SELF HELP, THE MEDIA AND THE FIRST AMENDMENT

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I. INTRODUCTION

In 1973, Harry Kalven observed that:

> It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism.[1]

Since Kalven wrote over thirty years ago, the role of self help in the development of First Amendment jurisprudence has continued to be little noticed and rarely invoked in any explicit way.

By self help, I mean, broadly stated, the primacy of individual choice or action—as opposed to government fiat—in defining the reach of the First Amendment. Such action can manifest itself in different ways. As Kalven observed, one strain of self help is resistance through counter-speech to expression that the individual finds noxious, harmful or otherwise lacking merit. This is not the only form self help can take, however. At the core of the First Amendment is the ideal of a citizen who makes up her own mind as to how to inform herself, what to believe, and how—and even whether—to express that belief. And, however one chooses to respond to ideas or expression, there is the

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1. Harry Kalven, Jr., *If This Be Asymmetry, Make the Most of It!*, CENTER MAG., May/June 1973, at 36, 36. Interestingly, the short article was written as a response to the "able, gracious, and sometime beleaguered defender of the Administration," Antonin Scalia who was arguing in favor of the restoration of "adversary balance between the government and the press." *Id.*

question of the individual's obligation to avoid exposure to that which is deemed offensive instead of seeking state protection.

In Part II of this Article, I examine briefly some of the underpinnings of self help as a value central to the First Amendment, and how that value has manifested itself in the case law. Then, in Part III, I consider how self help values might better inform how to deal with several media problems of current interest. In particular, I examine the Federal Communications Commission's (the "FCC" or the "Commission") renewed interest in indecency regulation of television broadcasting, issues surrounding recent attempts to compel journalists to identify their confidential sources, and the use of hidden recording devices in investigative journalism.

My observations, particularly in Part III, are not offered as a definitive or comprehensive examination of the subjects addressed. Nor do I intend to suggest that self help is a means for resolving all First Amendment problems. Rather, my intent is to address one important First Amendment value—one that has been, in Kalven's words, insufficiently noticed—and to offer some thoughts on how it might better be incorporated into the development of doctrine related to the media.

II. SELF HELP AND THE FIRST AMENDMENT

A. The Underpinnings of Self Help

Self help is a concept that asserts itself throughout the law. The right of self defense may mitigate application of the criminal laws.[2] Self help can override the law of trespass or conversion in cases of necessity.[3] It can be a prerequisite for invocation of a legal claim.[4] In most areas of legal doctrine, however, self help represents one of a number of available legislative or judicial policy choices governed by an analysis of the underlying costs and benefits of approaching a problem in a particular way.[5]

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2. *See, e.g.*, MODEL PENAL CODE § 3.04(1) (1962).

3. *See, e.g.*, Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 221-22 (Minn. 1910).

4. *See* CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1023 (S.D. Ohio 1997).

5. *See* Henry E. Smith, *Self-Help and the Nature of Property* 19 (Am. Law & Econ. Ass'n Annual Meetings, Working Paper No. 18, 2005), *available at* http://law.bepress.com/alea/15th/art18 ("The law's various approaches to self-help reflect the costs and benefits of delineating entitlements.").

The role of self help as a defining First Amendment value is quite different. It represents more than one possible option to be weighed equally against others.

In First Amendment terms, self help is a means to an end. It does not tell us why free speech is so important and needs to be specially protected as it is by the First Amendment,[6] but it does tell us something about when and how expression should be insulated from government control. Self help is often central to realizing the kinds of benefits that free speech is viewed as conferring on society.

It is not self-evident that, in providing for a system of free expression, self help must occupy such a dominant or exclusive role in regulation of the idea marketplace. The European Convention on Human Rights, for example, envisions a system that involves a more explicit compromise between individual action and government regulation.[7] Professor Jerome Barron has written eloquently about how government involvement in guaranteeing access to communications channels can actually benefit free expression.[8] Justice Stephen Breyer has recently advocated an approach to the regulation of expression that often is far more solicitous of government involvement.[9]

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6. The scholarly literature on the justifications for protecting expression is extensive. Excellent critical summaries of the various rationales can be found in FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-72 (1982) and Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

7. Clause 1 of Article 10 of the European Convention provides that "[e]veryone has the right to freedom of expression," and then, in the immediately following clause 2, the Convention qualifies that right, providing that "[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

8. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

9. *See* STEPHEN BREYER, ACTIVE LIBERTY 15-55 (2005). Justice Breyer identifies two forms of liberty: "Active Liberty" which involves the "sharing of a nation's sovereign authority" among the citizens, *id.* at 4, and "Modern Liberty" meaning freedom from government, *id*. at 5. He views the First Amendment as designed to protect each form of liberty. Thus, where the government acts in ways that he perceives are designed to promote participatory self government—campaign finance reform, for example—Justice Breyer would accord the government greater regulatory latitude. *Id.* at 40-50. Similarly, where a particular kind of expression does not directly contribute to participatory self government, he would also accord the government more latitude—an example is much of the regulation of commercial speech. *See id.* at 42, 53-54. In terms of the issues addressed in this Article, one might surmise that Justice Breyer would be sympathetic to reporter's privilege claims,

Yet, notwithstanding all this, the primacy of individual choice—the preference for self help—remains at the core of our First Amendment jurisprudence. In authoring what are probably the two most influential opinions in the development of modern First Amendment doctrine, Justices Oliver Wendell Holmes[10] and Louis Brandeis[11] envisioned a self-regulating speech marketplace insulated from government interference in all but the most extreme cases. For Holmes, self help was the best way for truth to emerge from the cacophony of ideas.[12] For Brandeis, self-regulating speech was the path to development of the kind of citizen necessary to sustain a vibrant, adaptive democracy.[13]

Self help serves other speech values as well. For example, if one accepts that an important function of free speech is to serve as a check on the abuse of government power,[14] then placing the responsibility for regulating expression largely in the hands of the individual is the only realistic way of accomplishing that goal.[15]

The continuing appeal of self help as a value at the core of First Amendment theory has most recently been articulated by Professor Vincent Blasi, from whom I quote at some length:

> [A] culture that prizes and protects expressive liberty nurtures in its members certain character traits such as inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil. Such character traits are valuable, so the argument goes, not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political. This claim plausibly can be said to form the spine of each

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as they are quite closely aligned with providing the tools necessary for democratic decision-making, but less so to limiting the government's ability to regulate broadcast indecency, which one can at least argue often involves matters somewhat removed from core self-governance. Some of Justice Breyer's recent opinions are at least suggestive of the latter point regarding indecency. *See* Ashcroft v. ACLU, 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737-52 (1996) (plurality opinion).

10. *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

11. *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

12. *Abrams*, 250 U.S. at 630.

13. *See Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 686 (1988) ("To Brandeis, as to Jefferson, the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens.").

14. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 [hereinafter Blasi, *Checking Value*].

15. *See* Greenawalt, *supra* note 6, at 142-43.

> of the renowned defenses of free speech produced by John Milton, John Stuart Mill, Oliver Wendell Holmes, and Louis Brandeis.[16]

Professor Blasi's premise provides a compelling justification for emphasizing self help in defining First Amendment doctrine. If we accept that building the kind of character traits Professor Blasi describes is central to the First Amendment, the importance of self help seems relatively obvious. By requiring that individuals fight back against noxious expression, do we not promote the development of the kind of self-motivating citizen so central to our form of government? By telling citizens that their remedy for expression they find offensive is to turn away, do we not foster qualities of perseverance and the "courage to confront evil"? By refusing to allow the government to interfere unduly with the individual's ability to inform herself, do we not promote inquisitiveness, introspection, and judgment?

Thus, unlike other legal doctrines where self help is simply one of a variety of options to be evaluated in a particular context, First Amendment self help is a necessary corollary to realizing the benefits of free speech. And, unless reliance on self help is likely to lead to serious, demonstrable harm, the First Amendment demands—or at least it should demand—that it be the preferred approach to regulation of the speech marketplace.

Nonetheless, while there are notable exceptions, explicit references to self help do not often find their way into actual doctrine. And, even where they do, the self help function has at times been unduly discounted. I turn then, first, to the various forms of self help that have been recognized, even if not always explicitly, and second, to how these concepts might better be incorporated into several media problems.

B. The Forms of Self Help

Self help has influenced development of First Amendment doctrine in two distinct contexts. First, there are the cases where the government takes some action that interferes with what I call deliberative self help—the right of individuals to inform and express themselves as they see fit. In these cases, the First Amendment acts as a sort of free trade agreement, protecting the self-regulatory character of the idea marketplace. Second, there are the cases where individual self help is advanced as an alternative to government regulation designed to prevent

16. Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569 (1999) (citations omitted) [hereinafter Blasi, *Free Speech*].

some harm caused by expression. Here, in effect, individuals are told that the government cannot interfere with free market forces and that their remedy is to take action themselves to avoid or mitigate the harm they perceive.

1. Government Interference with the Deliberative Self Help Process

Deliberative self help revolves around the ideal that society will ultimately benefit by leaving individuals free to inform and express themselves largely as they see fit. This kind of self help is in one sense aspirational; although informing oneself on public issues can fairly be characterized as an obligation of good citizenship,[17] it is an obligation that is enforced not by government decree, but only by individual action. It is largely left to individuals to help themselves become informed by deciding what information to avail themselves of and how, and whether to incorporate that information in their own personal system of beliefs.[18]

This does not mean, however, that deliberative self help is legally inert. The aspiration that individuals help themselves become informed citizens may translate in constitutional doctrine where the government acts in ways that potentially interfere with their freedom to do so. Most commonly the government does this when it seeks to game the system by intervening in the deliberative process to promote a particular message or value.[19]

The interference may be direct, as where the state requires that individuals actually express a particular sentiment—for example, love of country in the requirement that students recite the Pledge of Allegiance.[20] Or, the interference may be slightly more oblique, as where the government seeks to limit or influence the range of information available to individuals. As recognized in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*:[21] "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."[22]

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17. *See Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("[T]he greatest menace to freedom is an inert people . . . [and] public discussion is a political duty . . . .").

18. *See* Wooley v. Maynard, 430 U.S. 705, 707-08 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).

19. *See infra* notes 23, 121-24, and accompanying text.

20. *See Barnette*, 319 U.S. at 628-29; *Wooley*, 430 U.S. at 707 (requirement that drivers exhibit license plates bearing the state motto).

21. 475 U.S. 1 (1986).

22. *Id.* at 8.

One manifestation of interference with access to information can be found in the continuing evolution of commercial speech doctrine where paternalistic regulations by government designed to influence people's behavior by keeping them in the dark about a particular subject have consistently been rejected as incompatible with deliberative freedom.[23] Alternatively, the government may seek to promote the dissemination of particular categories of information or points of view by mandating their distribution by a particular class of speaker.[24]

The relationship of information access to deliberative self help was central to the decision in *Miami Herald Publishing Co. v. Tornillo*, which arose out of a Florida statute affording political candidates a right of reply to newspaper editorials attacking their personal character.[25] What is particularly interesting about *Tornillo* is that both sides seemed to rely on elements of the deliberative self help principle to support their positions.

