

**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...”<sup>2</sup>

Book dedication: “To Vito Russo, in gratitude for much good conversation and great gossip...”<sup>3</sup>

“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.”<sup>4</sup>

**INTRODUCTION**

My thesis is simple. The right of informational privacy, the great modern achievement often attributed to the classic Warren and Brandeis article, “The Right to Privacy,”<sup>5</sup> asserts an individual’s

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<sup>1</sup> An earlier version of this essay was presented to Martha Nussbaum and David Strauss’ Law and Philosophy Workshop at the University of Chicago Law School in 2000. I wish to thank the participants in that workshop, participants at Bowling Green conference in 2003, Michael Madow, Diane Zimmerman, and the editors at this journal for helpful comments, questions, and encouragement.

0. Samuel Warren & Louis Brandeis, “The Right to Privacy,” Harv. L.Rev. 4 (1890): 193-220.

<sup>3</sup> Larry Gross, Contested Closets (Minneapolis: University of Minnesota Press, 1993), dedication page.

<sup>4</sup> Max Gluckman, “Gossip and Scandal,” Current Anthropology 4 (1963): 307-316, 315.

<sup>5</sup> Warren & 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 to have private personal information not be circulated. Warren and Brandeis claimed that individual dignity in a modern society requires that people be able to keep their private life 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 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 which I have argued for elsewhere.<sup>6</sup> Here, instead, I will describe that theory of speech freedom, explore its implications for informational privacy, and finally suggest some reasons to think rejection of the privacy tort should not be so troubling and is, in fact, pragmatically desirable.

The Essay proceeds in the following way. Part I describes different possible informational privacy rights, identifying the one at stake in this Essay. Part II describes two conceptions of autonomy, showing that both speech freedom and informational privacy serve the ultimately most important substantive conception characterized as “meaningful” autonomy. It argues, however, that the right of free speech is better seen as based on the second, “formal” conception of autonomy and that grounding implies overriding the legal protection of informational privacy recommended by Warren and Brandeis. Thus, Part III describes various ways the law could treat informational privacy but recommends treatment consistent with the formal right of free speech. Part IV 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 resistance to my thesis. Finally, Parts V and VI offer two pragmatic reasons to find the thesis acceptable. Part V argues that the popular appeal of privacy may be to some significant degree misguided. Part VI argues that the

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Right to Publicity,” Law and Contemporary Problems 19 (1954): 202, 203.

<sup>6</sup> C. Edwin Baker, Human Liberty and Freedom of Speech (Oxford: Oxford University Press, 1989); C. Edwin Baker, “Harm, Liberty, and Free Speech,” So. Calif. L.Rev. 70 (1997): 979.

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, serve valuable functions that help make speech's constitutional status appealing and explicable. Thus, Parts IV, V, and VI together should make more plausible both the thesis of this Essay and the conception of autonomy on which I claim speech freedom is based.

## I. 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 refer 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 the joint holders, possibly resulting from joint participation in a private activity, by any non-intimate; (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 further dissemination* of the (private) information after an initial disclosure— i.e., a virtual property right in private information quite analogous to various intellectual property rights.<sup>7</sup> Thus, informational privacy could refer at least to the following: *information inalienability*, *disclosure control*, and *dissemination control*. Of course, none of these three 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 agreement among friends not to

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<sup>7</sup> Julie Cohen, "Examined Lives: Informational Privacy and the Subject as Object," Stanford L.Rev. 52 (2000): 1373-1438

repeat what is said or after a journalist's promise to a confidential source<sup>8</sup>), only as a result of legal compulsion (e.g., consider information found through trial discovery<sup>9</sup>), as a result of law violation (e.g., information initially obtained by trespass or illegal electronic eavesdropping<sup>10</sup>), only after an accidental betrayal of information (did not know one was being overheard), or as a result of practical necessity (e.g., must go into public space to get to work or to the hospital). In any event, a partial embodiment of each of these types of informational control within legal rules is possible.

The first conception – information inalienability – seems overtly contrary to the individual agency of the person required to be private. For example, the military's "don't ask, don't tell" policy prevents a gay or lesbian person's from disclosing his or her homosexuality – thereby coercively creating a degree of informational 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 could provide a rationale for this interpretation of information privacy. Privacy would be (to some limited extent) inalienable. This approach to privacy comes close to the premise behind child pornography laws – although that content may be crucially affected by the added paternalistic assumption that children are themselves 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.<sup>11</sup> More obviously, a prohibition of *public* nudity that applies even where all people exposed to the nudity are

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<sup>8</sup> *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (promissory estoppel can apply to newspaper that promised confidentiality)..

<sup>9</sup> *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (newspaper can be ordered not to publish information obtained through discovery).

