

AUTONOMY AND INFORMATIONAL PRIVACY,
OR GOSSIP: THE CENTRAL MEANING
OF THE FIRST AMENDMENT*

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"Gossip is no longer the resource of the idle and of the vicious, but has become a trade. . . ." ¹

Book dedication: "To Vito Russo, in gratitude for much good conversation and great gossip. . . ." ²

"I find that when I am gossiping about my friends as well as my enemies I am deeply conscious of performing a social duty; but that when I hear they gossip viciously about me, I am rightfully filled with righteous indignation." ³

I. INTRODUCTION

My thesis is simple. The right of informational privacy, the great modern achievement often attributed to the classic Samuel Warren and Louis Brandeis article, "The Right to Privacy" (1890),⁴ asserts an individual's right not to have private personal information circulated. Warren and Brandeis claimed that individual dignity in a modern society requires that people be able to keep their private lives to themselves and proposed that the common law should be understood to protect this dignity by making dissemination of private information a tort. As broadly stated, this right not to have private information distributed directly conflicts with a broadly conceived freedom of speech and of the press. My claim is that, in cases of conflict, the law should reject the Warren and Brandeis innovation. Speech and press freedom should prevail; the privacy tort

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¹ Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.

² Larry Gross, *Contested Closets* (Minneapolis: University of Minnesota Press, 1993), dedication page.

³ Max Gluckman, "Gossip and Scandal," *Current Anthropology* 4, no. 3 (1963): 307-16, at 315.

⁴ Warren and Brandeis, *supra* note 1. This article has been described as "perhaps the most famous and certainly the most influential law review article ever written." Melville B. Nimmer, "The Right of Publicity," *Law and Contemporary Problems* 19 (1954): 202, 203.

should be ignored. This conclusion requires a normative argument concerning the appropriate basis and status of speech freedom that this essay will not really provide but for which I have argued elsewhere.⁵ Here, instead, I will describe that theory of speech freedom, explore its implications for informational privacy, and finally suggest some reasons to think that rejection of the privacy tort should not be so troubling and is, in fact, pragmatically desirable.

The essay proceeds in the following way. Section II describes different possible informational privacy rights, identifying the one at stake in this essay. Section III describes two conceptions of autonomy, showing that both speech freedom and informational privacy serve the ultimately most important substantive conception, which is characterized as “meaningful” autonomy. Section III argues, however, that the right of free speech is better seen as based on the other, “formal” conception of autonomy, and that this grounding implies overriding the legal protection of informational privacy recommended by Warren and Brandeis. Thus, Section IV describes various ways that the law could treat informational privacy, but recommends treatment consistent with the formal right of free speech. Section V argues that protection of speech freedom leaves many ways of serving informational privacy fully available. Speech freedom turns out to be fully compatible with prohibiting possibly the most common and important ways in which informational privacy is invaded. This discussion should relieve some of the anticipated resistance to my thesis. Finally, Sections VI and VII offer two pragmatic reasons to find the thesis acceptable. Section VI argues that the popular appeal of privacy may be to some significant degree misguided. Section VII argues that speech that invades privacy—speech that I illustrate with gossip but that also includes other forms of individual expression as well as media invasions of privacy—serves valuable functions that help make the constitutional status of free speech appealing and explicable. Thus, Sections V, VI, and VII together should make more plausible both the thesis of this essay and the formal conception of autonomy on which I claim the right of free speech is based.

II. INFORMATIONAL PRIVACY

Informational privacy involves (some) limitation on inspection, observation, and knowledge by others. The appropriate legal response to claims for informational privacy depends, of course, on the more specific content of the claims. Among other possibilities, informational privacy could re-

⁵ C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989); C. Edwin Baker, “Harm, Liberty, and Free Speech,” *Southern California Law Review* 70 (1997): 979.

fer to one, or some combination, of the following: (1) *inalienable private information*, that is, categories of information that are not permissibly exposed to or held by anyone other than the original holder or, in the case of joint holders, possibly resulting from joint participation in a private activity, by any nonintimate; (2) *control over initial disclosure* of information; as an almost necessary corollary, this right implies the availability of a range of meaningful contexts in which private information can be created, discovered, or used in ways that do not necessarily result in any disclosure; or (3) *control over further uses and dissemination* of (private) information after an initial disclosure, that is, a virtual property right in private information quite analogous to various intellectual property rights.⁶ Thus, informational privacy could refer at least to the following: *information inalienability*, *disclosure control*, and *dissemination control*. Of course, none of these three conceptions need be absolute. Sympathy for, or legal recognition of, dissemination control, for example, could vary depending on the circumstances of the initial disclosure. Different conclusions might follow if the disclosure occurred only after an agreement of no further disclosure (e.g., after a private request and an agreement among friends not to repeat what was said, or after a journalist's promise to a confidential source),⁷ or only as a result of legal compulsion (e.g., information found through trial discovery).⁸ Likewise, conclusions might vary if the initial disclosure occurred as a result of violation of the law (e.g., information initially obtained by trespass or illegal electronic eavesdropping),⁹ or only after an accidental betrayal of information (e.g., being unknowingly overheard), or as a result of practical necessity (e.g., having to traverse public space to get to work or to the hospital). In any event, it is possible that legal rules can recognize and address each of these varying circumstances under which a person might claim a right to control further dissemination.

The first of the three conceptions of informational privacy that I enumerated above—information inalienability—seems overtly contrary to the individual agency of the person required to keep information private. For example, the U.S. military's "Don't ask, don't tell" policy prevents a gay male or lesbian from disclosing his or her homosexuality, thereby coercively creating a degree of information inalienability. Still, information inalienability might be thought in some contexts to serve (a certain conception of) personhood, a decent society, or other values. If so, this service

⁶ Julie Cohen, "Examined Lives: Informational Privacy and the Subject As Object," *Stanford Law Review* 52 (2000): 1373-1438

⁷ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (promissory estoppel can apply to newspaper that promised confidentiality).

⁸ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (newspaper can be ordered not to publish information obtained through discovery).

⁹ *Barnicki v. Vopper*, 532 U.S. 514 (2001).

could provide a rationale for this interpretation of informational privacy. Privacy would be, to some limited extent, inalienable. This approach to privacy comes close to the premise behind child pornography laws, although that premise may be crucially affected by the added paternalistic assumption that children are not capable of giving appropriate consent to disclosure and that any parent or guardian who gives consent is not acting properly in the child's interest.¹⁰ More obviously, a prohibition of *public* nudity that applies even where all people exposed to the nudity are consenting adults mandates a degree of inalienable privacy.¹¹

If, as claimed here, a person has a right to disseminate private information about another person, surely she should have the same right to disseminate information about herself. An obviously essential individual power is the capacity to reveal or expose oneself, be it to one's lover or to the world, at least to the extent that the person can find effective means to disseminate her verbal or pictorial self-portrait. If taken to its extreme, a regime of inalienable privacy would mandate

¹⁰ The Court relied upon concerns about a child's participation in the making of child porn and with the availability of the permanent record of the child's participation to justify the law in *New York v. Ferber*, 458 U.S. 747 (1982), harms that distinguish this case from *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down prohibition of computer-created child porn in which no actual child was used).

¹¹ *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding bans on public nudity as applied to dancers in dance halls or adult establishments). Both cases generated strong dissents. The dissenters distinguished public nudity before unconsenting adults, who might be considered to be viscerally assaulted by the nudity, and before exclusively consenting parties such as in a theater, where the state interest seems directed specifically at stopping expressive communication. (Elsewhere, I have suggested that in an advocacy as opposed to an entertainment context, nudity should sometimes be protected even in relation to those who are offended: Baker, *Human Liberty*, *supra* note 5, at 135, 173–78, 306 n.27, 318 n.29; and C. Edwin Baker, "The Evening Hours During *Pacifica* Standard Time," *Villanova Sports and Entertainment Law Journal* 3 [1996]: 45.) The plurality in *Pap's A.M.* attempted to meet the objection that the law aimed at suppressing communication by arguing that, instead, the state interest was related to preventing "secondary effects," that is, effects not dependent on whether anyone received the message and not involving any condemnation of the communicative exposure. The purported secondary effect would occur if people who may not even have received the communication come to the area and engage in activities that the state properly restricts, such as prostitution. Previously, purported secondary effects have only justified "zoning" the expression in a manner hoped to reduce these bad effects, which makes sense of the fact that secondary effects cases are analyzed much like "time, place, or manner" cases. No case prior to *Pap's A.M.* used secondary effects analysis to entirely bar the expression, a point emphasized by the dissent. Arguably, the plurality in *Pap's A.M.* only makes doctrinal sense if the complete ban on intentionally appearing in public in a "state of nudity" was not a complete ban on the particular expression. The plurality argues this is so. The dancer could make the same communication, the plurality implied, because she could be almost nude, a view ridiculed by the dissent, which claimed audiences distinguish dancing nude from dancing with "pasties and G-strings." The plurality seems overtly inconsistent with *Cohen v. California*, 403 U.S. 15 (1971), which emphasized not only that "the Constitution leaves matters of taste and style . . . largely to the individual" but also that the First Amendment protects the important emotive function of using a particular word, "fuck." *Cohen* also noted that any bar on the word's use runs the danger of suppressing ideas.

invisibility, a social erasure practiced in some totalitarian countries and possibly the experience of many subordinated peoples.¹² Any general policy of inalienability of private information is inconsistent with respect for autonomy or agency.¹³ However, this point plays little role in most theoretical discussions of informational privacy and will not be my concern here.

Largely because of its obvious potential to conflict directly with speech freedom, but also because it is often seen as the most important innovation of the Warren and Brandeis article and possibly the major development of the common law in the twentieth century, the third sense of informational privacy will be the focus of this essay; that is, this essay will focus on control over further dissemination once someone else holds one's personal information. More specifically, my question is whether an adequate and appropriate legal response to informational privacy claims should be limited mostly to maintaining or strengthening privacy in the second sense—control over initial disclosure and the maintenance of private spaces—and, in any event, should not extend to a more general, property-like claim to control others' dissemination of private information about oneself. My thesis is that a person's control over other people's dissemination of private information about the person, purportedly recognized under the rubric of protecting privacy, should be rejected in any case where it would restrict freedom of speech or of the press as properly understood. But the complete story will be more complex, including caveats on when limitations on further dissemination are not contrary to First Amendment requirements.

To jump ahead, the direction of the argument for these caveats will be twofold. First, as opposed to the strong sense of information inalienability rejected above—for example, a person cannot appear nude, even in an enclosed public space—there is also a more limited notion of *market inalienability*.¹⁴ Some (not all) people who consider an absolute bar on sodomy or on all sex outside of marriage as an outrageous affront to autonomy, consider a bar on prostitution (sex overtly for sale in the market) not to be so obviously impermissible. Likewise, laws that restrict one from selling certain information about oneself—market inalienability—may be desirable in some situations and are contrary neither to free speech nor to individual autonomy. For example, privacy may be properly served by barring Internet transactions in which, in exchange for access, payment, or other benefit, the Internet provider collects private information about the other party for largely unregu-

¹² Cf. Ralph Ellison, *The Invisible Man* (New York: Random House, 1952).

¹³ But cf. Anita L. Allen, "Coercing Privacy," *William and Mary Law Review* 40 (1999): 723–57, 740, 752–53.

¹⁴ Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996), 18–20.

lated later uses. In contrast, these policy reasons would not apply if the computer user consciously and voluntarily exposed the information about herself with the intent that it be available for general use. Second, as for property-like control of private information, this control will sometimes be acceptable in specific contexts. Specifically, it may be proper to give a person the right to control collection, use, or dissemination of certain private information by commercial, nonmedia enterprises or government agencies. Crucial to such an argument will be the claim that in these contexts the parties regulated do not have an autonomy or other constitutional, speech-based claim at stake.

III. TWO CONCEPTIONS OF AUTONOMY

A. *Meaningful autonomy*

'Effective' or 'meaningful' individual agency or autonomy might be described, loosely, as a capacity (including the necessary opportunities) to lead a meaningfully self-authored life without unnecessary or inappropriate frustration by others. The precise formulation or definition of the term 'meaningful autonomy' is not a major concern here. Rather, my point is that any such notion is not an on/off variable but a matter of degree. A key function of social policy and of the legal order ought to be to create the conditions that enhance meaningful autonomy. Meaningful autonomy is also concrete; the concern is not with having maximum abstract freedom of choice but with having opportunities to make those choices one actually wants to make. Enhancing effective autonomy for one person will often impair it for another. Conflicts are inevitable. A legal order that provides one person with great wealth, for example, will normally advance her effective autonomy, though this often means someone else will have less wealth, with the consequence that the latter's effective autonomy will be restricted. Recognizing that one of two claimants has a right to a plot of land (or a bank account) will typically advance the winner's capacity to lead a self-authored life while having the opposite effect on the losing claimant.

Many, many things—education, John Rawls's primary goods, sensible environmental policies—including informational privacy, can serve effective individual agency. Elimination of "informational" privacy was a major evil imagined in George Orwell's *1984*, a fictional horror not unlike what technology is rapidly making possible today. However, informational privacy is only one of many resources that can serve meaningful autonomy. To pick the key category of this essay, consider, for example, speech and information. Some have invoked as a central rationale for freedom of speech the premise that (effective) individual autonomy requires *information* and access to varying

viewpoints.¹⁵ For example, one person's meaningful autonomy might be enhanced by knowledge about her spouse, whom she thought loved her but who does not and who is actually having an affair, or is spending all of his time watching video porn, or is suffering in silence. The knowledge that potentially supports her self-authorship or effective autonomy potentially interferes with his informational privacy and his effective autonomy. In a world where the goal is to maximize, or fairly distribute, or provide appropriately conceived sorts of effective autonomy, the correct policy toward informational privacy would seldom be clear. Feminists, for instance, are among those who advocate more privacy in which appropriate forms of intimacy can flourish and yet also call for more exposure of people engaged in various forms of private abuse.¹⁶

The claim that meaningful autonomy requires privacy often involves assertions that for development, experimentation, and repose, individuals need the capacity to shield themselves, at various times and places and to varying degrees, from exposure to the critical eyes of the world. A common assertion is that the public sphere depends on and is, in this sense, parasitic on the private sphere (and, many commentators go on to add, vice versa).¹⁷ Most public persons will need, and certainly will have needed while developing into adulthood, to be able to withdraw occasionally into a private realm.¹⁸ Lack of opportunities to be private or anonymous is injurious to individuality and allows for extreme social control.¹⁹ Interestingly, these assertions in behalf of informational privacy

¹⁵ Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Affairs* 1, no. 2 (1972): 204–26; David A. Strauss, "Persuasion, Autonomy, and Freedom of Expression," *Columbia Law Review* 91 (1991): 334–71; and Richard H. Fallon, Jr., "Two Senses of Autonomy," *Stanford Law Review* 46 (1994): 875–905.

¹⁶ Anita L. Allen, *supra* note 13; Julie Cohen, *supra* note 6.

¹⁷ This is similar to Habermas's claim that private autonomy and public autonomy are co-original. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996), 104, 121–22, 263, 314, and 454. Individual rights are created by the exercise of public autonomy (the liberty of the ancients), but the exercise of public autonomy requires autonomous individual rights holders. See *infra* note 145.

¹⁸ Long a subject of science fiction, this need for privacy in order to develop as a full person was the theme of two recent popular Hollywood movies, *The Truman Show* (1998) and *Ed TV* (1999).

¹⁹ First Amendment doctrine recognizes this need for privacy, emphasizing the role that anonymity played in revolutionary pamphleteering and, more generally, its role in creating a willingness to engage in political activities. See *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958) (First Amendment protects against state demand for disclosure of membership lists); *Talley v. California*, 362 U.S. 60 (1960) (ban on anonymous leafletting is unconstitutionally overbroad); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (Socialist Workers Party has right not to report the identity of campaign contributors); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (person has right to distribute anonymous campaign literature). See generally Seth F. Kreimer, "Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law," *University of Pennsylvania Law Review* 140 (1991): 1–147. Fifth Amendment limits on compelled disclosure might also be seen, in part, as protecting these interests.

seem to emphasize (and maybe only require) the second interpretation of privacy: individual control over whether and when to make publicly available information about oneself. Nothing about providing considerable scope for a private sphere, sometimes understood as itself required by the First Amendment,²⁰ necessarily implies any direct or overt restriction on freedom of speech.