At the heart of the *Tornillo* debate was the idea that people's ability to deliberate effectively about the issues of the day requires access to relevant information.[26] The proponents of the right of reply statute[27] argued that media dominance over the effective channels of communication and the increasing concentration of press ownership required that media channels be opened up to segments of the public in order to ensure access to a full range of information on important subjects.[28] Because the media so dominate the channels of information distribution, it was argued,[29] individuals were no longer able effectively to participate in an important part of the deliberative self help process—the dissemination of information to the general public—without some

23. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497-98 (1996).

24. *See generally, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (reasoning that inclusion of gay rights group in parade not required since the parade's organizer, the speaker, did not wish to convey that group's message); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986) (holding that carriage of third-party newsletters in utility billing envelopes burdened First Amendment rights where the appellant disagreed with the message conveyed).

25. 418 U.S. 241 (1974).

26. As James Madison famously remarked: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910)).

27. Counsel of record was Jerome Barron in whose honor the symposium for which this Article was prepared was held. *See Tornillo*, 418 U.S. at 242.

28. *See id.* at 247-50. *See generally* Barron, *supra* note 8.

29. *See Tornillo*, 418 U.S. at 248-50.

government assistance.[30] The Supreme Court (and the opponents of the statute) did not necessarily take issue with the importance access to an array of information plays in the First Amendment self help scheme, but instead emphasized that by favoring one speaker over another, the statute could skew the deliberative self help process and would, thus, conflict with another relevant constitutional value—government non-interference.[31] In Part III.B, I address how deliberative self help might inform the debate over another access issue—reporter's privilege to protect confidential sources—where such a values conflict does not exist.

2. Self Help as an Alternative to Regulation

The second form of self help comes into play when the government seeks to protect individuals from some kind of harm that may result from expression. The harm may be moral outrage, an invasion of privacy or injury to reputation, and the government may seek to regulate directly—through criminal prohibition for example—or indirectly by providing an aggrieved party with a civil remedy for damages. In either case, self help has at times interposed itself as an alternative to government regulation or litigation. Self help may take the form of simply avoiding harmful speech or it may require that individuals actively resist potential harm by opposing noxious expression with counter-speech. The self help alternative may be exclusive—that is, self help may supersede any government remedy—or it may be partial—replacing the remedy in some, but not all, cases. The degree to which self help—whether in the form of avoidance or resistance—is interposed has depended on two complementary considerations: how effective self help is likely to be in ameliorating the harm and how deserving of protection a class of speakers is deemed to be.

a. Avoidance

The classic judicial formulation of the role of self help in avoiding noxious or distasteful expression was articulated by Justice Harlan in his

30. *Id.* at 250 ("In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.").

31. *See id.* at 256-58 ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'") (citation omitted); Brief of Appellant at 12-13, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (No. 73-797). Compelled media access has met with some success in the context of broadcast media regulation which may be subject to special considerations. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969). *But see* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973).

opinion in *Cohen v. California*,[32] requiring those likely to be offended by Mr. Cohen's epithet laden jacket to help themselves "simply by averting their eyes."[33] The avoidance rationale is the most well developed and explicitly recognized form of self help in First Amendment doctrine, having been applied in a variety of circumstances.

Averting their eyes was the remedy for those offended by an American flag with a peace symbol affixed to it which was hung out of a dormitory window.[34] Similarly, those offended by nudity visible on a drive-in movie screen were told simply not to look.[35] The seemingly strong preference for avoidance self help over government regulation of speech considered to be offensive to cultural norms[36] was strongly articulated by the Court in *Erznoznik v. Jacksonville*:[37]

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.[38]

With respect to the media, however, the Supreme Court has been inconsistent in incorporating self help in the form of avoidance. Self help was rejected as an effective alternative by the Supreme Court in *FCC v. Pacifica Foundation*,[39] which upheld the Commission's indecency regulation of broadcast radio containing profanity, notwithstanding the obvious social message underlying George Carlin's seven dirty words monologue.[40] In doing so, the Court relied in part on a perception that broadcasting intruded into the home,[41] where people are

32. 403 U.S. 15 (1971).

33. *Id.* at 21.

34. *See* Spence v. Washington, 418 U.S. 405, 405, 412 (1974).

35. *See* Erznoznik v. Jacksonville, 422 U.S. 205, 206, 212 (1975).

36. By offensive speech I mean to distinguish expression that causes purely psychic harm to one's social or cultural sensibilities and that which causes more measurable and serious harm, such as the outbreak of violence or injury to a relational interest. *See, e.g.*, *Cohen*, 403 U.S. at 17; RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 48-50 (1992).

37. 422 U.S. 205 (1975).

38. *Id.* at 209 (citations omitted).

39. 438 U.S. 726 (1978).

40. *Id.* at 748-51.

41. *Id.* at 748. Of course, the exposure to the offensive speech in *Pacifica* did not occur in the home at all. Carlin's routine was heard while a father was driving with his son. *Id.* at 730. In this respect, then, the case does not differ materially from, for example, a person by chance encountering nude images while driving past an outdoor movie screen, which was the subject of *Erznoznik*.

most deserving of protection, and that avoidance would be ineffective to prevent the intrusion:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.[42]

In minimizing the importance of avoidance self help by rejecting the notion that one need not endure any exposure to such material, the Court applied a standard that differed significantly from that used in its earlier decisions, which did, in fact, require that one exposed to offensive speech endure the proverbial first blow.[43]

More recently, however, in a series of cases involving telephones, cable television, and the Internet, the Court seems to have rediscovered self help as an alternative to regulation of electronic media.[44] It observed: "What the Constitution says is that these judgments [whether speech is indecent] are for the individual to make, not for Government to decree, even with the mandate or approval of a majority."[45]

In swinging the pendulum back towards the earlier self help cases, the Court relied principally on advances in technology that facilitate avoidance, and in so doing may well have undermined at least some of the vitality of *Pacifica* as supporting the kind of broad-based application of indecency regulation that is currently being advanced by Congress and the FCC. I turn to that subject in Part III.A. Also, in Part III.C, I consider how the avoidance rationale might influence the legal debate over an increasingly popular tool of investigative journalism—the use of hidden recording devices.

b. Resistance

Although counter-speech as an integral part of First Amendment theory has an unassailable pedigree,[46] it has not often found its way in any explicit sense into actual constitutional doctrine. The one clear

42. *Id.* at 748-49.

43. *See Erznoznik*, 422 U.S. at 210-11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

44. *See* Ashcroft v. ACLU, 542 U.S. 656 (2004) (Internet); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (cable television); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (telephones).

45. *Playboy Entm't*, 529 U.S. at 818.

46. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

exception to this is the constitutionalization of defamation law. In *Gertz v. Robert Welch, Inc.*,[47] the Court expressly required resort to self help in the form of counter-speech as a partial alternative to civil actions for libel:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[48]

Arguably, the Court has extended this self help principle to other forms of action as well, through its incorporation of the defamation standards, although it has not explicitly relied on the self help component in doing so.[49]

In advancing self help as a required alternative to litigation in those cases where defamed parties are unable to satisfy the relatively demanding constitutional burdens placed on them to prevail in a libel case,[50] the Court recognized that self help is not a perfect solution. Nonetheless, even though counter-speech is unlikely to remedy all of the harm caused by defamation in any given case,[51] the Court required it as the primary means of redress in a broad category of cases.

In this respect, the Court's rationale has come under severe criticism in some quarters, most articulately by David Anderson who argued that the inability of counter-speech to remedy the harm that libel can cause makes it unsuited as an alternative to a civil action for

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47. 418 U.S. 323 (1974).

48. *Id.* at 344. It is interesting to note that the Court's express reliance on counter-speech in *Gertz* was not supported by citation to any other authority.

49. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (intentional infliction of emotional distress); Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974) (false light invasion of privacy). Some lower courts have extended the standard to Right of Publicity and Lanham Act claims. *See, e.g.*, Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001).

50. *Gertz* established a distinction between public figures and officials, on the one hand, and private figures, on the other. In order to win a defamation case, the former must demonstrate that the libel was published with knowledge that it was false or in reckless disregard for the truth. *Gertz*, 418 U.S. at 340-42. Private figures need only demonstrate a negligent failure to discover the truth. *See id.* at 345-46.

51. Justice Powell observed that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.* at 344 n.9.

damages.[52] However, since Anderson wrote fifteen years ago, there has been something of a sea change in how we communicate. What was several years ago referred to as the coming information superhighway has become a reality with the almost universal availability of high speed internet connections and the rise of blogs and other means of digital communication as a significant player in the marketplace of ideas. This democratization of communication has provided ordinary individuals with a far greater ability to disseminate their messages, and in some ways has diluted the overarching dominance of traditional media which Professor Barron warned of in his 1967 article discussing the need for broader access to media channels of communication.[53] In the last several years, we have seen the ability of individuals acting collectively or alone to influence the media in ways that several years ago would have been almost unimaginable. Perhaps the most powerful example of this was the way in which bloggers virtually forced CBS News to confront problems with its reporting on President George W. Bush's National Guard service, leading to the retraction of the report, the firing of an award winning producer among others, and the ultimate resignation of Dan Rather as the *CBS Evening News* anchor.[54] In Part III.A, I explore how a more egalitarian communications market might affect the relevance of self help to the ongoing battle over indecency regulation of television broadcasting.

III. SELF HELP AND THE MEDIA

A. Indecency

In sustaining the FCC's power to regulate indecency in *Pacifica*, the Court emphasized the "narrowness" of its holding.[55] The limits of *Pacifica* were further underscored by Justice Powell's concurrence.[56]

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52. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 526-30 (1991). *But see* Note, *The Editorial Function and the* Gertz *Public Figure Standard*, 87 YALE L.J. 1723, 1747 (1978). As Professor Blasi observed, the degree to which one is willing to rely on self help in these kinds of cases "depends heavily on one's faith or lack thereof in corrective dynamics." Blasi, *Free Speech*, *supra* note 16, at 1580.

53. *See* Barron, *supra* note 8, at 1644-47.

54. *See, e.g.*, Corey Pein, *Blog-Gate*, COLUM. JOURNALISM REV. Jan.-Feb. 2005, at 30, 31, *available at* http://www.cjr.org/issues/2005/1/pein-blog.asp.

55. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

56. Justice Powell's vote was necessary for a majority, a fact which may give his opinion special weight. *Compare* McKoy v. North Carolina, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., dissenting) (explaining that where an individual Justice is needed for a majority, "the opinion is *not* a majority opinion except to the extent that it accords with his views"), *with id.* at 448 n.3

That opinion rested on a view of the decision as conducive to the "orderly development of this relatively new and difficult area of law,"[57] gave more credence to the potential importance of self help in such cases than did the majority,[58] and assumed that, in regulating, the FCC "may be expected to proceed cautiously, as it has in the past."[59]

For many years following *Pacifica*, regulators did, in fact, proceed cautiously.[60] Although there were exceptions to this overall restraint,[61] and over the years, notions of indecency have been broadened beyond the narrow context presented in *Pacifica*,[62] overall concepts of indecency were applied in ways that minimized interference with the creative and editorial prerogatives of broadcasters.[63]

In 2003, this began to change—quickly and dramatically. The change began with a stand-alone forfeiture proceeding, which the Commission used to announce a new "serious" violation standard. The new standard would result in license revocation proceedings and an intention to impose compound forfeitures for multiple utterances in a single program.[64] Shortly thereafter, the fires of indecency enforcement were fanned by a few notorious incidents—in particular Janet Jackson's now infamous wardrobe malfunction at the 2004 Super Bowl[65] and Bono's use of the phrase "fucking brilliant" in accepting a Golden Globe

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(Blackmun, J., concurring) ("[T]he meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative.").

57. *Pacifica*, 438 U.S. at 756 (Powell, J., concurring).

58. Justice Powell was particularly concerned about the absence of any ability of parents to limit exposure of children to such material. *See id.* at 757-59. He also reasoned that "[a]lthough the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, a different order of values obtains in the home." *Id.* at 759 (citations omitted).

59. *Id.* at 761-62 n.4 (Brennan, J., dissenting).

60. *See generally* Steven A. Lerman & Jean W. Benz, *Protected Speech in the Deep Freeze—From Caution and Restraint to Regulatory Excess*, MLRC BULL., Mar. 2005, at 1, 10-11 (discussing the FCC's willingness to reject petitions to deny broadcast licenses in the post-*Pacifica* decades).

61. *See, e.g.*, *In re* Citadel Broad. Co., 16 F.C.C.R. 11,839 (2001) (Notice of Apparent Liability that Eminem's popular song *The Real Slim Shady* was indecent); *In re* KBOO Found., 16 F.C.C.R. 10,731 (2001) (Notice of Apparent Liability that song *Your Revolution* by Sarah Jones was indecent). Both decisions were later reversed. *See In re* Citadel Broad. Co., 17 F.C.C.R. 483 (2002); KBOO Found., 18 F.C.C.R. 2472 (2003).

62. *See, e.g.*, Pacifica Radio, 2 F.C.C.R. 2698, 2699 (1987); Infinity Broad. Corp. of Pa., 3 F.C.C.R. 930 (1987); *see also* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

63. *See* Lerman & Benz, *supra* note 60, at 18-22 (discussing the narrow circumstances in which indecency would be regulated in the years following *Pacifica*).

64. *See* Infinity Broad. Operations, Inc., 18 F.C.C.R. 6915, 6919 (2003).

65. Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19,230, 19,231 (2004).

Award[66] Janet Jackson's antics spurred Congress to increase the maximum fines for indecency tenfold, $32,500 per utterance to $325,000.[67] And Bono's indelicate expression of glee over his award resulted in an Omnibus Order by the Commission, which in breathtaking fashion, expanded the range of profanity enforcement, including broadening the definition of profanity and eliminating the longstanding rule against punishing fleeting and isolated utterances.[68] The Commission has also taken other, less dramatic, but still significant steps to put additional teeth in its indecency enforcement,[69] and Congress continues to threaten, thus far without success, to extend indecency regulation beyond broadcasting to cable television.[70] At a time when new technology has placed at our fingertips a greater ability than ever for self regulation of what we and our children watch on television[71] and

66. *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4975-76 (2004) [hereinafter Golden Gold Awards].

67. *See* Nedra Pickler, *Bush Signs Broadcast-Decency Law*, ASSOCIATED PRESS, June 16, 2006, *available at* http://www.firstamendmentcenter.org//news.aspx?id=17026&SearchString=indecency_fines.

68. *See* Golden Globe Awards, 19 F.C.C.R. at 4980-81. Profanity was defined to include "personally reviling epithets naturally tending to provoke violent resentment," "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance," blasphemy, and divine imprecation. *Id.* at 4981, 4981 n.37. As to the fleeting nature of certain utterances, the Commission held that "[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law." *Id.* at 4980. Although the Commission argued that this abandonment of prior law was consistent with *Pacifica*, that conclusion is at least subject to serious question. *Compare id.* at 4982 ("[O]ur decision is not inconsistent with the Supreme Court ruling in *Pacifica*."), *with* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) ("This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction . . . .").

69. The Commission appears to have abandoned its historical practice of requiring that a complaint be supported by full or partial tape or transcript. *See* Emmis Radio License Corp., 17 F.C.C.R. 18,343, 18,345 (2002), *review denied*, 19 F.C.C.R. 6452, 6452 (2004); Infinity Broad. Corp. of L.A., 17 F.C.C.R. 9892, 9895 (2002). It has also moved away from the potential stare decisis effect of prior staff decisions. *See* Entercom Sacramento License, LLC, 19 F.C.C.R. 20,129, 20,135 n.38 (2004). Furthermore, the Commission has suggested a willingness to permit syndicated programming broadcast on one station to be used to establish what aired on another independent station even in the absence of a complaint. *Compare* Eagle Radio, Inc., 9 F.C.C.R. 1294, 1294 (1994) (refusing to investigate a station based on the airing of syndicated programming by another station absent supporting evidence), *with* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 6773, 6774 (2004) (holding six stations liable based on a single complaint against one of the stations).

70. *See generally* Robert Corn-Revere, *Stemming the Tide: Can the FCC's Anti-indecency Crusade Be Extended to Cable Television and Satellite Radio?*, MLRC BULL., Mar. 2005, at 43, 44-48 (discussing proposals to regulate cable and satellite programming).

71. *See generally* KAISER FAMILY FOUND., PARENTS, MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY (2004), *available at* http://www.kff.org/entmedia/7156.cfm (surveying parental concerns regarding indecency, its influences on children's lives, and whether or

see on the Internet,[72] it is at least worth considering what constitutional obligation there is, or should be, to take advantage of these measures and help ourselves by avoiding any offense before seeking government intervention.

As I discuss in Part II.B, *Pacifica* minimized the relevance of avoidance self help in judging whether indecency regulation is consistent with the First Amendment. Unlike earlier avoidance self help cases, which required that one endure at least some passing exposure to offensive expression, the Court rejected the first blow principle because "prior warnings cannot *completely* protect the listener or viewer from unexpected program content."[73] This departure from traditional notions of self help can be justified only if broadcasting was then, and remains today, different from other unregulated media in some way that is constitutionally significant.

It may be that the Court simply decides to allow continued indecency regulation of broadcasting on the theory that the medium has a long history of extensive regulation predicated at least in significant part on historical notions that broadcast frequencies are scarce and that broadcasters hold them in trust for the public.[74] Although the *Pacifica* decision was not predicated, at least explicitly, on the regulated industry model, that model has more recently been advanced as a principal characteristic distinguishing broadcast indecency regulation from similar regulation of the Internet.[75]

While a detailed treatment of the continuing validity of the scarcity and public trust rationales are beyond the scope of this Article, two points merit some mention. First, whatever the continuing viability of those rationales may be, they bear little relation to the reasons that have been advanced in support of indecency regulation, which revolve around the need to protect people, and particularly children, in the privacy of their homes.[76] Second, the traditional broadcasting model largely ignores the reality of how most people now receive television programming.

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not they are utilizing any of the self-regulating mechanisms offered to them by policymakers and the industry to date).

72. *See generally* AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, PROTECTING TEENS ONLINE (2005), *available at* http://www.pewinternet.org/pdfs/PIP_Filters_Report.pdf (considering the impact of the federal Child Online Protection Act (COPA) and increasing use of Internet filters).

73. FCC v. Pacifica Found., 438 U.S. at 748 (emphasis added).

74. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-90 (1969).

75. *See* Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

76. Although the Court in *Pacifica* referred to the more limited First Amendment protection of broadcasters and cited *Red Lion*, it was the considerations discussed in the text above on which it based the analysis. *See Pacifica*, 438 U.S. at 748-50.

About ninety percent of the country receives its television programming through cable or satellite distribution,[77] and those who do not subscribe to cable or satellite could do so if they chose to.[78] In a series of recent decisions, the Court has cast substantial—if not definitive—doubt on whether the kind of indecency regulation applied to broadcast television could be sustained if applied to cable.[79] It is fair to ask, then, whether the continuing regulation of broadcasting alone for indecent programming is sustainable, consistent with self help values that underlie the First Amendment.

My conclusion is that it is not. I reach this view both because I believe that the *Pacifica* rationale was seriously flawed when instituted, and whatever validity it may have had in 1978 has been seriously eroded by intervening advances in technology.

In the context of exposure to offensive speech, the self help obligation has been highest when one ventures into the outside world where they might expect to encounter a diverse range of expression.[80] In such circumstances, the First Amendment places the burden squarely on the individual by requiring that he or she avoid prolonged exposure, even if that might entail absorbing the first blow.[81] In a similar vein, those who have willingly exposed themselves to criticism by entering into a public debate bear greater responsibility to help protect themselves from the consequences of that engagement.[82] On the other hand, we are more willing to permit government intervention to protect relative innocents: those assaulted by unwanted speech in their home where privacy interests are at their apex and those subject to criticism who have not sought the attention.[83]

The Court's decision in *Pacifica* largely assumes the circumstances surrounding indecency regulation present a case where the self help obligation is at its nadir. It treats viewers largely as passive and often

77. *See Satellite TV Penetration up Significantly*, CONSUMERAFFIARS.COM, Aug. 18, 2005, http://www.consumeraffairs.com/news04/2005/jdpower_satellite.html.

78. The fact that it costs money to subscribe would not appear to be a sufficient reason to reject self help. *See* Ashcroft v. ACLU, 542 U.S. 656, 685 (2004) (Breyer, J., dissenting).

79. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812-15 (2000); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 753-60 (1996); *id.* at 782-87 (Kennedy, J., concurring in part and dissenting in part); *id.* at 812-19 (Thomas, J., concurring in part and dissenting in part).

80. *See* Erznoznik v. Jacksonville, 422 U.S. 205, 210-12 (1975) (exposure to drive-in movie screen); Cohen v. California, 403 U.S. 15, 21-22 (1971) (exposure to epithet in public courthouse).

81. *See Erznoznik*, 422 U.S. at 210-11; *Cohen*, 403 U.S. at 21.

82. *See supra* notes 49-51 and accompanying text.

83. *See Erznoznik*, 422 U.S. at 209; Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

unwitting victims who, in the absence of government regulation, would be forced to endure a pervasive stream of epithets and sexually explicit images in their homes.[84] The proposition is difficult to justify for several reasons.

