 610.

[105] *Id*.

In 1999, the Supreme Court of Idaho assessed whether plaintiffs had a reasonable expectation of privacy pertinent to facts disclosed by Robert Howard, a deputy sheriff, and his wife, Linda, who had monitored and recorded telephone conversations between their neighbor, Sandy Hoskins, and her friend.[106] Alleging that Hoskins threatened to kill his wife in a recorded phone call, the deputy took a copy of the recording to work and placed it in an investigation file. The Howards contended that the conversation was not private, in part, because the alleged "murder-plot" was a "matter of public concern."[107] Idaho's high court said plaintiffs' disclosure of private facts claim, as well as their intrusion upon seclusion claim, would turn on whether a reasonable person would find a privacy interest in the conversation. The court said this required a two-step analysis: 1) whether the speaker engaged in the conversation had an expectation that the information would remain private and 2) whether society would consider that expectation reasonable.[108] In other words, the court held that a trial court must determine whether a subjective and an objective expectation of privacy existed.[109]

Few rulings focused on whether the disclosure at issue would be highly offensive to a person of ordinary sensibilities.[110] In 2007 in *Baldwin v. Blue Cross/Blue Shield of Alabama*, the Eleventh Circuit Court of Appeals wrote that "a plaintiff in Alabama must show that the defendant's conduct was so outrageous that it caused the plaintiff mental

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[106] Hoskins v. Howard, 971 P.2d 1135, 1136-41 (Idaho 1998).

[107] *Id.* at 1140.

[108] *Id.* at 1141.

[109] *Id.*

[110] Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 486 (5th Cir. 2002); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997).

suffering, shame, or humiliation."[111] Nearly a decade earlier, the Supreme Court of Rhode Island had found that a trier of fact could determine that the state's governor, who disclosed the names of people who deposited money in several financial institutions, was liable for invasion of privacy. The court reasoned: "[F]or liability to exist, 'the fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities.' This requirement ensures that any disclosure be of the sort that could be expected to inflict harm on the person whose private affairs are made points of public discussion."[112] Those discussions clearly relate to the emotional harm value underlying privacy.

A few courts have used tests of reasonableness to determine whether the matter disclosed would be highly offensive to a reasonable person.[113] For instance, the aforementioned 1997 Rhode Island ruling treated the unreasonableness of the disclosure as "the gravamen of the tort."[114] That standard requires plaintiffs first to demonstrate that they expected the disclosed information would remain private and second that individuals from the community would consider that expectation "reasonable and would be willing to respect it."[115] The case arose after the governor of Rhode Island sent a newspaper a list including the account balances and names of people who had deposited more than $100,000 in closed financial institutions. The state supreme court remanded the case for

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[111] 480 F.3d 1287, 1308-09 (11th Cir. 2007).

[112] *Pontbriand*, 699 A.2d at 865 (quoting R.I. GEN. LAWS § 9-1-28.1(a)(3)(A)(ii)).

[113] Zaffuto, 308 F.3d at 486; *Pontbriand,* 699 A.2d at 866.

[114] *Pontbriand,* 699 A.2d at 866. The court ruled the claim should go to trial to determine whether a disclosure "could be expected to inflict harm on the person whose private affairs are made points of public discussion. This issue, of course, involves a factual determination of what would be offensive or objectionable in the context of this case."

[115] *Id.* at 864.

trial in which a jury could determine whether the facts disclosed "would be offensive or objectionable to a reasonable man of ordinary sensibilities."[116] Similarly, the state of Louisiana applies a reasonableness test that balances a plaintiff's privacy interest "with the defendant's interest" in disclosing the information at issue.[117] In 2002 the Fifth Circuit Court of Appeals affirmed a trial court's award of $2 in compensatory damages for disclosure of private facts because the defendant's "only interest was apparently to embarrass" the plaintiff and to "curry favor" with his peers.[118]

About one-third of the state high court and federal circuit court of appeals rulings in the disclosure of private facts cases focused on whether the information disclosed was a legitimate matter of public interest.[119] Some courts have found that matters of public concern or significance include the use of taxpayers' dollars,[120] acts of law enforcement officers,[121] activities of courts or public officials,[122] reports of crime,[123] reports of public

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[116] *Id*. at 871.

[117] Zaffuto v. City of Hammond, 308 F.3d 485, 486 (5th Cir. 2002).

[118] *Id.* at 491.

[119] Anderson v. Suiters, 499 F.3d 1228, 1235-37 (10th Cir. 2007); Doe 2 v. Associated Press, 331 F.3d 417 (4th Cir. 2003); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 132-33 (1st Cir. 2000); Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Purnell v. Smart, 1992 U.S. App. LEXIS 24313, at *4 (7th Cir. Sept. 22, 1992) (unpublished); Reuber v. Food Chem. News, Inc. 925 F.2d 703, 713 (4th Cir. 1991), *cert. denied,* 501 U.S. 1212 (1991); Lee v. Calhoun, 948 F.2d 1162, 1165 (10th Cir. 1991); Taus v. Loftus, 151 P.3d 1185, 1207-08 (Cal. 2007); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1379 (Fla. 1989); Macon Telegraph v. Tatum, 436 S.E.2d 655, 679 (Ga. 1993); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-84 (Mass. 2005); Mulgrew v. City of Taunton, 574 N.E.2d 389, 393 (Mass. 1991); Gauthier v. Police Comm'r of Boston, 557 N.E.2d 1374, 1376 (Mass. 1990); Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991); Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998); Doe v. Berkeley Publishers, 496 S.E.2d 636, 637 (S.C. 1998); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex. 1995).

[120] *Loe*, 600 A.2d at 1093.

[121] *Gauthier*, 557 N.E.2d at 1376.

[122] *Doe 2*, 331 F.3d at 421; *Purnell,* 1992 U.S. App. LEXIS 24313, at *7-8.

records,[124] reports of public controversies,[125] or matters ""called to public attention.""[126] In 1998, the Supreme Court of South Carolina held that "the commission of a violent crime between inmates of a county jail is a matter of public significance," even when that crime is a sexual assault.[127] In 2005 in *Ayash v. Dana-Farber Cancer Institute*, the Supreme Judicial Court of Massachusetts determined that disclosure of information about the professional performance of a doctor responsible for an experimental chemotherapy protocol under which two patients received chemotherapy overdoses, one of which was fatal, was a matter of "public scrutiny and interest."[128]

Notably, some courts that found the disclosed information pertained to public concerns specifically stated that they did not need to consider constitutional questions about the disclosure tort because plaintiffs failed to demonstrate the disclosures were not of legitimate public concern.[129] For instance, in *Veilleux v. National Broadcasting Co.*, the First Circuit Court of Appeals wrote:

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[123] *Macon Telegraph*, 436 S.E.2d at 679.

[124] Johnson v. Sawyer, 47 F.3d 716, 732 (5th Cir. 1995) (citing Cox Broadcasting v. Cohn, 420 U.S. 469, 495 (1975)).

[125] Purnell v. Smart, 1992 U.S. App. LEXIS 24313, at *8 (7th Cir. Sept. 22, 1992) (unpublished) (stating that allegations of racial discrimination are a matter of public interest); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-84 (Mass. 2005).

[126] Merlo v. United Way of Am., 43 F.3d 96, 104 (4th Cir. 1994) (quoting Prosser, LAW OF TORTS § 117 (5th ed. 1984)).

[127] Doe v. Berkeley Publishers, 496 S.E.2d 636, 636 (S.C. 1998).

[128] Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 683 (Mass. 2005).

[129] *E.g.*, Doe 2 v. Associated Press, 331 F.3d 417, 442 (4th Cir. 2003); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 107 (1st Cir. 2000); Cinel v. Connick, 15 F.3d 1338, 1346 n.9 (5th Cir. 1994) ("Because we find the broadcast of the materials a legitimate matter of public concern, we need not address whether the media is entitled to immunity from liability under the First Amendment for the public disclosure of lawfully obtained truthful facts."); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1379 (Fla. 1989).

> The constitutional validity of the unreasonable publication tort is unclear. To date, the Supreme Court has declined to decide "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press . . . ." We need not consider whether this tort is constitutionally viable, because we conclude that plaintiffs did not establish its state law elements.[130]

Applying Maine common law, that court assessed whether NBC invaded the privacy of a professional truck driver by broadcasting that one of his drug tests was positive for amphetamines and marijuana. The court found that the general subject matter of the report, highway safety and regulations pertinent to truck drivers, was of public interest. The court concluded that the identity of the driver was newsworthy because discussing his experience illustrated the subject of the broadcast.[131]

In a 1993 ruling in *Haynes v. Alfred A. Knopf*, the Seventh Circuit Court of Appeals suggested the matter of public interest element is related to the offensiveness element under Illinois common law. Writing for the majority, Judge Posner stated, "An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger."[132] The court defined the line between a newsworthy and an offensive disclosure by clarifying the link between the disclosed information and the author's

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[130] *Veilleux*, 206 F.3d at 132 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[131] *Id.* at 133. The majority wrote:

> We think defendants were entitled to illustrate their messages about highway safety and regulation with new information about the individual subject of their report. Simply reporting statistics about truckers who use drugs, or discussing the details of Kennedy's case without mentioning him by name, would have substantially less impact. (footnote omitted)

[132] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

purpose for a book about black migration to the North. Luther Haynes claimed that the author and publisher of the book invaded his privacy by disclosing information about the dissolution of his marriage to one woman and later marriage to another woman. The majority, however, found the information was a matter of public interest because it clearly related to at least one of the major themes of the book, "the transposition" of sharecropper morality to a "matriarchal and elastic" family structure.[133] Because the details about Haynes' relationships were relevant to the sociological transformation explored in the book, the details disclosed were "not only of legitimate but of transcendent public interest."[134]

In sum, most rulings examined whether summary judgment was properly granted on the grounds that the plaintiff could not prove that widespread publicity was given to information that was not a matter of legitimate public interest.[135] Fewer cases turned on whether the information disclosed was truly private or whether the disclosure would be highly offensive to a reasonable person.[136] When reviewing the publicity, private facts

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[133] *Id.* at 1232.

[134] *Id.* at 1232-33.

[135] *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 591 (8th Cir. 2008); Anderson v. Suiters, 499 F.3d 1228, 1235-37 (10th Cir. 2007); Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); Willan v. Columbia County, 280 F.3d 1160, 1162 (7th Cir. 2002); Phillips v. Grendahl, 312 F.3d 357, 371-72 (8th Cir. 2001); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 313 (6th Cir. 2000); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1236 (10th Cir. 1997), *appeal after remand,* 127 F.3d 879 (10th Cir. 1999); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Lee v. Calhoun, 948 F.2d 1162, 1165 (10th Cir. 1991); S.B. v. St. James Sch., 959 So. 2d 72, 91-92 (Ala. 2006); Rosen v. Montgomery Surgical Ctr., 825 So.2d 735, 739 (Ala. 2001); Johnston v. Fuller, 706 So.2d 700, 703 (Ala. 1997); Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-58 (Minn. 2003); Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999); Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 558 (Utah, 2000).

[136] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 764 (10th Cir. 2007); Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); Merlo v. United Way of Am., 43 F.3d 96, 104 (4th Cir. 1994); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); S.B.

and offensiveness elements, some courts' discussions implicated privacy values, which will be discussed in Section D and Section E. When reviewing the matter of public concern element, some courts' rationales mentioned free expression values, which will be discussed in Section C and Section E.[137]

C. Free Expression Values

Since June 1989, state high court and federal circuit courts of appeals primarily have discussed audience-based free expression values and rarely discussed liberty-based free expression values.[138] One unpublished ruling implicated the liberty-based value of autonomy for individual speakers.[139] Most cases, however, focused more specifically on audience-based values for freedom of expression, namely the marketplace of ideas, self-governance, and check on government values, or some combination of those values.[140] Regardless of which values were mentioned in courts' rationales, most of the decisions followed the U.S. Supreme Court's tendency to issue narrow holdings rather than categorical rules of law.

In a 2003 unpublished opinion, the Supreme Court of Idaho discussed the importance of individuals having the freedom to express themselves to the public without

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v. St. James Sch., 959 So. 2d 72, 92 (Ala. 2006); Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho 2002); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 553 (Mont. 2005); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997).

[137] *See infra* text accompanying notes 137-183, 227-278.

[138] Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *3-4 (Idaho Feb, 5 2003) (unpublished).

[139] *Id*.

[140] *E.g.*, Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1405-06 (8th Cir. 1997).

censorship.[141] Jane Doe and her husband claimed that Tarek Haw and *The Idaho Statesman* invaded their privacy by printing a letter that Doe wrote to the executive director of the Board of Medicine at the request of her psychiatrist, Dr. Haw. Her doctor included the letter in advertisements he placed in the newspaper to express grievances against the Board of Medicine.[142] Idaho's high court affirmed a trial court's summary judgment finding for Dr. Haw and the newspaper because a different conclusion could deter newspapers from publishing issue or editorial advertisements relevant to newsworthy matters.[143]

> Issue or editorial advertisements are commonly used by members of the public to give direct voice to their views on issues of public concern and are a long recognized tool for the expression of free speech. The issue or editorial advertisement gives its maker the opportunity to speak directly to the general public, not filtered through a particular reporter or lost in a broader story in which other views are expressed. The choice of words, the form of the advertisement belongs to its maker.[144]

Thus, the court emphasized the liberty-based value of autonomy for individuals addressing matters of legitimate public interest.[145]

A 1997 ruling by the Eight Circuit Court of Appeals incorporates elements from the liberty-based model and audience-based model.[146] In that ruling, *Coplin v. Fairfield Public Access Television Committee*, the court applied an autonomy-based rationale that incorporated the Millian principle associated with liberty model.[147] Applying Iowa law,

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[141] *Haw*, 2003 WL 21015134 at *2-3.

[142] *Id*. at *2-3.

[143] *Id*. at *6.

[144] *Id*.

[145] *Id*.

[146] Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1405-06 (8th Cir. 1997).

the court held that "speech that reveals truthful and accurate facts about a private individual can, consistently [sic] with the First Amendment, be regulated because of its constitutionally proscribable content," but only "in the 'extreme case.'"[148] That case arose from Randy Coplin's claim that the committee violated his First Amendment rights by sanctioning him for broadcasting sensitive information during a "Sex Survey" call-in show.[149] The court explained that exposing the sexual habits of a private person to "public ridicule" typically would be highly offensive and not a matter of legitimate public interest.[150] The court implicated the audience-based self-governance value by stating a different conclusion could be reached if the individuals discussed were public officials.[151] That tied the press's editorial freedom to its ability to inform audiences about public officials.

Another group of rulings linked press freedom to a form of liberty-based editorial autonomy and either a general audience-based right to know or a specific audience-based checking value.[152] For instance, the Fifth Circuit Court of Appeals' ruling in *Lowe v.*

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[147] *Id.* at 1403. Thomas Scanlon explained that principle by quoting Mill: "'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent *harm to others*.'" Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972) (quoting JOHN STUART MILL, ON LIBERTY 13 (1956).

[148] *Id*. at 1404.

[149] *Id*. at 1400-01.

[150] *Id*. at 1405.

[151] Coplin v. Fairfield Public Access Television Committee, 111 F.3d 1395, 1405-06 (8th Cir. 1997). Quoting the U.S. Supreme Court's 1992 ruling in *R.A.V. v. City of St. Paul* in turn quoting *Chaplinsky v. New Hampshire*, the Eighth Circuit wrote, "'[O]ur society, like other free civilized societies, has permitted restrictions on the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"" *Id.* at 1401-02 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

Hearst noted that court had declined to evaluate "the newsworthiness of specific details in a newsworthy story," preserving the editorial control of the press.[153] Applying Texas law, the court refused "to circumscribe the paper's coverage in this case by imposing judicial rules on what is relevant and appropriate in a story that is based on very personal" details that "became newsworthy by their connection to the alleged crimes."[154]

A few rulings have tied a general right to know or to receive information to the audience-based marketplace of ideas value.[155] For instance, in *Young v. Jackson*, the Supreme Court of Mississippi ruled that Jackson did not invade Young's privacy by revealing to Young's colleagues that she collapsed and was hospitalized because of complications from a hysterectomy—not from radiation poisoning, which her colleagues feared also could affect them.[156] The majority reasoned that under those circumstances, it is "'more important that information should be given freely than that a man should be protected from what under other circumstances would be an actionable wrong.'"[157] In other words, that ruling indicated that Young's co-workers' interest in learning about their potential health risks outweighed Young's privacy interest, even when the matter

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[152] *E.g.*, Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007); Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); Reuber v. Food Chem. News, 925 F.2d 703, 719-21 (4th Cir. 1991); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 552-53 (Mont. 2005); Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990).

[153] 497 F.3d at 251-52 (citing Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994)).

[154] *Id.* at 251.

[155] *Howell*, 106 F.3d at 220; *Reuber,* 925 F.2d at 719-21; *Svaldi,* 106 P.3d at 552-53; *Young*, 572 So.2d at 384-85.

[156] *Young*, 572 So.2d at 383-85. The court found that a qualified privilege defense, which provides that employees with a mutual interest may share certain information without being liable for invasion of privacy, protected Jackson.

[157] *Id*. at 382 (quoting Holmes, *The Path of Law,* 10 HARV. L. REV. 457, 466 (1897)).

disclosed involved intimate details about Young's reproductive health. That ruling favored the free flow of information to individuals, but the limited holding ultimately provides little guidance on how much gravity that court would assign to the marketplace of ideas value for freedom of expression under different circumstances.

Another ruling provides a more classic conception of the marketplace of ideas value by discussing the importance of allowing an audience to receive more than one side of a debate.[158] In *Howell v. Tribune Entertainment Co.*, Tammy Howell claimed that the Tribune Company invaded her privacy by broadcasting her stepmother reading from a police report during a television talk show on how stepparents and their stepchildren "have had trouble getting along."[159] Howell, who was 16 at that time, and her older sister had first accused their stepmother of adultery.[160] Applying Wisconsin law, the Seventh Circuit Court of Appeals reasoned, "Tammy may not hide behind Wisconsin's privacy law and from that shelter pelt her stepmother with defamatory accusations with impunity. Such a privilege would distort the terms of public debate by giving an unjustified advantage to the juvenile contestant."[161] Adding that Howell waived her right to privacy by volunteering to appear on the talk show, the court found that the show's producer broadcast that material "to prevent the audience from obtaining a one-sided view of the quarrel."[162] Writing for the majority, Judge Posner suggested that finding the company

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[158] Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997).

[159] *Id*. at 218.

[160] *Id*.

[161] *Id*. at 220-21.

[162] *Id*. at 221.

liable for broadcasting the stepmother's rebuttal "would place quite a damper on the media's taste for public controversy, in rather clear violation of the free speech clause of the First Amendment."[163]

The U.S. Court of Appeals for the Fourth Circuit's rationale in *Reuber v. Food Chemical News*, which was decided in 1991, involved both the marketplace of ideas and checking values for freedom of expression.[164] Melvin Reuber claimed that the publication invaded his privacy by publishing a letter of reprimand his supervisor at the National Cancer Institute wrote criticizing Reuber for publishing his own research on whether the Institute had changed its position on the carcinogenic nature of a pesticide.[165] Applying Maryland law, the court reversed the district court award of damages to Reuber. The appeals court alluded to the marketplace value when it stated that the First Amendment "protects the public's right to learn about both sides of the controversy through the press,"[166] and to the checking-value when it declared, "To uphold Reuber's manifold claims would be to disable the government from rebutting charges by employees that the positions taken by government agencies were ill-founded, ill-motivated, or even corrupt." The court added, "We think the First Amendment protects the right of persons both within and without government to challenge vigorously the conclusions of public agencies."[167] Connecting free expression to the ability of individuals and the press to

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[163] *Id*.

[164] 925 F.2d 703, 719-21 (4th Cir. 1991).

[165] *Id*. at 706.

[166] *Id*. at 720-21.

[167] *Id.*

challenge potential government ineptitude or malfeasance implicates the need to keep the power assigned to government agencies in check through the potential for public exposure and debate.[168]

A few rulings, which examined whether the disclosure of information relevant to criminal justice proceedings was privileged from liability for invasion of privacy, implicated the audience-based self-governance and checking values for free expression.[169] When discussing the public's right to know about judicial proceedings, those opinions primarily referred to the U.S. Supreme Court's rationale in its 1975 ruling in *Cox Broadcasting Corp. v. Cohn*.[170] In that case, the Court held that a television station could not be held liable for invasion of privacy resulting from the broadcast of a rape victim's name obtained from the open judicial records of a public prosecution. The interest in privacy fades for information that is available to the public, the Court said.[171] Writing for the majority, Justice White asserted:

> Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function []the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.[172]

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[168] *Id*. at 719-21.

[169] *E.g.*, Doe 2 v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-36 (Idaho 2003).

[170] *E.g.*, *Gates*, 101 P.3d at 562-63; *Cape Publ'ns, Inc*., 549 So. 2d at 1378-79 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975)); *Uranga*, 67 P.3d at 34-36.

[171] *Cox Broad. Corp.,* 420 U.S. at 491.

[172] *Id*. at 492.

State high court and federal circuit courts of appeals rulings have tied similar reasoning to brief discussions of the importance of exposing government agents and agencies to public scrutiny.[173]

In one of the earliest relevant rulings, decided in October 1989, the Florida Supreme Court recognized the self-governance and government watchdog values of the First Amendment.[174] The court, however, discussed a more general right to know when reviewing precedent under state common law. In that case, *Cape Publications v. Hitchner*, the court found that a newspaper could not be held liable for invasion of privacy "for publishing lawfully obtained and confidential child abuse information in a story on a related child abuse trial."[175] The court suggested that *Cox Broadcasting* indicated that the public's right to receive information "assumes special importance where judicial proceedings are concerned,"[176] and reasoned that Cape Publications was serving the checking function by publishing an article the purpose of which was "to scrutinize the judicial function."[177]

The U.S. Court of Appeals for the Tenth Circuit's ruling in *Avalardo v. KOB-TV* primarily relates to the self-governance and checking values.[178] Applying New Mexico law in 2007, that court found the First Amendment protected a New Mexico news station from liability for publishing the identities of two undercover police officers allegedly

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[173] *E.g.*, *Gates,* 101 P.3d at 562-63; *Cape Publ'ns, Inc*., 549 So. 2d at 1378-79; *Uranga*, 67 P.3d at 34-36.

[174] Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989).

[175] *Id.* at 1378.

[176] *Id.*

[177] *Id*.

[178] 492 F.3d 1210, 1219-21 (10th Cir. 2007).

involved in sexual assault when they were off duty.[179] Refusing to provide an exception for undercover police officers, the court reasoned that such action would "run afoul of the First Amendment" because allegations of "police misconduct" and commentary on the qualifications of police officers are matters of public interest protected by the First Amendment.[180] The court stated, "To be sure, any rule of law adopted in this area would implicate core and vital First Amendment values, and it is far from clear whether and how such a law might coexist with the freedom of the press."[181] The court's discussion relates to the self-governance and checking values, although the opinion does not explicitly name those values.

In sum, since 1989, state high court and federal appellate court rulings on disclosure of private facts claims primarily involved the audience-based marketplace of ideas, self-governance and checking values.[182] A couple of rulings also implicated the liberty-based autonomy value for free expression.[183] Those decisions include brief discussions of free expression values with little or no discussion of privacy values. Another group of rulings, which Section E reviews, mentioned the importance of

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[179] The court wrote, "An officer's alleged involvement in a sexual assault, even if off-duty, surely bears upon his or her qualifications and fitness to be a police officer." *Id*. at 1220.

[180] *Id*. at 1220-21.

[181] *Id*. at 1221.

[182] *E.g.*, Alvarado v. KOB-TV, 492 F.3d 1210, 1219-21 (10th Cir. 2007); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); Reuber v. Food Chem. News, 925 F.2d 703, 719-21 (4th Cir. 1991); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 552-53 (Mont. 2005); Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989).

[183] *E.g.*, Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1405-06 (8th Cir. 1997); Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *6-7 (Idaho Feb, 5 2003) (unpublished).

balancing free expression interests and privacy interests at issue in specific cases.[184] First, Section D explores how key privacy values appeared in other disclosure of private facts rulings issued by state high courts and federal appellate courts since 1989.

D. Privacy Values

Privacy literature indicates that individual-based privacy values—liberty, autonomy, and emotional health—and society-based privacy values—civility and community, forming and maintaining relationships, and promoting democratic processes—underlie the privacy torts. Since June 1989, most relevant appellate court opinions in disclosure cases did not include specific discussion of privacy values. A few appellate rulings on disclosure of private facts have recognized the right to privacy as the "right to be let alone,"[185] sometimes linking that phrase to the famous Warren and Brandeis article.[186] Such statements could be interpreted as linking privacy to most of the individual or societal values of privacy, especially the liberty and autonomy values. More obvious connections to privacy values primarily arose when courts discussed key elements of the plaintiff's case, mentioned the type of harm addressed by the tort, or compared the disclosure tort to intentional infliction of emotional distress, breach of confidentiality, or defamation. Those rulings primarily implicated the individual values of

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[184] *See infra* text accompanying notes 227-243.

[185] Doe 2 v. Associated Press, 331 F.3d 417, 417-21 (4th Cir. 2003); Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999).

[186] Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (quoting Warren & Brandeis, *Right To Privacy*, 4 HARV. L. REV. 193, 193 (1980)).

liberty, autonomy, or emotional health with little or no discussion of the societal values of promoting civility and community or forming and maintaining relationships.

Rulings that connected the general right to be let alone to a right to be free from undue pressure or "unwarranted publicity" typically suggested that a liberty value underlies privacy,[187] for instance, the Supreme Judicial Court of Massachusetts' 2005 ruling in *Ayash v. Dana-Farber Cancer Institute*.[188] Quoting the *Restatement (Second) of Torts*, the court said "'[E]very individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends.'"[189] Using that comment in its interpretation of the state's privacy statute, the court said the statute protected plaintiff against interference with her right to control the disclosure of sensitive, highly personal, or intimate information, such as "matters concerning her health or her lifestyle."[190] Connecting privacy to control over the publicity given to one's personal information and freedom from interference with that control implicates the liberty value for privacy.

Because the autonomy and liberty values may overlap, it is not surprising to find some descriptions of privacy relate to both individual values.[191] The Supreme Court of Minnesota's commentary on the disclosure of private facts tort suggested an autonomy

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[187] *Doe 2*, 331 F.3d at 420; *Swinton Creek Nursery*, 514 S.E.2d at 131-32.

[188] 822 N.E.2d 667, 681-82 (Mass. 2005).

[189] *Id*. at 682 (quoting RESTATEMENT (SECOND) TORTS § 652D cmt. b (1977)).

[190] *Id*. at 682-83.

[191] Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-83 (Mass. 2005); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553-54 (Minn. 2003); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc).

and a liberty value for privacy.[192] When the court first recognized the disclosure tort in *Lake v. Wal-Mart Stores, Inc.*, in 1998, it wrote: "[T]he right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."[193] The first part of that statement relates to personal agency and identity, which are part of the autonomy value.[194] The second part of that statement suggests individuals have freedom to choose if and how personal information is exposed to others.[195] That statement, however, clearly identifies the liberty value by name as well as description.

In 2009, the federal D.C. Circuit Court of Appeals indicated that the individual personal liberty, autonomy, and emotional health values underlie privacy.[196] In *Randolph v. ING Life Insurance and Annuity Co.*, the court held that plaintiffs failed to demonstrate that widespread publicity was given to private facts.[197] Quoting prior cases, the court said, "'[A] cause of action for the invasion of privacy "represents a vindication of the right of private personality and *emotional security*.'"[198] The disclosure branch protects

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[192] *Bodah*, 663 N.W.2d at 553-54; *Lake*, 582 N.W.2d at 235.

[193] *Lake*, 582 N.W.2d at 235.

[194] *Id.*

[195] *Id.*

[196] Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 711 (D.C. Cir. 2009).

[197] *Id*. at 711-12.

[198] *Id*. at 711 (quoting Vassiliades v. Garfinkel's, Brooks Bros., 492 A.2d 580, 587 (D.C. 1985) (quoting Afro-American Pub. Co. v. Jaffe, 366 F.2d 649, 653 (D.C. Cir. 1966))).

individuals "'from undue and unreasonable publicity.'"[199] The court mentioned emotional security when responding to the defendant's assertion that the District of Columbia Consumer Personal Information Security Breach Notification Act of 2006, which excluded pain and suffering from the actual damages plaintiffs could recover for a violation of that Act, was incongruous with the common law invasion of privacy tort.[200]

Some discussions of the elements of the disclosure tort clearly have connected privacy to the emotional health of individuals. In fact, the common law in a few states requires that a plaintiff must demonstrate likelihood for a disclosure to cause emotional harm.[201] For example, in 1999, the South Carolina Supreme Court wrote that the elements of the tort require the disclosure be of such a kind that would "bring shame or humiliation to a person of ordinary sensibilities."[202] Nine years earlier, the Supreme Court of Mississippi reasoned that a defendant cannot be held liable for disclosure of private facts "unless he should reasonably have foreseen that the person would be likely offended."[203] Of course, some states incorporate that more general description of emotional harm by requiring the disclosure be highly offensive or objectionable to a reasonable person, a requirement that relates to emotional harm.[204]

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[199] *Id*. (quoting *Peay v. Curtis Pub. Co*., 78 F. Supp. 305, 309 (D.D.C. 1948)).