Even this second sense of privacy, disclosure control, would be potentially problematic if there is a constitutional, presumably a First Amendment, right of access to information—a right said to serve individuals' autonomy interests.²¹ This conflict with the First Amendment is avoided, however, by those theorists who see the point of the First Amendment differently, that is, as more a matter of freedom to say what one chooses than to have access to information. In this alternative view, which I subscribe to, access to both privately held and governmentally held information is not a free speech matter but, rather, a policy issue usefully served by devices such as legislatively sculpted freedom of information acts combined with a constitutionally protected free press.²² Often, but not always, compelled private disclosure could be required when the disclosure serves some plausible informational policy goal.²³ In this view, when to compel, as well as when to forbid, government disclosure is properly decided on the basis of legislative or executive policy judgments rather than on the basis of a constitutional right of access to information. In any event, policy measures to protect informational privacy by securing rights to a shielded private sphere and to refuse to disclose information can contribute to meaningful autonomy. These rights do not conflict with speech freedom as conceived of in this essay.

Even if *meaningful* autonomy requires both access to some sorts of information about others and some capacity to limit disclosure, surely autonomy or agency is not robbed of value simply because a person does not possess *all* possible information or complete control over access to information about herself. Maximizing both access to information and the capacity to limit disclosure would be contradictory. Adding to one person's privacy decreases another person's information. The same informational privacy that contributes to one person's meaningful autonomy can undermine that of another. It is equally undesirable to try to *maximize* either access to information or privacy. Not only does a person not need either in maximal amounts, but meaningful autonomy probably does not require that a person always have any specifiable type of information about others available or about herself hidden.

²⁰ See cases cited in note 19.

²¹ See Scanlon, Strauss, and Fallon articles, *supra* note 15.

²² Justice Potter Stewart, "Or of the Press," *Hastings Law Journal* 26 (1975): 631–37; Baker, *Human Liberty*, *supra* note 5, chap. 10.

²³ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding disclosure requirements).

Still, both cloaking and making available particular categories of information may be valuable. Whether meaningful autonomy will be increased more by one or the other will characteristically vary not only among cultures and between various subgroups of a society, but also among different people within any subgroup or for the same person over time. These variations reflect the fact that both information availability and informational privacy relate to autonomy more as instrumental supports than as defining elements. Neither information nor privacy is, itself, a self-authored activity (though the activity of disclosure or hiding can be). Rather, both information and privacy are resources that make people more capable of various meaningful or valuable self-authored choices. Typically a person has more power of self-authorship when she has more of both the privacy and the information that *she* values. In contrast, for this person, gaining more of the wrong sort of privacy or information is at best a diversion, and sometimes can be a burden that reduces her capacity for meaningful self-authorship. Given that obtaining more of privacy or information imposes costs of various sorts, both on the person gaining the resource and on others, and given that obtaining either resource will vary in significance, the socially ideal amount and type of informational privacy or information availability will be controversial and contested.

B. Formal autonomy

The claim in the previous section is that both information (including privacy-invading information) and informational privacy instrumentally support meaningful autonomy. However, a potentially controversial distinction can be made between 'abstract autonomy', or what I will often call 'formal autonomy', and 'meaningful autonomy', a distinction roughly equivalent to what Rawls called "liberty" and the value or "worth of liberty."²⁴ The law affirms the formal conception of autonomy to the extent that the law recognizes an agent's legal right to choose what to do with herself (and her property—more on this later). The law recognizes her dominion over her own mind and body, given the inherent constraints of the environment and given her lack of any right to interfere directly with another's decisions about himself (and his property). This formal autonomy implies nothing about actual capacity, opportunity, or the availability of needed resources.

Although I will not defend them here,²⁵ three claims about formal autonomy need to be noted. First, the legitimacy of the legal order may depend on the law respecting individuals' (formal) autonomy. Second,

²⁴ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 204.

²⁵ See Baker, *Human Liberty*, *supra* note 5; Baker, "Harm," *supra* note 5.

unlike meaningful autonomy, which is always a goal that could be even better realized, the possibility exists for rather uncompromising recognition of or respect for—that is, legal embodiment of—formal autonomy. Third, respect for formal autonomy provides the best basis for the constitutional (and absolute) status of free speech.²⁶

Different theoretical accounts could be given for the status of formal autonomy. The account that I have found persuasive sees the legitimacy of the legal order as dependent on respecting people as equal and autonomous agents.²⁷ Only such respect can sustain the claim that people have an obligation to obey the law. And such respect both requires democracy as the basis for collective, legal authority and constrains democracy so that it does not deny people's autonomy or equality, requirements that can be fleshed out in consequent theories of equality and liberty.

In many respects, this view of two conceptions of autonomy repeats approaches that are relatively common in legal and political theory. The theory of criminal punishment that views legitimate punishment as limited by a principle of proportionality, but as extending no further than is beneficial for the collective welfare, embodies a formal conception of autonomy as a restraint and a more utilitarian element that controls within the bounds allowed by the constraint.²⁸ Likewise, a common conception of morality is that it makes universal claims, while ethics is a comprehensive doctrine concerning the good for a group or an individual. The view, which I have elsewhere called a two-level theory,²⁹ that ethics should

²⁶ In free speech literature, my distinction between meaningful and formal autonomy parallels Richard Fallon's distinction between "descriptive" and "ascriptive" autonomy. See Fallon, *supra* note 15. According to Fallon, in the past, First Amendment autonomy theorists have mostly ignored ascriptive autonomy in favor of descriptive autonomy, but that free speech doctrine ought to respond to both. Fallon observes that the two conceptions place sometimes conflicting demands on the legal order—and descriptive autonomy can lie on both sides of an issue. He then concludes that the proper approach balances all the autonomy claims (although when he does the balancing, it seems he usually favors the strongest claims made on behalf of descriptive autonomy). In my view, many scholars (including myself) whom Fallon characterizes as advancing *negative liberty*, *descriptive autonomy* claims were in fact offering *ascriptive autonomy* theories. See C. Edwin Baker, "Realizing Self-Realization: Corporate Political Expenditures and Redish's 'The Value of Free Speech'", *University of Pennsylvania Law Review* 130 (1982): 646-77 (criticizing Martin H. Redish for adopting a descriptive conception of autonomy). Although Fallon is right that both types of autonomy are important for law and policy, I provide a different account of their proper relationship. Namely, I propose that, rather than balance what are in effect apples and oranges, the law ought consistently to respect ascriptive (or formal) autonomy as a trump or side constraint in developing ways to promote descriptive (or meaningful) autonomy. I suggest that this approach is both more consistent with First Amendment law and more normatively defensible, although both points are disputed.

²⁷ C. Edwin Baker, "Foundations of the Possibility of Legitimate Law" (unpublished essay, 2003).

²⁸ See H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968), 1-27; and Kent Greenawalt, "Punishment," in Joshua Dressler, *Encyclopedia of Crime and Justice*, 2d ed. (New York: Macmillan, 2002), 1282-94, at 1289.

²⁹ C. Edwin Baker, "Sandel on Rawls," *University of Pennsylvania Law Review* 133 (1985): 895-928.

be determinative but only within the constraint of morality,³⁰ describes the relation that I claim here should apply between the two conceptions of autonomy. Basically, in each example, formal autonomy responds to what might be described as deontological claims, while descriptive or meaningful autonomy is more empirical or teleological.

The law respects formal autonomy to the extent that it meets two conditions. First, it must allocate ultimate control over a person's mind, body, and property to that person, except when that person would use her body or property to interfere with another's legitimate realm of decision-making control. Second, the law must not aim at eliminating or suppressing people's freedom to make decisions about behavior or values. These requirements have clear implications for speech, namely, that a person should be able to decide for herself what to say. These requirements, however, imply nothing about whether she will have the capability to say something, which would require, for example, knowledge on her part and which is more a matter of meaningful autonomy.

Obviously, legal recognition of formal autonomy (or liberty) is not necessarily absolute. A person could have autonomy in respect to some choices, could be free to say some things, and not others. Thus, as with meaningful autonomy, a person could have more or less formal autonomy. Nevertheless, formal autonomy is unlike meaningful autonomy, which conceptually could not be provided in any complete sense, and it is unlike either information availability or privacy, which may justifiably *not* be maximized (not only for cost reasons but also because of their diverse relation to meaningful autonomy). Decisions to impose direct legal limits on formal autonomy are not a necessary part of a legal order and should be especially troublesome. Such restrictions appear aimed at serving collective purposes by means of *unnecessarily* disrespecting or forbidding self-authorship rather than, for example, by *necessarily* distributing inherently limited resources. Thus, laws aimed at restricting choice are unlike laws selecting among different distributions, which inevitably affect different people's meaningful autonomy differently but do not themselves restrict formal autonomy, that is, individuals' choices about themselves and their property.

Legal rules that limit liberty (or formal autonomy, as described here) are not a logically necessary part of a legal order, while legal rules that limit the value or "meaningfulness" of a person's liberty—and that limit it differently for different people—are inherent to any legal order.³¹ Roughly, the claim is that most laws distribute the right to make particular choices (e.g., property law) or protect (i.e., most criminal and much tort law) or help rearrange (e.g., contract law) the distribution. These laws do not

³⁰ See, e.g., Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, trans. John M. M. Farrell (Berkeley: University of California Press, 2002).

³¹ The points merely asserted here and in the next two paragraphs are developed in Baker, "Harm," *supra* note 5.

themselves increase or decrease the choices that can be made about the use of resources (although they may make it more likely that people will engage in productive activities that will increase possible choices). These laws do determine who gets to make a particular choice, but they do not prohibit the possibility of making the choice. If the distribution does not give a person the right to make a particular choice, there is someone else who could give it to her. Of course, laws allocating choices have huge consequences for the worth of liberty. They do not, however, themselves restrict liberty. Formal liberty or autonomy is a person's right to make either choices that the law has allocated to that person or choices that the person can make once securing the consent of another person to whom the choice was previously allocated.

In contrast to these *allocative* or distributive laws are a second sort, which I label 'general prohibitions'. These laws prohibit certain choices on the part of everyone: for example, no one can engage in sodomy, say bad things about the president or the country, eat pork, drink bourbon, or charge a higher price. These general prohibitions are directed at making some choices unavailable, which usually means they are directed at limiting formal autonomy. Moreover, unlike allocative rules, general prohibitions are not an inherent or logically required aspect of a legal order. Thus, a commitment to respect formal autonomy suggests the following possible general principle: do not allow general prohibitions even when a general prohibition predictably increases the worth of liberty to many people more than it decreases the worth of liberty to others. I have defended such a principle in those contexts where formal liberty seemed to be actually at stake, that is, where the general prohibition was properly seen as blocking valued exercises of autonomy as opposed to merely making certain choices instrumentally more difficult, which distributional rules regularly do. Thus, my reformulated general principle is: a state acts improperly when its aim is to suppress individual choice as a means of carrying out even the state's good aims. This principle of liberty must be contrasted with the propriety of (sometimes) protecting a person's chosen actions from interference by another, which recalls the distributive or allocative issue.

One additional characteristic of this description of respect for formal autonomy merits attention. This view centrally identifies the person with agency, with action, and with the possibility of choice. In a sense, this is an activity view of personhood: it favors a person's activity of speech over the status of being unknown. This perspective accords, I think, with the view of Justice William J. Brennan, who, after asserting that "freedom of speech is itself an end," went on to say that "freedom of speech is . . . intrinsic to individual dignity," and who characterized "a democracy like [the United States]" as one "in which the autonomy of each individual is accorded equal and incommensurate respect."³² This would explain why

³² *Herbert v. Lando*, 441 U.S. 153, 184 n.1 (1979) (Brennan, J., dissenting in part).

he concluded elsewhere that “freedom of expression is made inviolate by the First Amendment.”³³ This identification of the person with activity is not the only one possible. Warren and Brandeis characterized the privacy that they defended as based on the principle of “an inviolate personality.”³⁴ Both Brennan’s and the conflicting Warren/Brandeis view characterize something as fundamental about the person that the law must respect, but they differ as to what that core aspect is.

Though in this essay my concern is primarily to explore the significance for informational privacy of a commitment to speech freedom, some comment on these (at least partially) conflicting views about what should be legally “inviolate” is warranted. Essentially, favoring “choice” over “personality” privileges a view of the fundamental aspect of personhood as activity rather than something static. To assert as basic a person’s right to have a characterization of her personality unchallenged by others’ expression is an assertion of power over others—in practice over their speech choices but in ambition over even their mental views. Though recognizing a person’s legitimate interest in others’ choices, the claim that a person should have this type of power over others seems very problematic. It is difficult to see why the legitimacy of a legal order would depend on its recognition of power over others. Certainly, it is not a power that a person would have in the absence of a legal grant. Thus, my premise will remain that formal autonomy of the sort described, which includes a person’s choices about her own speech, is plausibly something that the legal order should treat as inviolate. In contrast, any notion of personality that includes control over others’ speech is not a plausible candidate for treatment as inviolate. However, the latter view of personality still implicates often supremely important interests that merit various forms of incomplete legal as well as informal, customary support.

Whether or not formal autonomy as a conception of autonomy is appealing in general, if we narrow our gaze just to speech freedom it is clear that this kind of autonomy has the virtue that it could be, whether or not it should be, fully guaranteed. A person, whenever she is in a place where she has an unrestricted right to be, could be free to say whatever she wants. Of course, allocation rules will affect where (or when) a person can say particular things. Still, there is no category of “content” that a person necessarily must be prohibited from saying in order to authorize another person to make choices for herself, for example, whether or not to say the

³³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585 (1980) (Brennan, J., concurring in the judgment).

³⁴ Warren and Brandeis, *supra* note 1, at 205. Lillian BeVier suggests that privacy is the equivalent of speech as a constitutive element of liberty. I find this to be a strange conception of liberty. It implies that liberty is not merely a power of choice about one’s own action. Rather, it identifies liberty either with a state of affairs (i.e., the information is not known) or with power over other people’s acts (i.e., they cannot speak what they know). This notion of liberty, however, may explain why, in her contribution to this volume, BeVier does not find copyright’s restriction on people’s speech choices in conflict with the First Amendment, a view that I find equally strange.

same thing, to say something else, or to say nothing. Censorship—i.e., prohibitions on people's choices to communicate particular content—amounts to general prohibitions. (I put aside a preliminary theoretical inquiry, presumably informed by why speech should be protected, of identifying particular behavior as "speech" in a normatively or constitutionally relevant sense. Critics of free speech absolutism almost always mischaracterize the absolutists' position by assuming that absolutists believe that the First Amendment protects every verbal or vocal act, a view clearly repudiated by every prominent First Amendment absolutist. For example, no prominent First Amendment absolutist of whom I am aware ever defended First Amendment protection for perjury or commercial speech. Rather, absolutists claim that properly protected speech choices should not be suppressed on the basis of an instrumental balancing analysis of the sort that enamors the current Supreme Court majority.)

Of course, a formal autonomy speech right may not lead to much meaningful autonomy if a speaker never has access to the resources (e.g., educational, informational, conceptual, experiential) that are needed to have anything meaningful to say or the material resources that are necessary to communicate with her intended audience. Still, many civil libertarians (including me) incline toward absolutely protecting this type of formal autonomy against abridgement. Opponents of this position typically argue that such a principle should at best be a rule of thumb or a rebuttable presumption. That is, they argue that the claim of formal autonomy (or liberty) should be rejected when its recognition detracts seriously enough, as it sometimes does, from other people's meaningful autonomy, or when it seriously interferes with a more egalitarian provision for meaningful autonomy. In the context of privacy concerns, the opponents of absolutism might claim that speech freedom can detract from meaningful autonomy by allowing one person to expose personal information about another, and that this intrusion may justify limiting speech freedom.