In his dissent in *Pacifica*, Justice Brennan recognized that "an individual voluntarily chooses to admit radio communications into his home."[85] Just as one who enters a public debate must accept that he may be criticized,[86] so too should one who invites broadcasts into their home be required to recognize that they may be exposed to objectionable material. The *Pacifica* majority largely ignored this aspect of the case. Indeed, it cited but a single decision to support its pervasiveness in the home rationale, *Rowan v. United States Post Office Department*,[87] but *Rowan* is a slim reed on which to base a constitutional doctrine; fairly read, the decision actually is more supportive of a rule placing greater self help obligations on viewers, not lesser ones.

Rowan, which concerned a statute requiring direct mail advertisers to stop sending lewd or offensive materials to individuals who notified the postal authority that they no longer wished to receive such material, differs from *Pacifica* in two critical respects. First, the statute that was under consideration in *Rowan* actually promoted individual self help—the offended recipient was encouraged (indeed required) to take action based on his own sensibilities,[88] not those of others, to avoid receiving material in the future. Second, the resistance self help rationale was much weaker in *Rowan* since the material coming into the home truly was unsolicited, unlike television, which is invited in by the purchase of a receiving device and the viewer or listener's action in turning on and tuning the device.

Because indecency regulation does not, at bottom, involve a truly captive or unwitting victim, at a minimum constitutional self help values would support imposing some obligation on the recipient to endure at least a modicum of discomfort, as was endured by those subject to the

84. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). The notion that broadcast television intrudes into the home has been frequently cited as a defining characteristic of why broadcast indecency regulation is constitutionally justifiable. *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 659-60 (D.C. Cir. 1995); Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985) (recognizing *Pacifica*'s holding but noting that it does not apply to the facts of this case because viewers must subscribe to cable television; so that there is no intrusion as there is with broadcast television).

85. *Pacifica*, 438 U.S. at 764 (Brennan, J., dissenting).

86. *See Gertz*, 418 U.S. at 344-45.

87. 397 U.S. 728 (1970).

88. The decision as to what was lewd or offensive was also left up to the individual householder, *id.* at 736, thus further promoting the self help rationale.

offensive expression in other cases. Indeed, in some respects, those forced to view Mr. Cohen's expletive laden jacket were in a better position to complain than the typical television viewer. It is not unreasonable to assume that many of those exposed to Cohen's method of expressing himself in the courthouse were not there as a matter of choice, but rather because they were required to appear for some reason beyond their immediate control. In other words, they were far more captive and unwitting than the recipient of a broadcast signal.

Other than its status as an historically regulated activity, the only other distinction recently offered in support of differential treatment of broadcasters is the perception that viewers or listeners—and in particular children—are more likely to stumble upon offensive material on television than they are with other media, and in particular the Internet.[89] First, that proposition is subject to serious doubt; stumbling on sexually explicit material on the Internet is quite common.[90]

Second, even if one accepts its validity, the proposition does not explain why self help should be completely thrown out of the window. The self help values that operate in the indecency context at the very least support the placement of some serious obligation on viewers to protect themselves even if it entails some fleeting exposure. And, while the ability of one to do so in 1978 may have been somewhat limited, beyond of course turning off the television, today's landscape is far different. Advances in technology and changes in the broadcasting business model have significantly enhanced the ability of viewers and listeners to avoid offense—and for parents to control what their children are exposed to.[91]

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89. *See* Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

90. *See, e.g.*, Russell B. Weekes, *Cyber-Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 VA. J.L. & TECH. 4, ¶ 5 (2003), http://www.vjolt.net/vol8/issue1/v8i1_a04-Weekes.pdf ("Inadvertent exposure occurs on the Internet in a variety of ways: spam e-mails; misaddressed e-mails; unknowingly using search terms with sexual and non-sexual meanings as a key word in an online search; adult sites exploiting common misspellings of innocuous sites; confusion between domain names ('.com,' '.edu,' '.gov,' etc.); instant messages; and even adult sites replacing former children sites when the domain registration expires, to name the most prevalent."); Bella English, *The Secret Life of Boys: Pornography is a Mouse Click Away, and Kids Are Being Exposed to It in Ever-Increasing Numbers*, BOSTON GLOBE, May 12, 2005, at D1 ("Porn-peeping isn't always deliberate. Even if adolescents aren't looking for it, it can easily find them."); Tina Kelley, *Teaching Parents How to Protect Children on Line*, N.Y. TIMES, Aug. 20, 1998, at G3 ("Terri Dowling, an attendee whose 14-year-old son uses the Internet, was amazed by how quickly children can find trouble even when they aren't looking.").

91. Although the ability of parents to control what their children are exposed to is a very important consideration, it is not the only one in this regard, as children may have independent First

"Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[92] Justice Powell observed in his *Pacifica* concurrence that the Court was dealing with a new and difficult medium. What was appropriate almost thirty years ago is not necessarily indicative of what is needed today.[93]

Today those who wish either to avoid exposure to programming they consider offensive—or protect their children from such programming—have an array of tools available to them.[94] Most television sets manufactured since 2000 must be equipped with a V-Chip which allows for screening of individual programs by their ratings.[95] The ninety percent of Americans who get their television from cable or satellite have even more sophisticated options in the form of set top boxes which offer locking and blocking functions for individual channels.[96] VCRs, DVD players, digital video recorders and other

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Amendment interests and obligations as well. As Judge Posner observed in a recent case involving an attempt to ban ultra violent video games:

> Children have First Amendment rights . . . . The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576-77 (7th Cir. 2001).

92. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000). Moreover, in judging the use of technology, "[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time . . . . [A] court should not presume parents, given full information, will fail to act [to supervise their children]." *Id.* at 824.

93. *See* FCC v. Pacifica Found., 438 U.S. 726, 756 (1978) (Powell, J., concurring); *see also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.").

94. *See generally* Adam Thierer, *Parents Have Many Tools to Combat Objectionable Media Content*, Apr. 2006, http://www.ncta.com/DocumentBinary.aspx?id=293 (describing the tools available to parents to restrict or curtail objectionable content).

95. All sets larger than thirteen inches must be equipped with the V-Chip. *See* 47 U.S.C. § 303(x) (2000).

96. *See* Thierer, *supra* note 94, at 3.

devices provide additional market based solutions for controlling what programming comes into the home.[97]

It is undoubtedly true that technology is not a perfect solution to the problem, but, of course, perfection is not—nor should it be—the standard.[98] The question really boils down to where, as a matter of constitutional law, the burden should fall and how demanding it should be. As to the first question, in most spheres of our lives—driving in our car, entering public buildings, watching cable television, surfing the Internet—it has been held to fall either solely or principally on the individual, as the cost to expression of a contrary approach was viewed as too high.[99] The second question—how high to set the self help bar—is somewhat more difficult to answer, although recent case law strongly supports the view that *Pacifica* does not strike the correct accommodation.[100]

As I discuss above, relying in large part on the fact that broadcasting is received in the home, *Pacifica* almost completely subordinated the self help value, suggesting that any means of avoidance would have to "completely" protect against the exposure to offensive speech.[101] More recently, however, in cases involving telephone,[102] cable television,[103] and the Internet,[104] the Court appears to have significantly retreated from that limited view of the role of self help, but at the same time, it has offered the government a small modicum of flexibility. Rather than viewing the self help component as a complete bar to regulation, these decisions view it as a substantial barrier—requiring that the government prove that self help is not a viable less restrictive alternative to a ban on offensive speech.[105] To be sure that burden is considerable, as it should be. The government must demonstrate that self help measures will not be "feasible and effective" to achieve its goals,[106] and the reason for the ineffectiveness must derive from some inherent,

97. *See Playboy Entm't*, 529 U.S. at 821; Thierer, *supra* note 94, at 3.

98. *See* Ashcroft v. ACLU, 542 U.S. 656, 668 (2004); *Playboy Entm't*, 529 U.S. at 824, 826.

99. *See Playboy Entm't*, 529 U.S. at 813 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

100. *See infra* notes 102-07 and accompanying text.

101. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

102. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

103. *See, e.g.*, *Playboy Entm't*, 529 U.S. at 803.

104. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004); Reno v. ACLU, 521 U.S. 844 (1997).

105. That the ban may only be in effect for part of the day does not diminish the First Amendment concerns over such regulation. *See Playboy Entm't*, 529 U.S. at 812. Such reasoning would seem seriously to undermine any attempt to justify broadcast indecency regulation as a mere channeling of such programming into selected day parts. *See Pacifica*, 438 U.S. at 757 (Powell, J., concurring).

106. *Playboy Entm't*, 529 U.S. at 815.

structural limitation in the alternative means, not simply individual choice not to take advantage of self help.[107] Moreover, even proof that the self help alternative is not entirely effective may not "in all cases suffice to support a law restricting the speech in question."[108]

The implications of all this in respect to regulation of broadcast indecency are profound. Before these decisions, *Pacifica* stood alone in the degree to which it subordinated self help as the means for protecting individual sensibilities from speech which was merely offensive. And while it may have been easy to distinguish between being exposed to something distasteful in a public forum (nudity on a drive-in movie screen for example) and in the home, the same can hardly be said of distinguishing broadcast from cable television (or telephones and the Internet for that matter), all of which are used in the home. Nor can the likely exposure of children be the distinguishing factor; children use these other media in the same, or even greater, numbers that they use broadcasting.[109] The only possible distinction is that there is something about the self help alternatives available with respect to broadcasting that is significantly less effective than that which is applicable to other media. And, although the Court in *Playboy Entertainment* suggested precisely that based on an assumption that cable programming may be more subject to effective blocking than broadcasting, that dictum will likely prove difficult to sustain in light of the current realities of the market. As former FCC Chairman Michael Powell has remarked:

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107. *See id.* at 818-19. Moreover, the Court seriously questioned whether the government would have an independent interest in protecting children over and above that of their parents:

> [A] court should not presume parents, given full information, will fail to act. . . .
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> . . . .
>
> Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government's argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established . . . .

Id. at 824-25. In this respect the Court's decision may call into question earlier suggestions in the context of broadcast indecency that the government itself has an independent, compelling interest in protecting children. *See* Action for Children's Television v. FCC, 58 F.3d 654, 661 (D.C. Cir. 1995). Moreover, the government's position here fails to account for Judge Posner's point about the separate First Amendment interests of children. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001).

108. *Playboy Entm't*, 529 U.S. at 815.

109. *See, e.g.*, CNN.com, *Study: 'Digital Divide' Shrinks Among U.S. Kids*, Mar. 20, 2003, *available at* http://www.cnn.com/2003/TECH/internet/03/20/digital.divide.reut/index.html.