<sup>10</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>11</sup> The Court relied upon a concern with the child's participation in the making of child porn and the availability of the permanent record of exposure to justify the law in *New York v. Ferber*, 458 U.S. 747 (1982), harms which distinguish that case from *Ashcroft v. Free Speech Coalition* (2002) (striking down prohibition of computer-created child porn in which no actual child was used).

consenting adults mandates a degree of inalienable privacy.<sup>12</sup>

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 – to one’s lover or to the world, at least to the extent that the person can get the *New York Times* (or find other effective means) to disseminate her verbal or pictorial self-portrait. If taken to its extreme, a regime of inalienable privacy would mandate invisibility – a social erasure practiced in some totalitarian countries and possibly the experience of many subordinated peoples.<sup>13</sup> Any general policy of inalienability of private information is

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<sup>12</sup> *Barnes v. Glenn Theatre*, 501 U.S. 560 (1991); *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 theatre, 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; C. Edwin Baker, “The Evening Hours During Pacifica Standard Time,” *Villanova Entertainment & Sports Law J.* 3 (1996): 45.) The plurality attempted to meet this objection by arguing that the state interest was not in suppressing the communication itself but rather related to preventing “secondary effects,” i.e., effects not dependent on whether anyone receives the message and not involving any condemnation of the exposure. The purportedly secondary effect would occur if those who may not even receive the communication came to the area and engaged in activities that the state properly restricts. Previously purported secondary effects have only justified “zoning” the expression in a manner hoped to reduce these bad effects – which makes sense of fact that secondary effects cases are analyzed much like time, place, manner cases. No prior case used secondary effects analysis to entirely bar the expression, a point emphasized by the dissent in *Erie*. Arguably, the plurality 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 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,” as well as that any bar on the word’s use runs the danger of suppressing ideas.

<sup>13</sup> Cf. Ralph Ellison, *The Invisible Man* (New York: Random House, 1952).

inconsistent with respect for autonomy or agency.<sup>14</sup> However, this point plays little role in most theoretical discussions of informational privacy and will not be my concern here. will not be the focus of my inquiry.

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, this Essay will focus on the third sense informational privacy – control over further dissemination once someone else holds the information. More specifically, the 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 exposure and the maintenance of private spaces – and, in any event, should not extend to a more general, property-like claim to control other’s dissemination of private information about oneself. My thesis will be: 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 that it would restrict freedom of speech or of the press as properly understood. But the complete story will be more complex, including consideration of when limitations on further dissemination are not contrary to the First Amendment requirements.

To jump ahead, the direction of the argument for these caveats will be two-fold: First, as opposed to the strong sense of inalienability noted above – e.g., a person cannot appear nude (even in enclosed public space) – there is also a notion of *market inalienability*.<sup>15</sup> Some (not all) people who consider an absolute bar on sodomy or on all sex outside 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 restricting the “sale” of information about oneself – market inalienability – may be desirable in some situations and is neither contrary to free speech nor individual autonomy.

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<sup>14</sup> But cf. Anita L. Allen, “Coercing Privacy,” William and Mary L. Rev. 40 (1999): 723-757, 740, 752-53.

<sup>15</sup> Margaret Jane Radin, Contested Commodities (Cambridge: Harvard U. Press, 1996), 18-20.

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 unregulated later uses. In contrast, these policy reasons would not apply if the computer user consciously and voluntarily exposed the information 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 right to control collection, use, or dissemination of certain private information by commercial (but non-media) or governmental entities. 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.

## **II. 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 term's precise formulation or definition is not a major concern here. Rather, my point is that any such notion is not an on/off variable but rather is a matter of degree. A major function of the 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 the maximum abstract freedom of choice but having the opportunity 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 has less wealth, with the consequence that the other's effective autonomy is restricted. Recognizing rights in one of two claimants of a plot of land or a bank account will typically advance her capacity to lead her self-authored life while having the opposite effect on the losing claimant.

Many, many things (e.g., education, Rawls' primary goods, sensible environmental policies), including informational privacy, can serve effective individual agency. Elimination of "informational"

privacy was a major horror imagined in George Orwell's *1984*, a fictional horror not unlike what technology is rapidly making possible today. However, some informational privacy is only one of the many resources that can serve meaningful autonomy. To pick the key example for this Essay, consider 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.<sup>16</sup> 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 his time watching video porn or is suffering in silence or ... The knowledge that supports one person's self-authorship or effective autonomy can interfere with another's informational privacy (and her effective autonomy). Thus, 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 not be clear. Feminists, to pick one example, have been among those who have advocated more privacy in which appropriate forms of intimacy can flourish and more exposure of people engaged in various forms of private abuse.<sup>17</sup>

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 of the self to the critical eyes of the world. A common claim is that the public sphere depends on and is, in that sense, parasitic on a private sphere (and, many commentators go on to add, vice versa<sup>18</sup>). Most public persons will need, and

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<sup>16</sup> Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Aff.* 1 (1972): 204-226; David Strauss, "Persuasion, Autonomy, and Freedom of Expression," *Columbia L.Rev.* 91 (1991): 334-371; Richard H. Fallon, "Two Senses of Autonomy," *Stanford L. Rev* 46 (1994): 875-905.

<sup>17</sup> Anita Allen, *supra* note 13; Julie Cohen, *supra* note 6.

<sup>18</sup> This is similar to Habermas' claim that private autonomy and public autonomy are co-original. Jürgen Habermas, *Between Facts and Norms* (1996) [trans. William Rehg (Cambridge: MIT Press, 1996), 104, 121-22, 263, 314, 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 *supra* note 86.

certainly will have needed while developing into an adult person, to be able to withdraw occasionally into a private realm.<sup>19</sup> Lack of opportunities to be private or anonymous is hostile to individuality and allows for extreme social control.<sup>20</sup> Interestingly, these claims in behalf of informational privacy seem to emphasize (and maybe only require) the second interpretation of privacy – individual control over whether and when to make information about one’s self publicly available. Nothing about providing considerable scope for a private sphere, sometimes understood as itself required by the First Amendment,<sup>21</sup> necessarily raises any direct or overt restriction on freedom of speech.