In contrast to formal autonomy-based speech rights, meaningful autonomy-based, speech-related "interests" cannot be fully or absolutely protected or served. This conclusion should be obvious from our discussion, since provision of the same information that invades one person's privacy (and undermines her meaningful autonomy) can affirmatively serve someone else's meaningful autonomy. Both having information and having privacy are autonomy-based interests, but full provision of one necessarily limits the other: privacy limits information, sometimes access to information limits privacy. The conflict can be resolved only by a decision, presumably a policy decision, that tries best to balance or accommodate the competing interests.

As noted, my premise here is that the central justification for the *constitutional* status of freedom of speech relates to a need for the law to respect individual autonomy in the formal sense of protecting a person's choice of what to say (or her choice to listen to a willing

speaker).³⁵ An implication of this premise is that the constitutional status of speech is not centrally based on its instrumental contributions to meaningful autonomy.³⁶ Of course, this premise does not deny that speech freedom sometimes makes extraordinarily valuable and in some ways unique instrumental contributions to meaningful autonomy. However, like many resources that make instrumental contributions, speech freedom's instrumental contribution varies. Often, less emphasis on particular speech freedoms and more on other goods (e.g., privacy or equality) would arguably further a society's instrumental or policy concerns better than does protecting speech. Almost always, however, there is the necessarily speculative empirical possibility that an *instrumentally even better* policy would pursue meaningful autonomy only by means that did not limit formal autonomy's speech freedoms.³⁷ While instrumental contributions provide important reasons to value speech, they are a doubtful basis for giving it rule-like or constitutional protection. The instrumental contributions of speech are more like the contribution that many other factors make to meaningful autonomy. Certainly, anyone who reads the constitutional protection of speech as valuable for instrumental reasons must be constantly ready (except when convinced by rule-utilitarian arguments) to balance the interests served by speech freedom against other interests, including speech-related interests, served by particular restrictions of speech freedom.

IV. PRIVACY AND AUTONOMY IN LAW

I have argued that informational privacy can contribute to meaningful autonomy, and so can information that exposes private matters. Some degree of privacy may be an essential aspect of human dignity, although there is no reason to believe that privacy about any particular fact is essential. Cultures and individuals will vary in respect to the information that they find most important to keep private. Policy analysis should evaluate the significance of both informational privacy and information exposure in particular contexts. Policymakers can often choose which to favor, as illustrated by the trade-offs that generated the Privacy Act of 1974³⁸ as a statutory part of, and a limitation on, the Freedom of Information Act of 1966.³⁹ Although these policy choices will be contested, their content should mostly reflect judgments about distribution, effi-

³⁵ See Baker, *Human Liberty*, *supra* note 5.

³⁶ For a differing view, see articles listed in note 15. Also Martin H. Redish, "The Value of Free Speech," *University of Pennsylvania Law Review* 130 (1982): 591-645.

³⁷ Cf. Carlin Meyer, "Sex, Sin, and Women's Liberation: Against Porn-Suppression," *Texas Law Review* 72 (1994): 1097-1201.

³⁸ 5 U.S.C. 552(a).

³⁹ 5 U.S.C. 552. The Freedom of Information Act provides a right of access to much of the information maintained in federal agency records. The Privacy Act exempts from disclosure much information that would intrusively and arguably unnecessarily expose private information about individuals.

ciency, and matters of cultural or collective self-definition.⁴⁰ In any event, given the conflicting requirements of and generally instrumental importance of both information availability and informational privacy, *most* legal rules favoring or disfavoring one or the other should presumably be a matter of social policy and not constitutional principle.

Nevertheless, sometimes favoring or disfavoring a particular version of informational privacy can be a constitutional matter. Consider, first, two provisions of the U.S. Constitution that provide important protections of informational privacy. Protecting informational privacy is probably part of the explanation for, and certainly one consequence of, the Fourth and Fifth Amendments.⁴¹ Specifically, the second conception of informational privacy described at the beginning of Section II—disclosure control—is advanced when the Constitution limits searches and seizures (Fourth Amendment) or allows a person to refuse to be a witness against himself (Fifth Amendment). These amendments help protect initial disclosure against demands from a prying government, thereby helping to assure a person the seclusion needed for self-development.

Second, control over disclosure may be a significant aspect of First Amendment holdings protecting a person's right of anonymity, although whether the First Amendment justification for protecting anonymity really involves a general concern with a person's autonomous control over exposure of private information is doubtful. Often the justification involves anonymity's instrumental effect of making speech acts less costly to the speaker and, hence, of preventing the loss of publicly available speech due to the "chilling effect" of exposure. The goal may not be informational privacy itself but, rather, having more speech and, as a result, more information within a marketplace of ideas.⁴² Alternatively, maybe anonymity involves merely a formal speech right not to say things, like one's name, that one does not want to say.⁴³ Again, such a right would have nothing to do with any constitutional concern with informational privacy. Either explanation might explain why the First Amendment sometimes protects a person's choice not to identify herself while it

⁴⁰ C. Edwin Baker, "Posner's Privacy Mystery and the Failure of Economic Analysis of Law," *Georgia Law Review* 12 (1978): 475–95.

⁴¹ But compare Lessig's observation concerning the need to determine whether the point of these amendments is to prevent intrusions, or to prevent insults to a dignity-based informational privacy, or substantively to limit government power, or, presumably, some combination of these goals. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), 146–50.

⁴² *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Brown v. Socialist Party*, 459 U.S. 87 (1982); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

⁴³ Cf. *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting claim that a child receiving AFDC benefits had a religious free exercise claim to stop the federal government from requiring an identification number for receipt of benefits, but suggesting that the child might have a right not to use the number herself). In a demonstration at Stanford University in 1969, participants decided to give the movement's name in response to requests by the authorities that the demonstrators identify themselves. This tactic was neither an attempt to deceive nor a maneuver to hide (taking pictures was not discouraged) but a political statement of solidarity.

also protects other people's right to expose the person who wishes anonymity. That is, an anonymity right might be less about informational privacy and more about speech freedom. In fact, sometimes, anonymity can itself be part of a person's message, in which case any guarantee of speech freedom would require that the person be able to refrain from self-identification.

Sometimes a right not to disclose one's identity or other personal information obviously serves a person's instrumental need for a secluded expressive space in which to develop and to define herself. Consider recognition of an especially strong copyright in unpublished letters.⁴⁴ At least when a person plans never to publish, the right is not easily justified by American copyright theory, in which the constitutionally permissible ground for copyright is to encourage the creation and public availability of useful writings.⁴⁵ In contrast, the impulse to protect the contents of unpublished letters is quite understandable from the perspective of a person's interests in informational privacy. In any event, the conception of privacy as disclosure control is not the subject of this essay's critique of the third conception of informational privacy—control over dissemination. In fact, the possibility of strengthening control over initial disclosure provides a reason to reduce objections to not recognizing control over further dissemination.

Alternatively, First Amendment rights might disfavor informational privacy by trumping some privacy-affirming policies. Consider two possible types of First Amendment claims. First are claims made in behalf of a right to know or to have access to information, even when this information might be considered private. Imagine, for example, a claim that the public and/or the media have a right to enter a prison in a manner that a prisoner views as infringing upon her already-infringed-upon privacy. Although in closely divided decisions the Supreme Court basically rejected this claim, certainly there is plausibility to the idea that there is a constitutional right to access some information that someone else considers private.⁴⁶ Despite a legislative policy decision to protect minor victims of sex offenses against public exposure, a constitutionally based access claim prevailed when the press demanded the right to be present for a

⁴⁴ Cf. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (recognizing strong rights in respect to unpublished letters, relying on *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 [1985]), with 17 U.S.C. § 107 (as amended in 1992 to make fair use of unpublished materials more acceptable).

⁴⁵ U.S. CONST., art. I, § 8 (Congress has power "to promote the progress of science and useful arts by securing for limited times to authors . . . the exclusive right to their respective writings . . ."). This "limited grant . . . is intended to motivate the creative activity of authors. . . . The monopoly . . . thus rewards the individual author in order to benefit the public." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 546 (1985) (quoting *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 477 [1984] [dissenting opinion]).

⁴⁶ *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

child-witness's testimony in a 1982 sexual misconduct case.⁴⁷ So far the Supreme Court has recognized access claims only in cases involving the judicial process—essentially, access to the courtroom. Possibly the rationale is based less on the instrumentally valuable right to information than on a traditional liberty right to be present in the courtroom in order to observe the administration of public justice.⁴⁸

The second type of First Amendment claim is the limit on privacy policies that is central to this essay. Formal autonomy—or, more specifically, speech freedom—allows a person to say what she wants. This right, I claim, exists even when her speech causes harm, for example, even if the speech exposes information about another that the other wants to keep private.

Constitutional rights are often usefully viewed as trumps or side constraints. A privacy trump, such as a Fourth or Fifth Amendment right, requires the legal order to protect or favor privacy over certain forced information exposures. The claim here is the opposite: that a First Amendment trump limits the ways that the law can protect privacy. The formal conception of autonomy centers on the agent being the final authority over decisions about herself or, in the case of speech, about her speech. This corresponds to the common conception that people should be free to say what they want and to listen to what someone else with a right to speak wants to disclose. The right exists even if, as is often the case (sometimes intentionally), her speech is instrumentally harmful to another. Moreover, respect for a person's expressive autonomy should mean that the person is free to listen and observe in places where she has a right to be and among people with whom she has a right to interact in order to learn more and then speak about it. If recognized as an aspect of freedom of speech, this autonomy-based speech right would mean that the law cannot protect privacy by limiting people's speech.

The argument for speech rights of media entities differs somewhat from the argument for individual speech rights. The arguments differ because institutional entities like press enterprises have no intrinsic autonomy claims.⁴⁹ The constitutional status of media entities is better conceptualized as based on how their freedom instrumentally serves people's

⁴⁷ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

⁴⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

⁴⁹ See Frank I. Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), 12–14. There is generally no reason to think that the typical market-oriented, corporate media entity composed of numerous persons expresses or represents the unified, autonomous views of individuals involved in the enterprise, individuals who lose no individual expressive rights merely because of some regulation of the collective entity. Still, this claim may be less true in the case of voluntary expressive associations organized around the participants' solidaristic aims, which is why the Supreme Court has treated their First Amendment claims more generously than those of commercial or market-oriented corporations. Cf. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) with *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

interest in gaining information and vision and how it advances various other goods, especially democratic values such as those described in the Fourth Estate role or checking function of the press.⁵⁰ Still, there is normally no reason to expect, nor has the Court ever suggested,⁵¹ that the speech rights of individuals and the media will differ in scope, at least in respect to the factual or visionary content that the press can disclose.⁵² Thus, for present purposes, I will equate the *speech* rights of individuals and media entities.⁵³

I put aside whether the First Amendment restricts the state's power to limit information-gathering activities. For example, does the First Amendment prevent the state from forbidding all information-gathering trespasses or, more interestingly, forbidding an inquirer from asking specific people, maybe jurors, for information about their deliberations? Likewise, I put aside whether the First Amendment limits the government's ability to impose damages or punishment on people for the dissemination of information that was initially acquired illegally, either by the speaker or by others.⁵⁴ Nor do I doubt that a person can often bargain away or give up these rights to speak, although sometimes such a bargain will be void as either an "unconstitutional condition" or an agreement contrary to public

⁵⁰ See Stewart, *supra* note 22; Vince Blasi, "The Checking Value in First Amendment Theory," *American Bar Foundation Research Journal* (1977): 521; and Baker, *Human Liberty*, *supra* note 5, chap. 10.

⁵¹ But see note 52. Justice Stewart's view that the press has greater speech rights (Stewart, *supra* note 22), a view never accepted by the Court, creates the absurd image of a person being liable for reading aloud to her breakfast companion a newspaper story that the newspaper had a right to print.

⁵² I can think of one exception. Although copyright restricts the freedom of both individuals and the press to say or print what they want, the press's constitutional role as a provider of information and vision may be adequately protected by a combination of an expansive fair use privilege and the idea/expression distinction. In combination, these guarantee a right to copy the idea or facts but not the actual words of a copyrighted item. In contrast, copyright should be unconstitutional under the First Amendment to the extent that it prevents an individual from expressing herself by repeating or distributing specific copyrighted expression. C. Edwin Baker, "First Amendment Limits on Copyright," *Vanderbilt Law Review* 55 (2002): 891-951.

⁵³ Rights other than speech rights may differ. The government may have power to legislate regarding media structure or ownership in order to make the media better serve its public functions without having an analogous power over individuals. C. Edwin Baker, "Turner Broadcasting: Content-Based Regulation of Persons and Presses," *Supreme Court Review* (1994): 57-128. And the First Amendment may be a source of *defensive rights* that protect the institutional integrity of press entities, such as a "reporter's privilege" not to disclose a secret source, again without analogy to any individual rights. Baker, *Human Liberty*, *supra* note 5, chap. 10.

⁵⁴ For skeptical conclusions, see *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (invalidating restriction on publication of information of public importance that was obtained through illegal wiretap); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Brennan, J., et al, concurring) (indicating injunction against publication of information about the accused was improper no matter how shabbily the information was obtained); *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (rejecting publication damages for communicative content obtained through illegal means).

policy.⁵⁵ The “default position,” however, is the right to observe, listen, and learn, and then to speak.⁵⁶ The autonomy claim, which largely corresponds to Court decisions, is that law should not prevent a person or a media entity from disclosing at least lawfully obtained information, for example, the name of a juvenile defendant or of a rape victim.⁵⁷ If this conclusion is accepted, then the gossiping against which Warren and Brandeis inveighed would be a matter of protected First Amendment right.

V. PROTECTION OF PRIVACY

Unrestricted speech freedom does not leave informational privacy without protection. It only requires that the law not use a particular means—that is, abridging speech freedom—to protect privacy. The structure of this requirement is quite conventional in First Amendment contexts. The Court routinely holds that the government can pursue various goals, even the goal of effectively restricting what people or the press are *able to communicate* in order to preserve secrecy, confidentiality, or privacy, *as long as the means do not involve restricting speech*. Most obviously, the law may leave a person free to communicate whatever she knows but leave her unable to communicate certain information by denying her access to it. One permissible reason to deny her access is precisely to prevent her from being able to communicate certain information.

Thus, the Court would undoubtedly and unanimously hold that the state’s interest in the confidentiality of preliminary investigations of judicial fitness justifies the *state’s* nondisclosure (i.e., its preservation of the secrecy or privacy) of complaints about fitness, of the existence of an investigation, or of the information gathered therein. The state could reject requests by the public or the press for this information. The purpose of nondisclosure is to achieve state aims of informational privacy by disabling people from engaging in speech with particular content: what the press does not know, it cannot report. Nevertheless, in *Landmark Communications v. Virginia* (1978),⁵⁸ the Court unanimously held that this kind of legitimate state interest in restricting this kind of speech does not justify a bar on publication of such information once acquired. If “strangers to the inquiry” obtain this information, the state interest in preventing speech on this subject, which justified nondisclosure rules, does not justify restricting the speech of those who now have knowledge. The same

⁵⁵ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Generally, confidentiality—a restriction on speech—can be required of an employee or a person with an agency relationship to another.

⁵⁶ But cf. Jerry Kang, “Information Privacy in Cyberspace Transactions,” *Stanford Law Review* 50 (1998): 1193–1294.

⁵⁷ Cf. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (juvenile); *Florida Star v. B. J. F.*, 491 U.S. 524 (1989) (rape victim).

⁵⁸ 435 U.S. 829 (1978).

is true in many contexts. The Court, for example, is clear that a state can choose not to disclose the name of a rape victim or a juvenile defendant in order to protect privacy. Still, in *Smith v. Daily Mail Publishing Co.* (1979)⁵⁹ and *Florida Star v. B. J. F.* (1989),⁶⁰ the Court rejected restrictions on the publication of information that the press had legally acquired.

