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ARTICLES

SELF-CENSORSHIP AND THE FIRST AMENDMENT

ROBERT A. SEDLER*

I. INTRODUCTION

Self-censorship refers to the decision by an individual or group to refrain from speaking and to the decision by a media organization to refrain from publishing information. Whenever an individual or group or the media engages in self-censorship, the values of the First Amendment are compromised, because the public is denied information or ideas. It should not be surprising, therefore, that the principles, doctrines, and precedents of what I refer to as "the law of the First Amendment" are designed to prevent self-censorship premised on fear of governmental sanctions against expression. This fear-induced self-censorship will here be called "self-censorship bad."

At the same time, the First Amendment also values and protects a right to silence. The components of the First Amendment right to silence include: (1) the right to refuse to disclose one's beliefs and associations to the government; (2) the right to speak anonymously without disclosing one's identity; (3) the right not to be compelled to speak the government's message; (4) the

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1. It is an essential postulate of First Amendment theory that the primary purpose of the First Amendment is to provide information and ideas to the public, and that the right of the public to receive the information and the ideas is of greater importance than the right of the speaker to convey information and express ideas. The public interest, which lies at the heart of the First Amendment, is deemed to be advanced by the free dissemination of information and the free expression of ideas. See, e.g., Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that a federal wiretap law, which prohibited the illegal interception of telephone communications, cannot constitutionally be applied to impose liability against a newspaper for broadcasting an illegally-intercepted publication concerning a matter of public interest where organization had played no role in the illegal interception).

right not to be associated with a particular idea; and (5) the right to avoid unwanted ideas. The values embodied in the First Amendment right to silence support self-censorship in the sense that an individual or group or a media organization may decide to refrain from speaking or publishing, because he believes that the public interest is better served by his decision to refrain from speaking or publishing than by speaking or publishing. Therefore, this will be called "self-censorship good."

This Article first discusses "self-censorship bad," including the principles, doctrines, and precedents of the First Amendment that are designed to prevent self-censorship due to the fear of governmental sanctions against expression. I show that in their totality, these principles, doctrines, and precedents comprise a major part of the "law of the First Amendment," and stand as a bulwark against "self-censorship bad." The Article then discusses "self-censorship good" in the context of media organizations exercising their editorial discretion to refuse to publish certain information. Here I use two examples. First is the refusal of the media to identify victims of rape. Second is the refusal of the media to disclose certain information on the grounds that the disclosure of the information would cause serious harm to the national security. In this connection, I review at length the process by which media organizations make the decision to refuse to disclose information on national security grounds. The Article concludes by relating "self-censorship bad" and "self-censorship good" to the values of the First Amendment and the function of the First Amendment in the Nation's constitutional system.

II. "Self-Censorship Bad"

A. The Chilling Effect Concept

"Self-censorship bad" refers to decisions to refrain from speaking or publishing due to the fear of governmental sanction under a law prohibiting or regulating expression. One major objective of the "law of the First Amendment" is preventing self-censorship based on fear of governmental repercussions, an objective that is accomplished through the chilling effect concept that runs throughout the "law of the First Amendment." In my

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opinion, the chilling effect concept is the most fundamental and pervasive concept in the "law of the First Amendment." Indeed it is the only clear First Amendment concept that I have been able to identify at the present time. The chilling effect concept is the basis of the narrow specificity principle, the overbreadth doctrine,5 and the New York Times rule.6 In addition, the possibility of a serious chilling effect on expression is also an independent analytical basis for invalidating any kind of regulation of expression.7

The primacy of the chilling effect concept is directly traceable to the context in which the "law of the First Amendment" has developed. This area of law has been evolving for some ninety years, and the primary context in which it developed for many of those years was in response to governmental repression of dissent and the expression of unpopular ideas.8

As the Supreme Court extended protection to freedom of expression in this context, it promulgated the chilling effect concept as well as principles and specific doctrines designed to ensure that dissent can occur and unpopular ideas can be expressed. The chilling effect concept, along with these principles and specific doctrines, applies across the board to any interference with freedom of expression and are the principal vehicles by which the very strong protection of freedom of expression is achieved in actual First Amendment litigation.9 And, in applying the chilling effect concept and its derivative principles and doctrines, the Court has emphasized, again and again, the dangers to freedom of expression that result from self-censorship due to the fear of governmental sanction.

4. See infra notes 11–20 and accompanying text.
5. See infra notes 21–32 and accompanying text.
6. See infra notes 33–38 and accompanying text.
7. See infra Part II.C.
8. See Sedler, supra note 2, at 462 n.21 (discussing the historical context of the development of the "law of the First Amendment").
9. The Supreme Court has interpreted the First Amendment's guarantee of freedom of expression very expansively; the protection afforded to it is perhaps the strongest given to any individual right under the Constitution. In the United States, as a constitutional matter, the value of freedom of expression generally prevails over other democratic values, such as equality, human dignity, and privacy. Other democratic values must be advanced by means that do not abridge freedom of expression. It is for this reason that the constitutional protection afforded to freedom of expression in the United States is seemingly unparalleled anywhere else in the world, and why in the United States we provide more protection to freedom of expression than is provided under international human rights norms. See generally Robert A. Sedler, An Essay on Freedom of Speech: The United States Versus the Rest of the World, 2006 Mich. St. L. Rev. 377 (2006).
B. The Narrow Specificity Principle, the Overbreadth Doctrine, and the New York Times Rule

Under the narrow specificity principle, any governmental regulation of expression will be found to violate the First Amendment if it is “pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved.” The Court’s explanation of the basis of the narrow specificity principle directly points to the chilling effect concerning self-censorship caused by the breadth of the regulation. As the Court stated: “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

A number of the cases in which the Court has applied the narrow specificity principle to invalidate governmental regulation of expression clearly demonstrate the concern with preventing self-censorship. One in this set of cases involved a state requirement that teachers list all of the organizations to which they had belonged or contributed during the preceding five years, and a state bar admission requirement that applicants list all the organizations to which they belonged. Such a requirement could cause teachers or bar applicants to refrain from exercising their First Amendment right of freedom of association for fear of sanction due to their membership in a “disapproved” organization. Another set of cases involved absolute bans on engaging in certain forms of expression, such as knocking on the door or ringing the doorbell of a resident in order to deliver handbills, or distributing leaflets in the public streets or other public places. A similar case involved a municipal ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display it on demand. The absolute ban would necessarily inhibit persons from engaging in

13. The only inquiry that the state can make of bar applicants is the applicant’s “knowing membership in an organization advocating the overthrow of the Government by force or violence, . . . [and] sharing the specific intent to further the organization’s illegal purpose,” in order to determine the applicant’s “character and fitness” to practice law. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165 (1971) (citations omitted). See also Baird v. State Bar of Ariz., 401 U.S. 1 (1971).
16. Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) (finding that the law was not narrowly tailored to advancing the asserted interests in protecting the privacy of the residents and preventing fraud and crime).
the proscribed form of expression, and their resulting failure to do so would constitute a form of self-censorship.

Still another set of cases involves bans on publication by the media. These cases include: a ban on the publication of the name of a victim of a sexual offense, as applied to a newspaper that had obtained the name from an inadvertently-released police report;\(^ {17}\) a law imposing liability for the public dissemination of the name of a rape victim where the name had been obtained from public court documents;\(^ {18}\) a law prohibiting newspapers from publishing the name of a youth charged as a juvenile offender, as applied to information that the newspaper had obtained from private sources;\(^ {19}\) and a law prohibiting the publication of information in confidential legal proceedings, as applied to a non-participant who had lawfully obtained the information.\(^ {20}\) Such bans were designed to force the media to self-censor with respect to the publication of this information, and so would deprive the public of the self-censored information. It is possible that in at least some of these cases, a more precisely tailored restriction on the dissemination of the information may have been constitutionally permissible. However, the regulation at issue failed to satisfy the narrow specificity principle, and the Court’s invocation of the principle to invalidate the regulation assured that the media would not be engaging in self-censorship.