[200] *Id*. at 711 n. 12 (citing D.C. CODE § 28-3852 (2009)).

[201] *See, e.g.,* Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th. Cir. 2007); Young v. Jackson, 572 So.2d 378, 382 (Miss. 1990); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131 (S.C. 1999).

[202] *Swinton Creek Nursery*, 514 S.E.2d at 131.

[203] *Young*, 572 So. 2d at 382.

[204] *See, e.g.*, Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007) (stating the court doubted information about the plaintiff's destructive behavior "constitutes disclosure of the kind of sufficiently sensitive or intimate private fact 'which would be offensive and objectionable to the reasonable person.'"); Ozer v. Borquez,

A couple of rulings have discussed the mental health value for privacy when attempting to distinguish the harm redressed by the disclosure of private facts tort from the harm redressed by the tort of defamation.[205] In 2009, the Supreme Court of Pennsylvania found that a medical clinic's release of confidential medical information to the plaintiff's employer did not constitute the level of widespread publicity necessary for the disclosure to be actionable.[206] As the level of publicity required for the tort of defamation is distinct from the level of publicity required for the tort of disclosure, the court indicated that the primary harm addressed by each of those torts differs. The court wrote, "[A] libel claim primarily involves damage to reputation, while in an action for invasion of privacy, the central harm to be redressed is mental suffering due to public exposure."[207] The court acknowledged that damages for invasion of privacy torts may include harm to personal reputation. That ruling, however, emphasized emotional harm, suggesting emotional health is the primary value underlying the disclosure tort.

In an aforementioned plurality opinion suggesting that Indiana does not recognize the disclosure of private facts tort, the state supreme court's comparison of the disclosure and emotional distress torts emphasized the emotional health value for privacy.[208] Chief Justice Randall Shepard wrote that the tort protects an individual's "interest in mental

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940 P.2d 371, 378 (Colo. 1997) (en banc) ("The term 'highly offensive' has been construed to mean that the disclosure would cause emotional distress or embarrassment to a reasonable person."); Pontbriand v. Sundland, 699 A.2d 856, 864 (R.I. 1997) (requiring that "the 'fact which has been made public [is] one which would be offensive or objectionable to a reasonable man of ordinary sensibilities'").

[205] *E.g.*, Doe v. Methodist Hosp., 690 N.E.2d 681, 686-87 (Ind. 1997) (plurality); Burger v. Blair, 964 A.2d 374, 378-80 (Pa. 2009).

[206] *Burger*, 964 A.2d at 378.

[207] *Id.* at 378.

[208] *Methodist Hosp*., 690 N.E.2d at 681. Only two members of the five-member court joined in the plurality opinion. Two justices filed a separate opinion concurring in the result while one justice concurred in the result without opinion.

well-being, in avoiding the emotional distress that could result from disclosures."[209] But the plurality was not convinced that a disclosure tort was necessary to protect individuals' emotional health in the 1990s as it had been in the 1890s.[210] The plurality reasoned that that American society had grown "more open and tolerant," leaving individuals with modern sensibilities less susceptible to devastation than were individuals with Victorian sensibilities.[211] Even if modern individuals were likely to become devastated by disclosures, Shepard suggested the tort of outrage provided remedies for severe emotional distress.[212] Because the tort of outrage includes more stringent requirements for the plaintiff than disclosure, the plurality rejected the need to accept the disclosure of private facts tort, which it called "outrage 'lite.'"[213]

Another state high court's comparison of the disclosure tort and the breach of confidentiality tort implies the individual emotional health value relates to disclosure of private facts and the societal value of maintaining relationships relates to breach of confidentiality.[214] In *Swinton Creek Nursery v. Edisto Farm Credit*, the Supreme Court of South Carolina affirmed an intermediate court of appeals' conclusion that invasion of privacy and breach of confidentiality address distinct harms. The supreme court reasoned: "Warren and Brandeis envisaged a privacy right that would occupy ground not already covered by contract and confidentiality theories. In this sense, if a plaintiff has a claim for

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[209] *Id*. at 686.

[210] *Id*. at 691-92.

[211] *Id*. at 692.

[212] *Id.* at 691.

[213] *Id*.

[214] Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-33 (S.C. 1999).

breach of contract or confidentiality, there is no justification for reviving an otherwise invalid invasion of privacy claim."[215] In the explanatory footnote following that statement, the court suggested that breach of confidentiality focuses on the harm resulting from betrayal by the source of the disclosure rather than the emotional harm resulting from the disclosure of the information itself.[216] That note concluded, "[I]t is irrelevant in a breach of confidentiality claim whether the disclosure of the information would bring shame to a person of ordinary sensibilities."[217] Thus, whereas the breach of confidentiality tort relates to maintaining healthy relationships, the disclosure tort primarily relates to individual emotional health.

Comparing the disclosure and defamation torts, however, the Indiana Supreme Court plurality opinion discussed above suggests the disclosure tort may relate to the societal values of promoting civility and community or forming and maintaining relationships.[218] Discussing a reputational interest for the disclosure tort, the plurality claimed: "Truthful disclosures can be socially disruptive and personally dangerous. In many real-life situations, the maintenance of a social organization—such as a workplace—sometimes depends upon the ability of individuals to censor themselves and minimize internecine strife."[219] Focusing on the potential for discordant relations to disrupt those organizations, or micro-communities, the court's description implicates the

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[215] *Id.* at 133 (citing Warren & Brandeis, *Right To Privacy*, 4 HARV. L. REV. 193, 210-11 (1890)).

[216] *Id.* at 133 n.14.

[217] *Id*.

[218] Doe v. Methodist Hosp., 690 N.E.2d 681, 686 (Ind. 1997) (plurality).

[219] *Id*.

societal value of promoting civility and community.[220] In that case, Chief Justice Shepard suggested the disclosure tort acted as a libel law for truthful information because libel law addresses similar interests. He reasoned that recognizing disclosure, therefore, would contradict the Indiana Constitution.[221]

The Washington Supreme Court focused primarily on individual privacy values although it also implicated relational privacy values when it reaffirmed the state's recognition of the disclosure tort under common law.[222] The court's quotation of a 1988 decision implicates the individual values of liberty and emotional health by mentioning control over the dissemination of information when the disclosure would cause offense:

> every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals to his family or to close friends. . . . When these intimate details of his life are spread before the public gaze in a manner highly offensive to a reasonable man, there is an actionable invasion of privacy . . . .[223]

The court implied that releasing intimate details about the decedent harmed survivors precisely because decedents and their surviving relatives had formed special relationships, making intimate details about decedents' intimate details for the survivors.[224] The court held "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased."[225] The court's finding suggests that

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[220] *Id*.

[221] *Id*.

[222] Reid v. Pierce County, 961 P.2d 333, 339-40 (Wash. 1998).

[223] *Id*. at 341 (quoting Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 602 (Wash.1998)).

[224] *Id*. at 341-42.

survivors have an interest in protecting the integrity of individuals for whom they care, an interest grounded in the societal value of forming relationships as well as individual liberty and emotional health.

In sum, disclosure rulings primarily have discussed individual values rather than societal values for privacy. Most rulings have indicated that a liberty, autonomy, or emotional health value underlies privacy.[226] Only two rulings implied that privacy serves the societal values of maintaining civility and community or forming and maintaining relationships.[227]

E. Reconciling Free Expression and Privacy Values

Although both freedom of expression and privacy are highly valued in a democratic society, appellate court rulings suggest that disclosure of private facts plaintiffs should expect to prevail only in "extreme cases."[228] Rulings that attempt to reconcile potential conflicts between freedom of expression and privacy primarily have implicated select societal free expression values—marketplace of ideas, self-governance,

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[225] *Id*. at 342.

[226] *E.g.*, Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 711-12 (D.C. Cir. 2009); Doe 2 v. Associated Press, 331 F.3d 417, 417-21 (4th Cir. 2003); Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-83 (Mass. 2005); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553-54 (Minn. 2003); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990); Burger v. Blair, 964 A.2d 374, 378-80 (Pa. 2009); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995).

[227] Doe v. Methodist Hosp., 690 N.E.2d 681, 686 (Ind. 1997) (plurality); Reid v. Pierce County, 961 P.2d 333, 341-42 (Wash. 1998).

[228] *E.g.*, Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997).

and the checking function—and the individual privacy value of liberty. Most rulings that acknowledge a clash between freedom of speech or press and privacy have focused on the applicability of the common law newsworthiness defense or a similar First Amendment privilege. The balancing test applied to assess the newsworthiness of the facts at issue in each case generally has resulted in the public's interest in learning information outweighing the individual privacy interest.[229]

The 1993 Georgia Supreme Court opinion in *Macon Telegraph v. Tatum* indicates that the clash between privacy and press freedom necessitates weighing "the individual's right to privacy against the public's right to know and the press's right to publish."[230] The opinion does not identify any specific privacy values, but it clearly implicates three freedom of expression values. Quoting its own 1905 ruling that first recognized a common law right to privacy, the Georgia Supreme Court wrote that privacy "'is limited by the right to speak and print.'"[231] That quotation and text, included in a footnote, implicate a liberty-based autonomy value for individuals and the institutional press.[232] The opinion also ties press freedom to the audience-based self-governance and checking values for free expression: "A free press is necessary to permit public scrutiny on the conduct of government and to ensure that government operates openly, fairly, and

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[229] Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998) (plurality); *Ozer*, 940 P.2d at 378; Macon Telegraph v. Tatum, 6 S.E.2d 655, 657 (Ga. 1993); Uranga v. Federated Publ'ns, No. 27118, 2001 LEXIS 71 at *26-27 (June 21, 2001) (unpublished), *vacated and superseded on rehearing by* 67 P.3d 29, 35 (Idaho 2003).

[230] *Macon Telegraph*, 436 S.E.2d at 657.

[231] *Id*. at 658 (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905)).

[232] *Id.* at 658 n.2. The footnote states the Constitution of the State of Georgia clearly identifies the freedom to speak, write, and publish as a "liberty" for each individual person or publisher. *Id.*

honestly."[233] Extending that rationale to the facts of the case, the court found that Tatum could not prevail in her disclosure of private facts claim against the newspaper that published articles identifying her as the sexual assault victim found to have acted in self-defense when she shot and killed a man who broke into her home and exposed himself to her.[234]

Two years later, the Supreme Court of Texas also found that a newspaper could not be held liable for invasion of privacy for disclosing information that would identify a rape victim.[235] That court's examination of the newsworthiness of the disclosed matter implicated individual privacy and audience-based free expression values. The majority opinion grounded the right to privacy in personal liberty pertaining to one's self and one's property,[236] and it assessed whether Doe's right to privacy was violated by asking if a "logical nexus" existed between the information disclosed about Doe and the subject of the news report—her rape.[237] The court explained that private details might not be newsworthy if they "are not uniquely crucial to the case" or are just related to "a general, sociological issue."[238] But Doe's identifying information, including the general area in which she lived and the fact that she had a security alarm, was sufficiently relevant to the

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[233] *Id.* at 658.

[234] *Id.*

[235] Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 472 (Tex. 1995).

[236] *Id.* at 473-74. The court asserted that "the 'right to be let alone' is as much a part of personal liberty as the right to be free from physical restraint and the right to possess property."

[237] *Id*. at 474.

[238] *Id*.

reported crime, the subject of the news report, for the published information to be of public concern.[239]

Despite that conclusion, the court warned in dictum that it might find the publication of identifying information about a sexual assault victim to be an actionable invasion of privacy under other circumstances. The court wrote:

> Newspapers and other media should take precautions to avoid unwarranted public disclosure and embarrassment of innocent individuals who may be involved in otherwise newsworthy events of legitimate public interest. . . . Facts which do not directly identify an innocent individual but which make that person identifiable to persons already aware of uniquely identifying personal information, may or may not be of legitimate public interest.[240]

That court indicated that statement was a warning rather than a legal rule because requiring the media to assess the "individual and cumulative impact (of facts) under all circumstances" could have a "chilling effect" on press freedom.[241] The liberty-based value of autonomy for the institutional press clearly relates to that statement. Audience-based values also underlie the court's rationale that such a requirement "foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public."[242] That statement connects the disclosure of newsworthy information to a public right to receive information, implicating the audience-based marketplace of ideas, self-governance, and checking values for freedom of expression.

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[239] *Id*.

[240] *Id.* at 475.

[241] *Id.* The court wrote: "[I]t would be impossible to require them to anticipate and take action to avoid every conceivable circumstance where a party might be subjected to the stress of some unpleasant or undesired notoriety without an unacceptable chilling effect on the media." *Id.*

[242] *Id.*

In 1997, the Colorado Supreme Court wrote that balancing must be used when an individual's right to privacy clashes with the free expression rights guaranteed by the Constitutions of the United States and Colorado.[243] Guided by earlier rulings by the U.S. Ninth and Tenth Circuit Courts of Appeals, the state high court applied a newsworthiness test to balance press freedom and privacy.[244] The court described newsworthy information as information the public has a legitimate interest in learning.[245] The court wrote, "In determining whether a subject is of legitimate public interest, '[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake.'"[246] That rationale implicates the audience-based values for freedom of expression and the individual liberty value for privacy.

A 1998 plurality opinion by the Supreme Court of California focused on audience-based values for free expression by drawing the boundary between privacy and press freedom where Warren and Brandeis drew the line in 1890.[247] Warren and Brandeis indicated that disclosing matters of public and general interest would not constitute an invasion of privacy.[248] More than a century later, California's high court wrote in *Shulman v. Group W. Productions, Inc*.:

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[243] Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc) (citing U.S. CONST. amend. I; COLO. CONST., art. II, §10.).

[244] *Id.* at 378 (citing Gilbert v. Medical Econs. Co., 665 F.2d 305, 308 (10th Cir. 1981) and Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).

[245] *Id.* (quoting RESTATEMENT (SECOND) TORTS § 652D cmt. h (1976)).

[247] Shulman v. Group W. Prod., Inc., 955 P.2d 469, 474 (Cal. 1998) (plurality) (citing Warren & Brandeis, *Right To Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

[248] *Id.* (citing Warren & Brandeis, 4 HARV. L. REV. at 214).

> The sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate facts about the events and individuals of our time.[249]

The court asserted that courts historically determined whether an invasion of privacy was actionable by "balancing privacy interests against the press's right to report, and the community's interest in receiving, news and information."[250] It indicated that privacy interests could outweigh the public's right to know when disclosed details "bear only slight relevance to a topic of legitimate public concern."[251] Rather than discussing specific privacy values or free expression values, the opinion focuses on whether the disclosed information was newsworthy or "of legitimate public concern."[252] The court conceded that the analysis of newsworthiness requires courts to engage "to some degree in a normative assessment of the 'social value'" of a publication.[253] The analysis also requires courts to compare the extent to which the information revealed is private in nature and "the extent to which the plaintiff played an important role in public events."[254] That connects the editorial autonomy for the press to the general right for the public to receive information, which could incorporate any values from the audience-based model.[255]

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[249] *Id*.

[250] *Id*. at 478.

[251] *Id*. at 486.

[252] Shulman v. Group W. Prod., Inc., 955 P.2d 469, 479 (Cal. 1998) (plurality).

[253] *Id.* at 484.

[254] *Id.* at 484.

One unpublished opinion, which was subsequently vacated and superseded, applied a similar balancing method and suggested that a plaintiff's individual liberty-based privacy interest in the context of the case was sufficient to merit a trial.[256] In 2001 in *Uranga v. Federated Publications, Inc.*, the Idaho Supreme Court ruled that a trial court erred in granting summary judgment for a newspaper corporation based on the newsworthiness of information contained in a photograph of a forty-year-old statement. The court found that the published information did not implicate the public's right to scrutinize judicial proceedings because the statement that Uranga had engaged in a sexual liaison with his homosexual cousin, Fred, was not the subject of any judicial proceedings.[257] That sensitive information was only "tangentially" related to the subject of the newspaper's report.[258] Thus, the court concluded that a reasonable person might disagree with the trial court's assessment that Fred Uranga lacked a "legitimate expectation of privacy in a statement regarding his sexuality contained in a forty-year-old court file."[259] The court's rationale indicated the disclosure was not protected because the

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[255] *Id.* at 474. "Also clear is that the freedom of the press, protected by the supreme law of the First and Fourteenth Amendments to the United States Constitution, extends far beyond simple accounts of public proceedings and abstract commentary on well-known events." *Id*.

[256] Uranga v. Federated Publ'ns, No. 27118, 2001 LEXIS 71 at *26-27 (June 21, 2001) (unpublished), *vacated and superseded on rehearing by* 67 P.3d 29, 35 (Idaho 2003). The court explained:

> [C]onstruing the record liberally in favor of Uranga, and drawing all inferences in his favor, we find reasonable people could reach different conclusions from the evidence in determining whether Uranga has a legitimate expectation of privacy in a statement regarding his sexuality contained in a forty-year-old court file. Uranga has also presented evidence establishing genuine issues of disputed material fact on the other elements of a claim for invasion of privacy by intrusion. Therefore, we find the district court erred in granting summary judgment to the Statesman on Uranga's claims for invasion of privacy by publication of private facts . . ..

[257] *Id*. at *29-31.

[258] *Id*. at *16-17.

[259] *Id*. at *31.

disclosed statement was not used in any judicial proceedings that would implicate the checking value for freedom of expression.[260]

In the 2003 published opinion that superseded the 2001 *Uranga* ruling, the Supreme Court of Idaho focused solely on the constitutional guarantee of freedom of expression without balancing free speech and privacy values.[261] In that ruling, Idaho's high court held that the First Amendment as applied to the states via the Fourteenth Amendment would not permit a court to hold the newspaper liable for "accurately publishing a document contained in a court record open to the public."[262] The court reasoned that the age of the documents and the lack of a significant public interest in Uranga's identity did not sufficiently distinguish the facts of Uranga's case from those in *Cox Broadcasting v. Cohn*[263] to merit finding the newspaper liable for invasion of privacy.[264] The court asserted that the U.S. Supreme "was concerned about the chilling effect upon the freedoms of speech and press if liability for invasion of privacy could be based upon the reporting of information contained in records open to the public."[265] It also applied the Supreme Court's recognition that reports on crime, prosecutions, and

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[260] *Id*.

[261] Uranga v. Federated Publ'ns, Inc. v. Idaho Statesman, 67 P.3d 29, 33 (Idaho 2003). The state's highest court wrote:

> The issue before us in this case is whether, consistently (sic) with the First and Fourteenth Amendments to the Constitution of the United States, a person can have a cause of action for invasion of privacy by public disclosure of embarrassing private facts caused by the accurate publication of information in a court record open to the public.

[262] *Id*. at 35.

[263] 420 U.S. 469, 474-75 (1975).

[264] 67 P.3d at 35 ("There is no indication that the First Amendment provides less protection to historians than to those reporting current events.").

[265] *Id*. at 34 (citing *Cox Broad*., 420 U.S. at 496).

judicial proceedings are of "significant public interest."[266] The court indicated that the unique circumstances in the case "certainly evoke sympathy for Uranga," but it did not discuss the privacy interests at issue.[267] Rather, the ruling turned on the constitutional issues that implicate a liberty-based autonomy value and audience-based checking value for freedom of speech and of the press.

In 2003, the Fourth Circuit Court of Appeals applied a broad definition of newsworthiness to determine whether disclosing a sexual abuse victim's name was an invasion of privacy or a matter of public concern under South Carolina law.[268] In *Doe 2 v. Associated Press*, the court stated, "[T]here is some justification for the complaint" arising from a reporter's public identification of a sexual abuse victim, information the reporter learned during a sentencing hearing, but courts "do not sit as censors of the manners of the Press."[269] Although the ruling suggests that the AP might have exercised bad judgment,[270] the court found the news service did not invade Doe's liberty-based privacy, or "right to be let alone," by reporting a fact Doe voluntarily disclosed in an open court proceeding.[271] The court wrote:

> Without some indication from South Carolina courts to the contrary, we cannot understand how the voluntary disclosure of information in an unrestricted open court room setting could be anything but a matter of public interest. The nature of the information disclosed here does not change our legal analysis: "if a person, whether willingly or not, becomes an actor in an

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[266] *Id*. at 35 (citing *Cox Broad*., 420 U.S. at 492).

[267] *Id*.

[268] Doe 2 v. Associated Press, 331 F.3d 417, 420-22 (4th Cir. 2003).

[269] *Id.* at 422.

[270] *Id.*

[271] *Id.* at 420-21.

> event of public or general interest, then the publication of his connection with such occurrence is not an invasion of his right to privacy."[272]

The court connected the reporter's presence in an open court proceeding to the public's interest in learning about the administration of justice.[273] Thus, identifying the victim of a crime in that case related to the checking value for freedom of expression, which outweighed the liberty value for privacy in this case.

Four years later, a California Supreme Court ruling relied on the *Shulman* newsworthiness test when weighing freedom of speech against an individual's privacy interests.[274] The majority opinion balanced the public's right to know information about "Jane Doe," the subject of a child maltreatment study, and the individual's privacy interest.[275] As mentioned in section A, the court reasoned that the disclosed information was connected to a matter of public interest and was not of an "[i]ntensely personal or intimate" nature such that disclosing it "would be offensive and objectionable to the reasonable person."[276] Rather than discuss the potential for the disclosure to cause emotional harm that could be redressed by the disclosure tort, the court focused on the rights of academics to receive information on the subject matter.[277] The court indicated

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[272] *Id.* at 422 (quoting Doe v. Berkeley Publ'rs, 496 S.E.2d 636, 637 (S.C. 1998)).

[273] *Id.* at 421 (4th Cir. 2003) ("'[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.'") (quoting Smith v. Doe, 538 U.S. 84, 99 (2003)).

[274] Taus v. Loftus, 151 P.3d 1185, 1208 (Cal. 2007) (citing Shulman v. Group W. Prod., Inc., 955 P.2d 469, 479 (Cal. 1998) (plurality)).

[275] *Id*.

[276] *Id*.

[277] *Id*.

that articles discussing the original study had shown "it would be important and of interest from an academic standpoint to learn the effects of the events described in the case study upon Jane's future development."[278] The majority decided that a researcher's subsequent statements that Jane Doe "'engaged in 'destructive behavior'" as a teenager and later joined the Navy were relevant to academic analysis of a prominent case study on memories of childhood sexual abuse.[279] Notably, that rationale implicates a marketplace of ideas value for freedom of expression and an emotional health value for privacy by recognizing a limited right for academics to learn information that is not sufficiently sensitive to cause extreme emotional harm.

In sum, most of the courts that mentioned a balancing of interests test or a clash between freedom of expression and privacy issued rulings suggesting audience-based free expression values outweighed the individual privacy values at issue.[280] If those rulings implicated privacy values, the discussion related primarily to the individual liberty or emotional health values for privacy.[281] Most relevant rulings focused on whether disclosed information was a matter of legitimate public concern, with discussions of newsworthiness that implicated audience-based values for freedom of expression.[282] The majority opinions from a few of those cases assessed whether the

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[278] *Id*. at 1208-09.

[279] *Id*. at 1208-09.

[280] *E.g.*, Doe 2 v. Associated Press, 331 F.3d 417, 422 (4th Cir. 2003); *Taus*, 151 P.3d at 1208; Shulman v. Group W. Prod., Inc., 955 P.2d 469, 479 (Cal. 1998) (plurality); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 32-3 (Idaho 2003); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-84 (Tex. 1995).

[281] *E.g.*, *Doe 2*, 331 F.3d at 4203-21; *Taus*, 151 P.3d at 1208-09; *Shulman*, 955 P.2d at 479; *Ozer*, 940 P.2d at 378; *Uranga*, 67 P.3d at 32-3; *Star-Telegram, Inc.*, 915 S.W.2d at 473-84.

disclosed information related to the public's right to learn or scrutinize criminal justice proceedings, which relates to the self-governance and checking values for freedom of expression.[283] Only one ruling involving a balancing of interests test suggested that a reasonable person could find that a plaintiff's privacy was invaded by the disclosure of information,[284] and that ruling, the Supreme Court of Idaho's unpublished opinion in *Uranga v. Federated Publications*, was vacated and superseded by a published ruling.[285] In all of the aforementioned binding rulings, freedom of speech or press outweighed the privacy interests at issue in the cases.[286]

F. Conclusion

Although one prominent commentator has argued that "it is probably time to admit defeat, give up the efforts at resuscitation, and lay the noble experiment in the instant creation of common law to a well-deserved rest,"[287] four states' high courts have clarified that their states' common law does recognize invasion of privacy by the

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[282] *Doe 2*, 331 F.3d at 420-21; *Taus*, 151 P.3d at 1208-09; *Shulman*, 955 P.2d at 474; *Ozer*, 940 P.2d at 378; Macon Telegraph v. Tatum, 436 S.E.2d 655, 657 (Ga. 1993); *Uranga*, 67 P.3d at 34-5; *Star-Telegram, Inc.* 915 S.W.2d at 473-74.

[283] *Doe 2*, 331 F.3d at 420-21; *Uranga*, 67 P.3d at 34-5; *Tatum*, 436 S.E. 2d at 657; *Star-Telegram*, 915 S.W.2d at 472.

[284] Uranga v. Federated Publ'ns, No. 27118, 2001 LEXIS 71 at *26-27 (June 21, 2001) (unpublished), *vacated and superseded on rehearing by* 67 P.3d 29, 35 (Idaho 2003).

[285] *Uranga*, 67 P.3d at 32-33.

[286] *Doe 2*, 331 F.3d at 420-21; *Taus*, 151 P.3d at 1208-09; Shulman v. Group W. Prod., Inc., 955 P.2d 469, 474 (Cal. 1998) (plurality); *Ozer*, 940 P.2d at 378; *Macon Telegraph*, 436 S.E. 2d at 657; *Uranga*, 67 P.3d at 34-5; *Star-Telegram, Inc.*, 915 S.W.2d at 473-74.

[287] Zimmerman, *Requiem for a Heavyweight*, 68 CORNELL L. REV. 291, 364 (1983).

disclosure of private facts in the past twenty years.[288] On the other hand, during the 1990s, two states' high courts suggested their states' common law did not recognize the disclosure branch of invasion of privacy.[289] The courts in those six states reached different conclusions about the constitutionality of the tort.[290] Most state supreme and federal appellate courts that have considered disclosure cases since 1989, however, have focused on lower courts' interpretations and applications of at least one of the elements of a plaintiff's case.[291] Almost half of the relevant rulings focused on the failure of disclosure of private facts plaintiffs to demonstrate that defendants gave widespread publicity to matters not of legitimate public concern.[292]

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[288] Ozer v. Borquez, 940 P. 2d 371, 379 (Colo. 1997) (en banc); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002); Reid v. Pierce County, 961 P.2d 333, 341 (Wash. 1998).

[289] Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (plurality); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993).

[290] *Ozer*, 940 P. 2d at 379; *Methodist Hosp.*, 690 N.E.2d at 691; *Lake*, 582 N.W.2d at 235; *Karch*, 794 A.2d at 774; Howell, 612 N.E.2d at 703; *Reid*, 961 P.2d at 341.

[291] *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 591 (8th Cir. 2008); Anderson v. Suiters, 499 F.3d 1228, 1235-37 (10th Cir. 2007); Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); Willan v. Columbia County, 280 F.3d 1160, 1162 (7th Cir. 2002); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 132-33 (1st Cir. 2000); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 313 (6th Cir. 2000); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1236 (10th Cir. 1997); McNewmar v. Disney Store, Inc. 91 F.3d 610, 622 (3d Cir. 1996); Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Purnell v. Smart, 1992 U.S. App. LEXIS 24313, at *4-8 (7th Cir. Sept. 22, 1992) (unpublished); Reuber v. Food Chem. News, Inc. 925 F.2d 713, 703 (4th Cir. 1991), *cert denied*, 501 U.S. 1212 (1991); Lee v. Calhoun, 948 F.2d 1162, 1165 (10th Cir. 1991); S.B. v. St. James Sch., 959 So.2d 72, 91-92 (Ala. 2006); Rosen v. Montgomery Surgical Ctr., 825 So.2d 735, 739 (Ala. 2001); Johnston v. Fuller, 706 So.2d 700, 703 (Ala. 1997); Taus v. Loftus, 151 P.3d 1185, 1207-08 (Cal. 2007); Ozer v. Borquez, 940 P.2d 371, 377-79 (Colo. 1997); Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993); Macon Telegraph v. Tatum, 436 S.E.2d 655, 679 (Ga. 1993) (en banc); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-84 (Mass. 2005); Mulgrew v. City of Taunton, 574 N.E.2d 389, 393 (Mass. 1991); Gauthier, 557 N.E.2d 1374, 1376 (Mass. 1990); Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-58 (Minn. 2003); Hadnot v. Shaw, 826 P.2d 978, 986 (Okl. 1992); Burger v. Blair, 964 A.2d 374, 380 (Pa. 2009); Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999); Doe v. Berkeley Publ'rs, 496 S.E.2d 636, 637 (S.C. 1998); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex., 1995); Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 558 (Utah, 2000).