Both the rules that the Court would presumably uphold (government nondisclosure) and the rules that it struck down in *Landmark*, *Florida Star*, and *Daily Mail* (prohibitions on communications) aim at restricting dissemination of the same information. Both sets of rules, if allowed and effective, would accomplish the same end: preventing communication. The most salient difference is that the permissible restrictions directly limit only access to a resource, namely information, that is instrumentally useful to speakers and arguably to listeners (i.e., to their effective autonomy), while the impermissible restrictions explicitly limit a speaker's choice to speak or publish (i.e., limit her formal autonomy). The state acts properly in basing its information policies on instrumentalist, policy judgments about the value of privacy as compared to the value of information accessibility. The Court, however, blocks the execution of the state policy if the policy is carried out by means that violate formal autonomy. (Note that because both sets of rules serve the same state interest and thwart the exposure of the same information, the distinction between the rules is difficult—although maybe on rule-utilitarian grounds, possible—to explain on a marketplace-of-ideas theory of the First Amendment, which values speech instrumentally in terms of its contribution to the information available to people. In contrast, the difference is easily explained on grounds of respecting speakers' autonomy.)

This example makes clear that privacy is not without statutory protection. Privacy may also gain a degree of constitutional status due to people's episodic opportunities to be in nonpublic spaces. Consider, as I previously pointed out, the Fourth Amendment's protection of the home and of private papers, and the Fifth Amendment's protection in one special context of the right not to self-disclose. Other means exist to promote a world in which privacy is treated with greater regard. I share to some degree Warren's and Brandeis's tastes for more serious content in newspapers, although at dinner among colleagues, it is easy to see that even educated people (whether or not they are as aristocratic as Warren and Brandeis were) gossip, especially about academics who are not present. Possibly the government should try to structure media industries so that they would favor more "serious" content.⁶¹ However, the legal order's

⁵⁹ 443 U.S. 97 (1979).

⁶⁰ 491 U.S. 524 (1989).

⁶¹ Although the Court in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1964) appeared to rule this purpose constitutionally impermissible, all the Supreme Court's prior cases involving structural regulation of the media suggest the opposite. Baker, "Turner Broadcasting," *supra* note 53.

respect for formal autonomy or, as more commonly stated, for freedom of speech as manifest in much existing constitutional doctrine, requires that protection of privacy not take the form of directly limiting gossip.⁶²

The law can intervene to protect informational privacy at distinct junctures and in different ways. Most generally, the legal order can (1) restrict or regulate the initial alienation of private information; (2) restrict or regulate the gathering of information, most obviously by aiding a person in keeping information from originally being nonconsensually exposed; (3) prohibit further dissemination of information to which the subject objects; and (4) restrict or regulate particular uses (other than dissemination) of information that has been gathered. That is, the law can protect informational privacy by restricting the alienation, gathering, dissemination, and use of information. The first of these means, at least if applied to an individual's speech about herself, violates her speech rights, although I will suggest a different conclusion in the context of market alienations. The third of these means, at least as applied to individual speakers or to the media, violates the free speech principles assumed here. Subsections A and B below explore the second and fourth means of protecting informational privacy.

A. Restrictions on gathering private information

Many restrictions on gathering information are uncontroversial. As noted previously, the Fourth and Fifth Amendments impose gathering restrictions at least on government actors. (Conversely, the Sixth Amendment grants the accused a right to compulsory process for obtaining witnesses in his favor; this information-gathering right potentially intrudes into informational privacy and has been extended by other discovery rules and provisions for compulsory process.) One function of private property may be to protect a physical zone of privacy.⁶³ Generally, protection of physical and mental "zones" of privacy is either constitutionally compelled or a permissible policy choice.

Protection of "private zones" does not mean that the government should have unrestricted authority to limit gathering information. Prohibitions on journalists or presumably on anyone else observing, "monitoring," or even photographing a person when she appears in public realms should be (and probably are) impermissible, even though the observations necessarily expose information.⁶⁴ In public places, people generally have a

⁶² For the best development of this claim, see Diane L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort," *Cornell Law Review* 68 (1983): 291-367.

⁶³ C. Edwin Baker, "Disaggregating the Concept of Property in Constitutional Law," in Nicholas Mercuro and Warren J. Samuels, *The Economics of Legal Relationships*, vol. 4, *The Fundamental Interrelationships between Government and Property* (Stamford, CT: JAI Press, 1999).

⁶⁴ Cf. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

First Amendment autonomy right not only to speak but also to listen and look, that is, to gather information. When engaged in advocacy, people generally have a right to try to obtain new audiences by leafletting or even approaching people in order to try to engage them in discussion,⁶⁵ although continued pursuit of a targeted person who rejects such an approach eventually turns into legally proscribable harassment. The right to speak, however, presumably includes not just the right to advocate but also the right to question; that is, two slightly different premises protect information gathering. In public spaces, not only is gathering information by observation and passive listening generally permissible, but also gathering information can itself be a matter of speaking and then listening. Still, there may be circumstances that justify legal limits on information gathering even in public places or from willing information suppliers.

As noted, the Court has struck down applications of laws against publishing the name of juvenile defendants or rape victims, at least it has when the name has been "lawfully obtained."⁶⁶ It would seem illogical for the state to be able to change the result simply by making receipt of the information unlawful. For example, could the state make it unlawful for a private person to obtain information by reading a newspaper even if the newspaper itself had no right to possess or publish the information? Likewise, for the newspaper, as long as it receives the information from a voluntary source or obtains it by interviewing people, a law making the receipt illegal would violate the First Amendment guarantee of freedom to listen.

Nevertheless, the Court has written its opinions in this area very narrowly. In troubling dicta, the Court in *Florida Star*, while protecting publication of the rape victim's name, left open the question of whether "the Constitution permitted a State to proscribe receipt of [this] information," and, if it did, whether it could then prohibit publication.⁶⁷ Certainly, the government can forbid breaking and entering to get information. The Court's suggestion in *Florida Star* that the government can sometimes forbid "nonconsensual acquisition" of certain sensitive information leaves some ambiguity about the person whose consent is relevant. The most appropriate understanding surely is that the actual party from whom a person acquires the information must consent, for example, by speaking, or by handing over papers, or perhaps by the implied consent of appearing in a public place where observation will suffice to acquire the information. Alternatively, however, some read the Court's comment to mean that the acquisition is nonconsensual if obtained without consent from the person *about whom* the information refers. Still, it is difficult to believe that the government can restrict knowledge by requiring people to keep

⁶⁵ But cf. *Hill v. Colorado*, 530 U.S. 703 (2000).

⁶⁶ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Florida Star v. B. J. F.*, 491 U.S. 524 (1989).

⁶⁷ *Florida Star*, 491 U.S. at 536.

their eyes shut, and their questioning mouths closed, and their ears clogged. At dinner in the evening, a person should be able to report to her companion what she has seen or heard during the day, at least unless she is bound to confidentiality due to a special relation of trust with the party from whom she obtained the information. The same should be true for journalists (or gossip columnists). Possibly the best analysis is that information-gathering acts are themselves expressive or autonomy liberties, or press rights, protected by the First Amendment whenever they would not be illegal except for the content of the information obtained.

Two additional problematic questions concern illegally obtained information. First, no one doubts that a person is liable for any tort or crime committed while gathering information, but can she also be punished or have damages increased for communicating the information that she obtained illegally?⁶⁸ Second, if a person obtains information knowing or having reason to know that someone else originally obtained it illegally, can she be prohibited from further dissemination?⁶⁹ There are clear reasons to resist uniform yes or no answers. Liability directly punishes speech. Liability aims at cloaking potentially valuable information. The press regularly receives significant information from almost institutionalized systems of leaks or from disgruntled persons acting as whistle-blowers. Often, the press will have every reason to suspect that a source acted illegally in obtaining or passing on information. This certainly was the situation in the 1971 "Pentagon Papers" case,⁷⁰ in which the Supreme Court dramatically rejected the government's request for an injunction against publication of excerpts from a classified report that verified many of the antiwar movement's criticisms of U.S. military activities in Vietnam. As this case also illustrates, society often benefits from and presumably the First Amendment protects such speech. In contrast to this example, most people would find it quite horrifying if the First Amendment protected continued dissemination of sexually explicit or nude photos or personal diary entries obtained by illegal, nonconsensual entry into or spying on their bedrooms. It seems insufficient for minimal punishment or liability for trespass to be the only penalties for a person who invades another's privacy, takes explicit pictures or copies personal diary entries, and then either publishes the illegally obtained material or gives it to others to publish, just to fulfill a voyeuristic public's salacious interests in celebrities or even in random private individuals. However, when journalists were found to have trespassed on the premises of a grocery

⁶⁸ Cf. *Food Lion v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999) (rejecting, on First Amendment grounds, publication damages resulting from dissemination of illegally obtained information), with *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (allowing damages for tort to be enhanced due to publication).

⁶⁹ *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969) (rejecting damages for publication where publisher did not commit the illegal intrusion).

⁷⁰ *New York Times v. United States*, 403 U.S. 713 (1971).

chain in 1992 and to have obtained pictures that, when broadcast on television, led to millions of dollars of damage to the chain, the Court of Appeals allowed only \$2 damages for the trespass and the breach of a duty of loyalty, but nothing for the publication, even though surely the real harm of the intrusion was the loss due to exposure.⁷¹

Lower courts have struggled without arriving at a uniform answer to either question raised in the previous paragraph. Recently, in *Bartnicki v. Vopper* (2001),⁷² the Supreme Court found First Amendment protection for a newspaper that published information of “public concern,” distinguishing such information from other private information, even though the paper knew or should have known that the information was illegally obtained in violation of the wiretap law by a third party unconnected with the newspaper. This resolution at first seems appealing: it protects dissemination in contexts like the “Pentagon Papers” case while generating no incentive (or mercy) for dissemination of illegally obtained information that is trivial for public discourse but central to an individual’s privacy. However, my claim has been that the First Amendment should protect speech about anything, including “private” information that judges are unlikely to characterize as being about matters of public concern. When a person has information she wants to communicate, certainly when she has committed no crime, her speech should be protected.⁷³

Drawing on distinctions possibly important for copyright, a different analysis is possible. Arguably, copyright should be understood to violate the First Amendment if it prevents a person in a noncommercial context from saying whatever she likes, including the entire content of a copyrighted item. Such a restriction directly infringes the speaker’s liberty, in particular, her freedom of speech, on the basis of content. (Note, although closer to existing law than might be at first imagined, the analysis here does not purport to track existing case law but represents my attempt to show the constitutionally legitimate scope of copyright law.)⁷⁴ Very few of the privacy fears expressed in the spying-on-their-bedrooms scenario described above would be seriously raised in relation to this speech. Few noncommercial speakers will engage in breaking and entering designed to obtain salacious content appealing to voyeuristic interests; moreover, the fear of such an invasion primarily concerns the public (usually commercial) dissemination of whatever scandalous material is produced.

In contrast, copyright’s goal of providing an incentive for valuable creative behavior properly protects people’s expressive works from *commercial* appropriation without consent, while appropriately broad interpretations of two doctrines—‘fair use’ and the noncopyrightability of

⁷¹ *Food Lion*, 194 F.3d 505.

⁷² 532 U.S. 514 (2001).

⁷³ Long the doctrinal norm, this principle has been rejected in the arguably unique circumstances of child porn. *New York v. Ferber*, 458 U.S. 747 (1982).

⁷⁴ Baker, *supra* note 52.

'facts and ideas', only of expression—prevents any real limitation on the instrumentally justified constitutional role of the press. Since the media has no autonomy interests and often no constitutional interest in the precise expressive formulation of its product, but only a constitutional interest in being able to provide the public with information or vision, copyright as limited by a broad interpretation of these two doctrines does not abridge the press's constitutionally protected role. The Court's distinction in *Bartnicki* relating to material of public concern is roughly analogous. Explicit photographic images and private diary language can provide the public with valuable perspectives on human alternatives, but it is unclear that for this the media needs illegally obtained content. Either fictionalized or consensually obtained material would arguably suffice. Thus, prohibiting media reproduction of illegally obtained content that lacks "public concern" may be appropriate.⁷⁵ The prohibition does not interfere with the constitutional role of the media but merely limits some commercial exploitation of its position. In fact, almost the same analysis may be implicit in lower court decisions concerning the application of 'right of publicity' laws, which protect a person's interest in commercial use of his or her image, but which virtually always—and probably constitutionally must—exempt use for journalistic purposes. Although the press is free to increase its appeal by offering gossipy stories about celebrities, including revealing pictures, lower courts find that if a media report is knowingly false, then the account can be treated not as journalism but as commercial exploitation.⁷⁶ In constitutional terms, this distinction permits liability when a media entity is no longer performing its constitutionally protected role.

Additional questions arise about which both the law and normative theory seem unclear. Even if it is granted that people have an autonomy-based First Amendment right to gather information by either observing or listening to another person in public, does this right restrict the extent to which the state (1) can limit when space is considered "public" or (2) restrict use of technologically enhanced means of gathering information? My tentative answer to both questions is that existing law rightfully assumes that the state has such policymaking authority and that there is no persuasive First Amendment basis for objection.

⁷⁵ The argument in the text would not seem confined to illegally obtained information. For instance, the state could argue that the name of a rape victim or the name of person who in the distant past engaged in some disreputable behavior is or is no longer a matter of public interest. So far, courts have, in my view properly, mostly rejected these arguments. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Hayes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993). The information may add to the journalistic or scholarly integrity of the reports as well as provide truthful information about individuals that other persons may want.

⁷⁶ See *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (1983); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999). This point does not suggest that a right to protect one's image from unwanted use is wise policy even in these contexts. See Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," *California Law Review* 81 (1993): 125-240.

Note that the two questions are parallel. The normative premise behind the idea of a public space is not that all information should necessarily be public but that, when in a public space, people should have an anarchic right to provide, gather, and receive information. There does not seem to be, however, any logical or natural way to determine in particular instances the borders of the public sphere in which this right of a flesh and blood person obtains. The informational-privacy-related reason to protect private property is to provide places beyond the peering eyes and listening ears to which a person is exposed in public. The law, though, could reduce protection of privacy by eliminating or limiting trespass laws to certain types of private property.⁷⁷ Likewise, the law could increase protection even on public property by protecting people from eavesdroppers when in a relatively secluded spot that provides a reasonable basis for assuming privacy.

Information that is only available to listeners or observers through technologically enhanced means should not be understood as inherently “in” a public space. Rather, allowing nonconsensual use of technology amounts to saying that the information it generates is effectively in a public space, while limiting the technology’s use amounts to the opposite, treating the information as in a private sphere and the technology’s use as trespassing. Both property rules and rules about technology use construct realms where people either are or are not protected from non-consensual exposure. Both property and technologically enhanced observation could be regulated to protect privacy so that access only comes with permission, or could be left unrestricted so people are exposed. Just as the legal creation of both public space and private property is sociologically important, it seems likely that the law ought not automatically treat all the different technologies or different contexts of their use in the same way. Certainly, the value of privacy justifies treating some uses of technology as the equivalent of an invasion of a legally protected private sphere.

Telephone conversations are typically carried on cable or fiber optic lines that cross public space or on electromagnetic radio waves. Technology may allow a nonparticipant to hear (and record) conversations, although these eavesdroppers are as uninvited as if the conversation occurred in one’s private home. Existing wiretap laws sensibly treat conversations floating across public spaces as private, even if an intruding listener is traveling on a public road and the participants in the conversation are in a public park using cell phones.

⁷⁷ Cf. *Florida Publishing v. Fletcher*, 340 So. 2d 914 (1976); *Prahl v. Brosamle*, Case No. 152-062, Circuit Court, Dane County, August 28, 1982, cited in Marc A. Franklin, David A. Anderson, and Fred H. Cate, *Mass Media Law*, 6th ed. (New York, Foundation Press: 2000), 570. Neither the notion of private property nor the Constitution requires a trespass doctrine like that common in most American jurisdictions. A court developing an implied consent for reporters’ presence on private property, such as developed in *Fletcher* or *Prahl*, obviously does not assume that the owner would have actually consented in these circumstances, but, rather, assumes a public policy justification for treating reporters’ presence as “custom.”

Available technology allows a person receiving a call to identify the caller or, under readily available current technology, at least to identify the listed owner of the caller's phone. To protect the caller's privacy, could the government restrict the use of this "caller ID" technology, leaving it to the initiator of the call to voluntarily disclose her identity? The general assumption emphasized above is that people cannot be restricted from using their eyes and ears to identify a person. Putting aside the policy merits of this assumption, the question now is, does this freedom apply when the observation only occurs through use of technology? My claim has been that neither the interest in privacy nor the right to gather information automatically determines the best answer. A person should not automatically be assumed to have appeared in public for observation because she uses a telephone. Rather, whether she has so appeared should depend on society's policy choices about borders.