Even this privacy would be potentially problematic if there is a constitutional, presumably First Amendment, right of access to information – a right said to serve people’s autonomy interests.<sup>22</sup> This conflict with the First Amendment is avoided, however, by those theorists who see the point of the First Amendment differently, that is, more a matter of freedom to say what one chooses. In this alternative view, subscribed to here, 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

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<sup>19</sup> Long a subject of science fiction, this need for privacy to develop as a full person was the theme of two recent popular Hollywood movies, *The Truman Show* (1998) and *Ed TV* (1999).

<sup>20</sup> 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 commanded production of membership lists); *Talley v. California*, 362 U.S. 60 (1960) (ban on anonymous leafletting is unconstitutionally overbroad); *Brown v. Socialist Workers*, 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 Kreimer, “Sunlight, Secrets, and Scarlet Letter: The Tension between Privacy and Disclosure in Constitutional Law,” *U. Pennsylvania L.Rev.* 140 (1991): 1-147. Fifth Amendment limits on compelled disclosure might also be seen, in part, as protecting these interests.

<sup>21</sup> See cases cited in prior note.

<sup>22</sup> See *supra* note 15.

freedom of information acts combined with a constitutionally-based free press.<sup>23</sup> Often, but not always,<sup>24</sup> compelled private disclosures could be required when the disclosure serves some plausible informational policy goals. In this view, when to compel – as well as when to forbid – government disclosures are properly decided on the basis of legislative or executive policy judgments rather than on a basis of a constitutional right of access to information. In any event, policy measures to protect informational privacy by securing rights to shielded private places and to non-disclosure of information can contribute to meaningful autonomy. These rights do not conflict with speech freedom as conceived of here.

Even if *meaningful* autonomy requires both some information 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 nor complete control over access to information about herself. Maximizing both 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. Not only does a person not need either in maximal amounts, meaningful autonomy probably does not require that a person always have any specifiable type of information about herself hidden or about others available.

Still, both cloaking or making available particular categories of information may be valuable. Whether meaningful autonomy will be more increased 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 the same person over time. These variations reflect the fact that both informational privacy and information availability relate to autonomy more as instrumental supports than as a defining elements. Neither information nor privacy are themselves self-authored activities (though the activity of disclosure or hiding can be). Rather, both are resources that make people more capable of various meaningful or valuable self-authored choices. Typically a person has more power of self-authorship

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<sup>23</sup> Justice Potter Stewart, "Or of the Press," Hastings L.J. 26 (1975): 631-637; Baker, Human Liberty, supra note 5, ch. 10.

<sup>24</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (upholding disclosure requirements).

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 for her at best a diversion – and sometimes can be a burden that reduces her capacity for meaningful self-authorship. Given that obtaining more of each imposes costs of various sorts both on the person gaining the resource and on others and given that obtaining it 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 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 has called “liberty” and the value or “worth of liberty.”<sup>25</sup> The law affirms this formal conception of autonomy to the extent that the law recognizes the agent’s legal right to choose what to do with herself (and her property – more on this later), recognizes her dominion over her own mind and body, given the inherent constraints of the environment and given a lack of 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,<sup>26</sup> three claims about formal autonomy need to be noted. First, the legitimacy of the legal order may depend on the law respecting people’s (formal) autonomy. Second, unlike meaningful autonomy that is always a goal that could be even better realized, the possibility exists for rather uncompromising recognition of or respect for – legal embodiment of – formal autonomy. Third, respect for formal autonomy provides the best basis for the constitutional (and absolute) status of free speech.<sup>27</sup>

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<sup>25</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard U. Press, 1971), 204.

<sup>26</sup> See Baker, *Human Liberty*, supra note 5; Baker, “Harm,” supra note 5.

<sup>27</sup> In free speech literature, my distinction between meaningful and formal autonomy parallels Richard Fallon’s distinction between *descriptive* and *ascribed* autonomy. See Fallon, supra note 15.

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 dependent on respecting people as equal and autonomous agents.<sup>28</sup> 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 not to 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 as a restraint and a descriptive element that controls within the bounds allowed by the constraint.<sup>29</sup> Likewise, a common conception of morality is that it makes universal claims while ethics is a comprehensive doctrine concerning the good for a group

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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 he 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’”, Univ. of Pennsylvania L. Rev. 130 (1982): 646-677 (criticizing 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, 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 descriptive of First Amendment law and more normatively defensible – although both points are disputed.

<sup>28</sup> C. Edwin Baker, “Foundations” (unpublished essay, 2002).

<sup>29</sup> See H.L.A. Hart, Punishment and Responsibility (New York: Oxford U. Press, 1968), 1-27; Kent Greenawalt, “Punishment,” in Joshua Dressler, Encyclopedia of Crime and Justice 2<sup>nd</sup> ed. (New York: Macmillan, 2002), 1282-94, 1289.

or an individual. The view, which I have elsewhere called a two level theory,<sup>30</sup> that ethics should be determinative but only within the constraint of morality<sup>31</sup> 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 autonomy is more teleological.