Two federal circuit courts of appeals pointed out that the U.S. Supreme Court did not answer the question about the constitutionality of the disclosure of private facts tort because it was not necessary when considering the facts at issue in each appeal.[293] Quoting an earlier Seventh Circuit decision, the Eighth Circuit noted, "[T]he Court was not 'being coy in *Cox* or *Florida Star* in declining to declare the tort of publicizing intensely personal facts totally defunct.'"[294] Indeed, some courts have indicated that the newsworthiness test separates disclosures that are actionable invasions of privacy from disclosures protected by the First Amendment.[295] Notably, one court even quoted a Tenth Circuit Court of Appeals' decision issued almost eight years prior to the U.S. Supreme Court's *Florida Star* ruling to assert that adopting a newsworthiness privilege or legitimate public interest element "'properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press.'"[296]

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[292] *E.g.*, *Steinbuch*, 518 F.3d at 591; *Karraker*, 411 F.3d at 838; *Willan*, 280 F.3d at 1162; *Phillips*, 312 F.3d at 371-72; *Veilleux*, 206 F.3d at 132-33; *Parry*, 236 F.3d at 313; Roe, 124 F.3d at 1236; *McNewmar*, 91 F.3d at 622; *Cinel*, 15 F.3d at 1346; *Thomas*, 998 F.2d at 452; *Haynes*, 8 F.3d at 1232-35; *Purnell*, 1992 U.S. App. LEXIS at *4-8; *Reuber*, 925 F.2d at 713; *Lee*, 948 F.2d at 1165; *S.B.*, 959 So.2d at 91-92; *Rosen*, 825 So.2d at 739; *Johnston*, 706 So.2d at 703; *Taus*, 151 P.3d at 1207-08; *Ozer*, 940 P.2d at 377-79; *Elliott*, 629 A.2d at 9; *Tatum*, 436 S.E.2d at 679; *Ayash*, 822 N.E.2d at 682-84; *Mulgrew*, 574 N.E.2d at 393; *Gauthier*, 557 N.E.2d at 1376; *Loe*, 600 A.2d at 1093; *Bodah*, 663 N.W.2d at 551-58; *Hadnot*, 826 P.2d at 986; *Swerdlick*, 721 A.2d at 859; *Swinton Creek Nursery*, 514 S.E.2d at 131-32; *Berkeley Publ'rs*, 496 S.E.2d at 637; *Star-Telegram, Inc.*, 915 S.W.2d at 473-74; *Shattuck-Owen*, 16 P.3d at 558.

[293] Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

[294] *Coplin*, 111 F.3d at 1404 (quoting *Haynes*, 8 F.3d at 1232).

[295] *E.g., Taus*, 151 P.3d at 1208-09; Shulman v. Group W. Prod., Inc., 955 P.2d 469, 478-79 (Cal. 1998) (plurality).

[296] Ozer v. Borquez, 940 P.2d 371, 378-79 (Colo. 1997) (en banc) (quoting Gilbert v. Medical Econs. Co., 665 F.2d 305, 307 (10th Cir. 1981).

Courts have discussed the liberty-based autonomy value for freedom of expression,[297] at least one audience-based value for freedom of expression,[298] or a combination of those values.[299] Discussion of the autonomy value arose in two cases involving freedom of speech.[300] Courts tied the marketplace of ideas, self-governance, and checking function values to freedom of speech and to freedom of the press.[301] When courts mentioned the autonomy value and at least one of the audience-based values, their rationales related to freedom of speech or press.[302]

When courts discussed the autonomy value undergirding freedom of expression, their discussions of the liberty-based value related to John Stuart Mill's connection of freedom of speech to freedom from censorship. The Supreme Court of Idaho emphasized the individual benefits associated with communicating "to the public without

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[297] *E.g.*, Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007); Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); *Coplin*, 111 F.3d at 1405-06; Reuber v. Food Chem. News, 925 F.2d 703, 719-21 (4th Cir. 1991); Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *2-3, 6 (Idaho Feb, 5 2003) (unpublished).
; Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990); Svaldi v. Anaconda-Deer Lodge County,106 P.3d 548, 552-53 (Mont. 2005).

[298] *E.g.*, *Lowe*, 497 F.3d at 251-52; Doe 2 v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003); *Howell*, 106 F.3d at 220; *Reuber*, 925 F.2d at 719-21; Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003); *Young*, 572 So.2d at 384-85; *Svaldi*,106 P.3d at 552-53.

[299] *E.g.*, *Lowe*, 497 F.3d at 251-52; *Howell*, 106 F.3d at 220; *Reuber*, 925 F.2d at 719-21; *Young*, 572 So.2d at 384-85; *Svaldi*,106 P.3d at 552-53.

[300] Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1403 (8th Cir. 1997); *Haw*, 2003 WL at *2-3.

[301] *E.g.*, *Doe 2*, 331 F.3d at 421; Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); *Coplin*, 111 F.3d at 140; Reuber v. Chem. News, 925 F.2d 703, 719-21 (4th Cir. 1991); *Gates*, 101 P.3d at 562-63; *Cape Publ'ns, Inc.*, 549 So. 2d at 1378-79; *Uranga,* 67 P.3d at 34-6; Young v. Jackson, 572 So. 2d 378, 384-85 (Miss. 1990); Svaldi v. Anaconda-Deer Lodge County,106 P.3d 548, 552-53 (Mont. 2005).

[302] *E.g.*, Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007); *Howell*, 106 F.3d at 220; *Coplin*, 111 F.3d at 1405-06; *Reuber*, 925 F.2d at 719-21; *Young*, 572 So.2d at 384-85; *Svaldi*, 106 P.3d at 552-53.

censorship,"[303] describing issue advertisements as a "tool for the expression of free speech" by individuals, speech that is free from others' filtering.[304] The U.S. Eighth Circuit Court of Appeals' ruling in a case that involved another important venue for individuals' unfiltered speech, public television, also implied that freedom of speech for individuals is very important, and thus can only be proscribed in "the extreme case."[305]

Some rulings discussed a general audience-based right to know information, a concept that implicated the marketplace of ideas or checking function values. The Mississippi Supreme Court mentioned another aspect of the marketplace ideas value for freedom of speech when it discussed the importance of allowing individuals to receive information "freely."[306] The U.S. Seventh Circuit Court of Appeals discussed another attribute of the classic marketplace of ideas value, allowing audiences to receive more than one side of a debate or argument.[307] And, the Fourth Circuit related press freedom to the marketplace of ideas value when it discussed "the public's right to learn about both sides of a controversy" involving a research institute's response to a researcher's claims that the institute changed its position on a potential carcinogen.[308] That court also tied press freedom to the checking value when it identified a right "to challenge" public agencies.

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[303] Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *6 (Idaho Feb, 5 2003) (unpublished).

[304] *Id.*

[305] *Coplin*, 111 F.3d at 1404.

[306] Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990).

[307] Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997).

[308] Reuber v. Food Chem. News, Inc., 925 F.2d 703, 720-21 (4th Cir. 1991).

Several rulings implied the audience-based self-governance and checking values for freedom of expression when discussing the public's right to receive information about alleged crimes or judicial proceedings.[309] A few cited the U.S. Supreme Court's rationale from *Cox Broadcasting Corp. v. Cohn*, tying freedom of expression to "the beneficial effects of public scrutiny of the administration of justice."[310] The Florida Supreme Court mentioned the self-governance and check-on-government values when it discussed the First Amendment protection for a newspaper that published "lawfully obtained and confidential child abuse information" in an article related to a criminal trial on that topic.[311] The U.S. Tenth Circuit Court of Appeals' discussion of a television station's broadcast of the identities of two undercover police officers accused of sexual assault also related to the self-governance and checking values for press freedom.[312] That ruling provided one of the most explicit discussions of First Amendment values and acknowledged the conflict between privacy law and press freedom.[313]

Courts primarily provided implicit discussion of privacy values, which might explain why more than one individual value for privacy related to courts' mentions of the individual privacy values of liberty, autonomy, and emotional health.[314] Courts rarely

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[309] *See supra* note 154 and accompanying text.

[310] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003).

[311] *Cape Publ'ns Inc*., 549 So.2d at 1378-79.

[312] Alvarado v. KOB-TV, 492 F.3d 1210, 1219-21 (10th Cir. 2007).

[313] *Id*. at 1222.

[314] *E.g.*, Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 710-11 (D.C. Cir. 2009); Doe 2 v. Associated Press, 331 F.3d 417-20 (4th Cir. 2003); Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind.

discussed societal values for privacy, and if they did, their discussion only implicated the values of promoting civility and community or forming and maintaining relationships.[315]

Courts mentioned the liberty and autonomy values for privacy when discussing the history of the disclosure tort or the publicity element.[316] When discussing the development of the legal right to privacy in America, one even quoted Warren and Brandeis' definition of privacy as "'the right to be let alone.'"[317] In some cases, courts' discussion of the plaintiff's loss of control over sensitive information implicated the liberty value and the autonomy value.[318] The Supreme Court of Minnesota wrote, "The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."[319] The court connected that interest to one's control over her "private persona" and her "public persona," which implicates the autonomy value for privacy.[320] It is not surprising that a court's discussion of individuals' loss of control over the exposure of intimate aspects of their lives would implicate the liberty value and the autonomy value for privacy, considering that both values relate to personal agency.

1997) (plurality); Baldwin, at 1308-09; Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 681-82 (Mass. 2005); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553-54 (Minn. 2003); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990); Burger v. Blair, 964 A.2d 374, 378 (Pa. 2009); Pontbriand v. Sundland, 699 A.2d 856, 864 (R.I. 1997); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131 (S.C. 1999); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995); Reid v. Pierce County, 961 P.2d 333, 339-40 (Wash. 1998).

[315] *Methodist Hosp.*, 690 N.E.2d at 686; *Swinton Creek Nursery*, 514 S.E.2d at 131-33; *Reid*, 961 P.2d at 339-40.

[316] *Doe 2*, 331 F.3d at417-21; Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); *Ayash*, 822 N.E.2d at 682-83; *Bodah*, 663 N.W.2d at 553-54; *Lake*, 582 N.W.2d at 235; *Pontbriand*, 699 A.2d at 866; *Swinton Creek Nursery*, 514 S.E.2d at 126; *Star-Telegram, Inc*., 915 S.W.2d at 473.

[317] Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (quoting Warren & Brandeis, *Right To Privacy*, 4 HARV. L. REV. 193, 193 (1980)).

[318] *E.g.*, *Ayash*, 822 N.E.2d at 682-83; *Bodah*, 663 N.W. at 553-54; *Lake*, 582 N.W.2d at 235.

[319] *Lake*, 582 N.W.2d at 235.

[320] *Id.*

Courts primarily discussed the emotional health value undergirding privacy when indicating disclosures of private information cause emotional harm.[321] The South Carolina Supreme Court stated that the elements of the tort require that a disclosure of private facts would "bring shame or humiliation to a person of ordinary sensibilities."[322] The D.C. Circuit Court of Appeals quoted earlier case law when it described privacy as a right of "emotional security." [323] Although a broad conception of emotional security could relate to the emotional release and emotional injury aspects of the emotional health value, the court's mention of emotional security responded to the defendant's assertion that a D.C. statute that excluded pain and suffering from the actual damages plaintiffs could recover for breaches of electronic security contraindicated the ability for a plaintiff to collect damages for emotional harm resulting from a disclosure of private facts.[324]

If courts implied a societal significance for privacy, their discussions of privacy also involved at least one individual privacy value.[325] The South Carolina Supreme Court's comparison of the disclosure of private facts and breach of confidentiality torts related to the forming and maintaining relationships value.[326] But that ruling indicated that an emotional health value undergirded privacy and the value of forming and

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[321] *E.g.*, Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Pontbriand v. Sundland, 699 A.2d 856, 864 (R.I. 1997).

[322] Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131 (S.C. 1999).

[323] Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 711 n. 12 (D.C. Cir. 2009).

[324] *Id*. (citing D.C. Code § 28-3852 (2009).

[325] Doe v. Methodist Hosp., 690 N.E.2d 681, 686 (Ind. 1997) (plurality); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998).

[326] *Swinton Creek Nursery*, 514 S.E.2d at 131-33.

maintaining relationships undergirded breach of confidentiality.[327] The societal value of forming and maintaining relationships and the individual values of liberty and emotional health were implied by the Supreme Court of Washington's conclusion that individuals have a privacy interest that may be invaded by the disclosure of autopsy records of their immediate relatives.[328] No discussion was found of the other societal privacy values.

Few courts suggested that they attempted to reconcile conflicts between freedom of expression and privacy, or even acknowledged the tension between First Amendment interests and privacy interests that Justice Marshall mentioned in *Florida Star*.[329] In one sense, courts followed the U.S. Supreme Court's practice of relying on principles "that sweep no more broadly than the appropriate context of the case."[330] But most state high courts and federal courts of appeals did not balance free expression and privacy interests. They did not apply the limited First Amendment privilege from *Florida Star* that protects the trutfhful reporting of lawfully obtained information on matters of public significance. Nor did many quote the limited First Amendment principle from Bartnicki v. Vopper that stated, "privacy concerns give way when balanced against the interest in publishing matters of public importance."[331] But a few applied the First Amendment privilege from *Cox Broadcasting*, which prevents states from sanctioning the press for truthfully reporting matters of public interest that are available from publicly available judicial

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[327] *Id*.

[328] *Reid*, 961 P.2d at 342.

[329] 491 U.S. 524, 533 (1989).

[330] *Id*.

[331] 532 U.S. 514, 534 (2001).

records.[332] The latter standard, in addition to the common law privilege for matters of public interest or general interest, provide much broader protection for free expression. Rather, they relied on a common law public interest privilege that provides much broader protection for free expression than the aforementioned limited First Amendment privileges.

Several rulings referred to at least one individual value undergirding privacy law—most commonly the liberty value— and the marketplace of ideas, self-governance, and checking values for freedom of expression.[333] Some suggested the free expression interests outweighed the privacy interests at issue, but only gave lip-service to the traditional concept of balancing competing interests. Most of those rulings engaged in definitional balancing, suggesting that publishing information on a matter of public interest automatically outweighed any privacy interests at stake. Those rulings practically provided absolute protection for the free expression interests associated with the broad common law privilege that exempts matters of public or general interest from liability for disclosure of private facts.

In a few cases the courts' reasoning implicated key free expression values and privacy values.[334] Those opinions identified either the liberty-based autonomy value or audience-based marketplace of ideas, self-governance, and checking values for free

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[332] 420 U.S. 469, 491 (1975).

[333] Doe 2 v. Associated Press, 331 F.3d 417, 420-21 (4th Cir. 2003); Taus v. Loftus, 151 P.3d 1185, 1208-09 (Cal. 2007); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 474 (Cal. 1998) (plurality); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-5 (Idaho 2003); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex. 1995).

[334] *E.g.*, *Doe 2*, 331 F.3d at 420-21; *Taus*, 151 P.3d at 1208-09; *Ozer*, 940 P.2d at 378; *Star-Telegram, Inc.*, 915 S.W.2d at 473-74.

expression.[335] After mentioning at least one of those values undergirding freedom of expression, most courts did not discuss any of the values scholars tie to privacy. Some cases related to at least one free expression value and the individual liberty, autonomy, or emotional health values for privacy.[336] Nonetheless, courts did not truly balance the competing free expression and privacy interests.[337] Their discussions focused on freedom of expression without actually weighing free expression values against privacy values when they concluded that members of the public had a right to receive information at issue in that case.[338]

During the past two decades courts have crafted rulings that almost always found invasion of privacy claims failed on the basis of the elements or the common law newsworthiness defense.[339] A few courts remanded cases for trial.[340] But only one of

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[335] *E.g.*, Alvarado v. KOB-TV, 492 F.3d 1210, 1219-20 (10th Cir. 2007); *Doe 2*, 331 F.3d at 420-21; Howell v. Tribune Entertainment Co., 106 F.3d 215, 220 (7th Cir. 1997); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 719-21 (4th Cir. 1991); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); *Uranga*, 67 P.3d at 34-5; Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990); Svaldi v. Anaconda-Deer Lodge County,106 P.3d 548, 552-53 (Mont. 2005).

[336] *E.g.*, Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 710-12 (D.C. Cir. 2009); Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); *Doe 2*, 331 F.3d at 417-20; Taus, 151 P.3d at 1207; Ozer, 940 P.2d at 378; Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); Doe v. Methodist Hosp., 690 N.E.2d 681, 686 (Ind. 1997) (plurality); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 681-82 (Mass. 2005); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553-55 (Minn. 2003); *Young*, 572 So. 2d at 382; Burger v. Blair, 964 A.2d 374, 378-80 (Pa. 2009); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131 (S.C. 1999); *Star-Telegram, Inc.*, 915 S.W.2d at 473; Reid v. Pierce County, 961 P.2d 333, 339-40 (Wash. 1998).

[337] *Taus*, 151 P.3d at 1207; *Ozer*, 940 P.2d at 378; Macon Telegraph v. Tatum, 436 S.E.2d 655, 657 (Ga. 1993); *Star-Telegram, Inc*., 915 S.W.2d at 474.

[338] *E.g.*, Taus v. Loftus, 151 P.3d 1185, 1207-09 (Cal. 2007); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 474 (Cal. 1998) (plurality); *Cape Publ'ns, Inc*., 549 So. 2d at 1378-79.

[339] *See supra* text accompanying notes 77-136.

approximately seventy rulings upheld a jury's finding for the plaintiff. [341] In that case, the U.S. Fifth Circuit Court of Appeals applied Louisiana law, which allowed a plaintiff's privacy interests to prevail when no public interests were served by the disclosed "embarrassing" private information.[342] In three cases remanded for trial, the disclosure of private information also did not serve any public interests, but the disclosures harmed individual privacy interests associated with the liberty, autonomy, and emotional health values.[343] That suggests the disclosure of private facts tort is limited to providing redress for exploitative disclosures that harm individual liberty, autonomy, and emotional health without serving any public interests. In that respect, courts provided some consistent charting in this area of law, charting that allows constitutional free expression rights to limit successful disclosure claims to "extreme cases."[344]

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[340] Hoskins v. Howard, 971 P.2d 1135, 1142 (Idaho 1998); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 232 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002); Reid v. Pierce County, 961 P.2d 333, 342 (1998).

[341] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002)(affirming the award of $2 in compensatory damages and remanding for a new trial on punitive damages.).

[342] *Id*.

[343] *Lake*, 582 N.W.2d at 232; *Karch*, 794 A.2d at 774; *Reid*, 961 P.2d at 342.

[344] *E.g.*, Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997).

CHAPTER 3

Appropriation, the first privacy tort, was recognized by state statute in 1903 in New York[1] and then under common law in 1905 in Georgia.[2] More than 60 years later, the U.S. Supreme Court first addressed the conflict between freedom of expression and privacy in a false light case filed under the New York privacy law, originally passed in 1903 to provide a remedy for appropriation but subsequently applied to false light claims.[3] Because that case, *Time, Inc. v. Hill*,[4] involved the claim that publication of non-defamatory falsehoods constituted an invasion of privacy, the opinion provided little guidance for courts attempting to reconcile conflicts between freedom of expression and the privacy interests affected by the commercial exploitation of one's name, image, or likeness.

The U.S. Supreme Court has ruled on only one case involving misappropriation of identity.[5] In 1977 in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that the First Amendment did not protect a broadcast station from liability for appropriation when a newscast presented a performer's entire act, which was protected by the right of

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[1] N.Y. CIV. RIGHTS LAW §§ 50-51 (LEXIS 2010).

[2] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69-70 (Ga. 1905).

[3] *See, e.g.*, Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y. 1966).

[4] 385 U.S. 374 (1967).

publicity under Ohio law.[6] A narrow majority of the Court focused on the individual's right of publicity, a property-based right related to economic harm, not a privacy-based right related to emotional harm.[7] The Court described that right as "the right of the individual to reap the reward of his endeavors, and having little to do with protecting feelings or reputation."[8] This chapter does not address right of publicity cases unless they also involve invasion of privacy claims because the right of publicity is distinct from the right to privacy. As one legal scholar argued, the publicity-based tort of appropriation "has nothing to do with protecting personal privacy."[9]

In fact, the conflict between freedom of expression and the right to privacy was only implied in the *Zacchini* ruling by dissenting justices.[10] In one dissenting opinion, Justices Powell, Brennan, and Marshall criticized the majority for providing insufficient clarity and inappropriate "sensitivity to the First Amendment values at stake."[11] Those dissenting justices indicated that they would have granted greater deference to press freedom than was granted by the majority.[12] Writing for all three, Justice Powell argued that the First Amendment should protect news media against an appropriation suit "absent a strong showing by the plaintiff that the news broadcast was a subterfuge or

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[6] 433 U.S. 562, 573 (1977).

[7] *Id*.

[8] *Id*.

[9] Andrew McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L. REV. 988, 1003 n.61 (1995).

[10] 433 U.S. at 579-80 (Powell, J., dissenting); *id.* at 583 (Stevens, J., dissenting).

[11] *Id*. at 579-80. It is worth noting that Justice Marshall wrote the majority opinion in *Florida Star v. B.J.F.*, which recognized that press freedom and privacy both are significant interests. 491 U.S. 524, 526 (1989).

[12] 433 U.S. at 581.

cover for private or commercial exploitation."[13] His rationale involved the right to privacy as well as the right of publicity, but he indicated that free expression rights are paramount.[14] In the other *Zacchini* dissenting opinion, Justice Stevens suggested the majority did not show "proper sensitivity to First Amendment principles" because it focused on the "reach of the common-law tort" rather than the limits imposed by the First Amendment.[15]

Since the U.S. Supreme Court decided *Florida Star v. B.J.F.* in June 1989, the starting point for this dissertation, state high courts and federal circuit courts of appeals have discussed key freedom of expression and privacy values in a number of rulings involving privacy-based appropriation claims.[16] However, in only one case, in which an appellant claimed that the privacy-based appropriation tort violated the freedom of expression provisions of the First Amendment, did a court explicitly engage in ad hoc balancing of interests.[17] Also, only one post-1989 ruling identified by this study has hinted that a state might decline to recognize the appropriation tort. That ruling contained no discussion at all of privacy or free expression values, merely noting that the North

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[13] *Id*.

[14] *Id*. at 581-82 ("I emphasize that this is a 'reappropriation' suit, rather than one of the other varieties of 'right of privacy' tort suits identified by Dean Prosser in his classic article.") (citing William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960)).

[15] Zacchini v. Scripps Howard Broad. Co., 433 U.S. 562, 583 (U.S. 1977) (Stevens, J., dissenting).

[16] Searches for the key words of "privacy" and ("appropriation" or "use of name" or "use of image" or "use of likeness") in LexisNexis, Westlaw, and the Media Law Reporter found 297 court rulings from June 1989 through January 2010. Most of those rulings are not relevant to this study because they were handed down by state courts at the intermediate appellate level, involved other invasion of privacy torts, involved right of publicity claims, or involved statutory claims unrelated to the appropriation tort. Only forty-five rulings involved privacy-based appropriation claims.

[17] Doe v. Roe, 638 So. 2d 826, 828-30 (Ala. 1994) (per curiam).

Dakota Supreme Court had had opportunities to recognize the privacy torts but had failed to do so.[18]

In the cases identified in this study, the highest courts in four states recognized the appropriation branch of invasion of privacy for the first time after June 1989.[19] In addition, in 1998, the Supreme Court of Washington clarified that the common law of its state recognizes the privacy tort of appropriation.[20] Three years later, the U.S. Fifth Circuit Court of Appeals asserted that it expected Mississippi would recognize invasion of privacy by appropriation under the state's common law if a suitable case arose.[21] Although recognition of the privacy-based appropriation tort has expanded during the past twenty years, little is known about if and how state high courts and federal circuit courts of appeals have attempted to reconcile conflicts between free expression rights and privacy rights in privacy-based appropriation claims. This chapter examines that question.

More than one third of forty-five relevant rulings evaluated whether summary judgment awards were properly granted.[22] Most focused on whether the use of the

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[18] Hougum v. Valley Memorial Homes, 574 N.W.2d 812 (N.D. 1998).

[19] Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (en banc); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (en banc); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 269 (Vermont 1990).

[20] Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998) (en banc).

[21] Am. Guar. & Liability Ins. Co. v. 1906 Co., 273 F.3d 605, 608 (5th Cir. 2001) (concluding that the Supreme Court of Mississippi would find that an employee of the 1906 Co. committed invasion of privacy by under the intrusion and appropriation torts by secretly recording women in the dressing room at a store owned by Hattiesburg Coca-Cola Bottling Company and the insurance company).

[22] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759 (10th Cir. 2007) (unpublished); Zarrilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122, 123-25 (3d Cir. 2007) (per curiam) (unpublished); Meadows v. Hartford life Ins. Co., 492 F.3d 634, 637 (5th Cir. 2007); *Am. Guar. & Liability Ins. Co.,* 273 F.3d at 615; Newcombe v. Adolf Coors Co., 157 F.3d 686, 693 (9th Cir. 1998); Matthews v. Wozencraft, 15 F.3d 432, 436 (5th Cir. 1994); Schifano v. Greene County Greyhound Park, Inc., 624 So.

plaintiff's name or likeness constituted an actionable invasion of privacy.[23] Three decisions reversed summary judgment awards or judgment notwithstanding verdict and remanded appropriation claims for trial. [24] Fifteen rulings upheld summary judgments because the alleged appropriation was a privileged publication pertinent to a matter of public concern[25] or failed to satisfy the elements of the tort.[26] In four cases the courts upheld jury awards for plaintiffs who claimed their names or likenesses were exploited.[27] And one court upheld a permanent injunction to prevent appropriation.[28] The rationales for some rulings reviewed for this chapter clearly tied the analyses of the facts to key individual privacy values—liberty, autonomy, and emotional health—one key communicator-based free expression value—autonomy—and key audience-based free

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2d 178, 179 (Ala. 1993); Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (en banc); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599 (Ind. 2001); Tannenbaum v. Grady, 604 N.E.2d 16, 16 (Mass. 1992); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (en banc); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 701(N.Y. 1993); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); *Staruski*, 581 A.2d at 273; *Reid*, 961 P.2d at 335.

[23] *Zarrilli,* 231 Fed. App'x at 123-25; *Am. Guar. & Liability Ins. Co.,* 273 F.3d at 608; *Tannenbaum*, 604 N.E.2d at 16; *Newcombe,* 157 F.3d at 689; *Schifano*, 624 So. 2d at 179; *Felsher,* 755 N.E.2d at 599; *Simpson,* 669 A.2d at 1326; *Sloan*, 586 S.E.2d at 108; *Staruski,* 581 A.2d at 273; *Reid,* 961 P.2d at 335.

[24] *Newcombe,* 157 F.3d at 694; *Lake,* 582 N.W.2d at 236; *Staruski,* 581 A.2d 273-74.

[25] *Showler*, 222 Fed. App'x at 759; *Matthews*, 15 F.3d at 436; Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, 7 (6th Cir. 1990) (unpublished); *Joe Dickerson & Assoc.*, 34 P.3d at 997; *Howell*, 612 N.E.2d at 701; *Leddy*, 843 A.2d at 490-91; *Reid* 961 P.2d at 335.

[26] *Zarrilli*, 231 Fed. App'x at 123-25; *Meadows*, 492 F.3d at 637; *Am. Guar. & Liability Ins. Co.,* 273 F.3d at 615; *Schifano*, 624 So. 2d at 179; *Tannenbaum*, 604 N.E.2d at 16; *Simpson*, 669 A.2d at 1326; *Sloan*, 586 S.E.2d at 108; *Reid*, 961 P.2d at 335.

[27] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007) (affirming a judgment for King that included an award of damages in the amount of $57,672); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000) (finding the jury did not err in awarding $100,000 for misappropriation); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992)(unpublished) (per curiam) (affirming a judgment for Bowling that included an award of $1000 for the appropriation of his likeness); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995) (affirming a judgment for Riggins that included a $2 award of compensatory damages).

[28] Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599 (Ind. 2001).

expression values—the marketplace of ideas, self-governance, and the checking function.[29]

Section A of this chapter reviews how courts have defined and applied the elements of the appropriation tort. Section B explores how courts have addressed key free expression values in privacy-based appropriation cases. Section C examines court discussions of key privacy values, and Section D analyzes how relevant rulings have sought to reconcile conflicts between freedom of expression and privacy.