Even before the recent commercialization of "caller ID" technology, the architecture of the existing phone system allowed telephone companies to identify the phone initiating a call in order to route the recipient's reply to the right phone and to direct the phone bill to the responsible party. That is, the technology required a caller to identify herself (or at least her phone) to the phone company and its record keepers. Any law that limits a phone company's freedom to further utilize or communicate these records amounts to declaring the phone call private, which would be like treating it as having occurred on visually or aurally secluded private property controlled by the speakers, despite the caller having in a sense "voluntarily" exposed herself to the phone company. The law protects privacy in the call by restricting the phone company's speech. At first glance, the restraint might seem analogous to, but even less permissible than, restraints on further communications of illegally obtained information. The cases are distinguishable for two reasons, however. First, the telephone company should not be treated as having First Amendment speech rights. Second, the law can be treated as, in effect, creating a mandatory confidentiality term to the contract between the phone user and the company.

Likewise, the government should be able to protect privacy by declaring that disclosures functionally necessary for computer interactions are not to be treated as in a public space or as having been, in a constitutionally relevant sense, voluntarily exposed. Law professor Jerry Kang persuasively argues that the government should make the default rule be that the observer (the other computer or its owner) or the owner of the transmission system cannot permissibly "know" (make use of) the information *except* as needed to engage in the particular communicative interaction then occurring.⁷⁸ How this conclusion is understood is important. This default rule could follow from a notion of property in personal information (for example, property maintained until purposefully aban-

⁷⁸ Kang, *supra* note 56.

done in a specific transaction).⁷⁹ This property premise, however, strikes too hard at the concept of a First Amendment 'commons' where people generally are free to observe and hear what they can and then to talk about it. The better premise is to understand Kang's default position as having treated technology's capacity to expand this experiential commons or public sphere as subject to policy-based restrictions. The default rule simply rejects treating disclosures that are technologically necessary for a transaction-facilitating purpose as placing the technologically generated information into a public space.

Technology, of course, changes many things. Not only does technology enhance the power to hear or observe, it also allows making a permanent record of what is currently available to a person to see, hear, and repeat or publish verbatim. Some states outlaw taping without the consent of all speakers. Since my only point here is that protection of a broad speech freedom, which includes the right to disseminate "private information" about another, does not prevent appropriate legal regulation of the information-gathering process, I leave aside the issue of whether this regulation of technology should be permissible. Journalists have argued to no avail that these laws make their reporting less accurate because they must rely on memory and notes, and, even when their stories are accurate, the laws leave the media much more vulnerable to defamation suits because it is more difficult to prove the accuracy of their reports.⁸⁰ Even if regulating technologically enhanced means of invading privacy sometimes may be both desirable and not contrary to any notion of speaker/observer autonomy, restrictions on taping seem much more problematic.⁸¹ Still, a person may want to control when, or how, or even if *she* makes particular information public. Maybe the rule is more legitimate if directed against those who would force a person to be the unwilling or unknowing instrument (through recording) of communication.

B. Uses and users of information

Even though a party *properly* gathers or observes personal information about another, the use of such information presents an additional issue. An employer might freely observe another's race or sex but be forbidden to use that information in her hiring decisions. Free speech issues arise when the government regulates further communication of the information. Still, although the contexts are variable and sometimes raise contro-

⁷⁹ See Ann Bartow, "Our Data, Ourselves: Privacy, Propertization, and Gender," *University of San Francisco Law Review* 34 (2000): 633-704.

⁸⁰ *Dietemann v. Time, Inc.* 449 F.2d 245 (9th Cir. 1971); *Shevin v Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977).

⁸¹ Diane Leenheer Zimmerman, "I Spy: The Newsgatherer under Cover," *University of Richmond Law Review* 33 (2000): 1185-1231 (review and tentative First Amendment critique of these restraints).

versial constitutional issues, restrictions on other uses usually are and should be permitted.

Consider cases where information initially was legally obtained but by means that were not themselves constitutionally protected, for example, it was not gathered within constitutionally protected conversation or through constitutionally protected observation in a public sphere. Under such circumstances, the source—the government or private party—may have imposed as a condition of access that the information only be used for particular purposes or that it not be used in particular ways. Often the government restricts the use of personnel files, sometimes just to the uses that justified gathering the information in the first place. It regularly provides certain government employees with personal or private information about other employees or about members of the public, but limits any further disclosure of the records apart from the purpose for which they were provided.⁸² In *Seattle Times v Rhinehart* (1984),⁸³ the Court upheld a protective order, arguably a “prior restraint”, prohibiting publication of private information that the press obtained through use of the governmentally granted discovery power. On the other hand, sometimes a restriction on publication of or conversation about information obtained with government help or permission is held to be unconstitutional. Such restrictions are always potentially subject to attack as ‘unconstitutional conditions’.⁸⁴

In the late 1990s, lower courts invalidated a law that, though it made available names and addresses of arrestees to private parties for many purposes, including media exposure, denied the information to recipients who intended to use the information directly or indirectly to sell a product or service. In *Los Angeles Police Department v. United Reporting Publishing Corp.* (1999), the Supreme Court reversed.⁸⁵ Chief Justice William Rehnquist (never known to worry much about unconstitutional conditions) simply treated the law as a facially permissible restriction on access to information. He distinguished this limit on access from what would be an overtly objectionable prohibition on speaking. Although he reached the right result, his reasoning should be very troubling. The permissibility of conditioning access should depend on both the context of the original receipt and the content of the restrictions.

⁸² Cf. *Snepp v. United States*, 444 U.S. 507 (1980) (federal government can require former CIA employee not to disclose information obtained during employment without approval of agency).

⁸³ 467 U.S. 20 (1984).

⁸⁴ See *Seattle Times*, 467 U.S. at 37 (Brennan, J., and Marshall, J., concurring). Analogous to the unconstitutional condition doctrine, restrictions imposed by employers on further use by employees or restrictions imposed by contract could be unenforceable because contrary to public policy. A court could have easily decided to protect publication of the source’s name in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), or information provided by whistleblowers on this nonconstitutional ground.

⁸⁵ 528 U.S. 32 (1999).

Such restraints should always be potentially vulnerable to an unconstitutional condition attack, which was precisely the point of Justices John Paul Stevens and Anthony Kennedy in their dissent. They would find the law unconstitutional for denying access to certain parties because of those parties' use of the information for particular (commercial) speech purposes. (If such restrictions were imposed by a private party, a reasonable argument could be made that courts should deny enforcement of the agreement as "state action" that would violate the First Amendment or as unenforceable because "contrary to public policy.")⁸⁶ However, if commercial speech as well as other commercial practices either should not be constitutionally protected⁸⁷ or, as under the current doctrinal regime,⁸⁸ are more easily subject to limitation, then the dissent's final conclusion should be rejected at least to the extent that the restricted uses of the information were all commercial.

In addition to regulating certain uses of "private" information (for example, for hiring decisions) and imposing appropriate conditions on governmentally supplied information, another basis for restricting use may be especially important: the government's general authority to regulate businesses and commercial practices, including those of professionals. Securities laws illustrate that this power extends to regulating speech involved in this business. Disclosures are required—and sometimes prohibited. Insider use of information is forbidden. In the legal world, also, government regularly restricts speech and the use of information. Although sometimes cast as a disagreement over the propriety of regulating speech that is inconsistent with a defense attorney's role, arguably the disagreement that ensued among the justices over the standard for regulating a defense attorney's out-of-court speech was primarily over their differing visions of a defense attorney's role.⁸⁹ Lawyers, doctors, psychologists, and other professionals are often prohibited by malpractice rules or rules of professional ethics from engaging in role-inconsistent speech. Usually these rules restrict the dissemination of private information gathered from clients. The premise in these examples is that it is constitutionally permissible in commercial or professional interactions to legally restrict the use of personal information to the functions for which it was given, unless the person specifically and voluntarily grants per-

⁸⁶ See *supra* note 84.

⁸⁷ Baker, *Human Liberty*, *supra* note 5, chap. 9.

⁸⁸ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

⁸⁹ *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (5–4 decision upholding particular restriction on defense attorney's out-of-court speech). The case involved a lawyer's public statements at a news conference that he called to defend his client and to attack the veracity of the police. The Nevada Supreme Court had issued rules preventing defense attorneys from making public statements that might taint the jury pool. The attorney's case against the state disciplinary board's recommendation that he be reprimanded eventually reached the U.S. Supreme Court.

mission for broader use. More generally, I have argued elsewhere that a commitment to an autonomy or liberty-based theory of freedom of speech would not justify any protection for the speech of commercial entities (except the press).⁹⁰ Though controversial, I will assume this conclusion here without repeating my arguments. Most advocates of speech rights for corporations do not reject my claim about the implications of an autonomy-based theory but instead base their claims on an alternative, usually a marketplace-of-ideas theory of speech, and emphasize the instrumental contribution of corporate speech in supplying people with information.⁹¹

If commercial entities can be limited in ways that would be impermissible to restrict noncommercial or media entities, determining what constitutes a media entity will sometimes be crucial in determining the permissibility of privacy regulations. One possibility is that First Amendment protection extends to any *information provider*, any entity that sells or has information (or opinion or art or music) as its product. This, however, seems too broad. Lawyers and doctors and accountants are largely information providers but are not likely candidates to be characterized as “the press.” Alternatively, the protected entity could be one that offers *nonindividualized* communications as its product and makes this expression widely available to an interested public. The Investment Act of 1940 restricts who can engage in the investment-advice business, but exempts those who give advice by means of a bona fide publication of general and regular circulation. The Court majority in *Lowe v. Securities and Exchange Commission* (1985),⁹² found that this exemption covered a publisher of an investment-advice newsletter. Rejecting this statutory interpretation, Justice Byron White’s concurrence found the defendant nonexempt under the act but protected by the First Amendment. Both opinions are plausible on the facts. The interesting question is whether White’s *constitutional* analysis could distinguish this newsletter publisher from nonmedia commercial actors, for example those selling more individualized investment advice. Justice White said that he did not “suggest that it would be unconstitutional to [apply the act’s restrictions to] persons who, for compensation, offer personal investment advice to individual clients.” He thereby implicitly accepted the distinction that I offered above: the permissibility of restricting dissemination by commercial entities but the impermissibility of restricting dissemination of the same information by the press (or, presumably, individuals acting noncommercially). Moreover, arguably even the press can be regulated when delivering advertising—speech that is paid for—

⁹⁰ See, e.g., Baker, *Human Liberty*, *supra* note 5, chap. 9.

⁹¹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); Burt Neuborne, “The First Amendment and Government Regulation of Capital Markets,” *Brooklyn Law Review* 55 (1989): 5–63.

⁹² 472 U.S. 181 (1985).

rather than providing its own information and opinion.⁹³ In *SEC v. Wall Street Publishing Institute* (1988),⁹⁴ the D.C. Circuit Court of Appeals suggested that the government could require a paper to disclose the consideration (other than provision of free text) paid by the issuer of a security in exchange for the paper's publication of information about the security. Since the disclosure "carries an inherently pejorative connotation," the requirement should be seen as restricting the paper's freedom in disseminating paid-for speech, that is, advertising.⁹⁵

The difficulty of deciding what counts as media may apply to (commercially accessible) databases. They are part of an information-supplying or communications industry. Should they either always or sometimes be treated as constitutionally protected media? Maybe not. In *Dun & Bradstreet v. Greenmoss Builders, Inc.* (1985),⁹⁶ the majority allowed punitive damages when a credit reporting business inaccurately (defamatorily) reported to a client that a major business in the community had filed for bankruptcy. The Court based its ruling on the speech not being a matter of public concern, thereby presumably taking personal information that is not a matter of public concern outside the constitutional protection of *Gertz v. Robert Welch, Inc.* (1974).⁹⁷ (*Gertz* had held that, as for defamatory information of public concern, the law could not provide punitive damages unless the speaker knew the information was false or recklessly disregarded the question of its truthfulness.) Although the dissent in *Greenmoss* persuasively argued that speech about "economic matters . . . is an important part of our public discourse," the claim in this essay is that the majority's reasoning should be troubling even if the majority were right that a major local employer's bankruptcy was not a matter of public concern. Still, the outcome of the case may be right. The business of credit reporting is in many respects more like professions that are regulated than like the press. Just as an accountant sells tax advice, a credit reporting agency sells specific, individualized financial information to clients who seek the information to guide their commercial transactions.⁹⁸ These features distinguish credit reporting from both individuals' noncommercial speech and media communications.⁹⁹ If, but only if, my

⁹³ *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913). See generally, C. Edwin Baker, *Advertising and a Democratic Press* (Princeton, NJ: Princeton University Press, 1994), 118-37.

⁹⁴ 851 F.2d 365 (D.C. Cir. 1988).

⁹⁵ Despite this "commercial speech" explanation for the court's conclusion, the court's actual analysis was based on "government's broad power to regulate the securities industry." Clearly, however, the court was misguided to imply any broad, general governmental authority to regulate individuals' noncommercial speech or media speech about the securities industry.

⁹⁶ 472 U.S. 749 (1985).

⁹⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁹⁸ *Hadden View Investment Co. v. Coopers & Lybrand*, 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982) (accountant malpractice).

⁹⁹ *Gutter v. Dow Jones Inc.*, 22 Ohio St. 3d 286, 490 N.E.2d 898 (1989) (liability for error in stock table denied in contrast to liability for accountant error).

proposed ground for the decision were accepted, it would be permissible for a law to require a credit reporting agency to allow a person to review her file, to maintain a procedure for challenging inaccuracies, or to include in its report an indication that the person reported on disputes certain information contained therein¹⁰⁰—requirements that would mostly be unconstitutional if applied to newspapers.

Though *Greenmoss* could be understood to be about regulating a non-media business, a general power to regulate databases raises a somewhat different issue. Modern computer-based technology makes databases increasingly cheap to construct and easy to use. In finding a “personal privacy” interest in information that had previously been made public and was now stored on an FBI database containing rap sheets maintained on 24 million persons, the Court properly observed that “there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”¹⁰¹ But what follows for regulatory power? Consider, for example, four possible contexts: (1) laws generally restricting the conversion of certain types of properly obtained information into data collections; (2) laws regulating the maintenance of databases; (3) laws restricting creation of databases for certain (commercial) uses; and (4) laws restricting certain (commercial) uses of database information.¹⁰²

As to the first context, using computer technology in processing and organizing information about a person is in many respects parallel to using technology to gather information on her that would not otherwise be available to our eyes and ears. Arguably, both uses of technology should be equally subject to regulation. Or maybe an even closer analogy is tape recording. Even when a person has a constitutional right to hear and publish verbatim the contents of a speech, current doctrine permits a legal prohibition on recording it without the consent of the speaker, thereby preventing the listener from making the most accurate use of information that she rightfully possesses. In each of these cases, information about a person has been exposed, but the law would restrict technology that makes the information more usable. Nevertheless, it might be wise to resist these pro-regulatory conclusions. Not having a general right to process, comprehend, or access information that one rightfully has (and then to communicate it) seems to contradict the freedom of the intellect that surely is part of the meaning of free speech. Could a newspaper be barred from keeping and using files of its past stories? If not, could it be prohibited from using computers to do so at a lower cost than before?

¹⁰⁰ Cf. Fair Credit Reporting Act (1970) and Consumer Credit Reporting Act of 1996, 15 U.S.C. § 1681–1681t.

¹⁰¹ *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

¹⁰² My thinking here was prompted by Cohen, *supra* note 6.

Can individuals, for example, sociologists or historians, be prohibited from engaging in such activities? If the answer to these questions is “no,” although the issue is not beyond doubt, then general restrictions—for example, restrictions that apply not just to certain businesses or to certain uses but to all individuals and the press—on entering information into databases seem very questionable. Moreover, as to the second context, the same arguments apply to regulation of the maintenance of databases.