The overbreadth doctrine is closely related to the narrow specificity principle, and like the narrow specificity principle, is grounded in a concern for preventing a chilling effect on protected expression.\(^ {21}\) The overbreadth and vagueness doctrines operate to prevent a chilling effect that results from the existence and threatened enforcement of overbroad and vague laws directly regulating, or applicable to, acts of expression. These doctrines allow such laws to be challenged on their face for substantial overbreadth or vagueness without regard to whether the activity of the party challenging the law is itself constitutionally protected.\(^ {22}\)


\(^{21}\) See Massachusetts v. Oakes, 491 U.S. 576, 584 (1989) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.").

\(^{22}\) While the overbreadth doctrine has sometimes been explained by the Court as an exception to the rule against asserting the rights of third parties, in my opinion, it is more properly grounded in substantive terms. A party has a substantive First Amendment right, grounded in the concern for preventing a chilling effect on the exercise of that right, not to be subject to sanction under
The overbreadth doctrine is very important in practice, not only because it permits a law to be invalidated through a facial challenge without assessment of the constitutionality of the challenger's expressive activity, but because the constitutional analysis does not go beyond the terms of the law itself. Moreover, once a law is held void on its face for overbreadth, the law literally ceases to exist: it cannot be enforced against any person in any circumstance. In applying the overbreadth doctrine, a court must look to the terms of the law and must determine whether the law includes or could reasonably be interpreted to include within its prohibitions a substantial amount of protected expression. The more sweeping the terms of the law, the more likely it is to include within its prohibitions protected expression, and so the more likely it is to be found to be void on its face for overbreadth.

The following are examples of where the Court has invoked the overbreadth doctrine to invalidate laws on their face: a law imposing an absolute ban on peaceful picketing; a law forbidding a law that is void on its face. See Robert Allen Sedler, The Assertion of Constitutional Jus Tertii: A Substantive Approach, 70 Calif. L. Rev. 1308, 1326-1327 (1982). In this connection, the Court has held that a party that is not subject to sanction under the challenged law cannot assert an overbreadth challenge on the ground that the law violates the First Amendment rights of third parties. L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999) (holding that a party who wanted to obtain governmental information for purposes not authorized by statute could not assert facial challenge to statutory requirements).

23. The overbreadth must be "real [and] substantial . . . in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). In that case, the Court rejected an overbreadth challenge to a state law prohibiting "partisan political activity" on the part of state civil service employees. The Court upheld the law on the ground that such partisan political activity could interfere with the impartial and efficient operation of the civil service, and emphasized that the ban on such activity did not interfere with the ability of civil service employees to express political views outside the context of a partisan political campaign. The civil service employees who were challenging the law had engaged in soliciting political contributions from subordinates. They argued that the law could be interpreted as applying to activities such as wearing campaign buttons or placing campaign signs on the bumpers of their automobiles. The Court held that if the law were ever applied to such activities, it could be challenged as unconstitutional as applied to such activities, but that this possible overbreadth was not substantial in relation to the law's plainly legitimate sweep. Id. See also Virginia v. Hicks, 539 U.S. 113 (2003) (upholding municipal law closing to public use streets adjacent to a municipal housing development for low-income persons, in an effort to combat rampant crime and drug dealing there, and rejecting an overbreadth challenge to the law despite the possibility that it could be applied to bar a person seeking to come to the development for expressive purposes).

ding any person to "in any manner, oppose, molest, abuse or interrupt any policeman in the execution of his duty";\textsuperscript{25} a law forbidding the use of "opprobrious words or abusive language tending to cause a breach of the peace";\textsuperscript{26} a law forbidding individuals to "assemble on the sidewalk and conduct themselves in a manner annoying to persons passing by";\textsuperscript{27} a federal law banning indecent interstate commercial messages;\textsuperscript{28} and a federal law "criminaliz[ing] the commercial creation, sale or possession of certain depictions of animal cruelty."\textsuperscript{29} In the 1950s and 1960s, a number of states mandated that teachers and public employees execute "loyalty oaths" containing provisions that required or could be construed to require the declarant to refrain from engaging in protected expression or association and thus were void on their face for overbreadth.\textsuperscript{30} In more recent times, the overbreadth doctrine has been invoked to invalidate laws proscribing sexual expression in terms that go beyond legally unprotected obscenity.\textsuperscript{31} Similarly, efforts by public universities to maintain political correctness, through the adoption of codes that prohibit students from making statements that create a "hostile, intimidating or offensive environment for minorities, 


\textsuperscript{26} Gooding v. Wilson, 405 U.S. 518, 519 (1972) (quoting Ga. Code Ann. § 26-6303 (1933)).

\textsuperscript{27} Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971) (quoting Cincinnati, Oh., Code Ordinances § 901-L6 (1956)).

\textsuperscript{28} Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).


\textsuperscript{31} See Am. Booksellers Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986). The municipal ordinance in that case was a civil rights anti-pornography ordinance that defined "pornography" as the "graphic sexually explicit subordination of women." Id. at 324. The state can only prohibit the kind of "pornography" that rises to the level of "obscenity," as defined by the Court in Miller v. California, 413 U.S. 15 (1973). Id. Under the Miller definition, a work is obscene and beyond the protection of the First Amendment only if, taken as a whole, the dominant theme of the work appeals to a "prurient" interest in sex, it is patently offensive to contemporary community standards relating to the description or depiction of sexual activity, and it lacks serious "literary, artistic, political or scientific value." Id. If a state law, like the municipal ordinance at issue in this case, does not define "obscenity" in this manner or fails to very precisely define the sexual activity that cannot be described or depicted, it will be held void on its face for overbreadth. Id. at 331-32.
women, gay and lesbian persons and other protected groups," have run afoul of the overbreadth doctrine because the codes by their very terms prohibit a substantial amount of protected expression.\(^{32}\) As these examples demonstrate, the overbreadth doctrine is a major vehicle by which the Court prevents self-censorship due to the existence and threatened enforcement of overbroad and vague laws that regulate or are applicable to acts of expression.

The New York Times rule, taking its name from New York Times v. Sullivan,\(^ {33}\) is also derived from the chilling effect concept. It imposes stringent requirements in libel and other personal tort actions brought by public officials and public figures against the media or other speakers. In order to avoid a chilling effect on the discussion of issues of public interest, the New York Times rule mandates that there can be no recovery for false statements of fact about public officials or public figures, unless the plaintiff can prove with "convincing clarity" that the statement was knowingly false or made with reckless disregard for truth or falsity.\(^ {34}\) The New York Times rule also applies to actions for invasion of privacy and the infliction of emotional distress.\(^ {35}\) Moreover, the rule imposes certain limitations on libel actions brought by private figures against the media when the media has "publishe[d] speech of public concern."\(^ {36}\) In such a case the plaintiff must prove the falsity of the statement at issue, and there can be no award of punitive damages unless the test of "knowing falsehood or reckless disregard for the truth" has been satisfied.\(^ {37}\) The media, as expected, has adopted internal reporting and editing procedures designed to ensure that the information they publish is not actionable under the New York Times rule. The result is that successful libel actions against media organizations are exceed-


\(^{34}\) Id. at 285–86.


ingly rare and the media need not engage in self-censorship for fear of exposure to libel liability.  

C. The Chilling Effect Concept as the Basis for Invalidating the Regulation of Expression

The possibility of a serious chilling effect on expression can be an analytical basis for invalidating any kind of regulation of expression. There are numerous examples of the Court invalidating laws or governmental action on this basis, and in practice, it is very difficult for the government to justify a law or action that has this effect on expression.