A. Elements of Appropriation and Key Defenses

Most states have adopted the invasion of privacy by appropriation tort.[30] Many states have recognized appropriation under the common law by adopting language from the *Restatement (Second) of Torts*.[31] A few states have appropriation statutes, often modeled on the New York Right of Privacy Law adopted in 1903.[32] All the states have recognized substantially similar elements and privileges for invasion of privacy under the appropriation theory. The *Restatement (Second) of Torts* states, "One who appropriates to

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[29] *E.g.*, *Showler,* 222 Fed. App'x at 759; *Solano*, 292 F.3d at 1081; *Matthews,* 15 F.3d at 436; *Joe Dickerson & Assoc.,* 34 P.3d at 997; *Felsher,* 755 at 593; *Lake,* 582 N.W.2d at 234-35; *Howell,* 612 N.E.2d at 704; *Beverley,* 587 N.E.2d at 279; *Leddy,* 843 A.2d at 490-91; *Sloan,* 586 S.E.2d at 110-11; *Staruski*, 581 A.2d 269-70; WJLA v. Levin, 564 S.E.2d 383, 395 (Va. 2002).

[30] Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 999 (Colo. 2001).

[31] *E.g.*, Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); Schifano v. Greene County Greyhound Park, Inc., 624 So. 2d 178, 181 (Ala. 1993); *Dickerson,* 34 P.3d at 999; Felsher v. Univ. of Evansville, 755 N.E.2d 589, 593 (Ind. 2001); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Nemani v. St. Louis Univ., 33 S.E.3f 184, 187 (Mo. 2000); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 269 (Vermont 1990).

[32] *E.g.*, CAL. CIV. CODE § 3344 (Deering 1995); FLA. STAT. § 540.08 (1998); MASS. ANN. LAWS. Ch. 214 § 3A (LexisNexis 2009); NEB. REV. ST. § 20-201 (1943) (West 2006); N.Y. CIV. RIGHTS §§ 50-51 (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 839.1 (West 2002); R.I. GEN. LAWS. § 9-1-28.1 (1956); VA. CODE. ANN. § 8.01-40A (LexisNexis 2009); WIS STAT. § 895.50 (1997).

his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[33] Similarly, statutory law in New York and Virginia allows liability to be assigned to anyone who uses "for advertising purposes or for the purposes of trade" the name, image, or likeness of a person "without having first obtained the written consent of such person . . . ."[34] This section will first review how courts have defined and applied each of the appropriation tort's three key elements — commercial use; name, likeness, or identity; and lack of consent.

In determining whether a particular use constitutes a commercial use, some courts have used the concept of exploitation.[35] In two of those cases, both involving Texas's invasion of privacy law, the U.S. Fifth Circuit considered whether the uses at issue constituted "excessive exploitation" that reduced the value of the plaintiff's "property rights in his name or likeness."[36] In another case, the Supreme Judicial Court of Massachusetts reasoned that an attorney did not exploit the identity of a Massachusetts Institute of Technology professor of toxicology when the attorney included the professor's name in a list of experts he expected to call as witnesses in a trial.[37] The court acknowledged that an expert's name might be used to provide an attorney with the perception of an advantage, but the court explained that the attorney's truthful response that he had consulted with the professor did not constitute an actionable exploitative use

[33] RESTATEMENT (SECOND) OF TORTS § 652C (1977).

[34] N.Y. CIV. RIGHTS LAW § 50-51 (LexisNexis 2010); VA. CODE ANN. § 8.01-40A (LexisNexis 2009)

[35] *Zarrilli,* 231 Fed.App'x (3d Cir. 2007); Meadows v. Hartford Life Ins. Co., 492 F.3d 634, 639 (5th Cir. 2007); Matthews v. Wozencraft, 15 F.3d 432, 437-38 (5th Cir. 1994); Schifano v. Greene County Greyhound Park, Inc., 624 So.2d 178, 179-181 (Ala. 1993); Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992); Wilkinson v. Methodist, 612 N.W.2d 213, 216 (Neb. 2000).

[36] *Meadows*, 492 F.3d at 639; *Matthews,* 15 F.3d at 438-39.

[37] Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992).

of the expert's name "for purposes of trade" to benefit the attorney.[38] That suggests an exploitative use must unfairly help an individual in his or her business or profession.

In 2007 in *Zarrilli v. John Hancock Life Insurance Company*, the U.S. Third Circuit Court of Appeals found that James Zarrilli and his wife, Carol, did not have an actionable misappropriation claim against John Hancock Life Insurance Company because the exploitation was not intentional under New Jersey common law.[39] The Zarrillis claimed James's identity was used to the defendant's advantage when the company kept his voice mail message active and included his name in correspondence after his employment was terminated.[40] The court's unpublished, per curiam opinion stated, "[T]he Zarrillis presented no evidence that John Hancock acted with a commercial purpose or sought some other benefit from what it claimed had been a mistake."[41]

Other courts have questioned whether analysis of an exploitative use should require a plaintiff to prove that his or her identity had value that could be exploited.[42] In 1991, the U.S. Sixth Circuit Court of Appeals found that Larry Lusby failed to demonstrate *Cincinnati Magazine* had appropriated his identity by publishing an article explaining he had been married and divorced six times.[43] The court ruled that summary judgment was properly granted for the magazine because the plaintiff's likeness was used in relation to a

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[38] *Id*.

[39] *Zarrilli,* 231 Fed.App'x at 125.

[40] *Id*.

[41] *Id*.

[42] *E.g.*, Brown v. Ames, 201 F.3d 654, 661-62 (5th Cir. 2000), *rehearing denied,* 2000 U.S. App. LEXIS 5632 (2000); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); *Schifano,* 624 So.2d at181; Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, 7 (6th Cir. 1990) (unpublished).

[43] *Lusby,* 1990 U.S. App. LEXIS at 7.

news article. The court reasoned that under Ohio law, Lusby failed to show "that the defendant appropriated something of value beyond the value each person places on his own name or likeness."[44] The court continued, "The only complaint Lusby can make is that the use of his wedding photograph with six paper doll brides damages his name and reputation . . . ."[45] Two years later, the Supreme Court of Alabama applied a similar rationale when it held that several individuals could not prevail on an appropriation claim because they failed to demonstrate their identities had unique qualities or values that would result in a commercial profit.[46]

Almost a decade later, however, the Supreme Court of Colorado rejected the idea that a plaintiff had to prove his or her identify had value in order to prevail in a privacy-based appropriation lawsuit, suggesting that a commercial value requirement was more appropriate when the claim was based on a right of publicity, an exploitation of a property value, rather than an invasion of privacy.[47] In *Joe Dickerson & Associates v. Dittmar*, the Colorado Supreme Court stated:

> It appears illogical to require the plaintiff to prove that her identity has value in order for her to recover for her personal damages. The market value of the plaintiff's identity is unrelated to the question of whether she suffered mental anguish as a result of the alleged wrongful appropriation.[48]

Rather than analyze whether a plaintiff's identity had value worth exploiting, some courts have focused more directly on what constitutes commercial purposes that would

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[44] *Id.*

[45] *Id.*

[46] Schifano v. Greene County Greyhound Park, Inc., 624 So.2d 178, 179-81 (Ala. 1993).

[47] Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1002 (Colo. 2001) (en banc).

[48] *Id.*

benefit a defendant.[49] In 2002, the Supreme Court of Virginia indicated that "a name is used 'for advertising purposes' when 'it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service.'"[50] Any such unauthorized use "'has almost uniformly been held actionable.'"[51] In *WJLA v. Levin*, the court found that use of Dr. Levin's name and image was not an unauthorized use for advertising purposes. Rather, his name and image were used in promotional announcements on "a newsworthy event and a matter of public interest."[52] That case involved a news station's use of a physicians name in advertisements for a news story reporting that several of Levin's patients alleged he performed unnecessary "inappropriate" vaginal procedures.[53]

Courts have found that using an individual's name and/or picture in various types of promotional materials constitutes advertising purposes.[54] For example, in 1991 in *Beverley v. Choices Women's Medical Center*, the Court of Appeals of New York applied a test to determine whether the use of plaintiff's name and photo in a medical facility's calendar qualified as "advertising purposes."[55] The court explained that a person's

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[49] *E.g.,* King v. PA Consulting Group, Inc., 485 F.3d 577, 592-93 (10th Cir. 2007); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 276-77 (N.Y. 1991); WJLA v. Levin, 564 S.E.2d 383, 388 (Va. 2002); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362 (Va. 1995).

[50] WJLA v. Levin, 564 S.E.2d 383, 388 (Va. 2002) (quoting VA. CODE § 8.01-40A)).

[51] *Id.* at 395 (citing *Town & Country Props., Inc.*, 457 S.E.2d at 362).

[52] *WJLA*, 564 S.E.2d at 388.

[53] *Id.* at 387.

[54] *E.g.,* King v. PA Consulting Group, Inc., 485 F.3d 577, 592-93 (10th Cir. 2007); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 276-77 (N.Y. 1991).

[55] *Beverley*, 587 N.E.2d at 276-77.

identity "is used 'for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service."[56] The court asserted that the medical center's calendar, which included the facility's name, logo, telephone number, and services provided, in addition to the plaintiff's image, "is an advertising medium and promotional publication."[57] The court reasoned that sending a targeted audience a calendar with "laudatory references" about the center was "plainly designed to preserve existing patronage and to educate and solicit new clients."[58] Thus, including the plaintiff's name and photograph in a product designed to solicit customers was an actionable use.[59]

In another case, the Supreme Court of Virginia considered whether a use could serve a public interest rather than solely serving the defendant's commercial interests.[60] In *Town & Country Properties, Inc. v. Riggins* the majority concluded that a former football star's name was used in a flier to promote a sale, not to benefit consumers.[61] Referring to the distinction between uses protected by the First Amendment and actionable uses for trade or advertising purposes, the court asserted that constitutional

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[56] *Id.* at 278.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *E.g.*, Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

[61] *Town & Country Props., Inc.,* 457 S.E.2d at 362-64.

protection for speech "'is based on the informational function of advertising.'"[62] The majority wrote:

> The use was not relevant to dissemination of information to consumers about the physical condition, architectural features, or quality of the home . . . . Rather, the plaintiff's name was used strictly in a promotional sense to generate interest in the sale of real estate.[63]

Accordingly, the Supreme Court of Virginia found the trial court properly had awarded damages to Riggins because the football star's name was used primarily to benefit Town & Country financially rather than to provide information beneficial to the public.[64]

A few courts have focused on the second element of the appropriation tort, whether a plaintiff's identity was used.[65] The *Restatement (Second) of Torts* refers to this element as the use of a plaintiff's "name or likeness," which can mean different things in different jurisdictions.[66] For instance, using a plaintiff's first and last names without including other identifying attributes was not considered a use of identity in *Botts v. New York Times Company* in 2004 under New Jersey law.[67] The U.S. Third Circuit Court of Appeals found *The New York Times*, an advertising agency, and the United Negro College Fund did not appropriate the identity of Lawrence Botts III by using the name "Larry Botts" "as a generic placeholder for the prototypical underprivileged African-

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[62] *Id.* at 362-63 (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980)).

[63] *Id.*

[64] *Id.*

[65] *E.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 692-93 (9th Cir. 1998); Matthews v. Wozencraft, 15 F.3d 432, 437-38 (5th Cir. 1994); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Botts v. New York Times, 106 Fed. App'x, 109, 110 (3d. Cir., 2004) (unpublished).

[66] RESTATEMENT (SECOND) OF TORTS § 652C (1977). *See also* Newcombe, 157 F.3d at 690; Matthews, 15 F.3d at 437; *Simpson*, 669 A.2d at 1326; *Botts*, 106 Fed. App'x at 110.

[67] *Botts*, 106 Fed. App'x at 110.

American youth" in an advertisement.[68] The court reasoned that using the identity of Lawrence Botts III, a "college-educated Caucasian," actually would have hindered the advertisement's effectiveness as a fundraising tool for the United Negro College Fund.[69] Thus, Botts's identity was not appropriated in the ad.[70]

However, courts have found that using a name or image with an individual's other readily identifiable characteristics could be sufficient to constitute use of identity.[71] In 1998, in *Newcombe v. Adolf Coors Co.*, the U.S. Ninth Circuit Court of Appeals concluded that a question of material fact remained about whether a beer advertisement featuring a sketch of a baseball pitcher had appropriated the identity of Donald Newcombe, who played major league baseball in the 1940s.[72] It reversed the trial court's grant of summary judgment for the defendant in favor of Newcombe.[73] The appeals court found that "it would not be unreasonable for a jury to conclude" that the advertisement used Newcombe's identity to sell beer.[74] The appeals court asserted a jury could reasonably find Newcombe's likeness was used because the sketch included a pitcher with a dark complexion, similar to Newcombe's complexion, who assumed Newcombe's

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *E.g.*, Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 273 (Vt. 1990). (holding that a telephone company appropriated plaintiff's identity when it published a photograph of her, which was accompanied by her name, job description, and an endorsement of her employer).

[72] 157 F.3d 686, 693-94 (9th Cir. 1998).

[73] *Id*. at 694.

[74] *Id*.

pitching stance.[75] Although an artist drew another player's number on the pitcher's jersey, the combination of other unique attributes was sufficient for a jury reasonably to believe Newcombe was identified, the appeals court reasoned.[76]

Merely describing events from a person's life, however, may not constitute an actionable use of one's likeness, especially when the events are used in a book, movie, or other non-commercial venue.[77] The U.S. Fifth Circuit Court of Appeals has determined that describing "general incidents from a person's life" or life story does not appropriate the unique value associated with an individual's identity.[78] Applying Texas law, that court reasoned that the tort of appropriation is intended to protect unique values, such as reputation or prestige, associated with a plaintiff's identity.[79] The court wrote:

> The term "likeness" does not include general incidents from a person's life, especially when fictionalized. The narrative of an individual's life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects. Unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use.[80]

When a similar question arose in a recent publicity-based appropriation claim, the Supreme Court of Florida indicated that a First Amendment privilege prevented the fictionalized use of an individual's life story in a book or movie from being considered an

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[75] *Id*. at 693.

[76] *Id.*

[77] *E.g.*, Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); Tyne v. Time Warner Ent. Co., 901 So.2d 802, 809-810 (Fla. 2005), *aff'd,* 425 F.3d 1363, 1364 (11th Cir. 2005) (per curiam).

[78] *Matthews*, 15 F.3d at 437 (affirming the district court's grant of summary judgment for Wozencraft "because Texas law does not recognize a cause of action for appropriation of one's life story and because if it did, there would be an exception for biographies and 'fictionalized biographies.'").

[79] *Id.* at 437 (referring to RESTATEMENT (SECOND) OF TORTS § 652C, cmt. d (1977)).

[80] *Id*. at 438.

actionable appropriation of identity.[81] The Florida case involved a book and film that provided a dramatized story about members of a fishing vessel crew who died when their ship was lost at sea during a severe storm.[82]

The final element commonly applied in privacy-based appropriation claims assesses whether the plaintiff's name or likeness was used without proper authorization.[83] Courts have found that individuals may waive the right to privacy associated with using their identities through implied consent or explicit consent.[84] For instance, in 1993, the Supreme Court of Alabama reasoned that individuals could not prevail on a privacy-based appropriation claim against a Greyhound Park for including a picture of the plaintiffs at the park in a promotional brochure.[85] The court suggested the individuals essentially consented to the use because the plaintiffs would have seen their picture being taken after hearing announcements that the park was taking photographs for a promotional brochure.[86] Similarly, the Supreme Court of Missouri found that a university's use of a researcher's name in a federal grant application was an authorized use because the researcher and plaintiff, Rama K. Nemani, worked for the university

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[81] Tyne v. Time Warner Ent. Co., 901 So.2d 802, 809-810 (Fla. 2005); 425 F.3d 1363 (11th Cir. 2005) (per curiam).

[82] *Id.*

[83] RESTATEMENT (SECOND) OF TORTS § 652C (1977).

[84] Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1310 (11th Cir., 2008) (per curiam); Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957, 958 (4th Cir. 2007) (per curiam) (unpublished); Schifano v. Greene County. Greyhound Park, Inc., 624 So.2d 178, 179 (Ala. 1993); Nemani v. St. Louis Univ., 33 S.W.3d 184, 187 (Mo. 2000), *cert. denied*, 532 U.S. 981 (2001); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 656 (Neb. 1991).

[85] *Schifano*, 624 So.2d at 179-181.

[86] *Id.*

when the grant application was prepared.[87] The court overturned a $300,000 jury verdict for Nemani because the business relationship between the university and Nemani at that time constituted implied consent.[88]

Courts consistently have found that consent is a strong defense against a claim of misappropriation when the use does not exceed the scope of explicit consent granted in a contract or other written agreement. [89] Nebraska's privacy law states that any use that "does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed" is not actionable.[90] In a 1991 ruling in *Miller v. American Sports Co., Inc*., the Supreme Court of Nebraska found that publishing a promotional brochure with the word sex above a photograph of a female model was not an actionable invasion of privacy because the model "agreed to the unremunerated and unrestricted use of her photographs to sell products . . . ."[91] On the other hand, an U.S. Eleventh Circuit Court of Appeals per curiam ruling in *Rivell v. Private Health Care Systems, Inc.* found that the existence of a contract between medical providers and a discount medical services network did not preempt an invasion of privacy by appropriation claim under Georgia law for the network's use of plaintiffs' identities for purposes not included in the contract.[92] Remanding the case for trial, the Eleventh Circuit asserted that courts in seven

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[87] *Nemani*, 33 S.W.3d at 187.

[88] *Id*.

[89] *E.g., Id*. Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957, 958 (4th Cir. 2007) (per curiam) (unpublished).

[90] NEB . REV. STAT. § 20-202 (Reissue 1987); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 656 (Neb. 1991).

[91] *Miller*, 467 N.W.2d at 656.

[92] Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1310 (11th Cir., 2008) (per curiam).

states had "recognized that a use outside the scope of the permission granted in a contract . . . gives rise to an action by the licensor for invasion of privacy."[93]

Courts also have considered whether uses were exempt from liability because the alleged appropriation was privileged under a First Amendment, common law, or statutory exception for material that conveys a legitimate matter of public concern or interest.[94] This, of course, is closely related to the issue of whether the use qualifies as a commercial, trade or advertising use. When a plaintiff's name or likeness has been used in relation to content that addresses a matter of public interest, courts have found those uses privileged when a real relationship exists between the use of a plaintiff's identity and the matter public interest or concern.[95] For instance, in 2007, applying Oklahoma law, the U.S. Tenth Circuit Court of Appeals found that *Harper's Magazine* did not violate the privacy of Sergeant Brinlee, who was killed while serving in Iraq in the Oklahoma National Guard, by publishing a photograph of him in an open coffin at his funeral.[96] The court explained that the soldier's death and funeral were a matter of public interest and clearly relevant to the photo essay on grieving deaths resulting from the U.S. military

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[93] *Id.* at1310 (stating that courts in Georgia, New York, California, Massachusetts, Connecticut, Ohio, and Illinois all have recognized that standard of law.).

[94] *E.g.,* Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 761 (10th Cir. 2007) (unpublished); Groden v. Random House, Inc., 61 F.3d 1045, 1049 (2d. Cir. 1995); Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1004 (Colo. 2001) (en banc); Tyne v. Time Warner Ent. Co., 901 So.2d 802, 809-810 (Fla. 2005), aff'd by 425 F.3d 1363, 1364 (11th Cir. 2005) (per curiam); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Leddy v. Narragansett Television, L. P., 843 A.2d 481, 490; Beverley v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002).

[95] *Showler,* 222 Fed. App'x at 763-64; *Tyne*, 901 So.2d at 809-810; Groden, 61 F.3d at 1049; *Joe Dickerson & Assoc.*, 34 P.3d at 1004; *Messenger,* 727 N.E.2d at 552-54; *Leddy*, 843 A.2d at 490; *Beverley*, 587 N.E.2d at 278-79; *Finger,* 566 N.E.2d at 144; *WJLA*, 564 S.E.2d at 387-88.

[96] *Showler,* 222 Fed. App'x at 763-64.

intervention in Iraq.[97] Thus, the use was privileged because a real relationship existed between Sergeant Brinlee's image and the matter of public interest represented in the photo essay.[98]

Courts also have used a real relationship test to determine whether the use of a plaintiff's identity was privileged even though it served both a commercial use and a non-commercial use.[99] For instance, the Supreme Court of Colorado indicated that a private investigation firm, Joe Dickerson & Associates, was not liable for using Rosanne Dittmar's name in an article about her conviction of theft.[100] The article was published in a newsletter that explained financial fraud investigations conducted by the defendants, and the court acknowledged that the article at issue involved commercial purposes as well as informational purposes.[101] The court assessed "whether the character of the publication is primarily noncommercial" under Colorado law by reviewing whether the content primarily conveyed a commercial message or whether the content related to a matter of public concern.[102] Recognizing that the U.S. Supreme Court had established in *Cox Broadcasting v. Cohn* that information about the commission of and prosecution of crime are "matters of public concern," the Supreme Court of Colorado found that

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[97] *Id.*

[98] *Id.*

[99] Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1003 (Colo. 2001) (en banc); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703-04 (N.Y. 1993); Beverley v. Choices Women's Med. Ctr., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991).

[100] *Joe Dickerson & Assoc.*, 34 P.3d at 1003 ("[T]he defendant's use of the plaintiff's name and likeness in the context of an article related to her crime and conviction is newsworthy and, therefore, privileged.").

[101] *Id.* at 1003.

[102] *Id*. at 999.

summary judgment had been properly awarded to the defendant because the business's use of Dittmar's name in association with her arrest and conviction was privileged.[103]

Courts also have found news organizations' uses of individuals' images in advertisements for news to be privileged on First Amendment grounds.[104] To determine whether a use of an individual's identity is privileged, some courts have assessed whether a use is "an advertisement in disguise," meaning a "real relationship" does not exist between the plaintiff's identity and the matter of public interest presented.[105] In 2002, in *WJLA v. Levin*, the Supreme Court of Virginia found a news station was not liable for appropriating a doctor's identity by including his image in two advertisements that encouraged viewers to tune in to learn about allegations that Dr. Levin performed unnecessary vaginal procedures on his patients.[106] The court reasoned:

> [I]t cannot reasonably be disputed that the principal purpose of WJLA's announcements was to promote a report "of [a] newsworthy event[] or matter[] of public interest." It is a newsworthy event and a matter of public interest when a physician is accused by his patients of sexually assaulting them. [107]

The Virginia Supreme Court reversed a $575,000 award for Dr. Levin and held that a reasonable relationship existed between the advertisement and the subject of the news report. The highest state courts in Rhode Island and New York and the U.S. Tenth and

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[103] *Id*. at 1004 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975)).

[104] *E.g.*, Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 444-46, 448 (N.Y. 2000) (per curiam); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002).

[105] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-64 (10th Cir. 2007) (unpublished); Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1003-04 (Colo. 2001) (en banc); Beverley v. Choices Women's Med. Ctr., Inc., 587 N.E.2d 275, 752 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d at 490-91; WJLA, 564 S.E.2d at 387-88.

[106] WJLA, 564 S.E.2d at 395.

[107] *Id.* (quoting Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552 (N.Y. 2000) (per curiam)).

Sixth Circuit Courts of Appeals, applying Oklahoma and Ohio law respectively, also have found that a First Amendment privilege protects news outlets' use of individuals' images to illustrate content pertinent to matters of public interest.[108]

As indicated above, more than one-half of the post-1989, privacy-based appropriation claims identified by this study were found not actionable either because plaintiffs failed to support each element of the tort or because defendants demonstrated that the uses at issue were privileged as expression on matters of public interest or concern.[109] The following sections explore if and how courts discussed free expression and privacy values when ruling on privacy-based appropriation claims.

B. Free Expression Values

Courts have mentioned free expression values primarily when issuing rulings that consider whether an alleged appropriation of a plaintiff's identity was protected under a First Amendment, common law, or statutory privilege for publishing matters of public interest.[110] Autonomy is the only communicator-based free expression value discussed in

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[108] Showler, 222 Fed. App'x at 763-64; Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, *7 (6th Cir. 1990) (unpublished); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 551-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703-05 (N.Y. 1993); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 488-89 (R.I. 2004).

[109] *E.g.,* Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1310 (11th Cir., 2008) (per curiam); Meadows v. Hartford Life Ins. Co., 492 F.3d 634, 638-39 (5th Cir. 2007); Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957, 958 (4th Cir. 2007) (per curiam) (unpublished); Zarrilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122, 125. (3d Cir. 2007) (unpublished); Botts v. New York Times, 106 Fed. App'x 109, 110 (3d. Cir., 2004) (unpublished); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); Schifano v. Greene Cty. Greyhound Park, Inc., 624 So.2d 178, 179 (Ala. 1993); Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Nemani v. St. Louis Univ., 33 S.W.3d 184, 186 (Mo. 2000) (en banc); Wilkinson v. Methodist, 612 N.W.2d 213, 217 (Neb. 2000); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 656 (Neb. 1991); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356 (Va. 1995); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 273 (Vt. 1990).

the rulings reviewed for this chapter.[111] When discussing free expression values, courts focused on audience-based values in eight cases.[112] Relevant rulings described at least one of three key audience-based values—the marketplace of ideas, self-governance, and the checking function—occasionally in tandem with the autonomy value underlying freedom of the press.[113] Much of the relevant discussion was found in cases involving state statutory torts, including the New York Right to Privacy Law and others modeled upon the New York law.[114]

A few rulings that assessed whether a news outlet's use of a plaintiff's image or likeness was sufficiently newsworthy to merit First Amendment protection have discussed or suggested the autonomy value for freedom of expression.[115] For instance, in the 1993 case *Howell v. New York Post Company*, the New York Court of Appeals indicated that courts in the state repeatedly had found that publishing matters of public interest would not be considered tortious in deference to the legislative intent for the right

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[110] *Showler*, 222 Fed. App'x at 759; *Tyne*, 901 So.2d at 809-810; *Lusby*, 1990 U.S. App. LEXIS 9144 at *7; *Joe Dickerson & Assoc., LLC*, 34 P.3d at 998-1001; *Messenger*, 727 N.E.2d at 559-61; *Howell*, 612 N.E.2d at 703; *Beverley*, 587 N.E.2d at 279; *Leddy*, 843 A.2d at 490-91; *WJLA*, 564 S.E.2d at 490-91; *Town & Country Props., Inc.*, 457 S.E.2d at 361-62.

[111] Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); *Joe Dickerson & Assoc., LLC*, 34 P.3d at 998-1001; *Messenger,* 727 N.E.2d at 552-54; *Howell,* 612 N.E.2d at 703; Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143 (N.Y. 1991); *Leddy*, 843 A.2d at 490-91.

[112] *E.g., Showler*, 222 Fed. App'x at 759; *Tyne*, 901 So.2d at 809-810; *Lusby*, 1990 U.S. App. LEXIS 9144 at *7; *Joe Dickerson & Assoc., LLC*, 34 P.3d at 998-1001; *Howell*, 612 N.E.2d at 704; *Leddy,* 843 A.2d at 491; *WJLA*, 564 S.E.2d at 395; *Town & Country Props., Inc.*, 457 S.E.2d at 361-62.

[113] *Lusby,* 1990 U.S. App. LEXIS 9144 at *7; *Joe Dickerson & Assoc., LLC,* 34 P.3d at 998-1001; *Messenger,* 727 N.E.2d at 552-53; *Howell,* 612 N.E.2d at 703-04; *Finger,* 566 N.E.2d at 143; *Leddy*, 843 A.2d at 490-91; WJLA v. Levin, 564 S.E.2d 383, 395 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[114] *E.g.*, *Messenger*, 727 N.E.2d at 552-54; *Howell*, 612 N.E.2d at 703; *Finger*, 566 N.E.2d at 143-44;

[115] Howell v. New York Post Co., 612 N.E.2d 699, 703 (N.Y. 1993); *Finger,* 566 N.E.2d at 143-44; Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004).

to privacy law and "constitutional values in the area of free speech and free press."[116] In that case, Pamela J. Howell sought a reversal of a summary judgment award for the defendant and support for her claim that the New York Post Company violated her privacy by publishing a photograph of her walking with another patient at a private psychiatric hospital.[117] The photo was published in conjunction with an article about the other patient's recovery from being beaten almost a year earlier. Although Howell had not consented to the newspaper's use of her image, the court of appeals determined the First Amendment prevented the newspaper from being found liable for invasion of privacy when the newspaper published information clearly relevant to a matter of interest to the public.[118] The court reasoned that it had been "reluctant to intrude upon reasonable editorial judgments in determining whether there is a real relationship between an article and photograph."[119] The court's rationale involved the autonomy value for freedom of the press because it acknowledged the importance of allowing the individual news entity to decide what constitutes news.

When courts have discussed the importance of allowing publishers or news outlets to provide an unfettered free flow of information, the courts' commentary has involved the communicator-based autonomy value and the audience-based marketplace of ideas value for freedom of expression.[120] For instance, in *Groden v. Random House*

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[116] *Howell*, 612 N.E.2d at 703 (citing Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d at 143-44).

[117] *Id*.