The law respects formal autonomy to the extent, first, that it allocates ultimate control over a person's mind and body to that person except to the extent that the person would use her body or property to interfere with another's legitimate realm of decision making control and, second, that law 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 be able to decide for herself what to say. These requirements, however, say nothing about whether she will have the capability to say something, which would require, for example, knowledge on her part and which is a matter more 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, like with meaningful autonomy, a person could have more or less. Nevertheless, formal autonomy is unlike meaningful autonomy, which conceptually could not be provided in any complete sense, and unlike either information availability or privacy for which decisions not to maximally provide are obviously justified (not only for cost reasons but also for their diverse relation to meaningful autonomy). Decisions to impose direct legal limits on formal autonomy (direct limits on choice) 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 the *necessity* of distributing inherently limited resources. Thus, laws aimed

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<sup>30</sup> C. Edwin Baker, "Sandel on Rawls," 133 Univ. of Pennsylvania Law Rev. 133 (1985): 895-928.

<sup>31</sup> See, e.g., Rainer Forst, Contexts of Justice [trans.] John M.M. Farrell (Berkeley: Univ. of California Press, 2002).

at restricting choice are unlike laws choosing among different distributions, which inevitably affect different people's meaningful autonomy differently but do not themselves restrict formal autonomy – a person's choices about herself and her 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 limit the value or “meaningfulness” of a person's liberty – and that limit it differently for different people – are inherent to any legal order.<sup>32</sup> Roughly, the claim is that most laws distribute the right to make particular choices (e.g., property law) or protect (most criminal and much tort law) or help rearrange (e.g. contract law) these distributions. These laws do not themselves increase or decrease the choices that can be made about use of resources (although they may make it more likely that people will engage in productive activities that will increase possible choices). They do determine who gets to make a particular choice but 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 the 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 – no one can engage in sodomy, say bad things about the President or the country, eat pork, drink bourbon, 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 the 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

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<sup>32</sup> The points merely asserted here and in the next two paragraphs are developed in Baker, “Harm,” *supra* note 5.

seems 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 is what a distributional rule might 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 its good aims. This principle of liberty must be contrasted with the propriety of (sometimes) protecting a person's chosen actions from interference by another, the distributive or allocative issue.

One additional characteristic of this description of respect for formal autonomy merits attention. This view identifies the person most fundamentally with agency, with action, with the possibility of choice – in a sense, an activity view of personhood. It is in this sense that it favors a person's activity of speech over the status of being unknown. This identification accords, I think, with Justice Brennan's view, where after asserting that "freedom of speech is itself an end," goes on to say that "freedom of speech is ... intrinsic to individual dignity" and where he characterizes "a democracy like our own" as one "in which the autonomy of each individual is accorded equal and incommensurate respect."<sup>33</sup> This would explain why he would conclude elsewhere that "freedom of expression is made inviolate by the First Amendment."<sup>34</sup> 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."<sup>35</sup> Both Brennan's and the conflicting Warren/Brandeis assertion characterize something – but something quite different – as fundamental about the person that the law must respect.

Though in this Essay my concern is primarily to explore the significance for informational

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<sup>33</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 535, 585 (1980) (Brennan, concurring).

0. *Herbert v. Lando*, 441 U.S. 153, 184 (1979) (Brennan, dissenting).

<sup>35</sup> Warren and Brandeis, *supra* note 1, at 205. At the Bowling Green conference, Lillian BeVier suggested 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 that with power over other people's acts (they cannot speak what they know). This notion of liberty, however, may explain why BeVier does not find copyright's restriction on people's speech choices to conflict with the First Amendment, a view that I find equally strange.

privacy of a commitment to speech freedom, some comment on these at least partially conflicting views about what should be legally “inviolable” merit comment. Essentially, favoring “choice” over “personality” favors a view of the fundamental aspect of personhood as activity rather than a static status. To assert as basic a person’s right to have a characterization of their personality unchallenged by others’ expression is an assertion of power over others – in an immediate sense over their speech choices but in theory over even their mental views. Though recognizing a person’s legitimate interest in other’s choices, the claim that a person should have this type of power over another seems very problematic. It is difficult to see why the legitimacy of a legal order would depend on the legal order recognizing 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 choice about her own speech, is plausibly something that the legal order should treat as inviolable. In contrast, any notion of personality that includes control over other’s speech is not a plausible status to treat as inviolable – as opposed to a often supremely important interest that merits various forms of incomplete legal as well as informal customary support.

Whether or not this abstract approach to formal autonomy is appealing in general, turning to speech, clearly agent/speaker choice could be, whether or not it should be, fully (absolutely) guaranteed. A person, when ever she is in a place she has 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 empower another person to make a choice for herself – for example, whether or not to say the same thing, to say something else, or to say nothing. Censorship – i.e., prohibitions on a person choosing to communicate particular content – amounts to general prohibitions. (I put aside a preliminary theoretical inquiry, presumably informed by why speech should be protected, that is necessary to identify particular behavior as “speech” in a normatively or constitutionally relevant sense. Critics of free speech absolutists almost always mischaracterize their opponents 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 know ever defended protection for either perjury or commercial

speech. Rather, their claim is that properly protected speech choices should not be suppressed on the basis of some instrumental balancing analysis.)