A state law requiring a newspaper to give a “right of reply” to a political candidate it has attacked in print was found to violate the First Amendment because such a requirement may discourage newspapers from attacking political candidates and so deprives the public of this information. A federal law that only permitted the delivery of mail designated as “communist political propaganda” if specifically requested by the addressee in writing was also invalidated. The law was found to violate the First Amendment because it imposed “a limitation on the unfettered exercise” of the right of free expression—willing recipients could be inhibited from making a request for delivery, and to that extent would engage in reverse self-censorship by denying themselves access to the information.

The chilling effect concept has been invoked in a number of contexts to invalidate governmental efforts to prohibit constitutionally unprotected obscenity, where those efforts could have a chilling effect on the dissemination of constitutionally protected pornography. An early example of this situation was a state law giving a governmental agency the power to designate certain books as “objectionable,” to circulate a list of these books to the police, and to threaten to recommend prosecution against book-

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38. For an example of how difficult it is for a media organization to be held liable, see Bartnicki v. Vopper, 532 U.S. 514 (2001), which held that the federal wiretap law, which prohibits the illegal interception of telephone communications, could not constitutionally be applied to impose liability against a newspaper for broadcasting an illegally intercepted communication concerning a matter of public interest, notwithstanding that the newspaper had reason to believe that the communication had been illegally intercepted.


41. Id.

42. All pornography (except child pornography) that does not rise to the level of “obscenity” is, of course, protected by the First Amendment. See Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff’d mem., 475 U.S. 1001 (1986).
sellers that sold these books.\textsuperscript{43} In order to avoid the threat of prosecution, booksellers were likely to refuse to carry any books on the list, even though at least some of the books on the list were not obscene.\textsuperscript{44}

Similarly, the Court in \textit{Freedman v. Maryland}\textsuperscript{45} invoked the chilling effect concept to invalidate the traditional practice of state censorship of motion pictures, which effectively brought about the end of state motion picture censorship boards. These boards typically would require that the filmmaker obtain a license from the board prior to distributing the film to theaters in the state. While in theory, the board could only refuse to issue a license if it found the motion picture to be obscene, in practice the boards would frequently demand that in order to receive the license, the filmmaker make changes in the film that would satisfy the board's notion of appropriateness. Even if the filmmaker were to bring a successful court challenge to the board's refusal to issue the license, the resulting delay in distributing the film would have a significant economic impact on the filmmaker, and in order to avoid this delay, the filmmaker would likely agree to the changes demanded by the censorship board. Thus, the filmmaker would be engaging in self-censorship, and would not show the film that he wanted to show. In \textit{Freedman}, the Court held that if a censorship board wanted to deny a license to distribute a film on the ground that the film was obscene, the board had to initiate an expeditious and adversarial judicial proceeding to determine the alleged obscenity of the film.\textsuperscript{46} The principle from \textit{Freedman} was that there could be no advance prohibition of the dissemination of a film or any other work alleged to be obscene unless and until there had been an expeditious judicial determination of "obscenity" in an adversarial proceeding initiated by the governmental body.\textsuperscript{47} Since the censorship board could no


\textsuperscript{44} Id. at 71 (noting that this will leave book distributor's to "speculate" whether books were obscene or not).

\textsuperscript{45} Freedman v. Maryland, 380 U.S. 51 (1965).

\textsuperscript{46} Id. Interestingly enough, the \textit{Freedman} decision imposed as a constitutional requirement a prior judicial determination of obscenity in an adversary proceeding that the Court had previously upheld against a First Amendment challenge. See Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (upholding a state law against a First Amendment challenge that provided for the judicial determination of a book as "obscene" and the issuance of an injunction against the dissemination of a book determined to be "obscene" holding that because the book had been determined to be "obscene" in an adversary proceeding, it was not protected speech, and an injunction against its dissemination did not violate the prior restraint doctrine).

\textsuperscript{47} 380 U.S. at 58.
longer force the filmmaker to engage in self-censorship in order to avoid a delay in the distribution of the film, and since no film produced by a major studio would be found to be obscene, there was no reason for the state to continue to engage in motion picture censorship, and state censorship boards have ceased to exist. The Court has struck down Congress' efforts to protect minors from exposure to sexually explicit materials on the Internet because of a concern for self-censorship on the part of the disseminators of those materials. The Court has held the First Amendment was violated by a federal law that prohibited the transmission of "indecent messages to any recipient under 18 years of age," and "knowingly sending . . . or displaying . . . 'patently offensive' material in a manner available to persons under 18 years of age." The problem with this kind of law is that existing technology does not include any effective method for the disseminator to prevent minors from obtaining access to its Internet communications without at the same time denying access to adults. The law was unconstitutional because it would discourage the disseminators from sending sexually explicit materials onto the Internet even though adults could rightly see those materials, and the law would thus deny those adults access to those materials.

A final example of the Court's concern for preventing self-censorship is the Court's holding that a state law requiring political parties to report the names of their campaign contributors and recipients of campaign disbursements could not constitu-

48. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) (holding that as a matter of law, under the Roth-Miller test, the motion picture *Carnal Knowledge* was not obscene). No more cases involving obscenity prosecutions against major studio films came before the Court.


51. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997). See also Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) (indicating that any efforts to regulate the Internet dissemination of sexually-oriented materials to minors would probably violate the First Amendment, since filtering materials could be used to block such material at the receiving end). Also note that it has long been settled that the government cannot deny adults access to sexually explicit materials on the ground that the government is trying to protect minors from access to those materials. See Butler v. Michigan, 352 U.S. 380 (1957) (holding that state could not constitutionally ban sales to the general public of material "unsuitable for children").
tionally be applied to a minor political party, where the party showed a "reasonable probability" that such disclosure would subject the contributors to "threats, harassment or reprisals" from government officials or private persons.52

These examples demonstrate how the possibility of a serious chilling effect on expression is an analytical basis for invalidating any kind of regulation of expression. In these cases, the result of the Court's decisions was to prevent any self-censorship of expression resulting from the existence and enforcement of the challenged laws or governmental action.

The cases demonstrate how the Court has used the chilling effect concept and the principles and doctrines based on that concept to protect against what we have called "self-censorship bad." The result of the Court's doing so has been to advance the public interest in the dissemination of information and ideas, and so to implement strongly the values of the First Amendment.

III. "SELF-CENSORSHIP GOOD"

A. The Media and Editorial Discretion

We rely on the media to advance the public information function of the First Amendment by using its newsgathering resources to collect information and express opinions about matters of public interest and to convey them to the public at large. But the First Amendment also embodies a right to silence, and in performing its public information function, the media may also decide to invoke its right to silence. The media's exercise of its right to silence is reflected in the media's editorial discretion. A media organization may decide that it is in the public interest for it to refuse to disclose particular information that is in its possession, and when it chooses to exercise editorial discretion by refusing to disclose that information, it has concluded that in the circumstances presented, other values, such as a concern for an individual's privacy or a concern for national security, outweigh the public's interest in obtaining that information.53 The exer-

52. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982). But see Doe v. Reed, 130 S. Ct. 2811 (2010) (holding that the danger of a chilling effect on expression was not created, at least on the face of the law, by a state law requiring the public disclosure of petitions supporting a referendum on a state law, including the names and addresses of the signers, and so held that the law on its face did not violate the First Amendment).

exercise of editorial discretion to decide not to publish is an important component of First Amendment rights and, as a general proposition, the media cannot be compelled to disclose information that it does not wish to disclose.\(^5\)

When a media organization exercises editorial discretion by refusing to publish information in its possession, it is necessarily engaging in self-censorship. I refer to this form of self-censorship as "self-censorship good" because here the media is itself making the decision not to publish and, in doing so, it has concluded that under the circumstances, other values outweigh the public's interest in obtaining that information. Two specific examples of editorial discretion illustrate this "self-censorship good:” the refusal to disclose the identity of rape victims, and the refusal to disclose certain information that would be harmful to national security.

B. The Refusal to Disclose the Identity of Rape Victims

Published reports on crimes usually include identifying information about the victim, including the victim's name. Without such identifying information, the reporting would be incomplete, and the victim would be an abstraction rather than a real person. It is difficult to see any justification for refusing to disclose the identity of the victim, particularly since that identity will be disclosed during any criminal prosecution of the perpetrator.