[118] *Id.* at 704.

[119] *Id.*

Publishing, the U.S. Second Circuit Court of Appeals found summary judgment was properly awarded to the defendant because the First Amendment protected the publisher's use of Robert J. Groden's likeness in an advertisement incidental to a book involving a matter of public interest.[121] Groden's name and photograph were published in an advertisement for *Case Closed*, Gerald Posner's book about the assassination of President Kennedy, a matter of public interest.[122] The court explained that the publication of Groden's name fell under the incidental use exception that recognizes a right for "'news disseminators to publicize, to make public, their own communications."[123] That ruling added that the New York privacy law was designed "to protect privacy without preventing publication of matters of public interest." [124] The court continued, "At least since *Time, Inc. v. Hill*, the New York courts have been vigilant in interpreting the right of privacy to permit the free flow of information."[125] The court's mention of a free flow of information relates generally to the audience-based marketplace of ideas value, implying the public has a right to receive and to discuss information.[126]

Five years later, a New York Court of Appeals per curiam ruling also implicated the marketplace of ideas value for freedom of expression when it discussed whether a

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[120] *E.g.*, Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993); Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143-44 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 491 (R.I. 2004).

[121] *Groden*, 61 F.3d at 1050-51.

[122] *Id.*

[123] *Id.* at 1051.

[124] *Id.*

[125] *Id.* (citing Time, Inc. v. Hill, 385 U.S. 374 (1967); Arrington v. New York Times Co., 434 N.E.2d 1319 (N.Y. 1982)).

[126] *Id.*

magazine's alleged appropriation was a privileged publication of a matter of public interest.[127] In *Messenger v. Gruner + Jahr Printing*, the court found that the publishing corporation did not invade a 14-year-old's privacy when it used her photograph to illustrate its "Love Crisis" column in 1995.[128] Although a jury awarded Messenger $100,000 in damages because *YM*'s use of her image created the false implication that Messenger wrote the letter, the state high court asserted that the newsworthiness privilege extended to *YM*'s juxtaposition of Messenger's picture with a column about a young woman getting drunk and having sex with multiple partners.[129] The court reasoned:

> Consistent with the statutory—and constitutional—value of uninhibited discussion of newsworthy topics, we have time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or the article is an advertisement in disguise.[130]

Mentioning the "value of uninhibited discussion" connects the court's rationale to the audience-based marketplace of ideas value for freedom of speech and of the press.[131]

In 2004, the Supreme Court of Rhode Island ruling in *Leddy v. Narragansett Television, L.P.,* focused on the marketplace of ideas, self-governance, and checking values for freedom of expression when the court found the television station's use of Leddy's likeness was a privileged incidental use.[132] The appropriation claim arose from Channel 12's use of Gerald A. Leddy's name and image in promotions for a three-part

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[127] Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 550-51 (N.Y. 2000) (per curiam).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 553.

[131] *Id.*

[132] 843 A.2d 481, 490-91 (R.I. 2004).

investigative series on public employees who collected tax-free disability pensions from a city and paychecks from the state.[133] The court determined that the promotional uses were protected under the First Amendment.[134] The Rhode Island Supreme Court supported that conclusion with quotations from U.S. Supreme Court rulings that relate to the marketplace of ideas as well as the self-governance and checking values for freedom of the press.[135] Quoting *New York Times v. Sullivan*, a case involving defamation of a public official, the Supreme Court of Rhode Island tied First Amendment protection for free speech to the need for '"debate on public issues"' to '"be uninhibited, robust, and wide-open."'[136] Next, the court connected freedom of expression to the U.S. Supreme Court's '"recognition of the fundamental importance of the free-flow of ideas and opinions on matters of public interest and concern"' in *Hustler v. Falwell*, a case involving a claim for intentional infliction of emotional distress by a public figure.[137]

Although the Rhode Island Supreme Court recognized key First Amendment principles in *Leddy*, the court scolded Channel 12 for focusing its "attention on low-level government employees and others who do not deserve to bear the brunt of such base antics."[138] The court's ruling related the investigative series to the "disreputable aspects of 'ambush journalism'" even though the subject matter presented in the Channel 12

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[133] *Id.* at 484-85.

[134] *Id.* at 490-91.

[135] *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Hustler v. Falwell, 485 U.S. 46, 50 (1988)).

[136] *Id.* at 490 (quoting *New York Times*, 376 U.S. at 270).

[137] *Id.* at 491 (quoting *Hustler,* 485 U.S. at 50).

[138] Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004).

series related directly to the self-governance and checking values for freedom of expression.[139] The court affirmed summary judgment for the defendants, justifying its conclusion by stating, "[I]t is not our place to serve as the censors of journalistic discretion."[140] In a different context, that statement could suggest the importance of editorial autonomy rather than suggest the court's sensitivity to injuries Leddy sustained.

In summary, when courts discussed key free expression values they primarily found that summary judgment was awarded properly to defendants or that awards granted to plaintiffs should be reversed.[141] A few rulings tied press freedom to the communicator-based autonomy value when courts explained their reluctance to censor content involving a matter of public interest.[142] Courts more often tied freedom of speech or press to the audience-based marketplace of ideas, self-governance, and checking values.[143] Section D explores if and how courts attempted to reconcile conflicts between privacy and freedom of expression by discussing key values at stake. First, however, Section C explores if and

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[139] *Id.*

[140] *Id*.

[141] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759 (10th Cir. 2007); Matthews v. Wozencraft, 15 F.3d 432, 440 (5th Cir. 1994); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, at *7 (6th Cir. 1990) (unpublished); Joe Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 559-61 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); *Leddy*, 843 A.2d at 490-91; WJLA v. Levin, 564 S.E.2d 383, 395 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[142] *Howell*, 612 N.E.2d at 703 (N.Y. 1993); Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143-44 (N.Y. 1991); WJLA v. Levin, 564 S.E.2d 383, 395 (Va. 2002).

[143] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 764 (10th Cir. 2007); Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Joe Dickerson & Assoc.v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, at *7 (6th Cir. 1990) (unpublished); *Howell, Inc.,* 612 N.E.2d at 703; Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); *Finger*, 566 N.E.2d at 143-44; *Leddy*, 843 A.2d at 491; Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

how state high courts and federal circuit courts of appeals have discussed key privacy values in privacy-based appropriation cases.

C. Privacy Values

During the past 20 years, state high courts and federal courts of appeals have discussed primarily individual, rather than societal, values for privacy.[144] That contrasts with the tendency to implicate audience-based free expression values that generally benefit society.[145] Almost half the relevant rulings on privacy-based appropriation claims have implied that the appropriation tort provides redress for harm to the individual values of autonomy, liberty, or emotional health.[146] Only one ruling implicated the societal privacy value of forming and maintaining relationships.[147]

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[144] King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505 (6th Cir. 1992) (unpublished) (per curiam); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001); Miller v. Am. Sports Co., Inc. 467 N.W.2d 653, 679-80 (Neb. 1991); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998)(en banc).

[145] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759 (10th Cir. 2007); Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Joe Joe Dickerson & Assoc.v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, at *7 (6th Cir. 1990) (unpublished); *Howell*, *Inc.,* 612 N.E.2d at 703; Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); *Finger,* 566 N.E.2d at 143-44; *Leddy*, 843 A.2d at 491; *WJLA*, 564 S.E.2d at 394-95; Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[146] *E.g.,* Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); *King*, 485 F.3d at 591-92; Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505 (6th Cir. 1992)(unpublished) (per curiam); Schifano v. Greene Cty Greyhound Park, Inc., 624 So. 2d 178, 181 (Ala. 1993); Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1000 (Colo. 2001); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998) (per curiam); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 679-80 (Neb. 1991); Thompson v. C & C Research & Dev., 898 A.2d 495, 499-500 (N.H. 2006); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-1010 (N.H. 2003); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 110-11 (S.C. 2003); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998)(en banc).

[147] *Reid*, 961 P.2d at 341.

When courts have discussed the elements of invasion of privacy by appropriation, some have mentioned the value of individual identity, or personality, associated with the autonomy value for privacy.[148] For instance, in *King v. PA Consulting Group, Inc.*, the U.S. Court of Appeals for the Tenth Circuit focused on the value of identity when it affirmed a trial court's denial of the consulting firm's request for a new trial. That ruling allowed a jury verdict, which awarded Michael King $57,672 for invasion of privacy by appropriation, to stand. After King resigned from the consulting firm to work for a competitor, the firm "continued to distribute promotional materials listing King as the contact person for PA's Wholesale Energy Markets Practice."[149] King alleged that PA employees changed a voicemail message "to indicate King was unavailable, but that the caller should leave a message."[150] King also claimed that his replacement had all of King's email messages forwarded to King's replacement. King argued that the firm was using his name and identity to its commercial advantage. And the U.S. Court of Appeals for the Tenth Circuit found the firm's misuse of King's name constituted an invasion of privacy under Colorado law. [151] That finding involved the diminution of King's personal agency for his professional identity, which harmed personal autonomy.

Similarly, when the Supreme Court of New Hampshire's ruling in *Remsburg v. Docusearch, Inc.* recognized the appropriation tort under the state's common law, the

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[148] *Brown*, 201 F.3d at 658; *King*, 485 F.3d at 591-92*; Bowling,* 1992 U.S. App. LEXIS 18505; *Schifano*, 624 So. 2d at 181; *Felsher*, 755 N.E.2d at 600-01; *Lake*, 582 N.W.2d at 233; *Miller*, 467 N.W.2d at 679-80; *Reid*, 961 P.2d at 342.

[149] *King,* 485 F.3d at 591-92.

[150] King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007).

[151] *Id.*

court suggested an autonomy value and liberty value for privacy.[152] Helen Remsburg, the administrator of the estate of Amy Lynn Boyer, filed the appropriation case after an information broker sold Boyer's address, Social Security number, and other personal information to the man who killed Boyer.[153] The court explained that the interest protected by the tort "'is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.'"[154] That description relates to an individual's interest in controlling the use of his or her identity through which each person expresses individuality, the core of personal autonomy. Adding that appropriation is only actionable if the use at issue takes advantage of the individual's '"reputation, prestige or other value'" specifically associated with the plaintiff's identity, the court reasoned that the investigator sold the "information for the value of the information itself, not to take advantage of the person's reputation or prestige."[155] Thus, the Supreme Court of New Hampshire concluded that Boyer's privacy was not invaded because her identity was not exploited, and therefore, the autonomy and liberty interests at issue were not harmed.[156]

Other rulings also have discussed the autonomy and liberty values for privacy.[157] For instance, when the Supreme Court of Minnesota first recognized the appropriation

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[152] Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003).

[153] *Id.* at 1006.

[154] *Id.* at 1009 (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977)).

[155] *Id.* at 1009-10 (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977)).

[156] *Id.* Three years later, the Supreme Court of New Hampshire's rationale in *Thompson v. C&C Research and Development*, 898 A.2d 495, 499-500 (N.H. 2006), also related to the individual and liberty values for privacy. In fact, the ruling in *Thompson* found Thompson's privacy was not invaded because she had signed a contract that authorized the defendants' use of her identity. Thus, the plaintiff's autonomy and liberty values for privacy were not harmed under the facts of that case.

tort, as well as disclosure of private fact and intrusion, under the state's common law in 1998 in *Lake v. Wal-Mart Stores, Inc.*, the court stated, "Appropriation protects an individual's identity."[158] As mentioned previously, identity is related to individuality, personality, and thus, personal autonomy. In discussing its decision to recognize the three privacy torts, the Minnesota court added, "The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."[159] Choosing which aspects of one's personal life to expose to others relates to the liberty value for privacy. The Minnesota Supreme Court reversed the lower courts' rulings dismissing the appropriation, disclosure and intrusion claims and remanded the case for trial.[160] Elli Lake and Melissa Weber had charged Wal-Mart Stores, Inc. with all four types of invasion of privacy for allowing at least one image of the women standing together naked in a shower to circulate after the film was taken to a Wal-Mart store for processing.[161] The court reasoned: "One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection."[162] While the Minnesota court was referring to the privacy torts in general, rather than specifically to appropriation, that rationale relates directly to an individual's sense of personal dignity and bodily integrity, or personal liberty, by suggesting the distribution of the photographs revoked the individuals' control over when and how

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[157] Schifano v. Greene County Greyhound Park, Inc., 624 So. 2d 178, 181 (Ala. 1993); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998) (per curiam).

[158] *Lake*, 582 N.W.2d at 233.

[159] *Id.* at 235. The Minnesota Supreme Court, however, declined to recognize the false light invasion of privacy tort. *Id.* at 236.

[160] *Id.* at 235.

[161] *Id.* at 233.

[162] *Id.* at 235.

others viewed their naked bodies. Losing that control harmed Lake's and Weber's liberty as well as their autonomy.

Two more rulings referred to the individual privacy values of liberty and autonomy when discussing appropriation as an exploitation of one's identity or personality that harms individuality and undermines one's freedom to control the flow of information about one's self.[163] In *Sloan v. South Carolina Department of Public Safety*, the Supreme Court of South Carolina in 2003 defined the right to privacy as "the right to be let alone; the right of a person to be free from unwarranted publicity."[164] Sloan claimed her privacy was invaded when the State of South Carolina sold her driver's license information to Image Data. The ruling included the South Carolina common law definition for the appropriation tort, a "wrongful appropriation of personality."[165] That definition relates to the liberty value that is harmed when an individual loses the agency to protect her personality from exploitation by others. The court's explanation of the tort also overlaps with the autonomy value, or the right to control one's individuality, or "personal identity."[166] After clarifying the parameters of the privacy-based appropriation tort, the South Carolina Supreme Court affirmed the lower court's award of summary judgment for the defendant because the plaintiff had not demonstrated the facts were actionable. The court explained that a 1997 act passed by the state's legislature allowed

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[163] Felsher v. Univ. of Evansville, 755 N.E.2d 589, 593-99, 601 (Ind. 2001); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 110-11 (S.C. 2003).

[164] 586 S.E.2d at 110-11.

[165] *Id*. at 110.

[166] *See id*. at 110-11 (citing Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989)).

driver's license information to be sold. "Because the 1997 Act authorized the transaction between Image Data and DPS, Image Data did not misappropriate Sloan's driver's license information and photograph," the court said.[167]

When the Supreme Court of Colorado recognized the appropriation tort under the common law of Colorado in *Dickerson & Associates v. Dittmar* in 2001, the ruling described autonomy, liberty, and emotional health values for privacy.[168] That case arose because Joe Dickerson's private investigation firm published an article in a newsletter stating that Rosanne Dittmar had been convicted after the firm investigated her involvement in the theft of bearer bonds from her place of employment.[169] Finding that Dittmar's privacy had not been invaded, the court quoted from the 1890 Harvard Law Review article "The Right To Privacy," stating that privacy law would protect the "'general immunity of the person—the right to one's personality'" and "'the individual's right 'to be let alone.'"[170] As personality relates directly to the autonomy value for privacy, the right "to be let alone" relates directly to the personal liberty value. In discussing the evolution of privacy law, the majority also mentioned a mental health value for privacy. The court explained that states have allowed individuals to "recover for personal injuries such as mental anguish and injured feelings,"[171] and the injury resulting from appropriation of identity "may be 'mental and subjective'—in the nature of

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[167] *Id.* at 110.

[168] *See* 34 P.3d 995, 1000 (Colo. 2001).

[169] *Id.* at 998.

[170] *Id.* at 999 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 200-01, 207 (1890).

[171] *Id*. at 999 (citing *Reed v. Real Detective Publ'g Co.,* 63 Ariz. 294, 162 P.2d 133, 139 (1945); *Fairfield v. Am. Photocopy Equip. Co.,* 138 Cal. App. 2d 82, 291 P.2d 194, 197 (1955); *Annerino v. Dell Publ'g Co.,* 17 Ill. App. 2d 205, 149 N.E.2d 761, 762 (1958); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 1:7 (2d ed. 2000)).

humiliation, embarrassment, and outrage."[172] Although the Supreme Court of Colorado discussed those individual values for privacy, the majority concluded that the information at issue in Dittmar's claim was a privileged publication of a matter of public interest. In fact, a concurring opinion criticized for the majority for recognizing the tort when the facts at issue did not constitute a tortious invasion of privacy.[173]

Although key literature has included both emotional release and protection from emotional injuries under the mental health value, state high courts and federal circuit courts of appeals have focused primarily on the privacy-based appropriation tort as a shield from emotional harm. One ruling in which a state court first recognized the privacy-based appropriation tort discussed an emotional health value for the right to privacy. [174] In that 1990 ruling, *Staruski v. Continental Telephone Company of Vermont*, the Supreme Court of Vermont reasoned that the plaintiff did not need to prove that her identity had "pecuniary value" in order to receive damages for the appropriation of her name.[175] Staruski sued her employer for using her name and photograph in an advertisement for the company even though she refused to participate in the company's advertising. The Vermont Supreme Court found that courts in other jurisdictions had awarded damages even when the "'injury suffered is mental anguish alone.'"[176] Upholding an award of damages for Staruski, the court wrote that Staruski "feared

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[172] Joe Dickerson & Aossc. v. Dittmar, 4 P.3d 995, 1002 (Colo. 2001).

[173] *Id.* at 1005 (Coats, J., concurring).

[174] Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 270 (Vt. 1990).

[175] *Id.* at 269.

[176] *Id*. (quoting Faber v. Condecor, Inc., 195 N.J.Super. 81, 90-91, 477 A.2d 1289, 1294-95 (App.Div.1984)).

harassment" and Continental's management "showed 'a reckless or wanton disregard' of her rights" by ignoring her request not to include her name and photograph in an advertisement for the company.[177] That rationale, accordingly, relates to the individual mental health value as well as the individual liberty value for privacy.

In addition to mentioning at least one individual privacy value, two rulings involved a societal value for privacy, promoting civility and community.[178] In 1998 in *Reid v. Pierce*, the Supreme Court of Washington considered whether plaintiffs' privacy was invaded by county employees' unauthorized public displays of plaintiffs' relatives' autopsy photographs.[179] The court held "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent." [180] The court continued, "That protectable privacy interest is grounded in maintaining the dignity of the deceased."[181] Thus, the court's ruling that the Reid family's privacy could have been invaded by the county employees' exploitation of their deceased relative was undergirded by the autonomy of their deceased relative.[182] The court's rationale relates to the privacy value of civility and community because the county employees failed to extend a basic form of respect to the deceased and their relatives.[183] In *Showler v. Harper's Magazine,*

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[177] *Id*. at 273.

[178] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-74 (10th Cir. 2007); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998) (en banc).

[179] *Showler*, 222 Fed. App'x at 763-74; *Reid*, 961 P.2d at 342.

[180] *Reid,* 961 P.2d at 342.

[181] *Id*.

[182] *Id*. at 335-37.

[183] *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 962-64 (1989).

Inc., the U.S. Circuit Court of Appeals for the Tenth Circuit found that under Oklahoma law a news magazine's publication of photographs of an Oklahoma National Guard member in his coffin at a public funeral was different than the gruesome autopsy photographs at issue in *Reid v. Pierce*.[184] In *Showler*, the Tenth Circuit explained that the funeral photographs of Sergeant Brinlee clearly involved a matter of public interest and thus were not the type of images that could harm the privacy of Brinlee's relatives by offending community standards of decency.[185]

In summary, relevant rulings primarily explored three individual values for privacy—the autonomy, liberty, and emotional health values.[186] References to liberty or autonomy typically arose when courts discussed the development of privacy torts or the right to control the use of one's identity.[187] And some discussion of the emotional health value resulted from plaintiffs' claimed injuries.[188] Although relevant rulings often

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[184] *Showler*, 222 Fed. App'x at 761-62.

[185] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763 (10th Cir. 2007)

[186] *E.g., Id.* at 763-74; Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505 (6th Cir. 1992)(unpublished) (per curiam); Schifano v. Greene County Greyhound Park, Inc., 624 So. 2d 178, 181 (Ala. 1993); Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1000 (Colo. 2001); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998) (per curiam); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 679-80 (Neb. 1991); Thompson v. C & C Research & Dev., LLC, 898 A.2d 495, 499-500 (N.H. 2006); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-1010 (N.H. 2003); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 701-02 (N.Y. 1993); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 110-11 (S.C. 2003); PTS Corp. v. Buckman, 263 Va. 613, 621-22 (Va. 2002); WJLA v. Levin, 564 S.E.2d 383, 395-396 (Va. 2002); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 269-70 (Vt. 1990); *Reid*, 961 P.2d at 342.

[187] *E.g.*, *Brown,* 201 F.3d at 658; *King,* 485 F.3d at 591-92*; Bowling*, 1992 U.S. App. LEXIS 18505; *Schifano,* 624 So. 2d at 191; *Joe Dickerson & Assoc.*, 34 P.3d at 999; *Felsher*, 755 N.E.2d at 600-01; *Lake*, 582 N.W.2d at 233; *Miller*, 467 N.W.2d at 679-80; *Thompson*, 898 A.2d at 499-500; *Remsburg*, 816 A.2d at 1009-10; *Howell,* 612 N.E.2d at 701-02; *Sloan,* 586 S.E.2d at 1001-11; *PTS Corp.*, 263 Va. at 621-22; *WJLA*, 564 S.E.2d at 396; *Staruski,* 581 A.2d at 269; *Reid,* 961 P.2d at 342.

mentioned one or more individual privacy values, especially when courts recognized an appropriation tort for the first time under state common law, only two rulings involved a societal privacy value, promoting civility and community.[189] The following section explores if and how courts have reconciled conflicts between freedom of expression and privacy values.

D. Reconciling Free Expression and Privacy Values

Few privacy-based appropriation rulings discussed both free expression values and privacy values,[190] and in only one case did the court explicitly attempt to balance free expression and privacy values.[191] In a couple of cases, courts allowed the elements of the tort or defenses to delineate the boundaries between free expression and privacy rights as if those boundaries prevented free expression and privacy values from conflicting, thus negating the need for ad hoc balancing.[192]

In a 1994 case, *Doe v. Roe*, the Supreme Court of Alabama analyzed whether the use of plaintiff's adoptive children's identities was actionable under the appropriation tort or privileged under the free speech and free press provision of the Alabama Constitution.[193] John Roe filed the invasion of privacy claim on behalf of his children,

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[188] *E.g.*, *Joe Dickerson & Assoc.*, 34 P.3d at 999; PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1283-84 (Nev. 1995); *Howell,* 612 N.E.2d at 701-02; *PTS Corp*., 263 Va. at 621-22; *WJLA*, 564 S.E.2d at 396; *Staruski,* 581 A.2d at 269.

[189] *E.g.*, *Showler,* 222 Fed. App'x at 763-74; *Reid,* 961 P.2d at 342.

[190] Doe v. Roe, 638 So. 2d 826, 829-30 (Ala. 1994) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703-05 (N.Y. 1993); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

[191] *Doe,* 638 So. 2d at 829-30.

[192] Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

alleging that Jane Doe would invade the privacy of the children if she distributed a novel based on the murder of the children's natural mother by their father. Roe argued that distributing the book would harm the children "by appropriating a tragic event in their lives for commercial gain."[194] The Alabama Supreme Court disagreed, holding that a trial court erred by issuing a temporary restraining order to prevent Doe from distributing the story.

The court held that Doe's novel did not violate the children's personality-based privacy interest, which literature has associated with autonomy, or society's privacy interest in promoting civility and community because the novel was "based on events of public interest."[195] The court explained, "Doe's novel possesses social worth and is a significant medium for the communication of her ideas about an event in which society has an interest."[196] That rationale recognized non-specific communicator-based and audience-based values for free expression, but it did not suggest that expression serving those values would always outweigh the values underlying the appropriation tort. The court implied that privacy interests might overcome free expression interests under different circumstances, stating that Doe "may not exercise" her free speech "right in a manner that will injure the children's right to privacy."[197] Distribution of the novel, however, did not violate those rights.[198] Distributing information that was already

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[193] *Doe,* 638 So. 2d at 827 (citing ALA. CONST. art. 1, § 4).

[194] *Id.* at 829.

[195] *See id.* at 829-30.

[196] Doe v. Roe, 638 So. 2d 826, 829 (Ala. 1994) (per curiam).

[197] *Id.* at 830.

[198] *Id*. at 830.

available to the public and was matter of public concern could not offend community standards of decency, associated with the social value of promoting civility and community, or a personal interest in agency, associated with the individual privacy values of autonomy and liberty.

During the past twenty years, ad hoc balancing was not used in states where privacy is recognized by statute.[199] The New York Court of Appeals said balancing free expression and privacy interests was not a job for the court because privacy is recognized by statute in the state.[200] The court wrote, "Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature . . . ."[201] The court explained that the statute only applies to uses for advertising or trade purposes and courts have held that uses for news purposes are exempt from liability. "This is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press," the court wrote.[202] As mentioned previously, in *Howell v. New York Post, Inc.*, the court indicated that the *New York Post* had not invaded Pamela J. Howell's privacy by publishing a photograph of Howell walking with another patient at a private psychiatric hospital.[203] The court reasoned that the newspaper's use of the

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[199] *E.g.*, Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992); Wilkinson v. Methodist, 612 N.W.2d 213, 216 (Neb. 2000); Messenger, 727 N.E.2d at 553-54; Howell v. New York Post Co., Inc., 612 N.E.2d 699, 700, 703-05 (N.Y. 1993); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 278-80 (N.Y. 1991); Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143-45 (N.Y. 1991); PTS Corp. v. Buckman, 263 Va. 613, 623-24 (Va. 2002); WJLA v. Levin, 564 S.E.2d 383, 396 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

[200] *Messenger*, 727 N.E.2d at 553-54; *Howell*, 612 N.E.2d at 703-05; *Beverley*, 587 N.E.2d at 278-80; *Finger*, 566 N.E.2d at 143-45.

[201] *Howell*, 612 N.E.2d at 703.

[202] *Id*. at 704-05.

[203] *Id*. at 703-05.

photograph was privileged because the photograph was related to the subject of an article about the other patient's recovery from being beaten by her lover, the man accused of killing the patient's six-year-old adoptive daughter. That reasoning was grounded by the court's previous interpretations of a newsworthiness exception that corresponds to constitutional concerns about penalizing the publication of truthful information.[204] The New York Court of Appeals wrote, "Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature . . . ."[205] Thus, the ruling reconciled the potential conflict between press freedom and privacy by applying the newsworthiness exception rather than by engaging in overt balancing of free expression or privacy values.

In a 1995 ruling in *Town & Country Properties, Inc. v. Riggins*, the Supreme Court of Virginia found no need to engage in ad hoc balancing because the speech at issue, a flier designed to sell the house where John Riggins once lived, primarily served the advertiser's interest in promoting a sale rather than the public's interest in receiving information that could benefit the public.[206] The court disagreed with the defendant's assertion that a trial court violated the free speech provisions of the First Amendment and the Virginia Constitution by awarding damages to the plaintiff for invasion of privacy by appropriation.[207] The court reasoned that the U.S. Supreme Court had tied First Amendment protection for commercial speech to the informational function that speech

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[204] *Id*.

[205] *Id*. at 703.

[206] Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

[207] *Id*.

serves for message recipients.[208] Thus, the state court reasoned that Virginia's privacy law "is not constitutionally invalid" as applied to award the football star damages for appropriation because the published information did not serve the audience-based values that the Court has tied to the protection afforded to speech that promotes a product or sale.[209] That suggests the court did not need to weigh competing interests because the court defined the use of Riggins' name as expression unrelated to core constitutional values for freedom of expression.

In summary, most courts did not engage in balancing free expression values and privacy values when attempting to reconcile conflicts between the right to publish and the right to privacy in the appropriation cases studied in this research. [210] The only ruling that did seek to balance free expression and privacy interests compared broad communicator

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[208] *Id.*

[209] *Id*. at 395 to 96 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 384, (1997)).