Regarding the third and fourth contexts—laws restricting creation or uses of databases for certain commercial purposes—the permissibility of such laws may well be the same as the permissibility of regulating other commercial practices. All commercial practices, including the creation and use of databases, are generally subject to regulation while noncommercial and media uses of information are properly protected unless a particular use (e.g., for criminal purposes) is independently outlawed.¹⁰³ Certainly, commercial uses of information about a person’s race or sex are subject to prohibition. Some versions of a right of publicity restrict unconsented use of a person’s image even when the image is itself the product. This use of a person’s image is equivalent to the media providing the public with an expressive product that contains information or vision. Despite the questionable constitutionality of the right of publicity in this context, forbidding unconsented use of a person’s image for advertising is more clearly constitutional.¹⁰⁴ Restrictions on collecting information or using information in databases designed for commercial uses may be more like, and as permissible as, the second category of right of publicity claims: those restricting unconsented use of the person’s image in advertising. The law cannot give a person a general property right in her *persona*, that is, in personal information, but it can give her such a right assertable against nonmedia commercial uses.

If the restrictions described in the above paragraph are acceptable, then the implications are huge for greater protection of privacy. Those espousing privacy values often state them in sweeping, general terms as a purported right of a person to control (usually personal or private) information about herself. However, the issue is mostly inflamed by people’s sense of being ever more subject to manipulation, harassment, or targeting (e.g., unwanted phone solicitations) by market entities (or by government). If gathering, assembling, and using private information for commercial purposes were limited, the major concerns of privacy advocates would be met. These rules could also dramatically reduce the incentives for construction of offending databases, thereby further reducing the threat to privacy.

¹⁰³ But cf. the government’s questionable concession in *United Reporting*, *supra* note 85, that if the commercial user “independently acquires the data, the First Amendment protects its right to communicate it to others.” 528 U.S. at 45 (Stevens, J., dissenting).

¹⁰⁴ All scope for a right of publicity is critiqued in Michael Madow, *supra* note 76. My claim here is that the constitutional critique should only apply to nonadvertising appropriations of another person’s image.

Regulation of market activities might even go a step further. General rules forbidding alienation of private information impermissibly restrict a person's speech about herself. I suggested, however, that the law could establish a default position that information exposed by engaging in digital communications could only be used for functionally necessary aspects of the particular interaction involved. Still, commercial entities may be in a powerful strategic position to obtain consent to unrestricted use of the information in exchange for something they offer, such as access to their Web site, individualized service, a lower price or free use, or whatever. Standard reasons to regulate market transactions—for example, unequal information, structures that create inappropriate amounts of power of one party over the other, negative impact on third parties—could possibly justify prohibitions on market alienation of private information. A person would be left free, though, to publish personal information or even to give it to a particular commercial entity, except not in exchange for some benefit.

Many privacy advocates will not be satisfied with the protections defended here. Nevertheless, much of the rise in popular concern about disappearing privacy apparently, and quite reasonably, relates to fears about the collection and manipulative use of information by corporate and governmental bodies. Basically, my claim is that most privacy-protection policies that relate to *these* threats, although possibly difficult to secure politically, do not conflict with First Amendment principles. The area of real conflict between free speech and privacy is much more limited. The abstract principle that requires respect for people as autonomous agents in control of their own speech choices dictates that, in this discrete context, privacy claims should lose. Sections VI and VII will argue that this result is pragmatically justified on the basis of plausible, though inevitably inconclusive, consequentialist considerations. However, before taking up that issue, a final means of protecting privacy, which turns out to be fully consistent with the First Amendment, merits comment.

C. Strongest protector: Nonlegal norms

Probably the greatest protection of informational privacy comes through voluntary decisions not to disclose "private" information about another person or, possibly more often, to monitor closely when and to whom to make disclosures. These decisions are often quite rigidly determined by nonlegal social norms, such as the injunction not to "snitch." All communities value privacy, although to varying degrees and in relation to different information. Communities predictably develop different privacy-protecting social norms or practices that embody their judgments about privacy. Robert Post is surely correct about the necessity of "civility rules"

for the maintenance of communities, communities that are themselves necessary for autonomous individuals to develop.¹⁰⁵

The mistake would be to assume that these civility rules require legal or other formal enforcement mechanisms. As an empirical matter, I expect that reliance on social practice will maintain sufficient civility rules to fully meet Post's concern with having an environment in which people can develop as (autonomous) individuals. In contrast, legal enforcement of civility rules that protect privacy against offending communications, as well as enforcement of most other civility rules relating to expression, may make communities more rigid, oppressive, and slow to adopt useful change.

Contrary to frequent communitarian characterizations of liberal theory, my claims on behalf of the First Amendment never assume that individuals are factually "unencumbered" or that effective or meaningful autonomy can be a context-free conception. Both legal and societal respect for formal autonomy and practical realization of meaningful autonomy are historical achievements, not abstract realities that provide an ahistorical basis for some mythical social contract.¹⁰⁶ Rather, liberal theory's more modest claim is that appropriate respect for people's autonomy requires that individuals be left with the right to accept or at least to attempt to reject actual "encumbrances," that is, that they be left formally free to help to create or change their context by their choices. In this view, civility rules, though valuable as a category, in any particular case may be misguided or, at least, appropriately contestable. When these rules ought to be maintained, normally people's voluntary allegiance and informal enforcement will suffice. Change occurs when more and more individuals decide that the rules are wrong and act on their rebellious views. Behavioral votes are in a sense much more democratic and engaged than are the government's official decisions. Each person's behavioral vote contributes to the creation of the culture, the social rules. In many respects, this approach to civility rules is analogous to language. Both the existence of grammar and shared word meanings are necessary for social life. However, both are maintained—and changed—by a behavioral summing of people's speech choices.

The voluntariness of language rules does not mean that grammar and shared word meanings are not of major significance or a proper subject of government policy. Public education and, in a curiously different way, public support for the arts both, at times, exemplify such policies. (This

¹⁰⁵ Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *California Law Review* 74 (1986): 691; Robert Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995). For a liberal account of the necessity of community for development of individual autonomy and its implications for political theory, see also Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989).

¹⁰⁶ See Baker, "Sandel on Rawls," *supra* note 29.

fact is roughly analogous to the point of the two preceding subsections.) Information privacy can be a matter of policy embodied in legal rules even if not protected directly by law that prohibits offending speech choices. Civility rules—group choices—about what information should be private and private in what ways or to what extent, operate within a legal structure that protects against certain information-collection devices (e.g., secretly taping what happens in the bedroom) and that regulates various commercial uses of information.

These nonlegal norms protecting privacy can be both extraordinarily important and quite effective. They often protect secretive individuals, adding to their freedom. They both maintain and are maintained by group solidarity. Legal scholar Randall Kennedy describes how most African Americans know of other blacks who “pass.” Despite African Americans’ general disapproval of passing and despite their capacity to prevent it by exposure, social norms effectively prohibit exposure, especially exposure to whites.¹⁰⁷ Even in a world in which “passers” could hardly expect the law to protect them against exposure, these social norms have provided considerable protection. Interestingly, speech freedom provided not only *unused* power that blacks could have used over other “passing” blacks, but also power to enforce the informal civility rule of nonexposure. In the 1930s when an exclusive, “whites-only” restaurant hired blacks to identify passers who were attempting entry, presumably on the theory that it takes one to know one, Kennedy reports that “a Negro-owned newspaper published the names of the lookouts.”¹⁰⁸ In a sense, the newspaper revealed personal information about some people in order to enforce, and to punish them for violating, the civility rule against revealing certain personal information about others.

The account offered by communications professor Larry Gross of the history and debates over “outing” of gays makes the point even more powerfully.¹⁰⁹ The rule against exposing another person’s homosexuality has incredible strength, especially among gay men and lesbians. “Outing” had long been considered as a possible political strategy. It was debated by what Gross described as the first homosexual emancipation movement, but the Scientific Humanitarian Committee, founded in Germany in 1897, quickly rejected the “frequently suggested ‘path over corpses.’”¹¹⁰

¹⁰⁷ Randall Kennedy, “Racial Passing,” *Ohio State Law Journal* 62 (2001): 1145–93, 1171–73. Even if African Americans mostly condemn passing, many also view it as a method to flout and subvert silly but oppressive racist laws and norms. *Id.* at 1169–70. Kennedy observes that “Langston Hughes repeatedly defended passing as a joke on racism.” *Id.*

¹⁰⁸ *Id.* at 1171 (citing Shirlee Taylor Haizlip’s account). Cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (among constitutionally protected methods of exercising power, boycotters of white businesses applied pressure on black “violators” by reading aloud their names in church and by publishing their names in a local black newspaper).

¹⁰⁹ This paragraph is based entirely on Gross, *supra* note 2.

¹¹⁰ *Id.* at 9. Corpses may lie with both alternatives. Gross notes the suggestion that lack of positive role models contributes to the severely disproportionate number of suicides among gay youth. *Id.* at 126.

The history of outing and especially the debate over outing in the 1980s and 1990s shows the extreme continuing power of the rule forbidding disclosure. Most mainstream gay and lesbian groups and leaders claim to reject outing in any circumstances, although some evidence indicates that most individual gay men and lesbians viewed "outing" as appropriate in specific circumstances, most commonly in cases where the outed person exercised considerable power and publicly and effectively used that power to harm gays and their causes. Some thought the social good that could be expected to result from outing justified its use in somewhat broader contexts, for example, in identifying major sports, entertainment, or business figures who were potential role models. Interestingly, these supporters of outing typically argued their case within the homosexual community and, even though legally free to speak and thereby advance the good as they saw it, they seldom violated the community consensus not to out. That is, although the rule was nonlegal and unwritten, the possibility to propose "amendments" or repeal existed within the large gay public sphere, and yet when unamended, the rule remained generally effective—with occasional and usually very limited occasions of "civil disobedience" by "radicals."

The lesson of this history of outing, as well as the history of passing, might be threefold. First, informational privacy can be extraordinarily important and valuable even when, as the example of passing illustrates, the legal order would happily condone disclosure. Second, especially among those who have the information and, thus, often the power¹¹¹ to violate informational privacy, social norms protecting privacy can be extraordinarily effective.¹¹² Third, the existence of speech freedom allows for both participatory debate and practice that can challenge and change, or defend and maintain, these rules.

VI. OVERVALUATION OF PRIVACY

My abstract thesis is that formal autonomy, or free speech rights, should operate as a side constraint on policy formulation, that is, it should act as a "trump." Speech rights should prevail even when they run roughshod

¹¹¹ The capacity of someone with information to "out" another should not be assumed too quickly. A common mainstream view has been that homosexuality is not *so* bad as long as kept secret. The "Don't ask, don't tell" policy had not yet been invented by the U.S. military when Gross wrote his book, but he fully explained the appeal of such a policy. Gross, *supra* note 2, at 144–52. The mainstream press reflected this view by engaging in "inning," that is, by refusing to indicate a person's homosexuality in contexts where it would indicate a person's heterosexuality. Similarly, the press often refused to report as "news" that a major figure who assumed a public heterosexual image was actually gay, while routinely reporting other personal "news" about the figure.

¹¹² This point should not obscure the fact that "outing" in neighborhoods, employment, and social contexts of gays, usually by nongays, also occurs and often has tremendously harmful consequences. At the end of my discussion of gossip below in the text, I note that gossip has overtly negative as well as useful consequences.

over people's desire to keep information private. This thesis rejects giving people any property right in information about themselves that can be used to control the communicative choices of other individuals or the media.

Nevertheless, informational privacy is extraordinarily important to individuals and to communities. The information that should be kept private and the appropriate methods of guarding this privacy, however, are matters on which people and communities will differ. Societal self-definition involves creating particular types of communities, encouraging certain values and practices, and even supporting certain images of persons. In formulating privacy policies, all of these considerations, as well as concerns about efficiency and distribution, should have a role. Of course, the proper content and weight of these efficiency, justice, and self-definitional concerns, even as goals, are contestable. Nevertheless, elsewhere I have argued that their appropriate elaboration would lead to considerable legal protection for the privacy of persons and much less protection for the privacy of instrumentally valued, institutional creations such as corporations (or governments).¹¹³ Informational privacy is a valuable resource. Control over information can be a major form of power. Since each person would be a beneficiary, a personal right of informational privacy would be, distributionally, relatively egalitarian as compared to rights to material wealth that are often held very unequally. This egalitarian quality is a major plus in favor of a personal informational privacy right. But possibly most important is the contribution that privacy makes to meaningful autonomy, the capacity to lead a self-authored life. In contrast, these same concerns point the opposite way in respect to powerful institutions. An egalitarian or democratic social policy should be hesitant about unnecessarily increasing the power of already powerful institutions, including their ability to protect their own privacy and their capacity to invade the privacy of individuals. Thus, Section V drew from the work of many privacy scholars, as well as constitutional precedent, to suggest a wide variety of ways in which the law should be able to protect personal informational privacy.

Now, I want to take a different tack. This section suggests that privacy, no matter how essential for people's flourishing, currently is in danger of being seriously overrated, at least in many contexts. Thus, my claim here begins an inevitably incomplete pragmatic defense of the thesis that, when at stake, formal autonomy should "trump" privacy or, if the trumping conception is resisted, that formal autonomy justifies great caution before being compromised by pro-privacy policies.

Warren and Brandeis's encomiums for a right of informational privacy have resounded more in the court of public opinion than in the courts of

¹¹³ Baker, "Posner's Privacy Mystery," *supra* note 40. This argument responds to the opposite conclusion offered in Richard Posner, "The Right of Privacy," *Georgia Law Review* 12 (1978): 393-422.

law. Currently, great popular support exists for a right to privacy from the snooping eyes of government, of the media, and of corporate marketers. Also, people commonly disapprove of, for somewhat different reasons, neighborhood or office "gossip." Although I certainly cannot prove it, I am inclined to believe that there has been a recent surge in the popular appeal of informational privacy.¹¹⁴ Not only is the informational privacy tort a twentieth century invention, but my impression is that in the twenty-some years since legal scholar Diane Zimmerman's "requiem" for the tort,¹¹⁵ it has found greater judicial backing.

Greater popularity may reflect the plausible view that the increase in commercial use of newly cheapened, individualized marketing strategies and mounting encroachments by government have put privacy in greater danger today than ever before. Resistance to the "disciplinary agencies" of government and the market is surely progressive and justified. Possibly the central factor in their greater power, as well as a prime generator of increased fears, is the incredible advances in computer and related digital technologies that dramatically reduce the cost of collecting information and, possibly more ominously, lower the cost of indexing, storing, and retrieving it.¹¹⁶ If this power is driving the public's concern with informational privacy, the concern embodies a value orientation very similar to that implicit in my emphasis on autonomy. To be the author of their own lives, people want to evade the intrusive eyes of those who can exercise power over them. Of course, as contrasted to the claims of formal autonomy for speech rights and for locating final authority for choice in the individual, this concern refers more to the practical level of making autonomy effective or meaningful. From this perspective, society should resist any retreat from the defense of informational privacy and reject, for example, the advice of right-wing demagogues who recommend giving up civil liberties, including rights of privacy, in an irrational reaction to the criminal acts of September 11, 2001. Protection of privacy can be a sign of a self-assured society. Sound arguments justify many policy responses to popular demands for privacy, except, in my view, those aimed at limiting individuals' speech freedom or at censoring (as opposed to restructuring) the media.

Nevertheless, another possible basis for the growing popularity of privacy rights may be a sign of cultural sickness. Troublingly, the high valuation of privacy may reflect increasing desires to withdraw from civil society and especially from the public sphere. This increasingly common preference for virtually complete withdrawal stands in dramatic contrast to the classic vision of a private realm as a necessary base to which a person periodically repairs, but always with the hope and expectation of returning to the public world. My fear is that the current positive valu-

¹¹⁴ Zimmerman, "I Spy," *supra* note 81.

¹¹⁵ Zimmerman, "Requiem for a Heavyweight," *supra* note 62.