A different set of considerations comes into play when the crime is one of rape. There is considerable controversy over whether the media should refuse to identify rape victims.\(^5\) One view is that the media's failure to disclose the name puts the rape victim in a category apart from other violent crime victims, thereby perpetuating society's incorrect impressions and stereotypes about rape. The contrary view maintains that precisely because of these incorrect impressions and stereotypes about rape, from the perspective of the victim, rape is indeed different from other violent crimes. But regardless of the incorrect

\(^5\) But see Branzburg v. Hayes, 408 U.S. 665 (1972) (the media's right to refuse to disclose information is qualified as the media cannot claim greater First Amendment rights than the public at large have. For example, since members of the public can be compelled to testify before a grand jury, so can members of the media, and the Court has held that reporters called to testify before a grand jury can be compelled to reveal information derived from confidential sources). To this extent, the media can be required to disclose information that it does not wish to disclose.

impressions and stereotypes, the fact remains that rape is perceived by many persons as an extreme violation of the personal integrity and sexuality of the victim, and that disclosing the name of the victim may intensify the potential stigma and long term trauma experienced by the victim.56

As discussed previously, governmental efforts to prevent disclosure of the names of rape victims have been held to violate the First Amendment.57 It is precisely because the government cannot constitutionally protect rape victims from such disclosure that any responsibility for doing so lies with the media. Here the media must make the decision whether the public interest in knowing the identity of the victim outweighs the interest of the rape victim in keeping her identity secret.58

Because the determination of this matter involves a conflict between the public's interest in obtaining the information and the victim's interest in keeping her identity secret, it would seem that the determination whether to disclose should depend on the particular factual circumstances surrounding the offense and the victim. In my opinion, the case against disclosure is the strongest where the particular factual circumstances would likely lead to stigmatization of the victim, such as where the claimed rape was committed by an acquaintance or a relative, and there could be a question as to whether there was consent by the victim.59 Similarly, if the reporter had interviewed the victim, the reporter could determine whether the victim had strong fears about disclosure of her identity, and if so, there would be a strong reason not to disclose her identity.60 On the other hand,


58. It is beyond the scope of this Article and the competence of the author to resolve the conflicting positions on this very important matter. Rather, my focus will be on the exercise of editorial discretion and on the process by which media organizations make the determination to release or withhold the name of the rape victim. See

59. See Dana Berliner, Rethinking the Reasonable Belief Defense to Rape, 100 YALE L.J. 2687, 2687 (1991); Denno, supra note 56, at 1125 (“[T]he great majority of rapes are committed by an acquaintance or relative and, therefore, the consent of the victim is often presumed.”).

60. Denno, supra note 56, at 1125 (“A three-year longitudinal survey of a national probability sample of 4008 adult American women . . . concluded
disclosure would be more justified if the reporter had interviewed the victim and she did not strongly object to disclosure, which may occur where the victim was raped by a stranger and no one would likely question whether there had been consent. 61

Finally, where the alleged rapist is a public figure who has claimed that the sex was consensual, there may be a stronger public interest in revealing identifying information about the claimant, so that the public may make its own judgment about the claimed consent. 62 But in the final analysis, as stated above, the media organization must make the decision on the basis of the particular factual circumstances surrounding the offense and

that:[.] 'it is clear that rape victims are extremely concerned about people finding out and finding reasons to blame them for the rape. If the stigma of rape were not still a very real concern in the victims' eyes, perhaps fewer victims in America would be concerned about invasion of their privacy and other disclosure issues.' " (citing Nat'l Victim Ctr. & Crime Victims Research & Treatment Ctr., Rape in America: A Report to the Nation (1992)).

61. But see Paul Marcus & Tara L. McMahon, Limiting Disclosure of Rape Victims' Identities, 64 S. Cal. L. Rev. 1019, 1033 (1991) (concluding that the majority of rape victims who voluntarily reveal their identities "are white, middle class women in stable relationships" and, most significantly, are raped by strangers, because it is far less likely that these women will be stigmatized by the rape).

62. In 1991, a member of the Kennedy family, William Kennedy Smith, was accused of raping a woman whom he had met at a bar in Florida, and was subsequently acquitted. A number of media organizations disclosed her name, while others did not. See Denno, supra note 56, at 1114.

In 2003, Los Angeles Lakers' basketball superstar Kobe Bryant was prosecuted in a Colorado State court on a charge of raping a young woman at a resort where she was working. He admitted that he had sex with the woman, but claimed that the sex was consensual. Most of the media refused to disclose her name, but it was disclosed by a Los Angeles-based, nationally-syndicated radio talk show host, who said he did not believe the woman's story. The trial judge imposed a constitutionally questionable gag order against the media's revealing her name, which was upheld by the Colorado Supreme Court. The prosecution was dropped when the complainant refused to testify. She filed a civil suit for damages in a Colorado federal court, and the judge required that she reveal her name. No doubt, because Bryant was a very prominent athlete, there was much controversy over the refusal of most of the media to reveal the complainant's name, and the case sparked extensive public and media discussion over the media practice of refusing to reveal the name of a rape victim. See, e.g., Kirk Johnson, As Accuser Balks, Prosecutors Drop Bryant Rape Case, N.Y. Times, Sept. 2, 2004, at A1; Kirk Johnson, Name of Bryant Case Accuser Is Again Mistakenly Released, N.Y. Times, July 29, 2004, at A16; Adam Liptak, Privacy Rights, Fair Trials, Celebrities and the Press, N.Y. Times, July 23, 2004, at A20; Howard Pankratz & Mike McPhee, Bryant Settles Lawsuit, Denver Post, Mar. 3, 2005, at A-01; Kate Zernike, The Nation: What Privacy? Everything Else But the Name, N.Y. Times, Aug. 3, 2003, § 4, at 4; Lauren Johnston, Kobe Accuser Reveals Identity, CBS News (Oct. 15, 2004), http://www.cbsnews.com/stories/2004/10/05/ national/main647884.shtml; Rape Case Against Bryant Dismissed, MSNBC News (Sep. 2, 2004, 4:14 PM), http://nbcsports.msnbc.com/id/5861379/.
surrounding the victim. And the media organization should explain the reasons for its decision to withhold the name or to reveal it to the public.

In my opinion, one of the best examples of editorial discretion in this area was the decision of the *New York Times* and other newspapers not to reveal the identity of woman known only as the "Central Park jogger." In 1989, a young woman who was jogging in New York City's Central Park, was raped, severely beaten and left for dead by a group of wilding young men.\(^{63}\) When her assailants were prosecuted, she appeared in court and testified, although as a result of her severe beating, she could not remember any of the facts of her assault. Although her name was available from the court documents, editors of the *New York Times* and many other newspapers made the decision to keep her identity secret.\(^{64}\) The *New York Times* explained its decision in an editorial:

> The young woman who was raped, beaten and left for dead this spring in Central Park is known to most New Yorkers only as "the jogger." For a rape victim to want to remain anonymous and for the media to keep her so, is not unusual. Rape, even today, stigmatizes.

> This time, though, the decision to remain nameless was not made by the young woman but by her family. When found, she was half-frozen, unconscious, past deciding anything. . . . Moreover she has triumphed.

> The jogger got a lot of press because she is white, affluent and works on Wall Street. But in remaining anonymous she has, however, surmounted categorization. Without a name, one that might indicate ethnic origin and even a religion, we can perceive her for what she really is: a woman, who like countless women of every race and faith, has suffered a horrendous cruelty.