Of course, this formal speech-autonomy right may not lead to much meaningful autonomy if the speaker never has access to the resources (for example, educational, informational, conceptual, experiential resources) needed to have anything meaningful to say or the resources 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 such a position typically argue that such a principle should at best be a rule of thumb or rebuttal presumption. That is, they argue that the claim of autonomy or liberty should be rejected when its recognition does, as it sometimes does, detract seriously enough from some other people's meaningful autonomy or when it seriously interferes with a more egalitarian provision for meaningful autonomy. In the context of this Essay on privacy, their claim might be that speech freedom can detract from meaningful autonomy by exposure of personal information and that this intrusion may justify limiting speech freedom.

In contrast to formal-speech autonomy, the autonomy-based "interests" relevant to meaningful autonomy cannot be fully or absolutely protected or served. That conclusion should be obvious in this discussion since provision of the same information that invades one person's privacy (and undermines her effective autonomy) can affirmatively serve someone's else effective 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 interest conflict can be resolved only by a decision, presumably 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).<sup>36</sup> This premise is that the constitutional status of speech is not centrally based on its instrumental contributions to

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<sup>36</sup> See Baker, Human Liberty, supra note 5.

meaningful autonomy.<sup>37</sup> 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'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 speech protection – although almost always a necessarily speculative empirical possibility is that an *instrumentally even better* policy would pursue meaningful autonomy only by means that did not limit formal speech autonomy.<sup>38</sup> Thus, instrumental contributions provide important reasons to value speech but are a doubtful basis for giving it rule-like or constitutional protection. These instrumental contributions of speech are more like the contribution that many resources might make to meaningful autonomy. Certainly, anyone who constitutionally valued speech for these instrumental reasons must be constantly ready (except where convinced empirical by rule utilitarian arguments) to balance particular interests served by speech freedom against other interests served by particular restrictions.

### III. PRIVACY AND AUTONOMY IN LAW

Thus, 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 whose privacy they find most important. Policy analysis should evaluate the significance of both informational privacy and information exposure in particular contexts. Policy decisions can often choose which to favor, as illustrated by the trade-offs

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<sup>37</sup> For a differing view, see articles listed in note 15. Also Martin Redish, "The Value of Free Speech," U.Pa.L.Rev. 130 (1982): 591-645.

<sup>38</sup> Cf. Carlin Meyer, "Sex, Sin, and Women's Liberation: Against Porn-Suppression," Texas L.Rev. 72 (1994) 1097-1201.

that generated the Privacy Act of 1974<sup>39</sup> as a statutory part of – and a limitation on – the Freedom of Information Act.<sup>40</sup> Although these policy choices will be contested, their content should mostly reflect judgements about distribution, efficiency, and matters of cultural or collective self-definition.<sup>41</sup> 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 social policy and not constitutional principle.

Nevertheless, sometimes favoring or disfavoring any of these versions of informational privacy can be a constitutional matter. Consider first constitutional protections of informational privacy. Protecting informational privacy is probably part of the explanation for, and certainly one consequence of, some interpretations of the Fourth and Fifth Amendment.<sup>42</sup> Specifically, the second conception of privacy described above – disclosure control – is advanced when the Constitution limits searches and seizures or allows a person to refuse to be a witness against herself. These amendments help protect initial disclosure against demands of a prying government, thereby helping to assure a person the seclusion needed for self-development.

Likewise, control over disclosure may be a significant aspect of a 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

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<sup>39</sup> 5 U.S.C. 552(a).

<sup>40</sup> 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 these disclosure much information that intrusively and arguably unnecessarily exposes private information about individuals.

<sup>41</sup> C. Edwin Baker, “Posner’s Privacy Mystery and the Failure of Economic Analysis of Law,” Georgia L. Rev. 12 (1978) 475-495.

<sup>42</sup> But compare Lessig’s observation concerning the need to determine whether the point of these amendments is to prevent intrusions, or 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), 146-150.

effect of making speech acts less costly to the speaker and, hence, of preventing the loss of publically available speech due to the “chilling effect” of exposure. The goal may not be informational privacy itself but rather having more speech and hence more information within a marketplace of ideas.<sup>43</sup> Alternatively, maybe anonymity involves merely a formal speech right not to say things, like one’s name, that the person does not want to say.<sup>44</sup> 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 also protecting other people’s right to expose the person who wishes anonymity. That is, 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 any guarantee of speech freedom would require that the person be able to refrain from self-identification. Still, sometimes this right not to disclose identity or 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.<sup>45</sup> At least when the person plans never to publish, the right is not easily justified by American copyright theory in which the constitutionally permissible grounds for copyright is to encourage the creation and public availability of useful writings.<sup>46</sup> In contrast, the impulse to protect the contents of

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<sup>43</sup> NAACP v Alabama, 357 U.S. 449 (1958); Brown v Socialist Party, 459 U.S. 87 (1982); McIntyre v Ohio Elections Commission, 514 U.S. 334 (1995).

<sup>44</sup> Cf Bowen v. Roy, 476 U.S. 693 (1986) (rejecting claim that person had free exercise claim to stop the state from using an identifying number for the person but suggesting that she might have right not to use the number herself). In a demonstration at Stanford in 1972, participants decided to give the movement’s name in response to authority’s request that the demonstrator identify herself. This reply was neither an attempt to deceive nor to hide (taking pictures was not discouraged) but a political statement of solidarity.

<sup>45</sup> Cf. Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987) (recognizing strong rights in respect to unpublished letters, relying on Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1969)) with 17 U.S.C. § 107 (as amended in 1992 to make fair use of unpublished materials more acceptable).