¹¹⁶ Oscar H. Gandy, Jr., *The Panopticon Sort: A Political Economy of Personal Information* (Boulder, CO: Westview Press, 1993).

ation of privacy reflects a society in which all value is increasingly seen as located in private life. To an increasing extent, people seem to find all meaning in private interactions of family and other personal associations or, even more disconcertingly, in a more purely commodity-oriented world of private consumption with value largely based on wealth and material goods.¹¹⁷ According to this account, the value-orientation of commercial advertisers has virtually won. My concern is not with people recognizing that privacy and private life have true worth, but with their loss of a sense of value in public life. The public sphere is increasingly devalued and disinhabited. Though this point requires more development, my claim is that as a normative matter, the classical vision of society and of public life is more appealing, and the newer vision of “withdrawal” represents a dangerous decline.

Withdrawal represents a direct threat to the First Amendment values of dissent and challenge to the status quo.¹¹⁸ Often people will not merely withdraw themselves, but will also seek to enforce withdrawal. They fear that an active public sphere would disrupt conventional norms and private life. Not everyone loves a parade if, for example, it is a civil rights, antiwar, or neo-Nazi march. In his useful study of gay politics, Larry Gross noted how protection of privacy has been central to the gay agenda. In the years immediately after the “liberal” British *Wolfenden Report* in 1957,¹¹⁹ which recommended decriminalizing private homosexual behavior, and the British adoption of this policy, what resulted was an increase in prosecutions for arguably public homosexual behavior as the govern-

¹¹⁷ I am not in a position to prove this characterization to those who do not see it. Still, declining levels of voting, the media’s reduced emphasis on policy-oriented or political news, the view that society’s problems are more a matter of charity or private action than public policy, a cynical view of politicians and public servants, the so-called “bowling alone” phenomenon, as well as interpretations of popular culture, are among the features of social life that I would examine for evidence. Battles over taxes (or the size of government) can be seen as disagreements about whether *marginal* value lies more in public or private expenditures of resources and energies. A retreat to private life, if it exists, may be a uniformly global phenomenon or it may be that the United States is alone or at least in the vanguard, in which case comparative evidence would be informative. For example, the only reports that appeared in the mainstream American media on the 2003 Finnish parliamentary elections emphasized the lack of policy differences or issues, other than how to respond to increased unemployment, between the two dominant parties, which produced a voter turnout of only 70 percent. Lizette Alvarez, “Finnish Center Party Edges Past Social Democrats in Election,” *New York Times*, March 17, 2003, late edition—final, sec. A, p. 2, col. 3. Only by going beyond U.S. media, say, by viewing BBC online, could one discover that another prominent issue was the losing Social Democrats’ inadequate opposition to President Bush’s military policy toward Iraq. A Finnish academic told me, however, that the real story was the dramatic loss of seats by the conservative party, which apparently fell from favor because of the unpopularity of its promise of a tax cut, while both leading leftist parties picked up seats.

¹¹⁸ Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (Princeton, NJ: Princeton University Press, 1999).

¹¹⁹ *Report of The Committee on Homosexual Offenses and Prostitution, The Wolfenden Report*, authorized American ed. (New York: Stein and Day, 1963). The report stimulated a famous debate between Patrick Devlin and H. L. A. Hart. See Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965); and H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University Press, 1963).

ment tried to enforce closeting. Gross explained that mainstream opinion was often most adamant about preserving the *public* prevalence of heterosexual norms. Conservative policy could tolerate the private practice of homosexuality, while focusing its attention on the suppression of any public expression of homosexuality.¹²⁰ In an American example of the same phenomenon, the *Houston Post*, which apparently accepted the *private* homosexuality of its star minority columnist, nevertheless fired him when it became known that the paper had forced him to delete from his column a *public* disclosure of his homosexuality. Eventually, the paper rehired him, but only after public protests by Houston's Hispanic community and the local chapter of Queer Nation.¹²¹

As I previously noted, during the late 1980s and 1990s when "outing" was a central topic within the gay community, the matter of informational privacy almost inevitably came to the fore. Describing it as a right/left split, Gross noted two views of outing. First, many gay advocates argued that "the primary issue for the gay movement (perhaps the only issue) was the protection of the right of privacy."¹²² Opposition to "outers" was shrill even among some very thoughtful, important gay advocates. Randy Shilts, for one, characterized outers as "lavender fascists who would force their ideology on everyone."¹²³ Others described outing as immoral, as McCarthyism, terrorism, cannibalism, or as equivalent to a "bunch of Jews lining up other Jews to go to a concentration camp."¹²⁴ On the second view, which Gross characterized as the more leftist of the two, the issue was seen as one of gays' "right to create communities and their right to publicity" and its advocates argued that "[i]t is primarily our *public* existence, and not our right to privacy, which is under assault by the right."¹²⁵

Gross observed that publicity played a key role in the process of societal change in attitudes toward heterosexual cohabitation. He concluded that there is "no way to move beyond [antigay] attitudes without accepting and acting on the presumption that homosexuality must be seen and treated the same as heterosexuality. . . . [I]t behooves . . . us . . . to act accordingly, and outing—or [as journalist and activist Gabriel Aotello calls it], equalizing—is a means to this end."¹²⁶ Basically, this claim is that "[e]mphasizing [the right of privacy] plays right into our enemies' hands. Private is . . . exactly what they want us to be. . . . [W]e are . . . fighting less for the right to privacy than for the right not to have to be private."¹²⁷

¹²⁰ Gross, *supra* note 2, at 144–50. See also Larry Cata Becker, "Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration," *Florida Law Review* 45 (1993): 755–802.

¹²¹ Gross, *supra* note 2, at 149–50.

¹²² *Id.* at 146.

¹²³ *Id.* at 152.

¹²⁴ *Id.* at 127.

¹²⁵ *Id.* at 146.

¹²⁶ *Id.* at 169–70.

¹²⁷ *Id.* at 172 (quoting Benjamin Schatz, "Should We Rethink the Right to Privacy?" *Advocate*, February 1991).

Another illustration of the devaluing of public life can be found in a rarely commented upon aspect of libel law. A society that highly valued public life and civic participation would presumably reward and encourage, not penalize and burden, participation in public life. Although such a society would maintain and respect a private sphere to which all people could repair for relief, provisions, contemplation, and amusement, it would hardly encourage a total retreat to a “purely” private life. People in public life share with people who shun public roles a legitimate interest in maintaining their reputations and in conducting their private lives free from prying eyes. Actually, the parallel is not exact. For a person in public life, the consequences of injury to her reputation among people whom she does not know, with whom she does not work, and whom she will probably never meet, are normally much more severe than is a similar injury for those who do not enter public life. Reputation among strangers is often a major asset, a virtual currency, for people in public life, but it is of little instrumental significance for a purely private person. To oversimplify, reputation is truly valuable for a private person only among her close compatriots, while for the public person it is also extraordinarily valuable among strangers. Media libels carry a greater risk of influencing the perceptions of a public figure in the minds of strangers than of friends. Strangers will have fewer or no firsthand alternative bases on which to evaluate the libel, fewer opportunities to hear the libeled person’s defense, and often less incentive to inquire further. Thus, as compared to libels communicated to friends or even acquaintances, libels communicated to strangers are more likely to be determinative of their views. In other words, the legitimate interest in protection from media libels seems to be much greater in the case of people in public life.

Yet, existing defamation law reverses both my normative premises and my descriptive hypotheses. Rather than reward a person for becoming a public official or public figure by specially honoring her legitimate interests (e.g., in being spoken about truthfully), defamation law burdens such a person with greater legal vulnerability to libelous falsehoods.¹²⁸ To recover, she must prove that the libel was made with knowledge of its falsity or reckless disregard of its falsity, while the private person must only prove fault (i.e., negligence). (For public figures, increased vulnerability, apparently, also applies in the context of intentional infliction of emotional distress through public ridicule.)¹²⁹

This result does not reflect merely the judgment that (hopefully truthful) information about public issues is especially important, and, thus, the First Amendment should be especially protective in this context. Private figures receive more legal protection than public figures from injurious

¹²⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹²⁹ The Court has not ruled on the application of this tort to private persons. However, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), while applying the *Sullivan* standard of “actual malice” to inflictions of emotional distress, the Court emphasized that the case involved public figures.

speech even if the speech involves reporting on vitally important public issues. In *Gertz*, the Court reversed the normative principles that I suggested above and said “private individuals are . . . more *deserving of recovery*,” (emphasis added) apparently because private persons have made no attempt to assume “an ‘influential role in ordering society.’” To this lack of involvement, the Court contrasted “[a]n individual who decides to seek governmental office,” who, the Court says, “must accept certain necessary consequences.”¹³⁰ The fallacies in this argument are twofold. First, the consequence at issue, nonprotection from damaging falsehoods, is not “necessary”; rather, it results specifically from the Court’s own doctrine that denies protection. The Court decided to impose the greater danger on, by denying protection to, the person who chose to participate actively in the public sphere. Second, desert should have cut the opposite way. Public participation should be valued and could have been rewarded. Instead, the Court implicitly concluded that the state appropriately burdens this choice to become a public figure (believing that virtually all people who acquire this status do so voluntarily) by requiring that public figures give up much of their legal claim not to be subjected to reputational and emotional injuries. Essentially, the Court said that the state acts properly in rewarding people for avoiding the public sphere.

In discussions of informational privacy, ‘private’ refers to a characteristic of the information. In contrast, defamation law introduces a somewhat different, dual conception of ‘private’. First, it raises a question about whether the information at issue involved “matters of public importance,” a characteristic similar to that which fuels informational privacy analyses. However, courts usually wish to avoid the appearance of ideological regulation of the marketplace of ideas. Courts should be, and often have been, loath to say that any content that a newspaper decided to publish was not about a matter of public importance.¹³¹ Defamation law utilizes a second conception of privacy, and here courts are more active in interjecting their own judgments. Defamation law asks whether the person allegedly defamed is a public figure or a private person.

These two usages, privacy of the information and of the person, are connected in at least two ways. First, a person might want not to be a public figure precisely because she values control over her personal or private information, and she reasonably expects that it will be more difficult (even putting the law aside) to have this control if she becomes a public figure. A public figure loses her privacy both because the law protects it less and because people have a greater interest in knowing personal facts about her. Second, treatment of informational privacy as especially valuable may make for a culture that is more inclined to praise and reward private life, while the society that values and rewards active

¹³⁰ *Gertz*, 418 U.S. at 344–45.

¹³¹ *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 US 749 (1985), is a rare exception where the Court, despite the dissent’s devastating critique, characterized the content as private.

participation in the public sphere, although not ignoring the value of informational privacy, is likely to rank fame higher and informational privacy lower in its list of values. In any event, a positive valuation of civic participation and public excellence provides a reason for caution about maintaining too great an emphasis on informational privacy, except, as noted in Section V, when that emphasis relates specifically to preventing manipulation and control by governmental or corporate entities.

VII. THE VALUE OF GOSSIP

The common practice most at war with informational privacy is gossip, though the notion of gossip may understate the area of my concern. Warren and Brandeis may be right about gossip being the activity of the idle,¹³² in that at least some researchers make idleness part of its definition.¹³³ Other characteristics are relevant here. ‘Gossip’ is generally about a person and conducted behind that person’s back. Personal information that a person would not want known is its usual content, which suggests why gossip and informational privacy clash.¹³⁴ However, my focus in this essay is broader than the conventional understanding of the term ‘gossip’ indicates. The essay covers speech involving personal information even when it is used more overtly and more purposefully than is usually the case when we refer to ‘gossip’. As noted earlier, the conception of formal autonomy as a trump—or a requirement of full protection for speech—would protect gossip. My claim here is that this protection is not an unfortunate aspect of our initial commitment to formal autonomy, so unfortunate as to plausibly justify a reconsideration of our original normative impulse favoring speech freedom. Quite the contrary, gossip is a valuable aspect of free speech.¹³⁵

Even if gossip occurs most often when people are idle, so does the preponderance of most people’s *other* conversation, including political discussions. Though Warren and Brandeis did have some legitimate complaints, their association of gossip with idleness probably represented an attempt to belittle the activity. Nevertheless, the productive work done by gossip is multifarious, important, and often political in significant ways. Gossip provides a major mechanism for teaching social norms, often helping to show the norms’ real, as opposed to perceived, weight. Psycholo-

¹³² Warren and Brandeis, *supra* note 1, at 196.

¹³³ John Sabini and Maury Silver, *Moralities of Everyday Life* (Oxford: Oxford University Press, 1982), 92–94.

¹³⁴ Nothing here turns on a more precise definition of gossip; Sabini and Silver devote most of a chapter to describing the concept. *Id.* at 89–106. I should emphasize that nothing about gossip implies anything about whether it is or is not accurate, but the gossip that I defend here is only gossip that is not subject to the critique of being knowingly or recklessly false.

¹³⁵ This section draws heavily on Sabini and Silver, *supra* note 133; Gluckman, *supra* note 3.

gists John Sabini and Maury Silver observe that gossip is almost surely the way by which most people would unpack the ambiguities implicit in an abstract ethical injunction such as "Sex must be part of a meaningful relationship."¹³⁶ Gossip is also a major device for enforcing group norms. It is a central means of social control. Max Gluckman, one of the leading anthropologists of the twentieth century, emphasized how gossip, which is virtually a duty of membership in small groups, plays a crucial role in maintaining the unity of a group and its norms, as well as in establishing and policing the borders of the group.¹³⁷ English professor Patricia Meyer Spacks adds that gossip not only is "a crucial means of self-expression, a crucial form of solidarity," but also "provides a resource for the subordinated."¹³⁸ This is a theme she frequently reasserts.¹³⁹ Using fiction as her primary data on humanity, she finds that gossip not only "exemplifies the communal," it performs a "reparative function for the socially deprived."¹⁴⁰ Larry Gross, observing the use of gossip about celebrities in the "crafting of gay sub-cultural identity,"¹⁴¹ indirectly relies on Spacks' "analysis of gossip as an alternative discourse through which 'those who are otherwise powerless can assign meanings and assume the power of representation . . . reinterpreting . . . materials from the dominant culture into shared private meanings.'" ¹⁴² Relatedly, gossip is often a way of exercising power over dominant figures in one's community, and sometimes a method of partially removing oneself from their power.

Formulating, debating, teaching, and changing the norms of social life may be the most important social function of gossip. Certainly, there is more to be said for gossip, even more than noting its apparently universal appeal, an appeal almost as universal as that of sex, which is often its subject. Gossip is an essential means of communication. "[S]ex and gossip alike comprise modes of intimate communication," both of which are widely available to the dispossessed and marginalized as well as the powerful, are self-expressive, and are thereby "unpredictable and uncontrollable."¹⁴³ Additionally, gossip's democratic qualities should not be ignored. The ubiquity of the capacity to gossip and roughly equal distri-

¹³⁶ Sabini and Silver, *supra* note 133, at 100–101.

¹³⁷ Gluckman, *supra* note 3.

¹³⁸ Patricia Meyer Spacks, *Gossip* (New York: Alfred A. Knopf, 1985), 5. See also James C. Scott, *Domination and the Arts of Resistance* (New Haven, CT: Yale University Press, 1990), 142–43.

¹³⁹ See, e.g., Spacks, *supra* note 138, at 46. She claims that "gossip gives voices to the dominated as well as the dominant." *Id.* at 263.

¹⁴⁰ *Id.* at 256.

¹⁴¹ Gross, *supra* note 2, at 125.

¹⁴² *Id.* at 124 (quoting Andrea Weiss, "'A Queer Feeling When I Look at You': Hollywood Stars and Lesbian Spectatorship in the 1930s," in Christine Gledhill, ed., *Stardom: Industry of Desire* [London: Routledge, 1991], 283–99).

¹⁴³ Spacks, *supra* note 138, at 40. The role of sex as a form of communication is the reason that I have given for providing First Amendment protection to consensual sex. See, e.g., C. Edwin Baker, "Op-Ed: First Amendment Protection for Gays," *New York Times*, July 27, 1991, late-edition final, p. 23.

bution of this capacity make gossip an especially significant democratic tool of societal self-constitution. That is, not only is gossip possibly the most widely practiced method of participation in collective life, but it is also a relatively democratically distributed form of power to participate, and it is often used against people in positions of authority, sometimes bringing down or at least humbling them.