> Technology has evaporated any meaningful distinctions among distribution medi[a], making it unsustainable for the courts to segregate broadcasting from other medi[a] for First Amendment purposes. It is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set.[110]

The degree to which we are willing to impose self help as the principal remedy for indecent speech might also be influenced by changes in the communications marketplace regarding the potential effectiveness of counter-speech. As Professor Blasi recognized in his 1999 Nimmer Lecture:

> There are other ways to deal with . . . breaches of public decorum other than by invoking the heavy, slow-moving, clumsy artillery of the law. Informal, nonofficial sanctions and judgments, Milton recognized, will always provide the most important "bonds and ligaments" that hold a society together. . . . [Those] who assault the sensibilities of the public will be reigned in when their tactics cause audiences to recoil and their opponents to succeed in discrediting them.[111]

In terms of First Amendment self help, "nonofficial sanctions" might well include more reliance on counter-speech. *Gertz* at least suggests that where counter-speech is likely to be reasonably effective in mitigating harm, it should be a preferred alternative except in the most extreme cases.[112] In today's increasingly democratized speech marketplace,[113] there is no shortage of organized groups dedicated to monitoring and pressuring television networks and programmers in regard to objectionable content.[114] Anyone wishing to add their voice to a particular issue is but a mouse click away from registering their

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110. Corn-Revere, *supra* note 70, at 43, *quoting* Michael K. Powell, Comm'r, Fed. Commc'ns Comm'n, Remarks at American Bar Association 17th Annual Legal Forum on Communications Law, The Public Interest Standard: A New Regulator's Search for Enlightenment (Apr. 5, 1998). Echoing former Commissioner Powell's observations, a Second Circuit panel recently recognized that the current media landscape makes it "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television." Fox Television Stations, Inc. v. FCC, No. 06-1760-ag(L), 2007 WL 1599032, at *17 (2d Cir. June 4, 2007).

111. Blasi, *Free Speech*, *supra* note 16, at 1580.

112. With defamation law, extreme cases are those where publication is undertaken despite serious doubts about the truth. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-45 (1974).

113. *See supra* notes 53-54 and accompanying text.

114. The most active and aggressive of these groups is Parents Television Council whose web site at http://www.parentstv.org contains a veritable cornucopia of self help information and tools for avoiding and resisting indecency. Morality in Media's web site at http://www.moralityinmedia.org includes suggestions on influencing advertisers and networks. *See generally* Thierer, *supra* note 94, at 4.

dissatisfaction.[115] These groups can aggregate individual complaints to bring substantial pressure on broadcasters and the advertisers who represent their primary revenue streams, both of whom, of course, are dependent on delivery to a mass audience.[116] While it is true that much of the current effort is directed at marshalling complaints to the FCC, were that avenue less available, it is not hard to imagine how they might even more effectively redirect their efforts and bring pressure to bear in other ways.[117] And, when viewed in light of the greater technological means of avoidance now available to consumers, it does not seem normatively unfair to place a greater burden on television viewers to take responsibility for their own viewing habits.[118] Thus, the resistance component of self help at least suggests that we should also ask to what extent the marketplace of ideas will self-correct.[119]

Finally, there is one additional consideration favoring less direct regulation of broadcast content—government support of self help. Even were it limited in its ability to regulate indecent programming, there are other, less constitutionally intrusive, ways that the government might assist the self help process. It could, for example, create programs to encourage the use of self help technology.[120] It could facilitate the

115. Parents Television Council's site has an Action Center and promotes a Google browser add-on that enables individuals to fill out online forms with just one click. Parents Television Council, *Take Action*, http://www.parentstv.org/PTC/takeaction/main.asp (last visited Apr. 5, 2007).

116. For example, in 2006, Parents Television Council claimed success in convincing Mitsubishi to pull its ads from the program *Nip/Tuck*. *See* Parents Television Council, *PTC Commends Mitsubishi Motors for Ending Sponsorship of* Nip/Tuck, Oct. 3, 2006, http://www.parentstv.org/PTC/publications/release/2006/1003.asp. It also convinced a number of companies to withdraw advertising from the program *Rescue Me*. *See* Parents Television Council, Rescue Me *Advertiser & Cable Choice Campaign*, http://www.parentstv.org/PTC/campaigns/rescueme/main.asp (last visited Apr. 5, 2007).

117. Two recent examples illustrate the power of popular self help. In late 2006, Rupert Murdoch's News Corp. was forced to cancel plans to publish a book and air a television interview of a supposedly fictional confession by O.J. Simpson. *See O.J. Simpson Publisher Loses Job*, Dec. 15, 2006, http://money.cnn.com/2006/12/15/news/companies/simpson_publisher/index.htm (last visited July 20, 2007). In April 2007, CBS cancelled Don Imus' popular radio show as the result of adverse public reaction to offensive comments he made about the Rutgers University women's basketball team. *See* Bill Carter & Jacques Steinberg, *Off the Air: The Light Goes Out for Don Imus*, N.Y. TIMES, Apr. 13, 2007, at C1.

118. In other words, following the reasoning in *Gertz*, those who choose to view television are today both less in need of protection and less deserving of it. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

119. *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 229 (1982) ("There is every reason to believe that the marketplace, speaking through advertisers, critics, and self-selection by viewers, provides an adequate substitute for Commission involvement in protecting children and adults from television's 'captive' quality.").

120. *See* Ashcroft v. ACLU, 542 U.S. 656, 669 (2004).

dissemination of counter-speech by sponsoring public forums or public education programs.[121] Or it might even subsidize the creation of family friendly programming or viewing packages.[122] All of this seems to me preferable to the imposition of direct content-based restrictions which often lead figuratively to throwing the baby out with the bath water.

Concrete, real world examples of the bath water principle—known in more formal First Amendment terms as the chilling effect—tend to be elusive. Recently, however, with the new indecency regime, we have seen vividly how vague, punitive regulations designed to protect our sensibilities do, in fact, undermine undeniably valuable expression, and why the concept of a chill continues to have such resonance. In November 2004, sixty-six ABC television affiliates declined to air an unedited Veteran's Day broadcast of the award-winning film *Saving Private Ryan* because it contained numerous expletives uttered by soldiers in the heat of battle, and they feared that the FCC might take punitive action against them.[123] The same program aired on cable television, streamed on the Internet or distributed in virtually any other medium would have raised no serious legal objection—and any attempt to do so would without doubt have been met with powerful First Amendment objections. Whether we are willing to continue to permit a

121. The Court recently recognized that the government has broad authority when disseminating its own speech, either directly or through others. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560-61 (2005); Rust v. Sullivan, 500 U.S. 173 (1991). The degree to which the government might be able to do this consistent with the First Amendment is a complex question beyond the scope of my Article. There are clearly limits to content-based subsidization, and the Court has been divided on where to draw the line. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). Wherever that line might be drawn, subsidization would be constitutionally less suspect than recent calls to mandate that cable systems offer family friendly programming tiers. *See, e.g.*, Parents Television Council, *Cable Consumer Choice Campaign*, *available at* http://www.parentstv.org/PTC/cable/main.asp (last visited Apr. 5, 2007).

122. The government has broad subsidy powers to define programs consistent with its message even in the face of First Amendment claims. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 210-11 (2003) (plurality opinion); *Rust*, 500 U.S. at 194, 199; Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

123. *See* Lerman & Benz, *supra* note 60, at 3; *see also* Steven McElroy, *PBS Censors Itself Again*, N.Y. TIMES, Sept. 23, 2006, at B8. Moreover, the FCC recently recommended that Congress extend its regulatory authority to violent as well as indecent programming, thus potentially raising the stakes in the battle over content control of television programming. *See* Stephen Labaton, *F.C.C. Moves to Restrict TV Violence*, N.Y. TIMES, Apr. 26, 2007, at C1. The Commission is also seeking to extend its authority to the way in which cable television programming is packaged. *Id.* That issue, however, involves different considerations which are beyond the scope of this Article. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

disparate regime to continue in today's broadcasting world is a question that is certainly worth examining—and soon.[124]

B. Access and the Reporter's Privilege

Although the Supreme Court has repeatedly extolled the value of access to diverse sources of information as a corollary to deliberative self help, it has never actually translated that value into a concrete constitutional principle. As I discuss in Part II.A, the Court rejected an affirmative access right to the media in *Tornillo*,[125] and it has similarly refused to create such rights for the media in a series of cases involving access to information about prisons and prisoners.[126] In a related context with the potential to affect the range of information available to the public, the Court has also declined thus far to protect the media from compulsory process designed to force disclosure of confidential sources.[127]

The deliberative self help principle is animated by two subsidiary values—the desirability of access to a diverse array of information and the absence of government interference in the process. As to the first component, it seems almost beyond doubt that effective deliberative self help rests in some meaningful way on access to relevant information.[128] The Court itself has recognized that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

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124. The broadcast networks are currently engaged in litigation against the FCC over its fleeting expletives ruling and Janet Jackson's Super Bowl wardrobe malfunction. *See* Frank Ahrens, *Networks Sue Over Indecency Rulings*, WASH. POST, Apr. 15, 2006, at D1. In the case involving the Commission's abandonment of its fleeting expletives rule, the Second Circuit recently ruled in favor of the networks, holding that the FCC acted arbitrarily in changing how it dealt with such expression. *See* Fox Television Stations, Inc. v. FCC, No. 06-1760-ag (L), 2007 WL 1599032 (2d Cir. June 4, 2007). In dicta, the panel made several observations about the underlying constitutional issues surrounding the Commission's enforcement of its indecency regulations. Particularly relevant to this Article was the court's recognition that the Supreme Court's recent jurisprudence relevant to the subject can be read as strongly supporting the "notional pillar of free speech—namely, choice . . . ." *Id.* at *17. Moreover, the court recognized that technology has "empowered viewers to make their own choices about what they do, and do not, want to see on television" and suggested that this "may obviate the constitutional legitimacy of the FCC's robust oversight." *Id.* at *18.

125. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

126. *See* Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 835 (1974).

127. Branzburg v. Hayes, 408 U.S. 665 (1972).

128. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

public."[129] It also seems beyond serious dispute that the media plays a critical role in the process of widely disseminating a diverse array of information.[130]

Using the access rationale alone as a basis for First Amendment doctrine presents at least two problems. First, it is difficult to discern any limiting principle. In *Tornillo*, for example, why limit access only to political candidates? Aren't there a host of other worthy speakers who might benefit from access to media communication channels?[131] And what about access to government information? Surely, at least from the narrow perspective of facilitating dissemination of information, informed debate would benefit from an interpretation of the First Amendment as a sort of super-Freedom of Information Act. Such a view, of course, has been rejected by the Court.[132]

Second, when used as a sword to compel access—to the media as in *Tornillo* or to other information sources—the access rationale can conflict with the other deliberative self help value—freedom from government interference. Deliberative self help presupposes a speech marketplace in which "a speaker has the autonomy to choose the content of his own message."[133] Government interference in that marketplace may skew the available mix of information.[134] It was these values that won the day in *Tornillo*, but it is not hard to imagine cases where the

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129. Associated Press v. United States, 326 U.S. 1, 20 (1945); *see* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("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.").

130. In *Richmond Newspapers, Inc. v. Virginia*, the Court observed:

> That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media whose representatives "are entitled to the same rights [to attend trials] as the general public."