> Today the jogger is, in Dickens's phrase, "recalled to life." Even so, there is a part of life that is dead to her. She can't remember what happened that night. But if she

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64. See Alex S. Jones, *Most Papers Won't Name the Jogger*, N.Y. TIMES, June 13, 1990, at B3.
can't, the rest of us must—for her sake and for the sake of all those women who never make the paper or the 6 o'clock news but who know what it is to be treated like an object.\textsuperscript{65}

The decision of the \textit{New York Times} and other news organizations not to reveal the name of the victim of this horrendous attack has served to call attention to the plight of all women who have been raped, and so has served the public information function of the First Amendment far more effectively than if they had chosen to reveal the name of the victim. And, as this example indicates, there will clearly be circumstances where editorial discretion dictates that the media should exercise that discretion to refuse to reveal the name of the rape victim. Under the First Amendment, that decision is for the media and the media alone to make.

C. \textit{The Refusal to Disclose Information That Would Be Harmful to National Security}

Perhaps even more controversial than the refusal to disclose the name of a rape victim is the refusal to disclose information that the media has concluded would be harmful to national security. In the first place, information that the media voluntarily refuses to disclose on this basis often relates to important questions of public policy. One concern is that the media's refusal to disclose this information enables the government to keep secret information that the public rightly should have in order to evaluate the government's actions. Secondly, the media's voluntary refusal to disclose information on national security grounds becomes intertwined with the government's efforts to prevent the disclosure of such information.\textsuperscript{66}


\textsuperscript{66} For a discussion of the relationship between the government and the media with respect to obtaining information that may affect national security, see Robert A. Sedler, \textit{The Media and National Security}, 53 \textsc{Wayne L. Rev.} 1025, 1034–38 (2007). Sometimes the relationship between government and media is "adversarial," such as when the media obtains "unauthorized disclosures leaks" from officials inside the government, and when the government seeks to obtain information from the media that it is entitled to obtain from the general public in the form of compelling members of the media to testify before a grand jury and reveal information obtained from confidential sources. Sometimes that relationship is "symbiotic," such as when there is an "authorized leak," by which government officials voluntarily disclose information to the media, so that the media will assist them in conveying the government's message to the public. A further discussion of this matter is beyond the scope of the present Article.
The First Amendment generally precludes the government from trying to prevent the media from publishing information on purported national security grounds. Stated simply, there is no "national security" or "state secrets" exception to the requirements of the First Amendment. This proposition follows from the Supreme Court's landmark 1971 decision, *New York Times Co. v. United States (Pentagon Papers Case)*. The Supreme Court applied the prior restraint doctrine to hold that a court could not issue an injunction against the publication of the Pentagon Papers, a classified study detailing the American government's decision-making process in Vietnam. The government argued that the publication of this document—highlighting many mistakes in that process—would seriously impair the ability of the United States to negotiate a peace settlement with the North Vietnamese government. This argument was insufficient to justify a prior restraint, since, as Justice Brennan pointed out, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." The only circumstances in which a prior restraint could be justified, according to Justice

Note that the article title *The Media and National Security* was taken from a symposium panel of the same name, which was a part of a symposium held on November 16, 2006 that was sponsored by the Wayne Law Review and was entitled, "Issues in the War on Terror: Investigations, the Media and Article III Courts." I moderated the panel. The participants were William Harlow, the former Chief Spokesman for the Central Intelligence Agency, Dana Priest, a Pulitzer Prize winner and Washington Post Reporter, covering the intelligence community and national security issues, and Adam Liptak, the National Legal Correspondent for the New York Times. Much of the material in that article was based on the research that I did in connection with presiding over this Panel. In the course of the article I referred to certain points that were made during the panel discussion, but I made no attempt to obtain statements or specific information from the participants on the panel. I will refer to some of these points in the present Article.

67. 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.").

68. Id. at 714 (per curiam).

69. Id. at 725–26 (Brennan, J., concurring). Cf. *Haig v. Agee, 453 U.S. 280 (1981)* (upholding the revocation of a passport of a former C.I.A. agent who wrote a book disclosing secret intelligence operations and the names of C.I.A. agents for the purpose of obstructing intelligence operations and the recruiting of intelligence personnel); *United States v. Progressive, Inc., 467 F. Supp. 990, 1995 (W.D. Wis. 1979)* (issuing an injunction against the publication of a magazine article dealing with the development and production of thermonuclear weapons on the ground that publication of the article would contribute to nuclear proliferation and that would "adversely affect the national security of the United States." The government abandoned its case against the magazine
Stewart in his concurrence, would be where Congress has acted specifically to prevent the disclosure of information that would "surely result in direct, immediate, and irreparable damage to our Nation or its people."\textsuperscript{70} This formulation is the test used to determine when it is constitutionally permissible for a court to issue an injunction against the publication of information allegedly harmful to "national security."\textsuperscript{71}

The First Amendment would not likely tolerate post-publication sanctions against the media based on conjecture that disclosure of the particular information would be harmful to national security. It is unlikely that the government could constitutionally impose post-publication sanctions unless it could make a strong showing that the information was of such a nature that its disclosure would cause "direct, immediate and irreversible damage" to a particular national security interest.\textsuperscript{72} In other words, the constitutional permissibility of post-publication sanctions would be subject to the clear and present danger doctrine, and in this con-
text, what constitutes a clear and present danger to national security would be defined by the standard formulated in Justice Stewart’s concurrent to the *Pentagon Papers Case.*

Likewise, there is no “state secrets” exception to the First Amendment. That is, the fact that particular information has been classified as “secret” by the government does not mean that Congress can prohibit its disclosure. Rather, the disclosure of classified information can be prohibited only when the government makes a showing that the disclosure of the particular classified information would cause “direct, immediate and irreparable damage” to an identifiable national security interest. Two of the provisions of the federal law prohibiting the disclosure of classified information can satisfy this test: (1) the prohibition on disclosure of “the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government”; and (2) the prohibition on disclosure of “the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes.” These are very narrow prohibitions, and the disclosure of this kind of information could cause very serious harm to intelligence gathering activities.

However, the two other provisions of the federal disclosure of classified information law are overly broad. These provisions prohibit:

[K]nowingly and willfully . . . publish[ing] . . . in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . .

(3) concerning the communication intelligence activities of the United States or any foreign government; or

73. *Id.* The clear and present danger doctrine has developed primarily in the context of determining when the government can constitutionally prohibit the advocacy of unlawful action, such as the violent overthrow of the government. Under the clear and present danger test, advocacy of unlawful action is constitutionally protected except where the advocacy is directed toward inciting imminent lawless action and is likely to incite or produce such action. See *Brandeenburg v. Ohio,* 395 U.S. 444 (1969). *See also Hess v. Indiana,* 414 U.S. 105 (1973) (holding that threats of violence made by university students during an anti-war demonstration were neither directed nor likely to incite “imminent lawless action”).


75. It is difficult to see any responsible reporter seeking to obtain or report information about governmental codes or cryptographic systems. It would also seem that there is very little public interest in knowing about this kind of information.
The reason that these provisions could not be invoked against the dissemination of classified information by the media is that either (1) they would be void on their face for overbreadth, if they were not interpreted as embodying the clear and present danger test,77 or (2) if they were interpreted as embodying that exacting test, it is very unlikely that any particular publication would fall within the prohibition. Because two provisions of the federal disclosure of classified information law are very narrow and only prohibit the disclosure of information that no responsible journalist would want to disclose, and because two others are overly broad and could not constitutionally be invoked against the kinds of information that the media in fact would publish, it is not surprising that there are not reported prosecutions against members of the media for a violation of this law.

The point to be emphasized, then, is that there is no national security or state secrets exception to the requirements of the First Amendment and that, with very limited exceptions, the government cannot prevent or sanction the disclosure of information by the media on the ground that the disclosure is harmful to national security. This being so, if the media will not disclose information on the ground that the disclosure is harmful to national security, it can only be because the media, in the exercise of its editorial discretion, has concluded that the harm to the national security from the disclosure of the particular information outweighs the public's interest in obtaining the information.