<sup>46</sup> U.S. Constitution, Art I, § 8 (Congress has power “to promote the progress of science and the useful arts by securing for limited times to authors ... the exclusive right to their respective

unpublished letters is quite understandable from the perspective of a person's interests in informational privacy. In any event, the conception of privacy as control over the initial disclosure is not the subject of this Essay's critique of informational privacy. In fact, the possibility of strengthening control over initial disclosure provides a reason to reduce objections to not recognizing the third conception of privacy – control over further dissemination – which is the Essay's focus.

Alternatively, First Amendment principles might disfavor informational privacy. First Amendment rights may trump some privacy-affirming policies. Consider two possible types of First Amendment claims. First are claims made in behalf of a right of a right to know or to have access to information – sometimes even when this information might be considered private. Imagine, for example, a right for the public and/or the media 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 Court basically rejected this claim, certainly there is plausibility to constitutional rights to access to some information that someone considers private.<sup>47</sup> Despite a legislative policy decision to protect against public exposure of minor victims of sex offenses, a constitutionally based access claim prevailed when the press demanded the right to be present for the child witness's testimony in a sexual misconduct case.<sup>48</sup> 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 less based on the instrumentally valuable right to information than on a more formal liberty right to be present at this location in order to observe (this part of) the world.<sup>49</sup>

The second First Amendment claim is the limit on privacy policies that is central to this Essay.

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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 v Nation Enterprises*, 471 U.S. 539, 546 (1985) (quoting *Sony v. Universal Studios*, 464 U.S. 417, 429 and at 477, dissenting opinion).

<sup>47</sup> *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Houchins v. KQED*, 438 U.S. 1 (1978).

<sup>48</sup> *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982).

<sup>49</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 535 (1980).

Formal autonomy – or, more specifically, speech freedom – allows a person to say what she wants. That 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 information exposure. 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. It corresponds to the common conception that people should be free to say what they want – and to listen to what someone with a right to speak wants to disclose. The right exists even if, as is often the case, often even intended, 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 in which she has a right to be and among people with whom she has a right to interact in order to learn more about that which she can then speak. 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 media speech rights differs somewhat from the argument for individual speech rights. They differ because institutional entities like press enterprises have no intrinsic autonomy claims.<sup>50</sup> The constitutional status of the press, that is, media entities, is better conceptualized as based on how its freedom instrumentally serves people’s interest in gaining information and vision and instrumentally advances various other goods, especially democratic values such as those described in

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<sup>50</sup> See Frank I. Michelman, Brennan and Democracy (Princeton: 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*, 479 U.S. 238 (1986).

the fourth estate role or checking function of the press.<sup>51</sup> Still, there is normally no reason to expect, nor has the Court ever suggested,<sup>52</sup> 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.<sup>53</sup> Thus, for present purposes, I will equate the *speech* rights of individuals and media entities.<sup>54</sup>

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 by either the speaker or by others.<sup>55</sup>

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<sup>51</sup> See Stewart, *supra* note 22; Vince Blasi, "The Checking Value in First Amendment Theory," American Bar Foundation Research J. 1977 (1977): 521; Baker, Human Liberty, *supra* note 5, ch. 10.

<sup>52</sup> But see note 52. Justice Stewart's view that the press has greater speech rights, Stewart, *supra* note 22, a view never embodied excepted by the Court, creates the absurd image of personal liability for reading aloud to her breakfast companion a story that the press had a right to print.

<sup>53</sup> I can think of one exception. Although copyright restricts both individuals' and the press' freedom 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 the 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 L. Rev 55 (2002): 891-951.

<sup>54</sup> Rights other than speech rights may differ. The government may have power to legislate about media structure or ownership in order to make it 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 Rev. 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 secrete source, again without analogy to any individual rights. Baker, Human Liberty, *supra* note 5, chap. 10.

<sup>55</sup> 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);

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 policy.<sup>56</sup> The “default position,” however, is the right to observe, listen, and learn and then to speak.<sup>57</sup> 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 – e.g., the name of a juvenile defendant or of a rape victim.<sup>58</sup> If this conclusion is accepted, the gossiping against which Warren and Brandeis inveighed would be a matter of protected First Amendment right.

#### IV. PROTECTION OF PRIVACY

Unrestricted speech freedom does not leave informational privacy without the protection. It only requires that the law not use a particular means – 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

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Nebraska Press Ass’n v. Stewart, 427 U.S. 539 (1976) (Brennan et al, concurring) (indicating injunction against publication of information about the accused is improper no matter how shabbily the information was obtained); Food Lion v. Capital Cities/CBS, 194 F.3d 505 (rejecting publication damages for communicative content obtained through illegal means).

<sup>56</sup> Cohen v. Cowles Media, 501 U.S. 663 (1991). Generally, confidentiality – a restriction on speech – can be required of employees or people within an agency relation to another.

<sup>57</sup> But cf. Jerry Kang, “Information Privacy in Cyberspace Transactions,” Stanford L.Rev 50 (1998): 1193-1294.

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

prevent her from being able to communicate that information.