448 U.S. 555, 577 n.12 (1980) (quoting Estes v. Texas, 381 U.S. 532, 540 (1965)).

131. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.") (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

132. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 828 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974).

133. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

134. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 29 (1986) (Rehnquist, J., dissenting); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

potentially competing values of deliberative self help may line up and support application of the First Amendment to promote access.[135]

One of the principal areas where this is the case is reporter's privilege to protect confidential sources of information, which, of course, has been the subject of intense interest over the last two years with the jailing, or near jailing, of a number of prominent journalists.[136] The Court's only pronouncement on the subject, *Branzburg v. Hay*es,[137] seemed to reject almost categorically the idea that the First Amendment provides journalists with any privilege to withhold the identity of confidential sources in the face of compulsory process (in *Branzburg*—grand jury subpoenas). For many years after the decision, lower courts, both state and federal, staged something of a revolt against *Branzburg*, parsing it in a way that found a privilege, a result seemingly at odds with the relatively clear tenor of the decision.[138] More recently, though, courts have, with increasing frequency, begun to read *Branzburg* more literally, and the current trend has been to reject a constitutional basis for reporter's privilege.[139]

There have been recent attempts to persuade the Court to re-examine *Branzburg*. Thus far they have fallen on deaf ears,[140] but as that effort continues, it seems to me that the deliberative self help principle could help inform the debate.

The debate in *Branzburg* has, to a significant degree, revolved around whether the Press Clause of the First Amendment should provide

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135. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 737, 744 (1996) (plurality opinion) (relying on aspect of deliberative self help to sustain a regulation that restored editorial choice to cable operators).

136. For a general overview of recent clashes between law enforcement and the press, see Special Report, *Reporters and Federal Subpoenas*, Apr. 4, 2007, *available at* http://www.rcfp.org/shields_and_subpoenas.html. I talk in this Article in terms of protection for confidential sources. Claims of privilege may also implicate other forms of confidential information—reporters' notes for example—and many of the same considerations applicable to confidential sources would apply in these cases as well.

137. 408 U.S. 665 (1972).

138. *See* McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003). For an overview of the development of constitutional reporter's privilege since *Branzburg*, see Len Neihoff, *The Constitutional Privilege After* Branzburg*: An Historical Overview*, MLRC BULL., Aug. 2004, at 59, 61-81.

139. *See In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 968-72 (D.C. Cir. 2005), *cert. denied*, Miller v. United States, 545 U.S. 1150 (2005); *In re* Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004); *McKevitt*, 339 F.3d at 532-34.

140 *See Miller*, 545 U.S. 1150 (denying certiorari in Judith Miller case). The possibility of Supreme Court review of the privilege claims of a number of news organizations arising out of a subpoena issued in Wen Ho Lee's privacy act claim against the government evaporated when the case was settled while a cert. petition was pending. *See 5 News Organizations to Pay Wen Ho Lee*, ASSOCIATED PRESS, June 2, 2006, http://www.firstamendmentcenter.org/news.aspx?id=16974.

a special privilege for journalists not available to other speakers. This focus often has in turn led to a kind of definitional football over whether the Press Clause provides independent institutional rights different from the Speech Clause,[141] and, if so, whether it is possible to define the press with sufficient specificity and whether it is prudent for one class of speaker to be preferred over another.[142] Both the case law and scholarship suggest that definitional concerns are not as intractable as they may seem,[143] and by focusing on what I view as the wrong questions,[144] I cannot help but wonder whether we do not unduly devalue the important role that the press plays in a self-governing system of free expression.[145]

A central value of a self-regulating speech marketplace is that it serves as a check on the abuse of authority.[146] "To do their work, all the various checking agents depend on information concerning what the potential abusers of authority are doing."[147] Those willing to provide

141. The leading authority on this question is Professor David Anderson. *See generally* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002). As Paul Horwitz has observed, the free press model "raises . . . definitional concerns . . . and gives rise to the charge that the Constitution should create no privileged institutions." Paul Horwitz, *"Or of the [Blog]"*, 11 NEXUS 45, 49 (2006).

142. Anderson, *supra* note 141, at 435-82.

143. In practice, the definitional question of who qualifies as a journalist entitled to claim the privilege seems to me something of a red herring. The question arises relatively infrequently, and a number of courts have dealt effectively with this issue through a functional analysis of the purpose for which information was collected. *See, e.g.*, *In re* Madden, 151 F.3d 125, 130 (3d Cir. 1998); Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). A number of academic scholars have also addressed the issue from this perspective. *See, e.g.*, Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 430-31 (1999). Paul Horwitz has argued persuasively for an institutional approach to the question that would define the press in terms of its functional role in society and grant "a substantial degree of self-governance to those institutions that play a substantial role in contributing to the world of public discourse that the First Amendment aims to promote and preserve." Horwitz, *supra* note 141, at 56. A detailed examination of that question is beyond the scope of this Article, but for present purposes, it is enough, I think, to demonstrate that the definitional issue is not nearly so problematic as it might seem.

144. *See* Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 629 (1979).

145. It is more than ironic that by doing so, our First Amendment jurisprudence actually grants less protection to the journalist/source relationship than do other countries with less robust systems of free expression. *See* Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The* Randal *Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. LAW 1, 51-55 (2006); Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law*, MLRC BULL., Aug. 2004, at 183.

146 *See generally* Blasi, *Checking Value*, *supra* note 14, at 529-44.

147. Blasi, *Free Speech*, *supra* note 16, at 1574.

such information frequently will do so only if their identities can be protected so as to avoid retaliation by those in a position of power. Translating this fairly obvious point into First Amendment doctrine has proved more difficult, at least at the Supreme Court level.

As discussed above, in this context deliberative self help has two threshold components. First, would a privilege promote "the widest possible dissemination of information from diverse and antagonistic sources?"[148] Second, is creation of a privilege consistent or at odds with the principle that, absent a compelling reason, the government should not interfere with individual choice as the primary determinant of the mix of information that is brought into the speech marketplace?

As to the first component, the Court in *Branzburg* did, in fact, at a minimum acknowledge the principle that access to information is an important component of deliberative self help, coining the often cited, but rarely implemented, statement that "without some protection for seeking out the news, freedom of the press could be eviscerated."[149] The real problem with the Court's analysis comes in its treatment of the second component of self help—government interference. Here the Court drew a parallel to the compelled access cases:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . . .[150]

What the Court failed adequately to appreciate was that, as suggested above, the interference principle operates in these kinds of cases in a way that is inconsistent with self help; instead of relying on individual choice or action as the primary determinant, they substitute government fiat. Where compulsory process is concerned, however, the speaker claiming privilege is seeking to avoid government intervention and preserve individual choice—by the source to speak anonymously and by the publisher to honor that desire. This difference was central to Justice Potter Stewart's argument in his now famous remarks on the meaning of the First Amendment's Press Clause:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any

148. Associated Press v. United States, 326 U.S. 1, 20 (1945).
149. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).
150. *Id.* at 684-85.

> guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.[151]

That there is a difference between affirmatively compelling access to information (or the channels of communication) and seeking information through compulsory process does not fully answer whether the deliberative self help principle fully supports a privilege to resist such intrusions. As the Court has recognized in the compelled speech context, there is a difference between actions that substantially interfere with individual choice as to what to say—or not to say—and those that affect such choice only tangentially.[152] Thus, for example, the Court recently rejected a claim that requiring law schools to accommodate military recruiters violated the First Amendment because doing so "does not sufficiently interfere with any message of the school."[153] In *Branzburg*, the Court similarly diminished the First Amendment implications of reporter's privilege in part on the grounds that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[154]

The general laws principle has its limits, and with the exception of *Branzburg*, the cases applying it fall generally into two categories, both of which are characterized by the absence of any threat to robust debate or broad dissemination of information from diverse sources. Many of the cases involve the application of general laws to the business operations of the press in ways that have little to do with editorial freedom—for example the antitrust[155] or labor laws.[156] It was these seemingly inapposite cases on which the *Branzburg* majority principally relied.

There is, however, a second category of general laws cases that more closely implicate speech or editorial values. For example, the application of trespass law to protesters who entered the grounds of a

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151. Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 636 (1975) (excerpting Justice Stewart's address at the Yale Law School Sesquicentennial Convocation on Nov. 2, 1974).

152. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297, 1309-13 (2006); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 27 (1986) (Rehnquist, J., dissenting).

153. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1310.

154. *Branzburg*, 408 U.S. at 682.

155. *See* Associated Press v. United States, 326 U.S. 1, 3-7 (1945).

156. *See* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 189, 192-93 (1946); Associated Press v. NLRB, 301 U.S. 103, 122, 132-33 (1937).

prison,[157] or the application of promissory estoppel law to a newspaper that violated a promise to a source who had been promised anonymity.[158] These cases are characterized by three factors that significantly ameliorate concerns about any burden they might otherwise place on protected expression. First, they involve laws that are relatively well defined and predictable. Second, the decision whether to violate them is entirely within the speaker's control.[159] Third, the speaker has alternative means to communicate the equivalent message. Take, for example, *United States v. O'Brien*,[160] perhaps the seminal decision in this context. By burning his draft card, O'Brien violated a law that was clear and unambiguous.[161] He did so completely of his own volition, and there were numerous other ways that he could have communicated his anti-war, anti-draft message.[162] Similarly, in *Cohen v. Cowles Media Co.*,[163] a Minnesota newspaper made its own decision to breach an agreement with a source. It was sued under established legal doctrine relating to the enforcement of agreements, and it could have made its point without burning the source.

General laws that do not exhibit these characteristics have the potential to interfere more directly with expression and have been subject to more rigorous First Amendment scrutiny.[164] In *Edwards v. South Carolina*,[165] for example, the Court struck down a generally applicable breach of the peace statute as applied to peaceful protesters on statehouse grounds because it involved "an offense so generalized as to be . . . not susceptible of exact definition."[166] In *Hustler Magazine, Inc. v. Falwell*,[167] the unrestrained application of a cause of action for intentional infliction of emotional distress to a magazine was held to be incompatible with the First Amendment because its relatively broad and

157. *See* Adderley v. Florida, 385 U.S. 39, 40, 47-48 (1966).

158. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 665, 669 (1991).

159. *Id.* at 671 ("[A]ny restrictions that may be placed on the publication of truthful information are self-imposed.").

160. 391 U.S. 367 (1968).

161. *See id.* at 375, 381-82.

162. *See id.* at 382.

163. 501 U.S. 663 (1991).

164. *See id.* at 677 (Souter, J., dissenting) ("Thus '[t]here is nothing talismanic about neutral laws of general applicability,' . . . .") (quoting Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring)).

165. 372 U.S. 229 (1963).

166. *Id.* at 237 (internal quotation omitted).