The First Amendment strongly embodies the principle of editorial discretion and the right to decide what to publish or not publish.78 Reporters and editors are acting in the best traditions of the First Amendment and in accordance with their role in advancing the function of freedom of expression in a democratic and open society if they decide that particular information

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76. § 798(a)(3)-(4).
77. See Brandenburg, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").
should not be published because its disclosure would seriously harm the public interest in national security.

A little-known example of the media’s exercising editorial discretion in refusing to publish information that would seriously harm the public interest in national security is the media’s maintaining secrecy about the Manhattan Project that led to the development of the atomic bomb in World War II. The story of the media’s silence about the Manhattan Project was recently detailed in a book, *Necessary Secrets*, authored by Gabriel Schoenfeld, who has been a strong critic of what he considers to be the media’s current willingness to publish “governmental secrets.”79 As Schoenfeld has explained it, what he calls “the patriotic press” cooperated with the government to maintain the greatest secrecy possible about the Manhattan Project. Although Congress had given President Roosevelt the authority to prevent disclosure of “military information,” which Roosevelt interpreted to include information about the Manhattan Project at the Los Alamos, New Mexico facility, Roosevelt relied on the voluntary cooperation of the media rather than on any legal sanctions to prevent disclosure of information about the Manhattan Project.

The first line of defense against disclosure was the imposition of a regime of control at the facility, with extensive security requirements for those working at the facility and compartmentalization of the scientific activity conducted there.80 The next line of defense was the voluntary cooperation of the media. Shortly after the attack at Pearl Harbor and the declaration of war against the Axis Powers, Congress passed the First War Powers Act, which included a provision for press censorship, and Roosevelt issued an Executive Order establishing an Office of Censorship to organize the system. The President declared that “[i]t is necessary to the national security that military information which might be of aid to the enemy be scrupulously withheld at the source” and that he was calling upon the “patriotic press and radio to abstain voluntarily from the dissemination of detailed information of certain kinds.”81 The media were issued a “Voluntary Censorship Code” that they were asked to follow. The Office of Censorship lacked the power to punish violators, but it could “disclos[e] their names . . . [and] could also refer

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80. Id. at 142–45.
them . . . to the Justice Department for prosecution under the Espionage Act." 82

Schoenfeld goes on to explain that in order for the government to keep information about the Manhattan Project secret from the public, it was necessary for the Office of Censorship to inform the media in considerable detail about what they could not publish or discuss. 83 In addition, according to Schoenfeld:

The Office of Censorship wisely tolerated some release of information, recognizing, as an official postwar study of security arrangements noted, "that complete suppression of information about activities at these locations would actually draw more attention than a policy of judicious release or news of local interest, carefully controlled so as not to reveal any vital secrets." 84

Schoenfeld concludes: "By and large the system of censorship was highly successful. Journalists, conceiving of themselves in that distant era not as neutral observers, but as an integral part of the war effort, were eager to comply." 85

There can be no doubt that the exercise of editorial discretion by the media in maintaining secrecy about the Manhattan Project truly advanced the interest in national security. The Axis Powers and the rest of the world were kept in the dark about the atomic bomb until it was dropped on Hiroshima and Nagasaki in the summer of 1945, which brought about the immediate surrender of Japan. This exercise of editorial discretion by the media stands as a classic example of "self-censorship good."

The world today is a very different world from the time of World War II, and there is no longer the conception of the

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82. Schoenfeld, supra note 79, at 146.
83. For example, in June 1943, the media "were asked to refrain from public discussion of 'new or secret military weapons or experiments.'" Id. at 147. The censorship mandate laid out certain extremely sensitive information, proscribing references to: "[The production] or utilization of atom smashing, atomic energy, atomic fission, atomic splitting, or any of their equivalents. The use for military purposes of radium or radioactive materials, heavy water, high voltage discharge equipment, cyclotrons. The following elements or any of their compounds: plutonium, uranium, ytterbium, hafnium, protactinium, radium, thorium, deuterium." Id.
84. Id. at 148–49 (quoting Vincent C. Jones, Manhattan: The Army and the Atomic Bomb 278 (1985)).
85. Schoenfeld, supra note 79, at 147. Schoenfeld notes that while there were more than a few breaches of the censorship regime, they "stemmed from the sheer impracticability of walling off an enterprise of such scope," and when they did occur, "[a]gents from the Office of Censorship swooped in to trace the source of the leaks, to try to contain the story, and to warn the editors and broadcasters away from a repetition of the violation." Id. at 148–49.
"patriotic press." The media no longer hesitates to publish "military secrets" or other confidential information that has been leaked to it by disaffected government employees or others. The claim of the government that disclosure of this information would somehow harm national security is greeted with skepticism, particularly where the information reveals serious mistakes or wrongdoing on the part of government officials. This was the situation presented in the \textit{Pentagon Papers Case}, the disclosure by the New York Times of the National Security Agency's domestic surveillance program, under which it intercepted communications to the United States from suspected terrorists abroad without obtaining a warrant from the Foreign Surveillance Intelligence Court,\footnote{86. See generally Schoenfeld, supra note 79, at 17–53. Perhaps unsurprisingly, Schoenfeld is highly critical of the New York Times' decision to disclose the existence of the program, and he has used this example to argue for greater accountability in the press corps for publishing wartime military secrets. See also Gabriel Schoenfeld, \textit{Has the "New York Times" Violated the Espionage Act?}, \textit{Comment. Mag.}, Mar. 2006, at 23.} and most recently, by the Internet leak of some 91,000 classified documents on the Afghanistan war and 250,000 American diplomatic cables by WikiLeaks, a self-described whistleblower organization.\footnote{87. See Anne Flaherty, \textit{Pentagon Scrambles to Assess Wikileaks Damage}, \textit{Associated Press}, July 26, 2010, \textit{available at} http://www.washingtontimes.com/news/2010/jul/25/90000-us-documents-on-afghan-war-leaked-to-website; Eric Schmitt, \textit{In Disclosing Secret Documents, WikiLeaks Seeks 'Transparency,'} \textit{N.Y. Times}, July 25, 2010, at A11; Scott Shane \& Andrew W. Lehren, \textit{Leaked Cables Offer a Raw Look Inside U.S. Diplomacy}, \textit{N.Y. Times}, Nov. 29, 2010, at A1.} It is fair to say, then, that as a general proposition, today the media is very reluctant to exercise its editorial discretion to refuse to disclose classified information despite the government's claim that disclosure of the information will be harmful to national security.

At the same time, the media insists that sometimes it will exercise its editorial discretion to withhold or delay the publication of particular information on national security grounds. A media organization is most likely to exercise its editorial discretion on this basis when its reporters or editors have engaged in discussions with government officials, and have been persuaded that disclosure of the particular information will in fact cause serious harm to the national security.\footnote{88. For more information on this process, see Sedler, supra note 66. When discussing the "The Media and National Security" with a panel of government officials and media representatives, one of the matters discussed by the panel was the interaction between the media and government officials with respect to the disclosure of information involving issues of national security. All the panelists agreed that it was rare for the government to try to persuade the media to not publish an entire story. Rather, the government's concern was to}
In an op-ed published in the *New York Times* in 2006, Dean Baquet, then the editor of the Los Angeles Times, and Bill Keller, the executive editor of the New York Times, set forth an editorial view on how the media balances national security with its mission to report the news. They first point out that in recent years our papers have brought you a great deal of information the White House never intended for you to know—classified secrets about the questionable intelligence that led the country to war in Iraq, about the abuse of prisoners in Iraq and Afghanistan, about the transfer of suspects to countries that are not squeamish about using torture, about eavesdropping without warrants.

They then ask, "How do we, as editors, reconcile the obligation to inform with the instinct to protect?" They answer that sometimes the judgments are easy, such as their reporters in Iraq and Afghanistan "taking great care not to divulge operational intelligence in their news reports, knowing that in this wired age it could be seen and used by the enemy." But often the judgments are "painfully hard." The process, they say, begins with reporting. The reporters work with sources "who may be scared, who may know only part of the story, who may have their own agendas that need to be discovered and taken into account." "We double check and triple check. We seek out sources with different points of view. We challenge our sources when contradictory information emerges."