Thus, the Court would undoubtedly and unanimously hold that the state interest in the confidentiality of preliminary investigations of judicial fitness justifies the state's non-disclosure (preservation of the secrecy or privacy) of complaints about fitness, the existence of the investigation, and the information gathered in a preliminary investigation. The state could reject requests by the public or the press for this information. The purpose of non-disclosure is to achieve state aims 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*,<sup>59</sup> the Court also unanimously held that this legitimate state interest in restricting this speech does not justify a bar on publication of this information. If “strangers to the inquiry” obtain this information, the state interest in preventing speech on this subject, which justified non-disclosure rules, does not justify restricting the speech of those who now have knowledge. The same is true in many contexts. The Court, for example, is clear that the state can often 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*<sup>60</sup> (juvenile) and *Florida Star v B.J.F.*<sup>61</sup> the Court rejected restrictions on the publication of information.

Both the rules that the Court would presumably uphold (government non-disclosure) and the rules that it struck down in *Landmark* and *Florida Star* (prohibitions on communications) aim at restricting dissemination of the same communications. Both sets of rules, if allowed and effective, would accomplish the same end – preventing communication. The most salient difference is that the permissible restriction directly only limits possession of a resource, namely information, that is instrumentally useful to speakers and arguably for listeners (i.e., their effective autonomy) while the impermissible restrictions explicitly limit the speaker's choice to speak or publish (i.e., her formal autonomy). The state acts properly in basing its information policies on instrumentalist, policy

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<sup>59</sup>435 U.S. 829 (1978).

<sup>60</sup> 443 U.S. 97 (1979).

<sup>61</sup> 491 U.S. 524 (1989).

judgments about the value of privacy as compared to the value of information accessibility. The Court, however, blocks the execution of the policy if it 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 speaker 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 opportunity to be in non-public spaces – consider the Fourth Amendment protection of the home and of private papers. And the Fifth Amendment protects in one special context 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 and Brandeis' tastes for more serious content in newspapers – although at dinner among colleagues, it is easy to see that even educated people (whether or not as aristocratic as Warren and Brandeis) gossip, especially about non-present academics. Possibly the government should try to structure media industries so that they would favor more “serious” content.<sup>62</sup> However, the legal order's 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.<sup>63</sup>

The law can intervene to protect informational privacy at distinct junctures and in different ways. Most generally, the legal order can: (1) prohibit dissemination of exposing information to which the exposed person objects; (2) restrict or regulate gathering information, most obviously by aiding a person in keeping information from originally being non-consensually exposed; (3) restrict or regulate uses of information after having been exposed and gathered; and (4) restrict or regulate the alienation of

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<sup>62</sup> Although the Court in *Turner Broadcasting System v. FCC*, 5d12 U.S. 622 (1964), appeared to rule this purpose constitutionally impermissible, all the Supreme Court's prior media structural regulation cases suggest the opposite. Baker, “Turner Broadcasting,” *supra* note 53.

<sup>63</sup> For the best development of this claim, see Diane Zimmerman, “Requiem for a Heavy Weight: A Farewell to Warren and Brandeis' Privacy Tort,” *Cornell L. Rev.* 68: 291-367 (1983).

private information. That is, the law can restrict dissemination, gathering, use, and alienation. The first of these, at least as applied to individual speakers or to the media, violates the free speech principles assumed here. The fourth, 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. Sections A and B below explore the use of the second and third means of protecting informational privacy.

### **A. Restrictions on Gathering Private Information**

Many restrictions on gathering information are uncontroversial. As noted, the Fourth and Fifth Amendments impose gathering restrictions at least on state actors. (On the other hand, the Sixth Amendment grants the accused a right to compulsory process for obtaining witnesses; 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.<sup>64</sup> Protection of informational privacy in these “private zones” of private property or of the individual's mind is usually either constitutionally compelled or a permissible policy choice.

These protections of “private places” do not mean that the government should have unrestricted authority to limit gathering information. Prohibitions on news gathers, or presumably 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.<sup>65</sup> In public places, people generally have a First Amendment autonomy right not only to speak but also to listen and look – that is, gather information. When engaged in advocacy, people generally have a right to try to obtain new audiences by leafleting or even going up to people to try to engage in discussion,<sup>66</sup>

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<sup>64</sup> C. Edwin Baker, "Disaggregating the Concept of Property in Constitutional Law," in Warren Samuels & Nicholas Mercuro, The Economics of Legal Relations, v. 5: Fundamental Interrelationships Between Government and Property (1999).

<sup>65</sup> Cf. *Galella v Onassis*, 487 F.2d 986 (2<sup>nd</sup> Cir. 1973).

<sup>66</sup> But cf. *Hill v. Colorado*, 530 U.S. 703 (2000).

although continued pursuit of a targeted person who rejects communicative interaction eventually turns into legally prohibitable 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.”<sup>67</sup> 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 the 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 violate the First Amendment autonomy 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 also then prohibit publication.<sup>68</sup> 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, e.g., by speaking or handing over the papers or maybe by the implied consent of appearing in a public place where observation will supply the information. Alternatively, however, some read the Court’s comment to mean the acquisition is

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<sup>67</sup> Smith v. Daily Mail, 443 U.S. 97 (1979); *Florida Star v. B.J.F.*, 491 524 (1989).

<sup>68</sup> *Florida Star*, 491 U.S. at 536.