167. 485 U.S. 46 (1988).

undefined boundaries might permit the punishment of unpopular or controversial views.[168]

The decision of a prosecutor (or a civil or criminal litigant[169]) to seek the identity of a confidential source similarly intrudes directly into matters at the heart of the First Amendment—in this case the editorial choices of a speaker.[170] It does so, moreover, in a way that, while not boundless, certainly does not have the tight, predictable limitations exhibited by the general laws cases where speech burdens were upheld as incidental. The standards governing grand juries or litigants in seeking information about sources are broad, offering wide discretion, the exercise of which is unpredictable, beyond the speakers control and rife with the potential for serious abuse.[171]

Moreover, where confidential sources are implicated, there often will be no alternative way to secure equivalent information. While the press has been criticized at times for too freely promising anonymity to sources,[172] as a general rule, it is offered only when necessary to obtain

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168. *See id.* at 55.

169. *See generally* Neihoff, *supra* note 138, at 68-73 (discussing various courts' application of the reporter's privilege and suggesting that some courts may apply a higher standard to tip the balance in civil cases rather than in criminal matters).

170. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees . . . .

Id. This discretion is a corollary of the right of all individuals to be free from government interference in the decision to speak or to refrain from speaking. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943).

171. *See A Victory for Press Freedom*, N.Y. TIMES, Feb. 26, 2005, at A14. Although *Branzburg* alluded to the possibility of First Amendment protection where a prosecutor acted in bad faith, the recent controversy surrounding the subpoenas issued to Judith Miller and Matthew Cooper in the Valerie Plame case demonstrates why that protection is likely to be illusory. The special prosecutor in that case, Patrick Fitzgerald, is highly respected, and nobody, to my knowledge, seriously maintained that he acted beyond his authority or otherwise out of bad motives. Indeed, he was much praised even by some press commentators. Nonetheless, when all was said and done—after Judith Miller spent several months in jail, Vice President Cheney's Chief of Staff was indicted for perjury, and the press had been brought into considerable conflict with the Executive Branch—it turns out that the subpoenas may have been entirely unnecessary, as Mr. Fitzgerald knew the identity of the principal leaker early in the investigation. If this is so, it is fair to ask whether we would have been better served by a rule providing for press protection from an apparently unnecessary invasion of the editorial process. *See, e.g.*, Fred Barnes, *The Plamegate Hall of Shame*, WKLY. STANDARD, Sept. 11, 2006, at 7; Tom Hamburger & Richard T. Cooper, *Obvious Question in Plame Case Had Early Answer*, L.A. TIMES, Sept. 9, 2006, at A11.

172. *See, e.g.*, Michael Kinsley, *Secrets and Spies: What We Can Learn About Confidential Sources from Wen Ho Lee*, SLATE, June 9, 2006, http://www.slate.com/id/2143320/nav/tap2/.

information.[173] It will often be the case that without the ability to protect sources, journalists will not be able to obtain important information. While it may be difficult, or impossible, empirically to demonstrate how much information will be lost by the failure to provide adequate protection to the reporter/source relationship:

> What can, and has been demonstrated, however, is that information provided by confidential sources is increasingly necessary for the effective dissemination of information about government in this country, and that such sources typically claim that such information will not be provided in the absence of a pledge of confidentiality by the press.[174]

There is an additional reason that the general laws principle does not fit easily into the reporter's privilege box. In *Bartnicki v. Vopper*,[175] the Court limited the application of an admittedly non-content-based law of general application that sought to protect the privacy of telephone communications by prohibiting the publication of intercepted conversations.[176] Because the law at issue was aimed purely at speech, even if it did not target content, the Court applied a high level of scrutiny, ultimately protecting a radio broadcaster who disseminated the contents of an illegally intercepted conversation because it involved a matter of public concern.[177]

In a similar vein, by interfering with the desire to remain anonymous, compulsory process trenches directly on a subject at the heart of individual choice. A speaker's decision to remain anonymous, like the decision to refrain from speaking at all, is an important element of the decision of how, and even whether, to engage in expressing oneself. And, it is one with historical roots that date to the ratification of the First Amendment and before.[178] A speaker's identity, the Court has

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173. *See, e.g.*, New York Times Company, Confidential News Sources, Feb. 25, 2004, http://www.nytco.com/company-properties-times-sources.html ("The use of unidentified sources is reserved for situations in which the newspaper could not otherwise print information it considers reliable and newsworthy.").

174. Monica Langley & Lee Levine, Branzburg *Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 45 (1988). For a comprehensive review of the importance of confidential sources to effective journalism, see, for example, Steven D. Zansberg, *The Empirical Case:* Proving *the Need for the Privilege*, MLRC BULL., Aug. 2004, at 145, 147-49 (analyzing empirical evidence about the need for confidential sources and concluding that the American people could greatly suffer without a reporter's privilege).

175. 532 U.S. 514 (2001).

176. *Id.* at 526.

177. *Id.*

178. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-43 (1995); *id.* at 359-67 (Thomas, J., concurring).

recognized, is "no different from other components of [a] document's content."[179] Anonymity is not a "pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[180] Thus, leaving the choice to the individual, absent some higher value which can satisfy the kind of exacting scrutiny imposed by the First Amendment,[181] falls within core notions of free speech.

Viewed in this light, decisions by the government to seek the identity of sources from those disseminating information to the public would seem substantially to interfere with self help. If one accepts this to be the case, then it is not unreasonable to suggest that the problem of compulsory process be approached in a way that at least is sensitive to the very real underlying First Amendment values at stake. The *Branzburg* majority simply did not do this. Rather, it took a broad, categorical approach, effectively declaring that in all but perhaps the most egregious instances,[182] testimonial needs always outweigh First Amendment values.

The more First Amendment sensitive approach would ask whether the underlying deliberative self help values can be reconciled with the admittedly important government interests implicated by the use of compulsory process—in the case of *Branzburg*, for example, the needs of law enforcement to effectively investigate crime. Most I suspect would concede that the government's interest here can be compelling, but that is not the only question that needs to be asked. Ordinarily, in such cases, we also examine whether there is an appropriate fit between the government's interest and the means sought to further it.[183] While a complete examination of that question is beyond the scope of this Article, I offer several brief observations.

The *Branzburg* majority approach views this question in the broadest possible terms, largely divorced from the needs of law enforcement in a particular case.[184] In some contexts perhaps such an approach might be justified, particularly where the issues presented by a particularized inquiry may be beyond the ordinary competence of courts to evaluate. Issues of classification and national security, for example,

179. *See id.* at 348.
180. *Id.* at 357.
181. *See id.* at 346-47; Talley v. California, 362 U.S. 60, 65 (1960).
182. Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972).
183. *See* Bartnicki v. Vopper, 532 U.S. 514, 528-29 (2001).
184. *Branzburg*, 408 U.S. at 700-02.

might present such a case,[185] but questions of whether information is necessary to a criminal investigation and potentially available from other sources—the touchstones of the privilege advocated by the *Branzburg* dissent[186] and applied in many of the cases following that decision[187]—present the kinds of evidentiary issues that courts are entirely competent to evaluate.[188] Additionally, the experience of the thirty-four years since *Branzburg*—punctuated as it is by the application of a privilege in a wide array of circumstances[189]—strongly suggests that a better and more sensitive accommodation can be reached without unduly compromising law enforcement. Indeed, the very structure of privilege law that has been developed in this area is designed to avoid undermining criminal investigations when there is a real and substantial need for the information. Where information is critical to an investigation and otherwise unavailable from other sources, there is virtually unanimous agreement among the courts that any privilege would give way.[190] In order to sustain the *Branzburg* majority's view, one should have to show that such an approach would substantially undermine law enforcement in most cases. Certainly the Court's opinion did not do that, and I question whether it reasonably could have.

C. Surreptitious Recording

Investigative journalism—and in particular the television variety—has increasingly relied on undercover "sting" operations to expose wrongdoing. This kind of reporting may seek to examine very real and important issues[191] or it may delve into that which is relatively trivial.[192]

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185. *Cf.* New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) (discussing the broad authority of the executive branch in matters of national security).

186. *See Branzburg*, 408 U.S. at 725-52 (Stewart, J., dissenting).

187. *See* Neihoff, *supra* note 138, at 68-73.

188. Many common law privileges are less than absolute and require that courts make judgments about how necessary information is in a particular case. *See, e.g.*, *In re* Kathleen M., 493 A.2d 472, 475-76 (N.H. 1985) (physician-patient privilege may be overcome by countervailing interests); State v. Mayhand, 259 S.E.2d 231, 238 (N.C. 1979) (physician-patient privilege may be overcome if "necessary for the proper administration of justice"). Similarly, a court can issue a protective order in civil discovery on a showing of good cause. FED. R. CIV. P. 26(c).

189. *See generally* Neihoff, *supra* note 138, at 61-81.

190. *See, e.g.*, New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006) (observing that reporter Judith Miller's right to keep sources confidential was outweighed by the government interest in investigating criminal charges against organizations raising money to support terrorists).

191. *See, e.g.*, Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002) (investigating medical laboratory for misreading pap smears); Desnick v. Am. Broad. Companies, Inc., 44 F.3d 1345 (7th Cir. 1995) (investigating eye clinic for unnecessary surgery).

Undercover journalism raises a host of potential claims and can employ a wide variety of techniques.[193] One relatively common thread that links most such efforts together is the use of hidden recording devices, which over the last ten years or so have become incredibly portable and unobtrusive.[194] It is the constitutional implications of using such devices that I propose to examine in the context of self help.[195]

Before doing so, I should explain the limits of my inquiry. First, when I refer to the use of undercover recording, I mean the practice that is commonly referred to as participant recording where an event or conversation is recorded by someone either participating in it or who has unfettered access without the intervention of technology (for example, someone who can view or hear events from a public place). By so limiting my inquiry, I mean to distinguish interception by what is colloquially called bugging—the use of technological devices that enable someone to hear or witness an event that would ordinarily be out of reach. Intercepting a telephone call that one is not party to is an example. Involvement in such interception raises entirely different concerns that quite clearly can be the subject of liability without constitutional concerns.[196] Second, investigative journalism often involves the use of other techniques in conjunction with hidden recording. For example, a reporter may misrepresent his or her identity, thus potentially committing a fraud. Or he may excessively invade one's interest in the peaceful enjoyment of property and commit a trespass. The use of such techniques sometimes may invade interests that are appropriately and constitutionally subject to legal protection, and I do not intend here to suggest otherwise.

The question I am posing asks whether the use of a hidden recording device by one who can otherwise hear or witness an event without technological intervention can, in and of itself, support liability.

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192. *See, e.g.*, Sanders v. Am. Broad. Companies, Inc., 978 P.2d 67 (Cal. 1999) (investigating psychic telephone service).

193. *See, e.g.*, *Med. Lab. Mgmt. Consultants*, 306 F.3d at 806 (claims for intrusion, fraud, trespass and interference with contractual relations arising from reporter posing as party interested in opening a medical lab); Food Lion, Inc. v. Capital Cities/ABC Inc., 194 F.3d 505 (4th Cir. 1999) (claims of trespass and breach of duty of loyalty arising from reporters posing as employees of grocery store); *Desnick*, 44 F.3d at 1345 (claims of defamation, fraud and trespass arising from reporters posing as medical patients).