[210] *E.g.*, Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1310 (11th Cir., 2008) (per curiam); Zarrilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122, 125 (3d Cir. 2007); Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957, 958 (4th Cir. 2007) (per curiam) (unpublished); Meadows v. Hartford Life Ins. Co., 492 F.3d 634, 637 (5th Cir. 2007); Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759 (10th Cir. 2007); King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Solano v. Playgirl, Inc., 292 F.3d 1078, 1081 (9th Cir. 2002); Am. Guar. & Liab. Ins. Co. v. 1906 Co., 273 F.3d 605, 615 (5th Cir. 2001); Brown v. Ames, 201 F.3d 654, 658, 661 (5th Cir. 2000); Newcombe v. Adolf Coors Co., 157 F.3d 686, 693 (9th Cir. 1998); Matthews v. Wozencraft, 15 F.3d 432, 436 (5th Cir. 1994); Schifano v. Greene County. Greyhound Park, Inc., 624 So.2d 178, 179-181 (Ala. 1993); Joe Dickerson & Assoc.v. Dittmar, 34 P.3d 995, 998-1001(Colo. 2001); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 593-94 (Ind. 2001); Tannenbaum v. Grady, 604 N.E.2d 16, 16 (Mass. 1992); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Nemani v. St. Louis Univ., 33 S.W.3d 184, 187 (Mo. 2000), cert. denied 532 U.S. 981 (2001); Lake v. Wal–Mart Stores, Inc., 582 N.W.2d 231, 222-33 (Minn. 1998); Thompson v. C & C Research & Dev., LLC, 898 A.2d 495, 500 (N.H. 2006); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 553-54 (N.Y. 2000) (per curiam); Howell, 612 N.E.2d at 703-05; Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 278-80 (N.Y. 1991); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 143-45 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); PTS Corp. v. Buckman, 263 Va. 613, 623-24 (Va. 2002); WJLA v. Levin, 564 S.E.2d 383, 396 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363 (Va. 1995); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 268 (Vt. 1990); Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998) (en banc).

and audience-based free expression values to the individual privacy values of autonomy and liberty.[211] While the Supreme Court of Alabama in *Doe v. Roe* suggested that privacy interests might overcome free expression interests under different circumstances, the court concluded that the alleged appropriation of the plaintiff's children's life stories did not invade the children's privacy.[212] The New York Court of Appeals in another case only mentioned balancing free expression and privacy values when it assigned the job of balancing competing policy interests to state legislators.[213] And the Virginia Supreme Court found no need to engage in balancing when it determined the use of a plaintiff's name for advertising purposes was not protected expression.

E. Conclusion

Recognition of the common law invasion of privacy by appropriation tort has expanded during the past twenty years.[214] The highest courts in four states recognized the privacy-based appropriation tort for the first time after the U.S. Supreme Court suggested in 1989 in *Florida Star v. B.J.F.* that privacy and freedom of expression are both significant interests.[215] To date, more than half of the states have recognized an invasion

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[211] Doe v. Roe, 638 So. 2d 826, 829-30 (Ala. 1994) (per curiam).

[212] *Id.*

[213] Messenger, 727 N.E.2d at 553-54; Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703-05 (N.Y. 1993); Beverley, 587 N.E.2d at 278-80; Finger, 566 N.E.2d at 143-45.

[214] Joe Dickerson & Assoc.v. Dittmar, 34 P.3d 995, 997 (Colo. 2001); Lake v. Wal–Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (per curiam); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 268 (Vt. 1990); Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998) (en banc).

[215] Florida Star v. B.J.F., 491 U.S. 524, 530 (U.S. 1989); Joe Dickerson & Assoc., LLC, 34 P.3d at 997; Lake, 582 N.W.2d at 236; Remsburg, 816 A.2d at 1009-10; Staruski, 581 A.2d at 268.

of privacy by appropriation tort.[216] And only one ruling reviewed for this chapter has indicated that the invasion of privacy by appropriation tort might not be recognized under a state's law.[217] Most other rulings focused on whether the use was a privileged publication of newsworthy information or whether the plaintiff satisfied the three elements of the tort—commercial use of name or likeness without authorization.[218]

Courts have discussed individual privacy values when considering the commercial use element. Several rulings implicated the liberty, autonomy, or emotional health privacy values when assessing whether a defendant exploited an individual's identity by using her name, image, or likeness for the purpose of advertising a product or service.[219] Courts have found that actionable uses for advertising purposes include publishing a former football star's name in a flier promoting the sale of a home and using a physician's name in a medical center's calendar sent to solicit patrons. Those uses harmed the plaintiffs' autonomy and liberty. [220] The court's consideration of whether the flier's use of the football player's name was actionable also related to the emotional health value because the player alleged he felt "humiliated" and "violated" by the

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[216] Joe Dickerson & Assoc., 34 P.3d at 999.

[217] Nelson v. J.C. Penney Co., Inc., 75 F.3d 343, 347 (8th Cir. 1996) "[A]lthough it has been given a number of opportunities to hold that some types of invasion of privacy are actionable, the Supreme Court of North Dakota has consistently refused to do so. . . . this studied reluctance does not bode well for the acceptance of this kind of action in North Dakota in the future.").

[218] RESTATEMENT (SECOND) OF TORTS § 652C (1977).

[219] *See supra* notes 143–174 and accompanying text.

[220] Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 276 (N.Y. 1991); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 358 (Va. 1995).

exploitation of his name.[221] A Supreme Court of Massachusetts' ruling that defined a commercial use as an exploitative use for trade purposes related to the individual liberty value for privacy. The court reasoned that that an attorney had not used a professor's name for trade purposes when he included the professor's name in a list of experts he expected to call as witnesses because the attorney had talked with the professor and considered using the professor as an expert witness. [222]

Courts' discussion of the use of identity, name, or likeness primarily related to the individual privacy values of autonomy and liberty.[223] A few courts found that uses of individuals' life stories did not exploit their names or likenesses when those stories were already available to the public prior to the alleged appropriation.[224] The later use of material that was distributed in manners the plaintiff could not control did not undermine a plaintiff's autonomy or liberty. But the U.S. Ninth Circuit Court of Appeals' rationale in *Newcombe v. Adolf Coors Co*., which found that using a pitcher's skin tone and unique stance in a beer advertisement might be an exploitative use of his identity under California law, related to the individual privacy values of autonomy, liberty, and emotional health because the plaintiff, a "known recovering alcoholic," would not have promoted beer.[225] The connection to emotional health arose because the plaintiff claimed he endured emotional distress from the association of his identity with beer.

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[221] Town & Country Props., Inc., 457 S.E.2d at 361.

[222] Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992).

[223] *See supra* notes 145–165 and accompanying text.

[224] Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); Tyne v. Time Warner Ent. Co., 901 So.2d 802, 809-810 (Fla. 2005), *aff'd,* 425 F.3d 1363, 1364 (11th Cir. 2005) (per curiam); Doe v. Roe, 638 So. 2d 826, 829-30 (Ala. 1994) (per curiam).

[225] Newcombe v. Adolf Coors Co., 157 F.3d 686, 689 (9th Cir. 1998).

One court's discussion of the final element, lack of authorization, related to all three individual privacy values and to the societal value of promoting civility and community when it focused on dignitary harms.[226] The Supreme Court of Washington's ruling related to autonomy and civility and community when it found that county employees' unauthorized displays of gruesome autopsy photographs at parties and other settings invaded the privacy of decedents' immediate relatives because the employees failed to respect the deceased and their relatives.[227]

Community standards for decency, which undergird the social value of civility and community, also were mentioned in a U.S. Tenth Circuit Court of Appeals ruling that considered whether the publication of a national guard soldier's funeral photographs were privileged. Applying Oklahoma law in *Showler v. Harper's Magazine, Inc.*, the court found the magazine's publication of the photographs did not harm the decedent's family members' privacy because the photographs were closely related to the matter of public interest that they illustrated.[228] The court explained that publishing the photographs was not "so extreme and outrageous 'as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"[229]

Courts more often discussed the communicator-based autonomy value or the audience-based marketplace of ideas values for free expression when considering whether an alleged appropriation was a privileged publication of a matter of newsworthy

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[226] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-74 (10th Cir. 2007); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998) (en banc).

[227] *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 962-64 (1989).

[228] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763 (10th Cir. 2007).

[229] *Id.* at 760.

information or an advertisement "in disguise."[230] When courts suggested that a public interest or newsworthiness exception relates to the communicator-based autonomy value, their rationales tied the importance of freedom from government censorship to the ability for expression to serve audience-based interests.[231] For instance, in 1993 the New York Court of Appeals mentioned courts' reluctance to inhibit press freedom by "intrud[ing] upon reasonable editorial judgments" in relation to a public interest privilege.[232] That ruling tied freedom of expression to the impact of the content on audiences.[233] When rulings suggested that an alleged appropriation served a communal value for free expression, courts almost uniformly found the alleged appropriations were privileged, leaving no need to balance privacy and free expression interests.[234]

The only ruling that used balancing found that free expression values outweighed the privacy interests at issue.[235] The Supreme Court of Alabama found that the trial court erred by holding a prior restraint was necessary to prevent the distribution of a book from

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[230] *Messenger*, 727 N.E.2d at 552-54; *Howell*, 612 N.E.2d at 703; *Finger*, 566 N.E.2d at 143; *Leddy*, 843 A.2d at 491; *WJLA*, 564 S.E.2d at 387-88.

[231] *Messenger*, 727 N.E.2d at 552-54; Howell v. New York Post Co., 612 N.E.2d 699, 703 (N.Y. 1993); Beverley v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002); Town & Country Props., Inc., 457 S.E.2d 356, 361-62 (Va. 1995).

[232] *Howell*, 612 N.E.2d at 704.

[233] *Id.*

[234] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 764 (10th Cir. 2007); Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Joe Dickerson & Assoc.v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, at *7 (6th Cir. 1990) (unpublished); *Howell, Inc.,* 612 N.E.2d at 703; Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); *Finger*, 566 N.E.2d at 143-44; *Leddy*, 843 A.2d at 491; Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[235] *Doe*, 638 So. 2d at 829.

injuring children's privacy.[236] Reasoning that the novel pertained to a matter of public interest, the court wrote: "Thus, like most courts, faced with the competing interests of the right to privacy and the right to freedom of speech, this [c]ourt has held that the right to freedom of speech transcends the right to privacy so long as the speech pertains to a matter of public concern."[237] The Supreme Court of Alabama, however, indicated that liberty-based values for freedom of expression did not automatically outweigh privacy interests. The Alabama court stated that its constitution provides individuals with freedom to publish information but requires individuals to be "responsible for the abuse of that liberty."[238]

Courts routinely ruled in favor of defendants when their discussions of facts related to free expression values.[239] Courts only upheld awards for plaintiffs when uses of plaintiffs' identities were not clearly connected to matters of public interest,[240] which relate to the audience-based marketplace of ideas, self-governance, or checking function values. State and federal courts upheld awards of damages for plaintiffs whose names were used for unauthorized advertising purposes or exploitative purposes that received little, if any, constitutional protection and that harmed at least one of the individual privacy values—autonomy, liberty, or emotional health.[241] In one of the few mentions of

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[236] *Id*. at 827.

[237] *Id*. at 828.

[238] *Id.*

[239] *See supra* notes 63–123 and accompanying text.

[240] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992)(unpublished) (per curiam); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599 (Ind. 2001); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

[241] *See supra* notes 145–148 and accompanying text.

societal privacy values, the Supreme Court of Washington remanded a case for trial on whether the unauthorized use of autopsy photographs was tortious because the "egregious" facts offended community standards for decency.[242] Those findings bode well for media defendants who publish individuals' names or images to illustrate news articles. Courts primarily found for defendants when their uses of plaintiffs' names were rationalized by relating protection for speech on matters of public interest to communicators' rights to publish information and audiences' rights to receive information.

If courts mentioned free expression values when finding a plaintiff's privacy was invaded under the appropriation theory, they tied constitutional protection for expression to audiences' rights to receive accurate information about advertised products or services.[243] The commercial speech doctrine supports those rationales because several rulings by the U.S. Supreme Court have tied protection for speech that promotes a product or service to audiences' rights to be informed, and thus have indicated that the First Amendment does not protect false or misleading commercial speech.[244] In several cases examined for this chapter, the unauthorized uses of plaintiffs' names to promote a product or service were misleading.[245] Some rulings focused on whether the primary

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[242] *See supra* notes 175–181 and accompanying text.

[243] *E.g.,* King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

[244] *E.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 384, (1997); *Town & Country Props., Inc.*, 457 S.E.2d at 363-64.

[245] *E.g., King*, 485 F.3d at 591-92; Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 276-77 (N.Y. 1991).

benefit intended for the unauthorized use was informing the public or promoting the advertiser's products or services.[246]

In sum, state high courts' and circuit courts of appeals' rulings typically relied on the elements of the tort or the newsworthiness privilege to draw a definitional boundary between the uses that served free expression values and uses that exploited an individual's identity. The rulings have indicated that individuals who publish other persons' names, likenesses, or images in advertisements without obtaining proper authorization may be responsible for paying damages to plaintiffs whose identities are used in a manner that conflicts with key privacy values without serving key free expression values. But individuals who use persons' identities to illustrate a matter of public interest, a matter that serves communicator-based and audience-based free expression values generally will not be found liable for invasion of privacy.

[246] *See supra* notes 35-62 and accompanying text.

CHAPTER 4

Scholarship analyzing the 1989 U.S. Supreme Court decision in *Florida Star v. B.J.F.*[1] suggested that ruling diminished legal rights to privacy protected by tort law and set the stage for lower courts to focus on freedom of expression at the expense of privacy rights.[2] *Florida Star* established a First Amendment privilege that exempts disclosure of private facts plaintiffs from liability for the truthful publication of lawfully obtained information on matters of public significance.[3] Lower courts also have protected freedom of expression by applying a common law newsworthiness defense that exempts disclosure of private facts and appropriation defendants from liability for publishing matters of public or general interest from liability.[4] Indeed, First Amendment scholar Rodney Smolla called American privacy law "surprisingly weak," in part because of the strong newsworthiness defense often raised in publication-based tort cases.[5] Despite that

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[1] 491 U.S. 524 (1989).

[2] Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1199 (1990); Ken Gormley, *100 Years of Privacy*, 1992 WIS. L. REV. 1335, 1387-89; Deckle Mclean, *Lower Courts Point the Way on Press and Privacy Rights*, 22 COMM. & L. 41, 45 (2000).

[3] 491 U.S. at 532.

[4] *E.g.*, Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998) (plurality); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 998-1000 (Colo. 2001) (en banc);Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Macon Telegraph v. Tatum, 6 S.E.2d 655, 657-58 (Ga. 1993); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993).

[5] Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 289 (2002).

broad swath of protection for freedom of expression, a communication law professor suggested in 2009 that protection for the media under the newsworthiness defense could decrease "as society grows more anxious about the loss of privacy."[6] Other authors have argued that courts should devote greater attention to freedom of expression and privacy by balancing the competing interests at stake in individual cases.[7]

The purpose of this dissertation was to examine if and how federal circuit courts of appeals' and state high courts' opinions in disclosure of private facts and appropriation cases have reconciled conflicts between the fundamental democratic values undergirding freedom of expression and privacy since June 1989, when the *Florida Star* ruling was published.[8]

Despite some scholars' suggestions that *Florida Star* signaled the end of the disclosure tort, and perhaps other areas of privacy law,[9] this dissertation found that state recognition of the disclosure of private facts and appropriation torts has expanded during the past twenty years.[10] Most rulings did not discuss conflicts or clashes between freedom of expression and privacy rights.[11] In many of those cases, courts refrained from

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[6] Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1104 (2009).

[7] Edelman, *supra* note 2, at 1207 (1989); Gormley, *supra* note 2, at 1387-88; Irwin R. Kramer, *The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 CARDOZO ARTS & ENT. L.J. 113, 116-17 (1990).

[8] 491 U.S. 524 (1989).

[9] Edelman, *supra* note 2, at 207; Gormley, *supra* note 5, at 116-17.

[10] *See, e.g.*, Ozer v. Borquez, 940 P.2d 371, 379 (Colo. 1997) (en banc); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002).

[11] *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 591 (8th Cir. 2008); Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1310 (11th Cir., 2008) (per curiam); Meadows v. Hartford Life Ins. Co., 492 F.3d 634, 638-39 (5th Cir. 2007); Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957, 958 (4th Cir. 2007)

engaging in that discussion perhaps because it was unnecessary as the appeals were simply based on claims that lower courts erroneously applied the elements of the torts.[12] Those rulings followed the long-recognized rule that courts address constitutional issues "only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals."[13] Approximately half of the state high courts' and federal circuit courts of appeals' rulings, however, did discuss or imply at least one fundamental democratic value undergirding freedom of expression or privacy rights.[14]

(unpublished) (per curiam); Zarrilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122, 125. (3d Cir. 2007) (unpublished); Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); Botts v. New York Times, 106 Fed. App'x 109, 110 (3d. Cir. 2004) (unpublished); Willan v. Columbia County, 280 F.3d 1160, 1162 (7th Cir. 2002); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 313 (6th Cir. 2000); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1236 (10th Cir. 1997), *appeal after remand,* 127 F.3d 879 (10th Cir. 1999); McNewmar v. Disney Store, Inc., 91 F.3d 610, 622 (3rd Cir. 1996); Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994); Tichenor v. Roman Catholic Church, 32 F.3d 953, 963 (5th Cir. 1994); S.B. v. St. James Sch., 959 So. 2d 72, 91-92 (Ala. 2006); Rosen v. Montgomery Surgical Ctr., 825 So.2d 735, 739 (Ala. 2001); *Ex parte* The Birmingham News, Inc., 778 So. 2d 814, 818-19 (Ala. 2000); Johnston v. Fuller, 706 So. 2d 700, 703 (Ala. 1997); Schifano v. Greene Cty. Greyhound Park, Inc., 624 So.2d 178, 179 (Ala. 1993); Milam v. Bank of Cabot, 937 S.E.3d 653, 653 (Ark. 1997); *Ozer*, 940 P.2d at 377-79; Foncello v. Amorossi, 931 A.2d 924, 928 (Conn. 2007); Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993); Tannenbaum v. Grady, 604 N.E.2d 16, 17 (Mass. 1992); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-58 (Minn. 2003); Nemani v. St. Louis Univ., 33 S.W.3d 184, 186 (Mo. 2000) (en banc); Wilkinson v. Methodist, 612 N.W.2d 213, 217 (Neb. 2000); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 656 (Neb. 1991); Hadnot v. Shaw, 826 P.2d 978, 986 (Okla. 1992); Burger v. Blair, 964 A.2d 374, 380 (Pa. 2009); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999); Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 558 (Utah 2000); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 273 (Vt. 1990).

[12] *E.g.*, *Steinbuch*, 518 F.3d at 591; *Meadows*, 492 F.3d at 638-39; *Christian Broad. Network, Inc.*, 254 Fed. App'x at 958; *Zarrilli*, 231 Fed. App'x at 125; *Karraker*, 411 F.3d at 838; *Botts*, 106 Fed. App'x at 110; *Willan*, 280 F.3d at 1162; *Parry*, 236 F.3d at 313; *McNewmar*, 91 F.3d at 622; *Schifano*, 624 So.2d at 179; *Tannenbaum*, 604 N.E.2d at 17; *Simpson*, 669 A.2d at 1326; *Bodah*, 663 N.W.2d at 551-58; *Nemani*, 33 S.W.3d at 186; *Wilkinson*, 612 N.W.2d at 217; *Miller*, 467 N.W.2d at 656; *Hadnot*, 826 P.2d at 986; *Burger*, 964 A.2d at 380; *Sloan*, 586 S.E.2d at 108.

[13] Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[14] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759-64 (10th Cir. 2007); King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Alvarado v. KOB-TV, 492 F.3d 1210, 1219-21 (10th Cir. 2007); Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007);

This chapter provides a brief summary of the dissertation's findings, analyzes and discusses those findings, and suggests how future research can advance scholars' understanding of freedom of expression and privacy law. Section A summarizes what chapter two found about state high courts' and federal circuit courts' discussions of free expression and privacy values in disclosure of private facts cases. Section B summarizes what chapter three found about state high courts' and federal circuit courts' discussions of free expression and privacy values in appropriation cases. Section C explains and analyzes the findings of this study. Section D contains recommendations for future research.

A. Reconciling Free Expression and Privacy in Disclosure Cases

Chapter two found that state high courts' and federal circuit courts of appeals' rulings primarily focused on the elements of the disclosure tort or the public interest privilege. Some rulings identified a liberty-based autonomy value for freedom of expression or at least one audience-based value for freedom of expression—marketplace

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Doe 2 v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003); Willan v. Columbia County, 280 F.3d 1160, 1163 (7th Cir. 2002); Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); Coplin v. Fairfield Pub. Access, 111 F.3d 1395, 1404 (8th Cir. 1997); Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); *Matthews*, 15 F.3d at 440; Reuber v. Food Chem. News, Inc., 925 F.2d 703, 719-21 (4th Cir. 1991); Lusby v. Cincinnati Magazine, No. 89-3854, 1990 U.S. App. LEXIS 9144, *7 (6th Cir. 1990) (unpublished); Taus v. Loftus, 151 P.3d 1185, 1208-09 (Cal. 2007); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998) (plurality); Dickerson & Assoc., LLC v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1378-79 (Fla. 1989); Macon Telegraph v. Tatum, 6 S.E.2d 655, 657 (Ga. 1993); Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001); Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 552-53 (Mont. 2005); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993); Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143 (N.Y. 1991); Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275, 279 (N.Y. 1991); Leddy v. Naragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 395 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

of ideas, self-governance, or checking function—when discussing whether the information at issue related to the matter of public interest privilege or newsworthiness defense.[15] Some rulings discussed or implied at least one individual privacy value—liberty, autonomy, or emotional health—or a societal privacy value—promoting civility and community or forming and maintaining relationships—when examining whether the case involved widespread publicity of private information.[16] Few disclosure cases, however, used balancing to reconcile conflicts between the key democratic values undergirding freedom of expression and privacy.[17]

Almost half of the state high courts' and federal circuit courts of appeals' rulings in disclosure cases focused on whether the plaintiffs' claims were able to satisfy the elements of the tort as matter of law.[18] In seventeen cases, courts determined the

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[15] *E.g.*, *Lowe*, 497 F.3d at 251-52; *Doe 2*, 331 F.3d at 421; *Willan*, 280 F.3d at 1163; *Howell*, 106 F.3d at 220; *Coplin*, 111 F.3d at 1404; *Reuber*, 925 F.2d at 719-21; *Gates*, 101 P.3d at 562-63; *Cape Publ'ns, Inc.*, 549 So. 2d at 1378-79; *Uranga*, 67 P.3d at 34-6; *Doe*, 2003 WL at 21015134.

[16] *E.g.*, *Doe 2*, 331 F.3d at 417-21; Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); *Ayash*, 822 N.E.2d at 682-83; *Bodah*, 663 N.W.2d at 553-54; *Lake,* 582 N.W.2d at 235; *Pontbriand*, 699 A.2d at 866; *Swinton Creek Nursery*, 514 S.E.2d at 126); *Star-Telegram, Inc*., 915 S.W.2d at 473.

[17] *Shulman*, 955 P.2d at 486; *Ozer*, 940 P.2d at 378; *Macon Telegraph*, 6 S.E.2d at 657; Uranga v. Federated Publ'ns, No. 27118, 2001 Ida. LEXIS 71, *26-27 (June 21) (unpublished), *vacated and superseded on rehearing by* 67 P.3d 29, 35 (Idaho 2003).

[18] *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 591 (8th Cir. 2008); Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 838 (7th Cir. 2005); *Willan*, 280 F.3d at 1162; Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 132-33 (1st Cir. 2000); Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 313 (6th Cir. 2000); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1236 (10th Cir. 1997), *appeal after remand,* 127 F.3d 879 (10th Cir. 1999); McNewmar v. Disney Store, Inc., 91 F.3d 610, 622 (3rd Cir. 1996); Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Reuber v. Food Chem. News, Inc. 925 F.2d 703 (4th Cir. 1991), *cert denied*, 501 U.S. 1212 (1991); Lee v. Calhoun, 948 F.2d 1162, 1165 (10th Cir. 1991); S.B. v. St. James Sch., 959 So. 2d 72, 91-92 (Ala. 2006); Rosen v. Montgomery Surgical Ctr., 825 So. 2d 735, 739 (Ala. 2001); Johnston v. Fuller, 706 So. 2d 700, 703 (Ala. 1997); Taus v. Loftus, 151 P.3d 1185, 1207-08 (Cal. 2007); Elliott v. Healthcare Corp., 629 A.2d 6, 9 (D.C. 1993); *Ayash*, 822 N.E.2d at 682-84; Mulgrew v. City of Taunton, 574 N.E.2d 389, 393 (Mass. 1991); Gauthier v. Police Comm'r of Boston, 557 N.E.2d 1374, 1376 (Mass. 1990); Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 551-58 (Minn. 2003); Hadnot v. Shaw, 826 P.2d 978, 986 (Okl. 1992); Burger v. Blair, 964 A.2d 374, 380 (Pa. 2009); Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998).

defendants had not given widespread publicity to private information.[19] Three rulings turned on plaintiffs' failure to prove the disclosed information was true.[20] Eleven rulings scrutinized whether the information at issue was private, meaning the information was not widely available and was so intimate, intensely personal, or embarrassing that the disclosure would cause shame or humiliation.[21] Three other rulings used reasonableness tests to determine whether plaintiffs expected the information at issue to remain private and whether community members agreed that expectation was reasonable.[22] In almost one-third of the cases, however, courts used the final element, whether the disclosed information was a matter of legitimate public concern, to distinguish tortious disclosures of private facts from privileged disclosures of newsworthy information.[23]

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[19] *Steinbuch*, 518 F.3d at 591; *Karraker*, 411 F.3d at 838; *Willan*, 280 F.3d at 1162; *Phillips*, 312 F.3d at 371-72; *Veilleux*, 206 F.3d at 132-33; *Parry*, 236 F.3d at 313; *Roe,* 124 F.3d at 1236; *Cinel*, 15 F.3d at 1346; *Thomas*, 998 F.2d at 452; *Lee*, 948 F.2d at 1165; *S.B.*, 959 So. 2d at 91-92; *Rosen*, 825 So.2d 735, 739 (Ala. 2001); *Ex parte* The Birmingham News, Inc., 778 So.2d 814, 818-19 (Ala. 2000); Johnston v. Fuller, 706 So.2d 700, 703 (Ala. 1997); *Bodah*, 663 N.W.2d at 551-58; *Swinton Creek Nursery*, 514 S.E.2d at 131-32; *Shattuck-Owen*, 16 P.3d at 558.

[20] Campbell v. Lyon, 26 Fed. App'x 183, 186 (4th Cir. 2001) (unpublished) (per curiam); Barker v. Huang, 610 A.2d 1341, 1350 (Del. 1991); Nazeri v. Missouri Valley Coll., 860 S.W.2d 303, 303 (Mo. 1993).

[21] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 764 (10th Cir. 2007); Dasey v. Anderson, 304 F.3d 148 (1st Cir. 2002); Johnson v. Sawyer, 47 F.3d 716, 731-33 (5th Cir. 1995)(en banc); Merlo v. United Way of Am., 43 F.3d 96, 104 (4th Cir. 1994); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Reuber v. Food Chem. News, Inc., 925 F.2d 703, 719 (4th Cir. 1991); *S.B.*, 959 So. 2d at 92; Taus, 151 P.3d at 1208-09; Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho, 2002); Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548, 553 (Mont. 2005); Steele v. Spokesman-Review Publ'g Co., 61 P. 3d 606, 607 (Idaho 2002).

[22] Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002); Pontbriand v. Sundland, 699 A.2d 856, 864 (R.I. 1997).

[23] Anderson v. Suiters, 499 F.3d 1228, 1235-37 (10th Cir. 2007); Doe 2 v. Associated Press, 331 F.3d 417 (4th Cir. 2003); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 132-33 (1st Cir. 2000), Cinel v. Connick, 15 F.3d 1338, 1346 (5th Cir. 1994); Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232-35 (7th Cir. 1993); Purnell v. Smart, No. 92-2053, 1992 U.S. App. LEXIS 24313, at *7-8 (7th Cir. July 8, 1992) (unpublished); Reuber v. Food Chem. News, Inc. 925 F.2d 703 (4th Cir. 1991), *cert. denied,* 501 U.S. 1212 (1991); Lee v. Calhoun, 948 F.2d 1162, 1165 (10th Cir. 1991); Taus v. Loftus, 151 P.3d 1185, 1207-08 (Cal. 2007); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1379 (Fla. 1989); Macon Telegraph v. Tatum,

Courts typically discussed audience-based free expression values in relation to the legitimate public concern element or public interest privilege. One ruling discussed the liberty-based value of autonomy for individual speakers.[24] Other rulings linked the liberty-based autonomy value for press freedom to the audience-based marketplace of ideas or checking function values.[25] Most rulings that connected the public interest privilege to freedom of expression mentioned the audience-based marketplace of ideas value or implicated the audience-based checking function value.[26] Judge Posner, chief judge for the U.S. Seventh Circuit Court of Appeals, wrote two rulings involving a marketplace of ideas value for freedom of expression.[27] Four circuit courts of appeals' decisions cited the rationale from Posner's opinion in *Haynes v. Knopf*.[28] Other courts that suggested the self-governance and checking values for freedom of expression cited the U.S. Supreme Court's rationale from *Cox Broadcasting Corp. v. Cohn* that connects

436 S.E.2d 655, 679 (Ga. 1993); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 682-84 (Mass. 2005); Mulgrew v. City of Taunton, 574 N.E.2d 389, 393 (Mass. 1991); Gauthier v. Police Comm'r of Boston, 557 N.E.2d 1374, 1376 (Mass. 1990); Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991); Swerdlick v. Koch, 721 A.2d 849, 859 (R.I. 1998); Doe v. Berkeley Publishers, 496 S.E.2d 636, 637 (S.C. 1998); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex. 1995).

[24] Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *6 (Idaho Feb. 5 2003) (unpublished).