This essay places on center stage a conception of formal autonomy or liberty of choice that is often criticized as too individualistic.¹⁴⁴ In contrast, democratic participation is praised as a form of liberty that is appropriately and overtly oriented toward the public. Some scholars who advance this critique contrast liberty of choice, “the liberty of the moderns,” unfavorably with democratic participation, “the liberty of the ancients.”¹⁴⁵ The two are connected, however, in that both are about self-determination, which necessarily involves individual choices *and* participation in inherently collective choices. Gossip, like political speech, brings together the individual and the collective in another way. The capacity to gossip is an individual power, usually practiced outside the limelight of any official public sphere. It functions, however, to substantially involve the individual in the collective enterprise of norm creation, evaluation, and enforcement. These activities are fundamentally political. Arguably, much norm-evaluative, norm-exploratory, or norm-enforcement gossip merits the label “political speech” even more directly than the campaign speech that is merely instrumental to the selection of office holders.¹⁴⁶

First Amendment scholar Thomas Emerson listed four functions or values of speech that justified constitutional protection. His third function emphasized political participation in decision-making by all members of society. But this significant aspect of speech freedom, Emerson argued, “carries beyond the political realm. It embraces the right to participate in the building of the whole culture. . . .”¹⁴⁷ This extension is surely right. People make their individual decisions within and are greatly influenced by their social context. This context includes legal rules, formal structures, and official enforcement mechanisms. However, a larger part of the social framework is created and maintained informally. People’s expressive choices can directly change this informal social realm; they can create new

¹⁴⁴ I have replied to this criticism when leveled against John Rawls in Baker, “Sandel on Rawls,” *supra* note 29.

¹⁴⁵ Benjamin Constant, “The Liberty of the Ancients Compared with That of the Moderns,” (1819), in Biancamaria Fontana, ed. and trans., *Political Writings* (Cambridge: Cambridge University Press, 1988), 309–28. The “liberty of the ancients” consisted in “active and constant participation in collective power.” *Id.* at 316. My claim is that gossip has important similarities.

¹⁴⁶ C. Edwin Baker, “Campaign Expenditures and Free Speech,” *Harvard Civil Rights–Civil Liberties Law Review* 33 (1998): 1–55.

¹⁴⁷ Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 7.

behavioral standards and possibilities for action. Thus, the potential democratic contributions of both individuals' informal, apparently private speech and their behavioral choices provide an important reason, beyond respect for individuals' formal autonomy, for broad protection of expressive autonomy. New ideas and new norms frequently seem, especially to dominant groups, to be the height of irrationality when first expressed.¹⁴⁸ Often these ideas and norms can only develop and gain appeal and plausibility when actually embedded in new practices, usually of some dissenting subgroup or avant-garde.¹⁴⁹

Beyond the observation that individual behavioral choices, including speech choices, create the social realm that in turn influences further individual choices, is the more "dialogic" question: How do people discuss and evaluate these choices? Possibly the most common and central means is gossip: "Sally did *x*; that's pretty bad! Or is it? She was faced with *y*. What do you think?" A negative verdict on the behavior may well sway (or punish) Sally and lead others to avoid (or hide) doing *x*. Alternatively, frequent gossip about *y* may result in the rejection or relaxation of the established social prohibition on *x*.

Thus, any proponent of protecting only or primarily political speech *should* have a hard time ruling out protection of gossip or other presentations of private information. In *New York Times v. Sullivan* (1964),¹⁵⁰ the Court gave constitutional protection both to a newspaper and to various individuals whose advertisement purportedly defamed a public official. *Sullivan* might be limited to defamation of *public officials* if the decision were based solely on a right to criticize the government. There is a history that ties First Amendment freedom to the rejection of seditious libel, that is, libel of the government and its leaders. Legal scholar Harry Kalven, Jr., treated rejection of this offense as definitive of a free society. And rejection of seditious libel, he said, represents "the central meaning of the First Amendment."¹⁵¹ In contrast, the theory assumed in this essay suggests a broader scope to speech rights based on respect for individual autonomy. But a broader scope should also follow even within a narrow political-speech conception of free speech. A progression at least from public officials to public figures to matters of public concern as subjects of protected speech was clearly predictable even in a theory that emphasized only the democratic role of speech.¹⁵² No major modern First Amendment justification of speech freedom distinguishes speech about public officials

¹⁴⁸ See Kenneth Karst, "Boundaries and Reasons: Freedom of Expression and the Subordination of Groups," *Illinois Law Review* 1990 (1990): 95–149.

¹⁴⁹ Baker, *Human Liberty*, *supra* note 5, chap. 4.

¹⁵⁰ 376 U.S. 254 (1964).

¹⁵¹ Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, 1988), 63.

¹⁵² See Harry Kalven, Jr., "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment,'" *Supreme Court Review* (1964): 191–221, at 221.

from speech about other prominent or powerful people.¹⁵³ Thus, Justice Brennan quickly led the Court to apply the *Sullivan* standard to public figures. Even more obviously, the valuable public discourse that is essential to democracy could hardly have been limited to occasions when it concerned important people. Public discourse needs to consider all important matters. Thus, Justice Brennan, first bringing the Court with him in 1971 and then in dissent in 1974, extended the application of *Sullivan's* "actual malice" standard to matters of public importance.¹⁵⁴ This extension might be the end of the formal progression. Under this regime, state law imposing stricter liability for all defamatory falsehoods about *private* matters would not be problematic. (Even the First Amendment absolutists, who only concurred in *Sullivan* and claimed that they would absolutely protect speech about public matters, seemed willing to allow defamation judgments if the challenged speech was about matters sufficiently private.)¹⁵⁵ In fact, this is one of two doctrinal areas (the other being government employment) that routinely distinguishes speech content that is or is not about matters of public concern. The argument here, however, is that gossip's discussion of so-called private persons and private matters is political in creating, maintaining, enforcing, critiquing, or changing the societal norms that regulate and guide people's behavior. As such, even under a political theory of the First Amendment, *Sullivan* ought to apply here, too. Of course, the formal autonomy theory does not concede that only political speech should receive full protection. For it, merely the enjoyment of and desire to engage in "great gossip," that is, to reveal private facts, suffices to justify protection.

Another way to get to protection of gossip is to ask: Who is to decide what matters are of public importance? For the government, of which the courts are one branch, to define public importance detracts from the potential public sphere—a point Robert Post fondly makes.¹⁵⁶

¹⁵³ This may be a slight overstatement. Vince Blasi suggests that the checking function of the First Amendment argues for the propriety of giving challengers in electoral contests a right-to-reply such as the one struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), although he thought the checking function was not served by giving such a right to incumbents. Blasi, *supra* note 50. However, Kalven, who might have implied this view by suggesting that rejection of seditious libel is definitive of democracy, in fact saw the key to *New York Times v. Sullivan* in its adoption of Alexander Meiklejohn's political speech theory of the First Amendment. See Kalven, *supra* note 152.

¹⁵⁴ *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (Brennan, J., dissenting).

¹⁵⁵ A possible explanation is that absolutists do not credit "lies" as speech under the First Amendment. Absolutists never suggest, for example, that perjury or fraud constitute protected speech. If so, then they still might protect lies about political matters for prophylactic reasons. For example, they might distrust either state officials' or jurors' evaluation of the intentionality of falsehoods made during partisan debate. Falsehoods usually are knowing lies when made by the opposition but, when "we" make them, the falsity is always accidental and made in good faith! For this reason, absolutists might protect these, but only these, purportedly "knowing" falsehoods.

¹⁵⁶ Post, *Constitutional Domains*, *supra* note 105, 119–78.

In the media context, the predictable and arguably only acceptable answer is that if a newspaper thinks a matter worth presenting to the public, and if the public willingly buys the newspaper, the matter must be treated, at least constitutionally, as a matter of public importance. Editors should be free to challenge existing orthodoxy within the community about what matters are properly exposed and discussed. Thus, in rejecting the tort of public disclosure of private facts, Justice Hans Linde argued that the "editorial judgment of what is 'newsworthy' . . . is not properly a community standard. . . . [Some editors] may believe that the community should see or hear facts or ideas that the majority finds uninteresting or offensive."¹⁵⁷

Justice Linde's point illustrates not only how judgments about newsworthiness are controversial and ideological, but also how the capacity to contradict those judgments is central to the capacity to use speech to challenge the status quo, a point made more concretely in my earlier discussions of "outing." In Linde's opinion, editors make the decision about "public importance" when they decide whether to include a story. Of course, their occasional dissent from established conventions¹⁵⁸ will likely be condemned as at best pandering and at worst evil,¹⁵⁹ but the fact of their choice has the potential to change the social world. A debate about the propriety but not the suppression or legal punishment of their choice to challenge conventional norms is always appropriate.

Both informational privacy and the right to gossip can support meaningful autonomy. Both privacy and the ability to expose are resources or forms of power. Unlike material wealth, lawmaking power, or instruments of violence, the direct or "natural" connection to the person of both privacy and the ability to expose it necessarily results in their comparatively equal distribution. Thus, those who are committed to a democratic or egalitarian distribution of power and capabilities would have reason to value legal recognition of both. This point, however, does not explain why, in cases of conflict, the speech claim—the right to gossip—should trump the interest in privacy. Note, however, that absent (illegal) coercion, people usually can choose, initially, not to disclose information about themselves. The priority of speech freedom does not deprive people of this right. They and others can continue to avoid (or limit) disclosure or, alternatively, can choose to speak. Re-

¹⁵⁷ *Anderson v. Fisher Broadcasting Companies*, 300 Ore. 452 (1986).

¹⁵⁸ Gross noted that in the debates on outing at the first convention of the National Lesbian and Gay Journalists Association in 1992, "it was easy to tell who was on which team by the uniforms: those in favor are most often clad in multiple earrings and sassy T-shirts. Those opposed wear suits and ties." Gross, *supra* note 2, at 151. Still, one wonders which side was most committed to "official" journalistic norms that emphasize truth-telling and the public's right to know. In 1990, Michelangelo Signorile observed that to print a story "about a closeted gay man's woman friend as his lover . . . is applauded," but "if you print the truth you are deemed 'frightening and offensive.'" *Id.* at 60 (quoting Signorile).

¹⁵⁹ Karst, *supra* note 148; Shiffrin, *supra* note 118.

spect for autonomy should be seen as requiring that the choice between these alternatives be left to the individual, which is a voluntarist method of determining what information will be made available to a public. Similarly, the political as well as the autonomy-based claim on behalf of speech is that speech is a power that people should have and be able to use to try to change the world. The debates and practices about “outing” illustrate not that people will necessarily make the right choices—for what is “right” is inherently contestable—but that they will take their responsibilities in the exercise of this speech power seriously.

I would be remiss if I did not note the underside of gossip, although neither my comments here nor my earlier defense of gossip does either side justice. Gossip is often unfair in two ways and undesirable in a third. First, gossip is frequently inaccurate. Moreover, in contrast to falsehoods published in the media, these inaccuracies can be particularly hard for the unfairly treated person to discover and, thus, to refute. Nevertheless, the argument here only defends “true” gossip. Inaccurate gossip does not so much violate informational privacy as create a defamation type of injury. Application of *Sullivan’s* actual malice standard to the inaccuracies in reports about a family’s response to being taken hostage (a so-called “false light” privacy case) follows easily from either an autonomy notion of individual speech freedom or a standard conception of the media’s speech rights.¹⁶⁰

Second, even when true, gossip can be unfair. It can treat as important something about a person that should not, at least not now, be relevant for the person’s public *persona* or for most other evaluative purposes. Gossip can be a true report, but out of context. Most unfairly, even true gossip can provide a hard-to-challenge opportunity for prejudice to operate, or can stimulate or reinforce prejudices, often to the distinct disadvantage of members of vulnerable groups.

Third, gossip can unfairly divert attention from what should be important about a person or divert attention from society’s real problems. Is gossip the opiate of the masses? Personally, I find sensationalism, a part of the news at least since Roman times,¹⁶¹ hard to justify. A plausible characterization of most contemporary news content is that its focus on individuals and dramatic events detracts from vital and more complicated, but less “sexy,” structural issues. Still, limiting individual or media speech on these grounds seems paternalistic. For reasons noted above, maybe people become clearer about what they consider important by being able to explore issues in ways made possible by gossip or by gossip’s media equivalent. Providing a more vivid impression of actual pri-

¹⁶⁰ *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

¹⁶¹ John D. Stevens, *Sensationalism and the New York Press* (New York: Columbia University Press, 1991), 6–7.

vate practices may itself be valuable and do more for increasing toleration (and the perspicacity of critiques) than would the “closeting” of gossip. In the best of all worlds, maybe politics should be more about issues and less about personalities. But that is not our world, where most officeholders try to hew toward whatever the latest public opinion poll indicates. If they exercise little independent judgment, then political candidates’ personalities, integrity, competence, and honesty, which are the usual focus of sensationalist news and gossip, may be the most significant matters about them for electoral purposes. The point is, there is room for multiple views of relevance and relevance for different purposes. Even people’s guilty consumption of gossip and sensationalist news might make valuable social contributions.

Although much can be said—and too much was said—about the Bill Clinton/Monica Lewinsky affair, a common observation was that the drawn-out exposé fascinated and engaged even many people who reported that the affair and the cover-up did not determine, possibly was not even relevant to, their view of whether President Clinton should have remained in office. I am hesitant about the observation that I shall next make, partly because I did not follow either scandal too closely. Still, I wonder about differences between the impact of revelations about Clinton’s sexual activities and the earlier sexual harassment allegations leveled against Clarence Thomas at the time of his nomination to the Supreme Court. Arguably, discussion of allegations against Thomas helped put sexual harassment on the cultural map, a desirable result. Arguably, too, discussion of Clinton’s escapades constituted an implicit debate about how society ought to react when a public official’s personal life intersects with his public role, possibly a debate moving us closer to toleration. If there were these positive effects, then privacy-invading gossip and media sensationalism may have led to a useful discursive evaluation of norms. Admittedly, I continue to believe that both educational practice and social norms should encourage more interest in substantive public policy issues, which elites like me consider central. And I think governmental media policy should encourage the development of media institutions with less sensationalist, more serious (as well as more interesting and culturally playful) foci. Still, the affirmative reasons favoring gossip suggest that these choices are appropriately both contextual and contestable. This contextual inconclusiveness provides further pragmatic grounds, despite gossip’s underside, to reject *legal* restriction of so-called non-newsworthy, utterly offensive disclosures of private information.

VIII. CONCLUSION

Keeping all or some of the power to expose or to use private information out of the hands of the “disciplinary agencies” of government and

profit-oriented enterprises is often desirable. The press, however, must be exempted from this conclusion since it constitutes a crucial part of the public sphere. The propriety of legislative limitations on the power of government and market enterprises is similar to keeping from these institutions the power to be secretive. Limits on market entities' use of private information and Privacy Acts limiting government have the same legitimacy as the Freedom of Information Act, open meeting laws, and modern demands for transparency. Government's capacity to have easy, cheap, and not really consensual access to database information containing detailed personal profiles is leading us down a slippery slope at the end of which lies government decrees ordering people to wear an identifying star. Before reaching that dire end, government intrusiveness contributes to the creation of a timorous, docile population that tries to avoid any behavior that might, say, fit the profile of a terrorist. Surely individual autonomy must receive some protection from both governmental and corporate infringements of informational privacy.

In contrast, sometimes privacy may need to be breached if social progress is to be achieved. As Randall Kennedy's stories of "passing" and Larry Gross's account of "outing" illustrate, both privacy and exposure are forms of power that can be used by members of marginalized groups to pursue their cultural, political, and personal goals. (Of course, both privacy and exposure are also used by dominant groups to help maintain their favored norms.) Gossip teaches and maintains, but also helps to change norms of social relations, as it serves to reinforce the identity and cohesion of the oppressed.

My normative claim has been that speech freedom, including freedom to expose any private information that a person knows, is an aspect of formal autonomy that government must respect if it is to remain legitimate in its pursuit of conditions that make meaningful autonomy possible. My pragmatic claim has been that society and, especially, its oppressed segments benefit by leaving speech choices—whether to choose privacy or exposure—largely free of legal limitation. Speech freedom is a relatively egalitarian power that people can and will claim and use.

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