194. *See generally* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW § 15.09, at 896-903 (3d ed. 2005).

195. The use of hidden cameras has also been controversial among journalists prompting the Society for Professional Journalists to promulgate guidelines as to when the practice is acceptable. *See id.*

196. *See* Bartnicki v. Vopper, 532 U.S. 514 (2001).

In other words, can something that would otherwise be legal—for example conversing with someone—be made illegal simply by the fact that it is secretly being recorded? Typically such claims arise in two ways. First, some states have statutes that prohibit participant recording unless all parties to the conversation or event consent.[197] Second, even where such statutes are inapplicable, courts have imposed liability based on common law theories of intrusion.[198]

Somewhat surprisingly, there is a relative dearth of serious First Amendment analysis regarding this problem. Many cases avoid the issue by finding that the use of a hidden recording device under the circumstances presented did not contravene the applicable statute[199] or did not satisfy the common law requirements of intrusion.[200] Those courts that have confronted the constitutional issue, because they found statutory or common law liability, generally have relied on broad pronouncements largely devoid of serious, critical analysis. The leading example is *Dietemann v. Time, Inc.*,[201] which reasoned that "hidden mechanical contrivances are [not] 'indispensable tools' of newsgathering" and the "First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[202] Despite that the first assumption is open to serious question both as to its accuracy[203] and its relevance[204] and that the second is a cliché telling us little about why a prohibition solely against

197. A majority of state statutes permit participant recording where one party to the conversation consents, which is also the general rule codified in the Federal Wiretap Act, 18 U.S.C. §§ 2510-22 (2000). *See generally* DIENES ET AL., *supra* note 194, § 15.08[1][b][i][C], [2][b], at 878, 886. A minority of states, including California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington, ordinarily require the consent of all parties. *See id.* § 15.08 [2][c], at 887 & n.706. Even those states requiring the consent of all parties recognize exceptions. California, for instance, excludes, inter alia, conversations made "in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." CAL. PENAL CODE § 632(c) (West 1999).

198. *See, e.g.*, Sanders v. Am. Broad. Companies, Inc., 978 P.2d 67, 71-77 (Cal. 1999); Dietemann v. Time, Inc., 449 F.2d 245, 248-50 (9th Cir. 1971).

199. *See* Deteresa v. Am. Broad. Companies, Inc., 121 F.3d 460, 463-65 (9th Cir. 1997).

200. *See* Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806, 812-20 (9th Cir. 2002).

201. 449 F.2d 245 (9th Cir. 1971).

202. *Id.* at 249.

203. For example, one of the Society for Professional Journalists criteria for using hidden cameras asks whether the reporter has exhausted all other alternatives for obtaining the information. *See* DIENES ET AL., *supra* note 194, § 15.09 at 896-903.

204. That there may be alternative ways of conveying information has been rejected as a basis for regulating the content of speech. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 416 & n.11 (1989); Spence v. Washington, 418 U.S. 405, 411 & n.4 (1974).

participant recording should survive constitutional attack,[205] the *Dietemann* case has taken on almost talismanic status in terms of the constitutional analysis in this area.[206]

Self help as an alternative to liability has relevance here, although it has largely been ignored in the context of hidden taping by journalists. These cases ordinarily do not arise out of claims that the press has reported anything that is false or intimately private, either of which might give rise to a claim independent of the surreptitious recording. Rather, what is involved here are statements or actions that individuals consider ill advised or embarrassing. In *Dietemann*, for example, the plaintiff exhibited his quasi-medical quackery to the reporters, and in another recent controversial case, *Sanders v. American Broadcasting Companies, Inc.*,[207] employees of a psychic hotline bared their souls to an undercover reporter.[208] Any harm that occurred as a result of the journalists' actions could easily have been avoided by the individuals being more circumspect in their choice of words, actions, or conversation partner. There was, moreover, no compulsion to their speaking; they chose to do so on their own. Indeed, the ability to avoid the embarrassment arising from their speech was significantly greater than in the typical First Amendment avoidance cases which ordinarily tolerate some exposure to harm by requiring that an offended individual turn away after enduring the first expressive blow.[209] Here, individuals simply need to be a bit more circumspect in what they say or do in front of relative strangers. Self help then has the potential to be quite effective in avoiding any harm.

The appropriateness of self help as an alternative in these kinds of cases becomes even more compelling when one considers the potential countervailing interests that might be raised here. It is important to keep in mind that the aggrieved individuals in most cases have no privacy interest in the content of their conversations. They do not involve, for example, publication of the kind of intimate personal details that might

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205. While the statement is undoubtedly true as an abstract principle, the fact is that in many cases the First Amendment does act as a bar to the enforcement of laws that ordinarily are unobjectionable when not applied to speech-related activities. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 891 (1982) (interference with business relationships); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (breach of the peace statute).

206. *See* Sanders v. Am. Broad. Companies, Inc., 978 P.2d 67, 72-73 (Cal. 1999); Shevin v. Sunbeam Television Corp., 351 So. 2d 723, 727 (Fla. 1977); Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 793 n.2 (Minn. Ct. App. 1998).

207. 978 P.2d 67 (Cal. 1999).

208. *See id.* at 69-70.

209. *See supra* note 43 and accompanying text.

give rise to a disclosure of private facts claim. Nor do they ordinarily involve claims of inaccuracy which might serve as the basis for a defamation claim.[210] In other words, had the reporter simply described in words what was said or done, there would be no claim. As one appellate court has recognized:

> Every individual must from time to time reach beyond his private enclave, draw other people into his activities, and expose his activities to public view. In any normal life, even in pursuing his most private purposes, the individual must occasionally transact business with other people. When he does so, he leaves behind, as evidence of his activity, the records and recollections of others. He cannot expect that these activities are his private affair.[211]

In a similar vein, the Supreme Court has recognized in the analogous context of the Fourth Amendment that there is "no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"[212]

The question, then, is whether the addition of a recording device somehow alters this equation. Again in the context of the Fourth Amendment, the Court has eschewed finding any interest of constitutional magnitude that might spring from the presence of a recording device:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[213]

Nonetheless, a number of courts have, in the civil context, found a distinction, although most of them fail to explain why this is so beyond the simple assertion that it is.[214] In one case, the Ninth Circuit did attempt to explain the possible difference:

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210. Where there are allegations sufficient to support a defamation case, plaintiffs have been permitted to proceed with the libel claim even where the surreptitious recording claim fails. *See, e.g.*, Desnick v. Am. Broad. Companies, Inc., 44 F.3d 1345, 1349 (7th Cir. 1995).

211. Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1043 (D.C. Cir. 1978).

212. United States v. White, 401 U.S. 745, 749 (1971) (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).

213. *Id.* at 751.

214. *See* Sanders v. Am. Broad. Companies, Inc., 978 P.2d 67, 72-73 (Cal. 1999); Dietemann v. Time, Inc., 449 F.2d 245, at 249 (9th Cir. 1971).

> In the former situation [i.e., secondhand repetition] the speaker retains control over the extent of his immediate audience. Even though that audience may republish his words, it will be done secondhand, after the fact, probably not in its entirety, and the impact will depend on the credibility of the teller. Where electronic monitoring is involved, however, the speaker is deprived of the right to control the extent of his own firsthand dissemination. . . . In this regard participant monitoring . . . den[ies] the speaker a most important aspect of privacy of communication, the right to control the extent of first instance dissemination of his statements.[215]

The reasoning here has two critical flaws. First, to the extent that the rationale relies on some kind of proprietary interest in the speaker to firsthand dissemination of his expression, it may well be inconsistent with copyright law,[216] which, among other things, would be a possible remedy for such matters,[217] and even if it protected the speaker's right, would provide at least some flexibility for the dissemination of newsworthy information.[218] Second, the court's reasoning seems to attach some weight to the notion that purely secondhand repetition will not be as reliable, an idea that seems wildly at odds with First Amendment values. The Supreme Court has recognized that "[a]n electronic recording will many times produce a more reliable rendition"[219] of what was said than will "unaided memory,"[220] and it is of course beyond dispute that the First Amendment is especially solicitous of truthful information.[221] Thus, a rationale that encourages less accurate reporting would seem unsustainable.

I will end where I began this discussion. I do not suggest that there will never be privacy interests in these cases that might trump particular approaches to newsgathering. Where, for example, a reporter commits a trespass, one may well have reason to complain, and self help will clearly not ameliorate the harm. Similarly, where a journalist gains access to information through misrepresentations that would constitute an actionable fraud, there may be interests that are not adequately

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215. Deteresa v. Am. Broad. Companies, Inc., 121 F.3d 460, 470 (9th Cir. 1997) (citing Warden v. Kahn, 160 Cal. Rptr. 471, 476 (Ct. App. 1997).

216. *See* 17 U.S.C. § 102 (2000).

217. *See id.* § 301.

218. *See id.* § 107.

219. United States v. White, 401 U.S. 745, 753 (1971).

220. *Id.*

221. Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001). "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Id.* at 527 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979)).

protected by self help. These interests do not rise or fall on the presence of surreptitious recording devices, however. The assumption by some courts that they do, not only fails to recognize the crucial distinctions, but also perpetuates a preference for inaccurate journalism that seems antithetical to the First Amendment.

IV. CONCLUSION

In thinking about the role of self help in First Amendment doctrine, two basic points stand out. First, as Professor Greenawalt suggests at different points in his review of the justifications for special protection of speech, we need to ask what the alternative is.[222] Since the founding of our republic, we have seen that when given the opportunity to regulate the idea marketplace, the government's tendency—to put it mildly—is to overreach. With the ink on the First Amendment barely dry, the Adams administration proceeded with a campaign to suppress expression through enactment of the Sedition Act.[223] Beginning in the early twentieth century, the government punished harmless, misguided individuals for expressing views at odds with the government line.[224] Most recently the FCC system has turned a Super Bowl half time show into a cause celeb for the regulation of expression that some might find offensive.

Second, by accepting more government involvement in the regulation of expression, we often will never know what has been lost. Speech regulation involves many imponderables. How many sources will never come forward if reporters cannot protect them? What abuses will go undiscovered if investigative journalism is unduly limited? How many valuable programs will never see air or even development out of a fear that the cost of defending them before the FCC will be too high?

I do not mean to suggest here that there is no place for government intervention or that placing the burden on individuals may on occasion exact too high a price. Nevertheless, it seems to me that more explicitly recognizing that the benefits of self help ordinarily outweigh its burdens will in the long run serve us well.

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222. *See* Greenawalt, *supra* note 6, at 138, 142.

223. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964).

224. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919). While the majority of the Court found that the publications at issue were incendiary, the dissent reasoned that the defendants lacked the requisite intent for criminal prosecution. *Id.* at 624-31 (Holmes, J., dissenting).