[25] *E.g.*, Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007); Howell v. Tribune Entm't Co., 106 F.3d 215, 220 (7th Cir. 1997); *Reuber*, 925 F.2d at 719-21; Young v. Jackson, 572 So.2d 378, 384-85 (Miss. 1990); *Svaldi*, 106 P.3d at 552-53.

[26] *Doe 2*, 331 F.3d at 421; *Howell*, 106 F.3d at 220-21; *Reuber*, 925 F.2d at 719-21; *Young*, 572 So.2d at 383-85; *Svaldi,* 106 P.3d at 552-53; *Gates*, 101 P.3d at 562-63; *Cape Publ'ns, Inc.*, 549 So. 2d at 1378-79; Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34-6 (Idaho 2003).

[27] Howell v. Tribune Entm't Co., 106 F.3d 215, 220-21 (7th Cir. 1997); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

[28] Willan v. Columbia County, 280 F.3d 1160, 1163 (7th Cir. 2002); *Veilleux*, 206 F.3d at 104; *Howell*, 106 F.3d at 220; Coplin v. Fairfield Pub. Access, 111 F.3d 1395, 1404 (8th Cir. 1997).

the public's right to receive information to "the beneficial effects of public scrutiny of the administration of justice."[29]

Several courts discussed individual values for privacy—liberty, autonomy, or emotional health—when examining the elements of the tort or when determining whether to recognize the disclosure tort under state common law.[30] Some of those rulings implied a liberty value for privacy when they mentioned Warren and Brandeis's definition of privacy as a right "to be let alone."[31] The Supreme Court of Minnesota, however, explicitly connected privacy to personal liberty when it chose to recognize the disclosure of private facts tort in 1998.[32] That ruling also implied that privacy served personal autonomy, which is associated with personal agency and personal identity.[33] Another ruling also related privacy to aspects of the individual autonomy value for privacy.[34] But courts most often discussed the emotional health value for privacy as individuals' desires to prevent emotional harm, such as shame or humiliation.[35] Only one of those cases referred to "emotional security," a concept broad enough to include the emotional well-

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[29] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975); *Gates*, 101 P.3d at 562-63; *Cape Publ'ns, Inc.*, 549 So. 2d at 1378-79; *Uranga*, 67 P.3d at 34-36.

[30] Doe 2 v. Associated Press, 331 F.3d 417, 417-21 (4th Cir. 2003); Foncello v. Amorossi, 931 A.2d 924, 929 (Conn. 2007); Pontbriand v. Sundland, 699 A.2d 856, 866 (R.I. 1997); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-32 (S.C. 1999).

[31] *E.g.*, Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (quoting Warren & Brandeis, *Right To Privacy*, 4 HARV. L. REV. 193, 193 (1980)).

[32] Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc).

[33] *Id.*

[34] Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702, 711 (D.C. Cir. 2009).

[35] *E.g.*, Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308-09 (11th Cir. 2007); *Randolph*, 973 A. 2d at 711; Young v. Jackson, 572 So.2d 378, 382 (Miss. 1990); *Swinton Creek Nursery*, 514 S.E.2d at 131.

being and emotional release factors of emotional health. Courts' references to societal values for privacy also were rare. In fact, the only references to the societal value of forming and maintaining relationships appeared in cases that also implicated the individual liberty and emotional health values for privacy.[36]

If courts mentioned conflicts,[37] clashes,[38] or tensions between freedom of expression and privacy[39] and attempted to reconcile those clashes, they typically applied a form of definitional balancing. That approach sought to identify the boundary between categories of privileged disclosures and categories of tortious disclosures and determined whether the facts at issue fell into the category of privileged publications or into the category of invasions of privacy.[40] Nine of those cases discussed values undergirding freedom of expression and values undergirding privacy.[41] Rather than engaging in an explicit balancing approach that weighed competing interests, a few courts claimed to

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[36] Doe v. Methodist Hosp., 690 N.E.2d 681, 686 (Ind. 1997) (plurality); Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126, 131-33 (S.C. 1999); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998).

[37] Uranga v. Federated Publ'ns, Inc. v. Idaho Statesman, 67 P.3d 29, 33 (Idaho 2003).

[38] Shulman v. Group W. Prod., Inc., 955 P.2d 469, 479 (Cal. 1998) (plurality).

[39] *E.g.*, Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997).

[40] Doe 2 v. Associated Press, 331 F.3d 417, 422 (4th Cir. 2003); *Coplin*, 111 F.3d at 1405-06; Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); Taus v. Loftus, 151 P.3d 1185, 1208-09 (Cal. 2007); Gates v. Discovery Commc'ns, Inc., 101 P.3d 553, 562-63 (Cal. 2005); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 486 (Cal. 1998) (plurality); Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc); Macon Telegraph v. Tatum, 6 S.E.2d 655, 657-58 (Ga. 1993); Uranga v. Federated Publ'ns, No. 27118, 2001 Ida. LEXIS 71, at *26-27 (Idaho June 21, 2001) (unpublished), *vacated and superseded on rehearing by* Uranga v. Federated Publ'ns, Inc. v. Idaho Statesman, 67 P.3d 29, 35 (Idaho 2003); Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 683 (Mass. 2005); Gauthier v. Police Comm'r of Boston, 557 N.E.2d 1374, 1376 (Mass. 1990); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473-74 (Tex. 1995).

[41] *Doe 2*, 331 F.3d at 422; *Coplin*, 111 F.3d at 1405-06; *Haynes*, 8 F.3d at 1232; *Taus*, 151 P.3d at 1208; *Shulman*, 955 P.2d at 479; *Ozer*, 940 P.2d at 378; *Uranga*, 67 P.3d at 32-3; *Ayash*, 822 N.E.2d at 683; *Star-Telegram, Inc.*, 915 S.W.2d at 473-84.

balance press freedom and privacy by applying a newsworthiness test that assesses the relevance of disclosed information to "a topic of legitimate public concern."[42]

Most rulings that applied a test to assess whether the information at issue was newsworthy, or related to a matter of public interest, found that the liberty-based editorial autonomy value for freedom of expression and audience-based marketplace of ideas and checking function values for freedom of expression could trump any privacy interests at issue.[43] Indeed, in 1993 when the Georgia Supreme Court asserted that clashes between press freedom and privacy require courts to weigh individuals' privacy rights against the press's right to provide audiences with information, [44] the court indicated that a 1905 Georgia Supreme Court ruling had defined the formula for that balancing by recognizing privacy was limited by free expression rights.[45] In 1995, the Supreme Court of Texas found a newspaper could not be liable for invading the privacy of a woman the paper identified as a rape victim. The court indicated that the public had a right to receive information about the commission of a crime, [46] thus implying an audience-based value for freedom of expression. In dicta, however, the court suggested the media have a moral obligation to "take precautions" to ensure they do not reveal sensitive information about crime victims. [47]

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[42] *Shulman*, 955 P.2d at 486. *Also see*, *Ozer*, 940 P.2d at 378 (citing Gilbert v. Medical Econs. Co., 665 F.2d 305, 308 (10th Cir. 1981) and Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)); *Star-Telegram, Inc.*, 915 S.W.2d at 474.

[43] *E.g.*, Macon Telegraph v. Tatum, 6 S.E.2d 655, 657 (Ga. 1993); *Star-Telegram, Inc.*, 915 S.W.2d at 474.

[44] *Macon Telegraph*, 6 S.E.2d at 657.

[45] *Id*. at 658 (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905)).

[46] Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 472 (Tex. 1995).

Only two rulings in disclosure of private facts cases upheld lower court rulings that found a plaintiff could receive damages for invasion of privacy.[48] One of those opinions was vacated by the same state high court that issued it and was superseded on rehearing by a decision reaching the opposite conclusion.[49] In the other decision, *Zaffuto v. City of Hammond,* the Fifth Circuit Court of Appeals upheld $2 in compensatory damages and remanded the case for a new trial on the amount of punitive damages. [50] In that case, the court weighed the privacy interest of the plaintiff against the defendant's interest in disclosing information and concluded the defendant disclosed information for the purpose of shaming Zaffuto, harming the emotional health that privacy is intended to protect, without serving individual- or audience-based values for freedom of expression.[51]

In sum, during the past twenty years, federal circuit courts of appeals' and state high courts' rulings have recognized significant individual and societal values for freedom of expression and for privacy.[52] When courts have acknowledged the potential for freedom of expression and privacy to collide, though, they typically have found the published information was protected under constitutional or common law privileges for matters of public interest associated with audience-based marketplace of ideas or

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[47] *Id*. at 475.

[48] Zaffuto v. City of Hammond, 308 F.3d 485, 486-91 (5th Cir. 2002); Uranga v. Federated Publ'ns, No. 27118, 2001 Ida. LEXIS 71, at *26-27 (Idaho June 21, 2001) (unpublished), *vacated and superseded on rehearing by* Uranga v. Federated Publ'ns, Inc. v. Idaho Statesman, 67 P.3d 29, 32-33 (Idaho 2003).

[49] *See Uranga*, 2001 Ida. LEXIS at *26-27.

[50] *Zaffuto*, 308 F.3d at 486-491.

[51] *Zaffuto*, 308 F.3d at 491 (affirming the award of $2 in compensatory damages and remanding for a new trial on punitive damages).

[52] *See supra* notes 24 to 35 and accompanying text.

checking function values.[53] Two opinions, one of which was vacated and superseded, did however, suggest that free expression interests might yield to individual privacy interests in circumstances that undermine the emotional health value for privacy without serving a liberty-based or audience-based value for freedom of expression.[54]

B. Reconciling Free Expression and Privacy in Appropriation Cases

Chapter three found that four state high courts recognized appropriation for the first time during the past twenty years.[55] Although Dean Smolla asserted in 2002 that appropriation is the only area of privacy that "has been a ripping success for plaintiffs,"[56] state high courts and federal circuit courts of appeals upheld lower court rulings for appropriation plaintiffs only four times during the past twenty years among the cases identified in this study.[57] Courts also remanded five cases for further proceedings.[58] In

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[53] *See supra* notes 36 to 44 and accompanying text.

[54] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 475 (Tex. 1995).

[55] Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (en banc); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 236 (Minn. 1998) (en banc); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 268-69 (Vt. 1990).

[56] Smolla, *supra* note 3, at 289.

[57] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007)(affirming a judgment for King that included an award of damages in the amount of $57,672); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000) (finding the jury did not err in awarding $100,000 for misappropriation); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. July 30,1992) (unpublished) (per curiam) (affirming a judgment for Bowling that included an award of $100 for the appropriation of his likeness); Town & Country Properties, Inc. v. Riggins, 457 S.E.2d 356, 365 (Va. 1995)(affirming lower court's finding for plaintiff and remanding for award to be reduced to $25,000 in actual damages).

[58] Am. Guarantee & Life Ins. v. 1906 Co., 273 F.3d 605 (5th Cir. 2001) (remanding with instructions for the district court to enter summary judgment against the insurance company and to indicate the company is legally required to defend and reimburse the 1906 Co. for damages related to misappropriation); Newcombe v. Adolf Coors Co., 157 F.3d 686, 693-94 (9th Cir. 1998) (remanding for trial because

most other cases, appellate courts found lower courts had not erred by entering summary judgment for defendants or by dismissing plaintiffs' appropriation claims.[59]

Almost half of forty-five appropriation rulings analyzed in this study turned on the court's determination that the plaintiff failed to satisfy the elements of the tort—commercial use of identity or likeness without proper consent—as a matter of law.[60] Courts found that using a plaintiff's name or photograph in a brochure[61] flyer,[62] or voicemail message without the plaintiff's implied or explicit consent constitutes an actionable use of identity for trade or advertising purposes.[63] Appellate courts affirmed lower court damages awards to plaintiffs only when the use promoted a product or service rather than serving a newsworthy purpose tied to at least one audience-based free expression value.[64]

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summary judgment improperly was awarded); Joe Dickerson & Assoc. v. Dittmar, (remanding the case to intermediate court of appeals with instructions to reinstate the trial court's award of summary judgment for the defendant); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998) (en banc); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 273-74 (Vt. 1990).

[59] *E.g.*, Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 759 (10th Cir. 2007) (unpublished); Zarilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122, 123-25 (3d Cir. 2007) (per curiam) (unpublished); Meadows v. Hartford life Ins. Co., 492 F.3d 634, 637 (5th Cir. 2007); Am. Guar. & Liability Ins. Co., 273 F.3d at 608; *Newcombe*, 157 F.3d at 693; Matthews v. Wozencraft, 15 F.3d 432, 436 (5th Cir. 1994); Schifano v. Greene County Greyhound Park, Inc., 624 So. 2d 178, 179 (Ala. 1993); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (en banc); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599 (Ind. 2001); Tannenbaum v. Grady, 604 N.E.2d 16, 16 (Mass. 1992); Simpson v. Central Maine Motors, Inc., 669 A.2d 1324, 1326 (Me. 1996); *Lake*, 582 N.W.2d at 236; Howell v. New York Post Co., Inc., 612 N.E.2d 699, 701(N.Y. 1993); *Beverley*, 587 N.E.2d at 279; Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490-91 (R.I. 2004); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); *Staruski*, 581 A.2d at 273; Reid v. Pierce County, 961 P.2d 333, 335 (Wash. 1998) (en banc).

[60] *E.g.*, Howell, 612 N.E.2d at 703; *Finger,* 566 N.E.2d at 143-44; Leddy, 843 A.2d at 490-91.

[61] Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. July 30, 1992) (unpublished) (per curiam).

[62] Town & Country Properties, Inc. v. Riggins, 457 S.E.2d 356, 365 (Va. 1995).

[63] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007)

When examining whether use of an individual's identity related to a matter of public interest and was, therefore, privileged, courts primarily discussed the liberty-based free expression value of autonomy, at least one audience-based free expression value—marketplace of ideas, self-governance, or checking function—or a combination of those values.[65] A few rulings implicated the liberty-based autonomy value for freedom of the press when courts indicated that members of the press must decide what is newsworthy without judicial censorship or second-guessing.[66]

Rulings generally implicated the individual privacy values of autonomy, liberty, or emotional health when courts discussed the elements of the tort.[67] Some discussion of plaintiffs' injuries related to the emotional harm factor of the emotional health value.[68] Only two rulings implied a societal value underlies privacy, the forming and maintaining relationships value.[69]

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[64] *King*, 485 F.3d at 593; B*rown*, v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); *Bowling*, 1992 U.S. App. LEXIS at *2; Beverley v. Choices Med. Ctr., 587 N.E.2d 275, 279-80 (N.Y. 1991); *Town & Country Properties, Inc.*, 457 S.E.2d at 365.

[65] *E.g.*, Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993); *Beverley*, 587 N.E.2d at 278-79; Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002); *Town & Country Props., Inc.,* 457 S.E.2d 356, 361-62 (Va. 1995).

[66] Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 998-1000 (Colo. 2001) (en banc); *Messenger,* 727 N.E.2d at 552-54; *Howell*, 612 N.E.2d at 704; *Finger*, 566 N.E.2d at 143; *Leddy*, 843 A.2d at 490-91.

[67] *E.g.*, King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at * 12-13 (6th Cir. July 301992) (unpublished) (per curiam); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001); Miller v. Am. Sports Co., Inc. 467 N.W.2d 653, 679-80 (Neb. 1991); Reid v. Pierce County, 961 P.2d 333, 342 (Wash. 1998)(en banc).

[68] *E.g.*, Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 105 (Colo. 2001) (Coates, concurrence); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 269 (Vt. 1990).

[69] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-74 (10th Cir. 2007); Reid, 961 P.2d at 342.

Courts rarely discussed both freedom of expression and privacy values or engaged in an explicit balancing of interests.[70] A few courts followed the New York Court of Appeals' tendency to treat the public interest privilege or newsworthiness defense as the definitional boundary between freedom of expression rights and privacy rights.[71] Those rulings typically focused on whether the use was a newsworthy one related to a matter of public interest or was "an advertisement in disguise."[72] In most of those cases, courts suggested that uses of plaintiffs' identities served an informative purpose related to the marketplace of ideas, self-governance, and/or checking function values, and thus the courts did not need to weigh the values undergirding freedom of expression against the values undergirding privacy.[73] One ruling suggested that privacy rights could limit free speech and press rights provided under different circumstances than those presented by the case.[74] That ruling identified general communicator-based and audience-based values for free expression and implied that appropriations that harm individual privacy values, such as autonomy and liberty, could be punished without violating free expression rights

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[70] *E.g.*, Schifano v. Greene Cty. Greyhound Park, Inc., 624 So.2d 178, 179 (Ala. 1993); Miller v. Am. Sports Co., Inc., 467 N.W.2d 653, 656 (Neb. 1991); Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108, 108 (S.C. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 273 (Vt. 1990).

[71] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-64 (10th Cir. 2007) (unpublished); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1003-04 (Colo. 2001) (en banc); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., 612 N.E.2d 699, 703 (N.Y. 1993); *Beverley* v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[72] *Showler*, 222 Fed. App'x at 763-64; *Dickerson & Assoc.*, 34 P.3d at 1003-04; *Messenger*, 727 N.E.2d 553; *Howell*, 612 N.E.2d at 703; *Beverley*, 587 N.E.2d at 278-79; *Leddy*, 843 A.2d at 490-91; *WJLA*, 564 S.E.2d at 387-88.

[73] *But see*, *Town & Country Props., Inc.*, 457 S.E.2d at 361-62.

[74] Doe v. Roe, 638 So. 2d 826, 830 (Ala. 1994) (per curiam).

if children's identities are used in an exploitative manner unrelated to matters of public interest.

Two courts found that plaintiffs' privacy was invaded by the unauthorized use of their identities for advertising purposes because the exploitative uses did not provide the type of information that served a public interest.[75] Those rulings also applied a definitional boundary to assess whether a person's identity was appropriated in a manner that harmed individual liberty, autonomy, or emotional health without benefiting society by contributing to audiences' right to receive information that facilitates discussion or debate of public issues, contributes to self-governance, or checks abuses of power.

In sum, courts primarily have recognized individual values for privacy—liberty, autonomy, and emotional health—and audience-based values for freedom of expression—marketplace of ideas, self-governance, or checking function values.[76] When uses of a person's identity implicated an audience-based value by providing information of public interest, courts found those uses fell on the privileged side of a definitional boundary associated with the newsworthiness exception.[77] Courts ruled in favor of plaintiffs only when the uses of their identities harmed individual privacy values rather than promoting free-expression values associated with audiences' rights to receive information on matters of public interest.[78]

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[75] *Beverley*, 587 N.E.2d at 279-80; Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 365 Va. 1995).

[76] *See supra* notes 28-38, 67-73, and accompanying text.

[77] *See supra* notes 43-47, 75, and accompanying text.

[78] King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 486-91 (5th Cir. 2002); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at * 12-13 (6th Cir. July 30, 1992) (unpublished) (per curiam); Uranga v. Federated Publ'ns, No. 27118, 2001

C. Reconciling Conflicts between Free Expression and Privacy

Today, when digital media enable any person with access to the Internet or a mobile phone to act as a mass communicator, to distribute information to large audiences within seconds, individuals' anxiety about invasions of privacy has increased.[79] During the past twenty years, technological changes have enabled any person with a digital media device to widely publicize another person's private information or to use another person's identity to one's own benefit, which in turn, allows any user to invade others' privacy and to be sued under the disclosure of private facts or appropriation torts. As technology has increased the ease through which individuals can communicate to mass audiences, the number of states that have recognized the disclosure of private facts or appropriation tort also has increased.[80] As the potential for individuals to become plaintiffs or defendants has grown, so has the need for courts to clarify what types of communications are protected by the First Amendment and what types are vulnerable to tort claims.

This dissertation found that an increasing number of states have recognized two common law invasion of privacy torts that involve potential conflicts between the right to publish and the right to privacy since Justice Marshall asserted that both interests are important. Despite Justice Marshall's suggestion that courts should balance those

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Ida. LEXIS 71, at *26-27 (Idaho June 21, 2001) (unpublished), *vacated and superseded on rehearing by* Uranga v. Federated Publ'ns, Inc. v. Idaho Statesman, 67 P.3d 29, 32-33 (Idaho 2003); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001).

[79] *See*, *e.g.*, DAMIAN TAMBINI, DANILO LEONARDI & CHRISTOPHER T. MARSDEN, CODIFYING CYBERSPACE: COMMUNICATS SELF-REGULATION IN THE AGE OF INTERNET CONVERGENCE 72 (2008); DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 6-7 (2004).

[80] Joe Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (en banc); Ozer v. Borquez, 940 P.2d 371, 379 (Colo. 1997) (en banc); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (en banc); Karch v. Baybank, 794 A.2d 763, 774 (N.H. 2002); Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1009-10 (N.H. 2003); Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266, 268-9 (Vt. 1990).

competing interests,[81] few state high courts and federal circuit courts of appeals explicitly balanced privacy and free expression values.[82] Rather, courts consistently have considered the elements of disclosure or appropriation torts and privileges for publishing matters of legitimate concern or interest to the public.[83] That tendency suggests that courts have assumed that the decades of precedent that defined common law and constitutional principles have struck a proper balance between the right to publish and the right to privacy,[84] both of which are undergirded by fundamental democratic values. During the past twenty years, however, courts have operationalized the conceptual boundaries for free expression and privacy in a manner that allowed the constitutional right to publish to trump common law privacy rights in disclosure cases and in appropriation cases.[85]

This dissertation found no state high courts' or federal circuit courts of appeals' rulings that upheld an award of damages against any member of the news media. But courts upheld damage awards for plaintiffs in one of seventy disclosure cases[86] and in

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[81] Florida Star v. B.J.F., 491 U.S. 524, 530 (1989).

[82] *See supra* notes 39-47, 70-74 and accompanying text.

[83] *Florida Star*, 491 U.S. at 532. *See supra* notes 18-23, 60-66 and accompanying text.

[84] The privilege for matters of public or general interest first was recognized in the now famous 1890 article by Samuel Warren and Louis Brandeis. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L.REV. 193 (1890). The Supreme Court connected that privilege to a constitutional privilege in *Time, Inc.v. Hill*., 385 U.S. 374, 388 (1967). Eight years later, the Court identified a narrower category of protection in *Cox Broadcasting* by stating that press freedom protected reporting on the prosecution of criminals and judicial proceedings, which were matters of public concern. Cox Broad. v. Cohn, 420 U.S. 469, 492 (1975). In 1989, the Court established another narrow category of privileged information for matters of public significance in *Florida Star.* 492 U.S. at 532.

[85] *See supra* notes 42-46, 75, and accompanying text.

[86] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2003). The Supreme Court of Idaho vacated a ruling that found a newspaper's publication of a court record, which disclosed the name of an individual who engaged in homosexual activity with his cousin decades earlier, was an actionable disclosure of a

four of forty-five appropriation cases.[87] And one court upheld an injunction to protect plaintiffs against invasion of privacy by an individual's appropriation of plaintiffs' identities online.[88] In each of those cases, courts applied the elements of the privacy torts and occasionally key defenses to the facts at issue, implying courts accepted that those standards of law struck the proper balance between the right to publish and the right to privacy.

In disclosure of private facts cases, courts relied almost exclusively on whether the disclosed information related to a matter of public concern or significance and thus was privileged under the First Amendment. They followed the constitutional tests created by the Supreme Court's rulings in *Cox Broadcasting v. Cohn* and *Florida Star v. B.J.F.* For instance, in 2003, the Supreme Court of Idaho reasoned that a newspaper's publication of a document found in a twenty-year old court record was privileged because the First Amendment prohibited a state from sanctioning a media defendant for publishing information found in a court record available to the public. In fact, some rulings that determined the disclosed information related to a public concern did not discuss the elements of the tort, much less the values undergirding the tort. Those rulings suggested those privileges provided a categorical boundary for constitutional rights that necessarily outweighed privacy rights. That tendency supports legal scholars' assertions

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private fact. Uranga v. Federated Publ'ns, No. 27118, 2001 Ida. LEXIS 71, *26-27 (June 21) (unpublished), *vacated and superseded on rehearing by* 67 P.3d 29, 35 (Idaho 2003).

[87] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992) (unpublished) (per curiam); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

[88] Felsher v. Univ. of Evansville, 755 N.E.2d 589, 599 (Ind. 2001).

that lower courts could use the *Florida Star* ruling to focus on free expression rights and negate privacy rights.[89]

The only award of damages to a disclosure of private facts plaintiff upheld on appeal did not apply the constitutional privilege nor did it apply the element of the tort some states have recognized that exempts disclosures of legitimate matters of public concern from liability. In *Zaffuto v. City of Hammond*, the Fifth Circuit Court of Appeals applied a balancing test under Louisiana's disclosure tort.[90] The court found an assistant police chief invaded the privacy of a police sergeant and the sergeant's wife's by recording and replaying one of the couple's private telephone conversations about the police sergeant's approval of "a controversial department restructuring."[91] That ruling was limited to considering whether a lower court erred in its application of Louisiana's reasonableness test, which assesses "the reasonableness of the defendant's conduct . . . by balancing the plaintiff's interest in protecting his privacy from serious invasions with the defendant's interest in pursuing his course of conduct."[92] Reasoning that the defendant had no legitimate interest in disclosing that information other than to benefit the defendant, the court upheld a $2 award of compensatory damages and remanded the case for trial on punitive damages. That ruling focused on the intentional nature of the tort, examining whether a defendant's motivation for the disclosure could justify harming the

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[89] *See* 491 U.S. 524, 530 (1989).

[90] *Zaffuto*, 308 F.3d at 491.

[91] *Id.*

[92] *Id.* at 491.

plaintiff's privacy interests.[93] The rationale, however, loosely parallels questions about whether a disclosure benefits message recipients as well as the communicator.

Courts also focused on the primary purpose for any use of a plaintiff's identity when determining whether an alleged appropriation was privileged.[94] If the purpose for using a plaintiff's name or likeness related to a matter of public interest, those uses were protected under common law or constitutional privileges.[95] The rulings that were not privileged, however, were considered exploitative or uses that primarily were intended to benefit the communicator in a manner that provided minimal, if any, benefit to others.[96] Those rulings, accordingly, respected the boundaries for constitutional protection in a manner that prevented defendants from paying damages for accidental, or unintended, uses of others' names or identities.

Not surprisingly, state high courts and federal circuit courts awarded damages more often in appropriation cases involving commercial speech than in disclosure of private facts cases.[97] The U.S. Supreme Court established in a 1976 ruling in *Virginia Board of Pharmacy v Virginia Consumer Council* that commercial speech, which does no

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[93] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002).

[94] *See supra* note 65, 75 and accompanying text.

[95] Showler v. Harper's Magazine Found., 222 Fed. App'x 755, 763-64 (10th Cir. 2007) (unpublished); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 1003-04 (Colo. 2001) (en banc); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., 612 N.E.2d 699, 703 (N.Y. 1993); Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141, 144 (N.Y. 1991); Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002).

[96] *E.g.*, *Beverley* v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 361-62 (Va. 1995).

[97] Courts upheld an award of damages in one disclosure of private facts case. Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002). Courts upheld awards of damages in four appropriation cases. King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992) (unpublished) (per curiam); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

more than promote the sale of a product or service and is true and not misleading, receives limited First Amendment protection,[98] less than would be extended to the truthful publication of news. Whereas the constitutional protection for publications of matters of public interest is grounded in the audience-based model's acknowledgement of benefits to information recipients and the liberty-based model's acknowledgement of benefits for communicators and audiences,[99] the constitutional protection for commercial speech is tied to the audience-based model.[100] Restricting that protection based in the ability of information to benefit audiences has allowed courts to exclude false or misleading communications from the scope of constitutional protection. Thus, when unauthorized uses of plaintiffs' names or likenesses mislead audiences by falsely implying that plaintiffs are promoting a product or service, those uses fall outside the scope of constitutional protection.[101] The elements of the tort provide a mechanism for courts to determine whether a defendant's use of a plaintiff's name promotes a product or service and whether a use misleads audiences.

Courts consistently have used the elements of the disclosure and appropriation torts and the newsworthiness defenses or public interest privileges to identify definitional boundaries between publicity associated with the right to publish and abuses of that

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[98] 425 U.S. 748, 759-65 (1976).

[99] *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-92 (1977); FREDERICK SCHAUER, FREE SPEECH PRINCIPLE 71 (1982).

[100] *E.g.*, Gerald J. Baldasty & Roger A. Simpson, *The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment*, 56 WASH. L. REV. 365 (1981); Thomas I. Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U. L.Q. 1; James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29; Michael J. Hayes, *What Ever Happened to 'the Right to Know'?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111 (2007); William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303; David M. Obrien, *The First Amendment and the Public's 'Right to Know'*, 7 HASTINGS CONST. L.Q. 579 (1979).