The next step is hearing the government’s case. Baquet and Keller say that no article on a classified program gets published without the government’s involvement. A typical situation was the government saying to a reporter, "We have a real problem with this story. Can you take some facts out of the story?" Facts that the government typically wants to remove from stories are those relating to the location or assistance from foreign governments that those governments would prefer to keep secret. From the standpoint of the government official making the request, it is "Trust me on this one." From the standpoint of the editor—the request not to disclose always goes to a top editor—it is a matter of trying to accommodate the request by winnowing down the story to "what is really important." Id. at 1030.

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
until the responsible officials have been given a fair opportunity to comment. More significantly, they say:

[I]f the [responsible officials] want to argue that publication represents a danger to national security, we put things on hold and give them a respectful hearing. Often we agree to participate in off-the-record conversations with officials, so that they can make their case without fear of spilling more secrets onto our front pages.

97. Id.

98. Id. When WikiLeaks posted some 91,000 leaked classified documents on the Afghanistan war on its Web site, it justified the disclosure as an effort to reveal "unethical behavior" by governments and corporations. Schmitt, supra note 87.

"We believe that transparency in government leads to reduced corruption, better government and stronger democracies," the organization’s Web site says. "All governments can benefit from increased scrutiny by the world community, as well as their own people. We believe this scrutiny required information." . . . In a telephone interview from London, the organization’s founder, Julian Assange, said the documents would reveal broader and more pervasive violence in Afghanistan than the military or the news media had previously reported. "It shows not only the severe incidents but the general squalor of war, from the death of individual children to major operations that kills hundreds," he said.

Id. Schmitt’s report notes that WikiLeaks did exercise some degree of editorial discretion when it "withheld some 15,000 documents from release until its technicians could redact names of individuals in the reports whose safety could be jeopardized." Id. WikiLeaks also claimed that it had discussed the proposed disclosure with Pentagon officials, and that the Pentagon had "expressed a willingness to discuss reviewing a trove of classified documents before public release," but the Pentagon disputed this claim, saying that it would "not negotiate some ‘minimized’ or ‘sanitized’ version of a release by WikiLeaks of additional U.S. government classified documents." Thom Shanker, WikiLeaks and Pentagon Disagree About Talks, N.Y. TIMES, Aug. 19, 2010, at A10. In a later development, Defense Secretary Robert M. Gates informed Senator Carl Levin, the Chairman of the Senate Armed Services Committee that, "while the release of 75,000 classified documents about the war in Afghanistan by the Web site WikiLeaks endangered the lives of Afghans helping the United States, the disclosures did not reveal any significant national intelligence secrets." Elisabeth Bumiller, Gates Found Cost ofLeaks Was Limited, N.Y. TIMES, Oct. 17, 2010, at A8. Similarly, with respect to the disclosure of 250,000 diplomatic cables, Secretary Gates noted that descriptions of the leaks as a "melt-down, a . . . game-changer, and so on" were "fairly significantly overwrought." Elizabeth Bumiller, On Disclosures, Gates Takes the Long View, N.Y. TIMES, Dec. 1, 2010, at A12. He said:

The fact is, governments deal with the United States because it is in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. . . . Some governments . . . deal with us because they fear us, some because they respect us, most because they need us. We are still . . . indispensable. . . . So other nations will continue to deal with us. . . . We will continue to share sensitive information with one another. Is this embarrassing? Yes.
They then give examples of decisions that they have made to hold an article or to eliminate some facts.  

In the final analysis, they make the decisions:

We understand that honorable people may disagree with any of these choices—to publish or not to publish. But making those decisions is the responsibility that falls to editors—to publish or not to publish. But making those decisions is the responsibility that falls to editors, a corollary to the great gift of our independence. It is not a responsibility we take lightly. And it is not one that we can surrender to the government.

id.


Id. 99. Baquet & Keller, supra note 89. Baquet and Keller note that in the past few years they have each withheld or delayed an article when Federal Officials convinced them that the risk of publication outweighed the benefits. Similarly, the New York Times withheld the article on telephone eavesdropping for more than a year “until editors felt that further reporting had whittled away the administration’s case for secrecy.” Id. The paper further maintains that it did not publish articles that “might have jeopardized efforts to protect vulnerable stockpiles of nuclear material and articles about highly sensitive counterterrorism initiatives that are still in operation.” Id. The Los Angeles Times disclosed that it withheld information about American espionage and surveillance activities in Afghanistan discovered on computer drives purchased by reporters in an Afghan bazaar. Editors there noted one way they dealt with security concerns was “by editing out gratuitous detail that lends little to public understanding but might be useful to the targets of surveillance.” Id. An additional example of this situation was the Washington Post’s agreement—made at the Bush Administration’s request—not to name the specific countries that had secret Central Intelligence Agency prisons. Id.

100. Id. Keller recently discussed the New York Times’ decision to publish the diplomatic cables obtained by WikiLeaks. He pointed out that the Times made its decision about what cables to publish independently of WikiLeaks’ own publication decisions. See Bill Keller, A Note to Readers: The Decision to Publish Diplomatic Documents, N.Y. Times, Nov. 29, 2010, at A10. He further noted that

[t]he Times has taken care to exclude, in its articles and in supplementary material, in print and online, information that would endanger confidential informants or compromise national security. The Times’ redactions were shared with other news organizations and communicated to WikiLeaks, in the hope that they would similarly edit the documents they planned to post online.

Id. Editors at the Times next sent to Obama Administration officials the documents they planned to post to “invite[c] them to challenge publication of any information that, in the official view, would harm the national interest.” The Administration officials, after “making clear that they condemn the publication of secret material,” suggested additional redactions, some of which were made. Keller also discussed how editors attempted to balance concern for national security with the paper’s mission to report the news:
Schoenfeld, the senior editor of Commentary, espouses a different view about the responsibility of the media with respect to government secrets in "the life-and-death area of national security."\textsuperscript{101} Schoenfeld takes as his starting point the New York Times’ disclosure of the National Security Agency’s domestic surveillance program, and maintains that "there is a well-founded principle that newspapers do not carry a shield that automatically allows them to publish whatever they wish," and further that, "the press can and should be held to account for publishing military secrets in wartime."\textsuperscript{102} However, as Schoenfeld notes, "[i]t is hardly surprising that, over the decades, successful prosecution of the recipients and purveyors of leaked secret government information has been as rare as leaks of such information have become abundant."\textsuperscript{103} But, legality aside, Schoenfeld raises the question of "whether, in the aftermath of September 11, we as a

The question of dealing with classified information is rarely easy, and never to be taken lightly. Editors try to balance the value of the material to public understanding against potential dangers to the national interest. As a general rule, we withhold secret information that would expose confidential sources to reprisals or that would reveal operational intelligence that might be useful to adversaries in war. We excise material that might lead terrorists to unsecured weapons material, compromise intelligence-gathering programs aimed at hostile countries, or disclose information about the capabilities of American weapons that could be helpful to an enemy. On the other hand, we are less likely to censor candid remarks simply because they might cause a diplomatic controversy or embarrass officials.