[101] *E.g.*, Town & Country Properties, Inc. v. Riggins, 457 S.E.2d 356, 365 (Va. 1995).

right.[102] Those legal principles indicate that the right to publish and the right to privacy are both important for a democratic society. But a couple of courts that associated speech and privacy rights with liberty indicated that individuals' freedom to express themselves may end at the point that the expression intentionally would harm an individual's privacy.[103] Accordingly, courts only upheld an award of damages for an appropriation plaintiff when the use of the plaintiff's name or likeness fell outside the scope of protected expression.[104] Similarly, the only award of damages upheld for a disclosure plaintiff resulted from an individual's abuse of his liberty-based right to distribute information.[105]

Those findings suggest that publishers might benefit by asking several questions before they send communications to multiple recipients. First, they could ask whether a communication is likely to benefit intended message recipients less than the sender. If the communication primarily will benefit the sender without benefiting recipients by serving an audience-based value for free expression—marketplace of ideas, self-governance, or checking function—the communication might fall outside the scope of constitutional protection and thus lead to a successful invasion of privacy claim. Second, they could ask whether the communication is likely to harm any person identified in the communication. If the communication is likely to cause harm that conflicts with individual values for

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[102] *See supra* notes 18-29, 60-64, 70-75 and accompanying text.

[103] *E.g.*, King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Doe v. Roe, 638 So. 2d 826, 829-30 (Ala. 1994) (per curiam).

[104] King, 485 F.3d at 593; Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992 (unpublished) (per curiam); Beverley v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

[105] Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002).

privacy—liberty, autonomy, or emotional health—or social values for privacy—forming relationships or promoting community and civility—the communication might lead to a successful invasion of privacy claim. Third, they could ask whether the intent of the communication is closely tied to misleading message recipients or harming a person identified in the communication. The communication might lead to a successful invasion of privacy claim if its purpose is closely tied to spreading false or misleading information, exposing a person identified in the communication to emotional harm, or undermining that person's sense of autonomy or dignity. They must provide affirmative answers to at least two of those inquiries for the communication to lead to a successful invasion of privacy claim.

The U.S. Supreme Court also should take action to provide greater clarity in this area. Now that individual communicators instantly can transmit information to mass audiences, individuals may more easily give widespread publicity to another's private information or use another's name or likeness to their own benefit. The Court's rulings involving disclosure of private facts and appropriation provide little guidance for individuals who widely publicize private information because the rulings focus on news media's rights to disseminate information related to the audience-based self-governance and checking function values. *Cox Broadcasting* and *Florida Star*, however, do not clearly extend First Amendment protection to communications that serve a marketplace of ideas value or to individual free expression values without serving the self-governance and checking function values.[106] In the cases analyzed for this study, however, lower

[106] Florida Star v. B.J.F., 491 U.S. 524, 530 (1989); Cox Broad. v. Cohn, 420 U.S. 469, 492 (1975).

courts have demonstrated a willingness to protect communications that serve a marketplace of ideas value or an autonomy value for free expression.[107] Indeed, lower courts upheld awards of damages in a private facts case involving an individual communicator and in an appropriation case involving an individual communicator when the publicized information were not connected to legitimate matters of public interest, concern, or significance.[108]

Those findings suggest the U.S. Supreme Court should accept an invasion of privacy case involving a non-media defendant and a matter of public or general interest. In that case, the Court should establish a constitutional privilege for individuals and for news media to freely publicize matters of public interest, a privilege undergirded by the individual autonomy value and the audience-based marketplace of ideas, self-governance, and checking-function values. Courts across the nation, then, could allow a new, broad constitutional privilege to strike the proper balance between the right to publish and the right to privacy.

But, as the Court will appear to broaden the scope of protection for free expression, it must clarify that the disclosure of private facts and appropriation torts are not facially unconstitutional. The Court may justify the constitutionality of those torts by requiring disclosure and appropriation plaintiffs to satisfy a constitutional fault level. Two cases included in this analysis provide a foundation for that fault level. In *Zaffuto v.*

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[107] *See supra* notes 43-46; 73 and accompanying text.

[108] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2003); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992) (unpublished) (per curiam); Beverley v. Choices Women's Med. Ct., Inc., 587 N.E.2d 275, 278-79 (N.Y. 1991); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

City of Hammond, the Fifth Circuit Court of Appeals focused on the intentional and unreasonable nature of an assistant police chief's disclosure of a phone conversation, which Terry Zaffuto and his wife assumed was private.[109] In *Town & Country Properties, Inc. v. Riggins*, the Supreme Court of Virginia indicated that a former professional football player's name was used in a manner intended to benefit an advertiser without providing message recipients with information that would help them make a decision about whether to purchase the advertised product.[110] Both of those rulings indicated that a plaintiff could prevail because a defendant intended to use another's sensitive, personal information or identity in a manner that would benefit the communicator without providing message recipients with information a reasonable person would relate to public health, public safety, public policies, or social awareness or with information that would help recipients make decisions related to the disclosed subject matter. Thus, a plaintiff can only satisfy the recommended constitutional level of fault by proving that she: 1) did not intentionally use another's sensitive, personal information or identity; 2) solely to the benefit of the defendant; 3) because the use benefitted message recipients by providing information related to public health, public safety, public policies, or social awareness or providing information that would help recipients make at least one decision about the advertised or publicized subject matter.

Such a ruling from the high court would clarify how lower courts must conceptualize the boundaries between the right to publish and the right to privacy in a manner that protects fundamental democratic values undergirding freedom of expression

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[109] *Zaffuto*, 308 F.3d at 491.

[110] *Town & Country Props., Inc.*, 457 S.E.2d at 362-64.

as well as privacy. The need for such a ruling will only increase in a digital age when individuals can publish messages for mass audiences once only reached by news media.

In sum, courts' operationalization of boundaries between free expression and privacy rights has demonstrated the supremacy of constitutional law over common law. Courts only upheld awards of damages for common law invasions of privacy when claims involved an abuse of constitutional rights or a lack of constitutional rights.[111] That tendency has allowed few plaintiffs to recover for invasion of privacy and has minimized the likelihood for invasion of privacy cases to chill freedom of expression. Still, the U.S. Supreme Court should accept an invasion of private facts and an appropriation case involving a non-news media defendant. That ruling must establish a constitutional privilege that clearly applies to non-media defendants' publication of matters of public or general interest.

D. Suggestions for Future Research

This dissertation focused on whether courts balanced competing interests after the U.S. Supreme Court stated in *Florida Star v. B.J.F*. that free expression and privacy values are significant[112] Future research could deepen our understanding of how courts operationalized the conceptual boundaries for the right to press and the right to privacy by examining how courts have reconciled conflicts between free expression values and privacy values in false light invasion of privacy and intrusion cases. That research could

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[111] King v. PA Consulting Group, Inc., 485 F.3d 577, 593 (10th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 491 (5th Cir. 2002); Brown v. Ames, 201 F.3d 654, 662 (5th Cir. 2000); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at *2 (6th Cir. 1992) (unpublished) (per curiam); Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356, 362-64 (Va. 1995).

[112] 491 U.S. 524 (1989).

provide greater understanding of the individual and societal values that courts associate with press freedom and privacy.

Future research also could clarify the operational boundaries for privacy rights by applying a theory that categorizes individual privacy values and societal privacy values as complementary rather than dichotomous. Daniel Solove has argued that society benefits from protecting individual privacy rights, and thus individual privacy rights are valuable because they benefit society.[113] Solve discussed that continuum of individual and societal values in relation to governmental intrusions.[114] Exploring whether courts have identified such a continuum in any of the tort-based invasion of privacy claims also would illuminate the conceptual boundaries for privacy rights protected by the intrusion, disclosure, appropriation, and false light torts.

Analysis of courts' discussions of fundamental democratic values in cases involving torts designed to protect personality or confidentiality also could yield a richer understanding of the conceptual boundary between press and privacy rights. Such studies could compare courts' attempts to reconcile conflicts between freedom of expression and publicity-based appropriation to courts' attempts to reconcile conflicts between freedom of expression and privacy-based appropriation. Other studies could examine how courts' operationalization of privacy rights in privacy tort cases compares to courts' operationalization of confidentiality in breach of confidentiality cases.

Finally, during a time of rapid technological changes that allow more individuals to give widespread publicity to private information or to exploit individuals'

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[113] Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 762-63 (2007).

[114] *Id*.

personalities, future research should examine if and how courts have identified different values for traditional news media, social media, and other digital media. It would be particularly valuable for research to examine whether courts have taken different analytical approaches in cases involving members of the traditional press than they have taken in cases involving individuals' communication via electronic or digital media.

E. **Conclusion**

In sum, this dissertation found minimal balancing in state high courts' and federal circuit courts of appeals' rulings in disclosure and appropriation cases during the past twenty years.[115] Some courts indicated that they balanced free expression and privacy by applying newsworthiness tests.[116] Most cases implied that elements of the torts and the newsworthiness defense struck an appropriate balance between the right to publish and the right to privacy.[117] And some rulings discussed free expression values—autonomy, marketplace of ideas, self-governance, and checking function—in relation to the newsworthiness defense.[118]

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[115] *E.g.*, Doe v. Roe, 638 So. 2d 826, 829-30 (Ala. 1994) (per curiam).

[116] *E.g.*, Taus v. Loftus, 151 P.3d 1185, 1208 (Cal. 2007); Shulman v. Group W. Prod., Inc., 955 P.2d 469, 474 (Cal. 1998) (plurality) Ozer v. Borquez, 940 P.2d 371, 378 (Colo. 1997) (en banc) Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703-05 (N.Y. 1993); Finger v. Omni Pub. Int'l, Ltd., 566 N.E.2d 141, 143 (N.Y. 1991); Town & Country Props., Inc. v. Riggins, 457 S.E.2d 356, 363-64 (Va. 1995).

[117] *See supra* notes 42-47, 64-67 and accompanying text.

[118] *E.g.*, Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246, 251-52 (5th Cir. 2007); Doe 2 v. Associated Press, 331 F.3d 417, 421 (4th Cir. 2003); Willan v. Columbia County, 280 F.3d 1160, 1163 (7th Cir. 2002); *Howell*, 106 F.3d at 220; Coplin v. Fairfield Pub. Access, 111 F.3d 1395, 1404 (8th Cir. 1997); Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549, 552-54 (N.Y. 2000) (per curiam); Howell v. New York Post Co., Inc., 612 N.E.2d 699, 703 (N.Y. 1993); *Beverley*, 587 N.E.2d at 278-79; Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); WJLA v. Levin, 564 S.E.2d 383, 387-88 (Va. 2002).

The rationales from some rulings focused on respecting the constitutional boundaries for protection of freedom of expression.[119] In an unpublished ruling, the Supreme Court of Idaho indicated that taking another approach would limit speech and "shackle the First Amendment."[120] Other courts indicated that defendants' disclosures of information about plaintiffs or defendants' uses of plaintiffs' identities were privileged because the publicized information encouraged a free flow of information or provided audiences with details that would foster discussion and debate, self-governance, and checking the power of government.[121] Their approaches suggested that publishing information that served First Amendment values could outweigh privacy values.[122] Indeed, courts upheld awards of damages for plaintiffs when publicity was given to sensitive information and when uses of identity conflicted with individual privacy values—liberty, autonomy, or emotional health—but did not serve any audience-based First Amendment values.[123]

[119] *E.g.*, Groden v. Random House, Inc., 61 F.3d 1045, 1051 (2d Cir. 1995); Dickerson & Assoc. v. Dittmar, 34 P.3d 995, 998-1001 (Colo. 2001) (en banc); *Howell,* 612 N.E.2d at 703; *Finger*, 566 N.E.2d at 143.

[120] Doe v. Haw, No. CV-OC-0205441D, 2003 WL 21015134, at *6 (Idaho Feb. 5 2003) (unpublished).

[121] *See supra* notes 25-29, 64-65, 73, and accompanying text.

[122] *See supra* notes 25-29, 64-65, 73, and accompanying text.

[123] *E.g.*, King v. PA Consulting Group, Inc., 485 F.3d 577, 591-92 (10th Cir. 2007); Zaffuto v. City of Hammond, 308 F.3d 485, 486-91 (5th Cir. 2002); Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505, at * 12-13 (6th Cir. July 30, 1992) (unpublished) (per curiam); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 600-01 (Ind. 2001).

REFERENCES

Primary Sources

U.S. Supreme Court Cases

Abrams v. United States, 250 U.S. 616 (1919)

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936)

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

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980)

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

Florida Star v. B.J.F., 491 U.S. 524 (1989)

Gitlow v. New York, 268 U.S. 652 (1925)

Hustler v. Falwell, 485 U.S. 46 (1988)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

New York Times v. Sullivan, 376 U.S. 254 (1964)

Time, Inc. v. Hill, 385 U.S. 374 (1967).

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977)

Federal Circuit Courts of Appeals Cases

Appropriation

Am. Guar. & Liability Ins. Co. v. 1906 Co., *273 F.3d 605* (5th Cir. 2001)

Botts v. New York Times, 106 Fed. App'x 109 (3d. Cir., 2004) (unpublished)

Bowling v. Bowling, No. 91-5920, 1992 U.S. App. LEXIS 18505 (6th Cir. 1992) (unpublished) (per curiam)

Brown v. Ames, 201 F.3d 654 (5th Cir. 2000)

Christian Broad. Network, Inc. v. Busch, 254 Fed. App'x 957 (4th Cir. 2007) (per curiam) (unpublished)

Groden v. Random House, Inc., 61 F.3d 1045 (2d Cir. 1995)

King v. PA Consulting Group, Inc., 485 F.3d 577 (10th Cir. 2007)

Lee v. Calhoun, 948 F.2d 1162 (10th Cir. 1991)

Lusby v. Cincinnati Monthly Publ'g Corp., No. 89-3854, 1990 U.S. App. LEXIS 9144 (6th Cir. 1990) (unpublished)

Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994)

McNewmar v. Disney Store, Inc., 91 F.3d 610 (3rd Cir. 1996)

Meadows v. Hartford Life Ins. Co., 492 F.3d 634 (5th Cir. 2007)

Nelson v. J.C. Penney Co., Inc., 75 F.3d 343, 347 (8th Cir. 1996)

Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998)

Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308 (11th Cir., 2008) (per curiam)

Solano v. Playgirl, Inc., 292 F.3d 1078, 1081 (9th Cir. 2002)

Zarrilli v. John Hancock Life Ins. Co., 231 Fed. App'x 122 (3d Cir. 2007) (unpublished)

Disclosure

Alvarado v. KOB-TV, 492 F.3d 1210 (10th Cir. 2007)

Anderson v. Suiters, 35 Med.L.Rptr. 2409 (10th Cir. 2007)

Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287 (11th Cir. 2007)

Campbell v. Lyon, 26 Fed.App'x 183 (4th Cir. 2001)

Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994)

Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395 (8th Cir. 1997)

Dasey v. Anderson, 304 F.3d 148 (1st Cir. 2002)

Doe 2 v. Associated Press, 331 F.3d 417 (4th Cir. 2003)

Haynes v. Alfred A. Knopf Inc., 8 F.3d 1222 (7th Cir. 1993)

Howell v. Tribune Entm't Co., 106 F.3d 215 (7th Cir.1997)

Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995)

Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005)

Lee v. Calhoun, 948 F.2d 1162 (10th Cir. 1991)

Lowe v. Hearst Newspapers P'ship L.P., 497 F.3d 246 (5th Cir. 2007)

McNewmar v. Disney Store, Inc., 91 F.3d 610 (3rd Cir. 1996)

Merlo v. United Way of Am., 43 F.3d 96 (4th Cir. 1994)

Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299 (6th Cir. 2000)

Purnell v. Smart, 1992 U.S. App. LEXIS 24313 (7th Cir. 1992) (unpublished)

Randolph v. ING Life Ins. & Annuity Co., 973 A. 2d 702 (D.C. Cir. 2009)

Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221 (10th Cir. 1997), *appeal after remand,* 127 F.3d 879 (10th Cir. 1999)

Reuber v. Food Chemical News, Inc., 925 F.2d 703 (4th Cir. 1991)

Riley v. Harr, 292 F.3d 282 (1st Cir. 2002)

Sapia v. Regency Motors of Metairie, Inc., 276 F.3d 747 (5th Cir. 2002)

Showler v. Harper's Magazine Foundation, 222 Fed. App'x 755 (10th Cir. 2007)(unpublished)

Steinbuch v. Cutler, 518 F.3d 580 (8th Cir. 2008)

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993)

Tichenor v. Roman Catholic Church, 32 F.3d 953 (5th Cir. 1994)

Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir.2000)

White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990)

Willan v. Columbia County, 280 F.3d 1160 (7th Cir. 2002)

Zaffuto v. City of Hammond, 308 F.3d 485 (5th Cir. 2005)

State Cases

Appropriation

Beverley v. Choices Women's Med. Ctr, Inc., 587 N.E.2d 275 (N.Y. 1991)

Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003)

Doe v. Roe, 638 So. 2d 826 (Ala. 1994) (per curiam)

Felsher v. University of Evansville, 755 N.E.2d 589 (Ind. 2001)

Finger v. Omni Publ'ns Int'l, Ltd., 566 N.E.2d 141 (N.Y. 1991)

Howell v. New York Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993)

Joe Dickerson & Associates, LLC v. Dittmar, 34 P.3d 995 (Colo. 2001)(en banc)

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998)(en banc)

Leddy v. Narragansett Television, L.P., 843 A.2d 481 (R.I. 2004)

Messenger v. Gruner + Jahr Printing, 727 N.E.2d 549 (N.Y. 2000) (per curiam)

Miller v. Am. Sports Co., Inc., 467 N.W.2d 653 (Neb. 1991)

Nemani v. St. Louis University, 33 S.W.2d 184 (Mo. 2000)

Pavesich v. New England Life Ins. Co., 50 S.E. 68 (1905)

People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269 (Nev. 1995)

PTS Corp. v. Buckman, 561 S.E.2d 718 (Va. 2002)

Reid v. Pierce County, 961 P.2d 333 (Wash. 1998) (en banc)

Remsburg v. Docusearch, Inc., 816 A.2d 1001 (N.H. 2003)

Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902)

Schifano v. Greene Cty. Greyhound Park, Inc., 624 So.2d 178 (Ala. 1993)

Simpson v. Central Maine Motors, Inc., 669 A.2d 1324 (Me. 1996)

Sloan v. South Carolina Dept. of Pub. Safety, 586 S.E.2d 108 (S.C. 2003)

Stanfield v. Osborne Industries, Inc., 949 P.2d 602 (Kan. 1997)

Staruski v. Cont'l Tel. Co. of Vermont, 581 A.2d 266 (Vt. 1990).

Tannenbaum v. Grady, 604 N.E.2d 16 (Mass. 1992)

Thompson v. C & C Research & Dev., 898 A.2d 495 (N.H. 2006)

Town & Country Props., Inc., v. Riggins, 457 S.E.2d 356 (Va. 1995)

Tyne v. Time Warner Entertainment Co., L.P., 901 So.2d 802 (Fla. 2005)

Wilkinson v. Methodist, 612 N.W.2d 213 (Neb. 2000)

WJLA v. Levin, 564 S.E.2d 383 (Va. 2002)

Disclosure

Adams v. King County, 192 P.3d 891 (Wash. 2008)

Ayash v. Dana-Farber Cancer Institute, 822 N.E.2d 667 (Mass. 2005)

Barker v. Huang, 610 A.2d 1341 (Del. 1991)

Bodah v. Lakeville Motor Express Inc., 663 N.W.2d 550 (Minn. 2003)

Burger v. Blair, 964 A.2d 374 (Pa. 2009)

Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989)

Doe v. Berkeley Publishers, 496 S.E.2d 636 (S.C. 1998)

Doe v. Haw, 2003 WL 21015134 (Idaho Feb, 5 2003) (unpublished)

Doe v. Methodist Hosp., 690 N.E.2d 681 (Ind. 1997) (plurality)

Elliott v. Healthcare Corp., 629 A.2d 6 (D.C. 1993)

Ex parte Birmingham News, Inc., 778 So.2d 814 (Ala. 2000)

Finebaum v. Coulter, 854 So. 1120 (Ala. 2003)

Foncello v. Amorossi, 931 A.2d 924 (Conn. 2007)

Gates v. Discovery Commc'ns, Inc., 101 P.3d 553 (Cal. 2005)

Gauthier v. Police Commissioner of Boston, 557 N.E.2d 1374 (Mass. 1990)

Hadnot v. Shaw, 826 P.2d 978 (Okl. 1992)

Hall v. Post, 372 S.E.2d 711 (N.C. 1988)

Hoskins v. Howard, 971 P.2d 1135 (Idaho 1998)

Howell v. New York Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993)

J.C. v. WALA-TV, Inc., 675 So.2d 360 (Ala. 1996)

Johnston v. Fuller, 706 So.2d 700 (Ala. 1997)

Karch v. Baybank, 794 A.2d 763 (N.H. 2002)

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998) (en banc)

Loe v. Town of Thomaston, 600 A.2d 1090 (Me. 1991)

Macon Telegraph Publishing Co. v. Tatum, 436 S.E.2d 655 (Ga. 1993)

Marleau v. Truck Ins. Exchange, 37 P.3d 148 (Or. 2001)

Milam v. Bank of Cabot, 937 S.E.3d 653 (Ark. 1997)

Mulgrew v. City of Taunton, 574 N.E.2d 389 (Mass. 1991)

Nazeri v. Missouri Valley Coll., 860 S.W.2d 303 (Mo. 1993)

Ozer v. Borquez, 940 P.2d 371 (Colo. 1997) (en banc)

Pontbriand v. Sundlun, 699 A.2d 856 (R.I. 1997)

Randolph v. ING Life Ins. and Annuity Co., 2009 WL 1684470 (D.C. 2009)

Reid v. Pierce County, 961 P.2d 333 (Wash. 1998)

Rosen v. Montgomery Surgical Ctr., 825 So.2d 735 (Ala. 2001)

S.B. v. Saint James School, 959 So.2d 72 (Ala. 2006)

Shattuck-Owen v. Snowbird Corp., 16 P.3d 555 (Utah 2000)

Shulman v. Group W. Prod., Inc., 955 P.2d 469 (Cal. 1998) (plurality)

Star-Telegram, Inc. v. Doe, 915 S.W.2d 471 (Tex 1995)

Steele v. Spokesman-Review, 61 P.3d 606 (Idaho 2002)

Svaldi v. Anaconda-Deer Lodge County, 106 P.3d 548 (Mont. 2005)

Swerdlick v. Koch, 721 A.2d 849 (R.I. 1998)

Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126 (S.C. 1999)

Taus v. Loftus, 151 P.3d 1185 (Cal. 2007)

Uranga v. Federated Publ'ns Inc., 67 P.3d 29 (Idaho 2003)

Uranga v. Federated Publ'ns, No. 27118 (LEXIS June 21, 2001) (unpublished)

Warner-Lambert Co. v. Execuquest Corp., 691 N.E.2d 545 (Mass. 1998)

Young v. Jackson, 572 So.2d 378 (Miss. 1990)

Statutes

MASS. ANN. LAWS. Ch. 214 § 3A (LexisNexis 2009)

NEB. REV. ST. § 20-201 (1943) (West 2006)

N.Y. CIV. RIGHTS §§ 50-51 (LexisNexis 2010)

OKLA. STAT. ANN. tit. 21, § 839.1 (West 2002)

VA. CODE. ANN. § 8.01-40A (LexisNexis 2009)

Secondary Sources

Restatement Sections

RESTATEMENT (SECOND) OF TORTS § 867 (1939)

RESTATEMENT (SECOND) OF TORTS § 652 A-E (1977)

Books

ANITA ALLEN, PRIVACY LAW & SOCIETY (2007).

THOMAS PHILLIP BOGGESS, 31 CAUSES OF ACTION § 47 (2d ed. 2008)

W. JOSEPH CAMPBELL, YELLOW JOURNALISM (2003)

FRED CATE, PRIVACY IN THE INFORMATION AGE (1997).

MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL (2003)

THOMAS I. EMERSON, SYSTEMS OF FREEDOM OF EXPRESSION (1969)

AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999)

ERVING GOFFMAN, INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR (1967)

ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959)

GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE (1992)

JOSEPH H. KUPFER, AUTONOMY AND SOCIAL INTERACTION (1990)

J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (2d ed. 2000).

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)

ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1969)

JOHN MILTON, AREOPAGATICA: A SPEECH TO THE PARLIAMENT OF ENGLAND, FOR THE LIBERTY OF UNLICENSED PRINTING (1819) (1644).

JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb, eds., Yale Univ. Press 2003) (1859)

DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT (1972)

BRUCE W. SANFORD, LIBEL AND PRIVACY (rev. 2d ed. Supp. 2004)

FREDERICK SCHAUER, FREE SPEECH PRINCIPLE (1982)

MICHAEL SCHUDSON, DISCOVERING THE NEWS (1978)

RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992)

DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (2d ed. 2006)

DANIEL J. SOLOVE, THE DIGITAL PERSON (2004)

DANIEL J. SOLOVE, THE FUTURE OF REPUTATION (2007)

DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008)

DAMIAN TAMBINI, DANILO LEONARDI & CHRISTOPHER T. MARSDEN, CODIFYING CYBERSPACE (2008)

ALAN WESTIN, PRIVACY AND FREEDOM (1967)

Articles

A primer on Invasion of Privacy, 31 NEWS MEDIA & L. (Fall 2007)

Elbridge L. Adams, *The Right of Privacy, And Its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905)

David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755 (2004)

Gerald G. Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759 (1978)

C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of The First Amendment*, 21 SOC. PHIL. & POL'Y 215 (2004).

C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977)

Gerald J. Baldasty & Roger A. Simpson, *The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment*, 56 WASH. L. REV. 365 (1981)

Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1966)

Lillian BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL .L. REV. 482 (1980)

Randall P. Bezanson, *Means and Ends and Food Lion: The Tension between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. (1998)

Randall P. Bezanson, *Politcal Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press*, 72 IOWA L. REV. 1359 (1987)

Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977)

Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133 (1992)

Vincent Blasi, *The Pathological Perspecive and the First Amendment*, 85 COLUM L. REV. 449 (1985)

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 522

Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964)

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

Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974)

Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983)

C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1 (1983)

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)

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

Judith Crown, *Florida High Court Rejects 'False Light' As a Cause of Action*, INSIDE COUNSEL 75 (Jan. 2009)

Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139 (2003)

Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1989)

Thomas I. Emerson, *Colonial Intentions and the Current Realities of the First Amendment*, 125 U. Pa. L. Rev. 737 (1977)

Thomas I. Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U. L.Q. 1

Thomas I. Emerson, *The Right of Privacy and Freedom of The Press,* 14 HARV. C.R.-C.L. L. REV. 328 (1979)

Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963)

Owen Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405 (1986)

Charles Fried, *Privacy [A Moral Analysis]*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 205 (Ferdinand David Schoeman ed., 1984)

Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1104 (2009)

Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1979)

Ruth Gavison, *Too Early for a Requiem*, 43 S. CAROLINA L. REV. 437 (1992)

Walter Gelhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 WASH. U. L. Q. 25

Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977)

James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29

Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C.L. REV. 709 (1996)

Ken Gormley, *100 Years of Privacy*, 1992 WIS. L. REV. 1335

Hyman Gross, *The Concept of Privacy*, 42 N.Y.U.L. Rev. 33 (1967)

Michael J. Hayes, *What Ever Happened to 'the Right to Know'?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111 (2007)

Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1204 (1976)

Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1

Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROBS. 307 (1966)

Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2003)

Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of The First Amendment,"* 1964 SUP. CT. REV. 191

Jane Kirtley, *Freedom of the Press: The Most Serious Threat Is . . . The Cloak of Privacy*, 30 COLUMBIA JOURNALISM REV. 46 (1991)

Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990)

Irwin R. Kramer, *The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 CARDOZO ARTS & ENT. L.J. 113 (1990)

William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303

Andrew McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L. REV. 988 (1995).

Deckle Mclean, *Lower Courts Point the Way on Press and Privacy Rights*, 22 COMM. & L. 41 (2000).

Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245

Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1995)

Melville B. Nimmer, *The Right to Speak from* Time*s to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968)

Louis F. Nizer, *The Right of Privacy: A Half Century's Developments* 39 MICH. L. REV. 526 (1941)

David M. O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 8 (1980)

David M. Obrien, *The First Amendment and the Public's 'Right to Know'*, 7 HASTINGS CONST. L.Q. 579 (1979)

W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305 (1983)

Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEORGE WASH. L. REV. 1 (1957)

Robert C. Post, *Rereading Warren and Brandeis*, 41 CASE W. RES. L. REV. 647 (1990)

Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989)

Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001)

William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960)

James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323 (1975)

Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1981)

Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 272 (Ferdinand David Schoeman ed., 1984)

Jeffrey H. Reiman, *Privacy, Intimacy, and Personshood*, 6 PHIL. & PUB. AFFAIRS 34-35, 38-44 (1976)

Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008)

Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117 (2001)

Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989)

Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972)

Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991)

Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609 (1999)

Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 289 (2002).

Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999)

Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002)

Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745 (2007).

Daniel J. Solove, *Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006)

Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 970 (2003)

Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975)

Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO. L. J. 2103 (2000)

Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 272 (Ferdinand David Schoeman ed., 1984)

John H. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962)

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

G. Edward White, *The First Amendment Comes of Age: Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1997)

Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630 (1967).