\textit{Id.}

101. Schoenfeld, \textit{supra} note 86, at 23.
103. \textit{Id.} at 24. As discussed \textit{supra} notes 67–73 and accompanying text, the disclosure of information that the government wishes to keep secret on national security grounds can only be prohibited where the government makes a strong showing that the disclosure of the information would cause "direct, immediate and irreparable damage" to a particular national security interest. The disclosure of the National Security Agency’s domestic surveillance program does not meet this exacting test, and so is constitutionally protected. There is no question that the government may constitutionally impose sanctions—including criminal prosecution—on government employees who leak information because the employee cannot successfully assert a First Amendment right to violate the oath of secrecy. \textit{See United States v. Morison, 844 F.2d 1057} (4th Cir. 1988). Morison was employed at the Naval Intelligence Support Center and had a Top Secret security clearance. In connection with his security clearance, he had signed a non-disclosure agreement. He had also been doing work for \textit{Jane’s Fighting Ships}, an English publication providing current information on naval operations internationally. He took certain secure satellite photographs of a Soviet aircraft carrier under construction in a Black Sea naval shipyard and sent them to \textit{Jane’s}. Morison was convicted under the Espionage Act, \textit{18 U.S.C. §§ 641, 793(d)(e)}, for transmitting secret documents to "one not entitled to receive them." \textit{Morison, 844 F.2d} at 1060. The court summarily
nation can afford to permit the reporters and editors of a great newspaper to become the unelected authority that determines for us all what is a legitimate secret and what is not."\textsuperscript{104} Carried to its logical conclusion, Schoenfeld's position is that the media should not be publishing military secrets in wartime.\textsuperscript{105}

Obviously, many media organizations disagree with that position, and as we have seen, they frequently publish what Schoenfeld calls "government secrets in wartime."\textsuperscript{106} For better or worse, because of the strength of the First Amendment in the American constitutional system,\textsuperscript{107} only the media can decide

rejected his claim that the First Amendment protected the transmittal. \textit{Id.} at 1068.

It may also be assumed that if members of the media played some role in the illegal acquisition of the leaked material, as where a reporter or editor conspired with or paid the government employee to provide the media with the material, that non-governmental person could be prosecuted for its actions along with the government employee. \textit{See} Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that where members of the media played no role in the illegal interception of a telephone conversation, media outlets could not be prosecuted for publishing the illegally intercepted information). The Court made it clear that if members of the media had engaged in illegal conduct, it could be prosecuted for engaging in that conduct. \textit{Id.} at 528.

The United States government has thus far been unsuccessful in its efforts to show that Julian Assange, the founder of WikiLeaks, actively solicited or was otherwise involved in the leaks. \textit{See} Charlie Savage, \textit{U.S. Prosecutors, Weighing WikiLeaks Charges, Hit the Law Books}, N.Y. TIMES, Dec. 8, 2010, at A12. The article notes that

\textit{[i]f Mr. Assange did collaborate in the original disclosure, then prosecutors could charge him with conspiracy in the underlying leak, skirting the question of whether the subsequent publication of the documents constituted a separate criminal offense. But while investigators have looked for such evidence, there is no public sign suggesting that they have found any.}

\textit{Id.} \textsuperscript{104} Schoenfeld, \textit{supra} note 86, at 31.

\textsuperscript{105} \textit{Id.} Again, it must be noted that Schoenfeld's position does not account for the Constitutional concerns about government censorship. Further, the argument does not define what a "military secret" is. Schoenfeld develops this position more strongly elsewhere. \textit{See} Schoenfeld, \textit{supra} note 79, at 248–75. He concludes: ":[T]he conduct of the press today raises the question posed by James Schlesinger of whether the free society built by the Founders can defend itself, and not only from external dangers but also from those who would subvert democracy by placing themselves above the law." \textit{Id.} The book discusses in great detail past and contemporary disclosure of "necessary secrets" by the media and disaffected government officials. Notwithstanding the author's strong advocacy of his position, the book is a valuable resource for understanding this highly controversial subject in all of its aspects.

\textsuperscript{106} Schoenfeld, \textit{supra} note 86, at 24.

\textsuperscript{107} \textit{See} Sedler, \textit{supra} note 2 (discussing the strength of the First Amendment in the American constitutional system).
whether to publish government secrets in wartime. If the media’s publication of government secrets in wartime somehow impedes the government in its war on terrorism, this is the price that we have chosen to pay for living under a constitutional system in which the value of freedom of expression takes precedence over other values, including the value of national security. The positive side of the equation is that the government cannot operate in secret, that its actions are subject to public scrutiny and criticism, and that the pressure of public opinion, sometimes manifested in Congressional action, may force a change in government policy. For example, in the wake of public criticism following the media disclosure of the National Security Agency’s domestic surveillance program, the Bush Administration announced that in the future, it would seek warrants for such surveillance from the Foreign Intelligence Surveillance Court. In addition, Congress made legislative changes that actually expanded the authority of the government to seek warrants for such surveillance. The public debate over surveillance of communications directed toward American citizens—and indeed the public debate over all governmental activities in the war on terrorism—is the result of the media’s relentless disclosure of those activities and is in the best traditions of the First Amendment. And in the midst of all the controversy over the Internet leak of some 91,000 classified documents on the Afghanistan war and 250,000 American diplomatic cables by WikiLeaks, it cannot be doubted that the disclosure of those documents made the American public exponentially more informed about the many facets of American involvement in Afghanistan and about the numerous issues of American foreign policy reflected in the once-secret diplomatic cables.


109. See Scott Shane, Senate Panel to See Papers on Agency’s Eavesdropping, N.Y. TIMES, Oct. 26, 2007, at A22. The law embodying these changes, however, was only effective for six months. In connection with the Congressional debate over reauthorization, the White House agreed to share secret documents of the National Security Agency’s domestic surveillance program with the Senate Judiciary Committee. Id.

But, in some circumstances, the media has concluded that it is in the public interest to exercise its editorial discretion to withhold or delay the publication of particular information on the ground that the disclosure of this information will be harmful to national security. Here too, when the media puts the public interest in national security above the public interest in disclosure of the information, the media likewise is acting in the best traditions of the First Amendment. For in the American constitutional system, the essential values of the First Amendment require that the media, and not the government, make the determination whether the public interest is better served by the disclosure of particular information or by the withholding of that information.  

111. See generally Keller, supra note 100, at A10; Bill Keller, Dealing With Assange and the WikiLeaks Secrets, N.Y. Times, Jan. 30, 2011, at MM32 (“A free press in a democracy can be messy. But the alternative is to give the government a veto over what citizens are allowed to know.”). The question of whether the public interest is better served by the disclosure of the particular information or by the withholding of that information has clearly come to the fore with respect to the disclosure of the leaked WikiLeaks classified documents and diplomatic cables. In explaining the decision of the New York Times to publish the
IV. Conclusion

In this Article I have approached self-censorship in terms of "self-censorship bad" and "self-censorship good." I have explained how the principles, doctrines, and precedents of what I have referred to as the "law of the First Amendment" are designed to prevent "self-censorship bad" due to the fear of governmental sanctions against expression.

In this connection I have discussed the chilling effect concept, the narrow specificity principle, the overbreadth doctrine, the New York Times rule, and the use of the chilling effect concept as the basis for invalidating the regulation of expression. The result of the Court's use of the chilling effect concept and the principle, doctrines, and precedents derived from that concept has been to advance the public interest in the dissemination of information and ideas, and so to strongly implement the values of the First Amendment.

At the same time, I have explained how the First Amendment right to silence serves as the basis for the media's exercise of its editorial discretion to make the determination that it is in the public interest for it to refuse to disclose information in its position. When it makes that determination, it has concluded that in the circumstances presented, other values, such as a concern for an individual's privacy or a concern for national security, outweigh the public's interest in obtaining that information. I have illustrated the media's application of editorial discretion by the refusal of the media to disclose the identity of rape victims and by its refusal to disclose certain information that it concludes will be harmful to the national security. I have explained that under the law of the First Amendment, the government cannot constitutionally prohibit the media from disclosing the identity of rape victims or from disclosing information that the government considers harmful to national security. The decision to dis-
close or not to disclose in both instances is a decision that under the First Amendment is for the media and the media alone to make.

In the final analysis, then, we rely on the strong protections of the First Amendment to prevent "self-censorship bad" and on the First Amendment rights of the media to bring about "self-censorship good." It is the First Amendment and the values that the First Amendment seeks to promote that determine the nature of self-censorship in American society.