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 their eyes shut, their questioning mouths closed, 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 it. The same should be true for journalists (or gossip columnists). Possibly the best analysis is that these 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 issues concern illegally obtained information. No one doubts that a person is liable for any tort or crime committed while gathering information. Can she, however, also be punished or have damages increased for communicating the information that she obtained illegally?<sup>69</sup> Or, 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?<sup>70</sup> There are clear reasons to resist either uniform yes or no answers. Liability directly punishes speech. Liability aims at cloaking potentially valuable information. The press regularly receives democratically significant information from almost institutionalized systems of leaks or from a disgruntled person acting like a whistle blower. Often, the press will have every reason to suspect the source acted illegally in obtaining or passing on the information. That certainly was the case in the *Pentagon Papers Case*,<sup>71</sup> where the Court dramatically rejected the government's request for injunction against publication of excerpts from a classified report that verified many of the antiwar movement's criticisms of the government war activities in Vietnam. But as this case also illustrates, society often benefits from and presumably the First

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<sup>69</sup> Cf. *Food Lion v. Capital Cities/ABC*, 194 F.3d 505 (4<sup>th</sup> Cir. 1999) (rejecting, on First Amendment grounds, publication damages resulting from dissemination of illegally obtained information) with *Dietemann v. Time*, 449 F.2d 245 (9<sup>th</sup> Cir. 1971) (allowing damages for tort to be enhanced due to publication).

<sup>70</sup> *Pearson v. Dodd*, 410 F.2d 701 (D.D.Cir.1969) (rejecting damages for publication where publisher did not commit the illegal intrusion).

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

Amendment protects this speech. On the other hand, 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, non-consensual entry into or spying on their bedroom. It seems wrong to allow minimal punishment or liability for the trespass to be the only liability for a person who invades another's privacy, takes possibly pornographic pictures or copies personal diary entries, and then either publishes or gives to others to publish the illegally obtained pictures or information, all merely just to fulfill a voyeuristic public's salacious interests in celebrities or even in random private individuals. However, when journalists trespassed into the premises of grocery chain and obtained pictures whose publication created millions of dollars of damage to the chain, the Court allowed only \$1 liability for the trespass although surely the harm of the intrusion includes the loss due to exposure.<sup>72</sup>

Lower courts have struggled without coming to a uniform answer to either question. Recently, in *Bartnicki v. Vopper*,<sup>73</sup> 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 wire tap law by a third party unconnected with the newspaper. This resolution at first seems appealing – it protects dissemination in contexts like the the *Pentagon Papers* while generating no incentive (or mercy) for dissemination of illegally obtaining 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 the 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.<sup>74</sup>

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

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<sup>72</sup> *Food Lion v. Capital Cities/CBS*, 194 F.3d 505 (4<sup>th</sup> Cir. 1999).

<sup>73</sup> 532 U.S. 514 (2001).

<sup>74</sup> 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).

noncommercial context from saying whatever she likes, including the entire content of a copyrighted item. This restriction directly restricts the speaker's liberty, her freedom of speech, on the basis of content. (Note, although closer to existing law than might be at first imagined, the analysis here do not purport to track existing case law but represent my attempt to show the constitutionally legitimate scope of copyright law.<sup>75</sup>) Very few of the privacy fears expressed in the second scenario described above would be seriously raised in relation to this speech. Few non-commercial speakers will engage in the breaking and entry designed to obtain salacious content appealing to voyeuristic interests; moreover, the fear primarily concerns the broad public (usually commercial) availability of the content.

In contrast, copyright's goal of providing an incentive for valuable creative behavior properly protects people's expressive creations from unconsented *commercial* appropriation – while an appropriately broad interpretations of two doctrines, fair use and the non-copyrightability of facts and idea, only of expression, protect 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 – only a constitutional interest in being able to provide the public with information or vision, copyright as limited by a broad interpretation of these 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 the illegally obtained content – either fictionalized or consensually obtained material would arguably suffice. Thus, prohibiting media reproduction of this illegally-obtained content that lacks “public concern” may be appropriate.<sup>76</sup> The prohibition does not interfere with the constitutional role of

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<sup>75</sup> Baker, *supra* note 52.

<sup>76</sup> 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 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, rejected these arguments. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975); *Hayes v. Alfred A. Knopf*, 8 F.3d 1222 (7<sup>th</sup> 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 individuals may want.

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 their image, but which virtually always – and probably constitutionally must – exempt its use for journalistic purposes. Although the press is free to increase its appeal by offering gossipy stories, including exposing pictures, of celebrities, lower courts find that if the media’s report is knowingly false, the behavior can be treated not as journalism but commercial exploitation.<sup>77</sup> In constitutional terms, the distinction is that the media entity would no longer be performing its constitutionally protected role and, thus, liability would be permissible.

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 (i) can limit when space is considered “public” or (ii) restrict use of technologically enhanced means of gathering information? My tentative conclusion is that existing law rightfully assumes such state policy-making authority for both and that there is no persuasive First Amendment basis for objection.

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 that space, people should have an anarchic right to provide, gather, and receive information. There does not seem, however, any logical or natural way to determine 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

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<sup>77</sup> See *Eastwood v. Superior Court*, 149 Cal.App.3rd 409 (1983); *Hoffman v. Capital Cities/ABC*, 33 F.Supp.2nd 867 (C.D.Cal. 1999). This point does not suggest that right of publicity protection is wise policy even in these contexts. See Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights,” *Calif.L.Rev.* 81 (1993): 125-240.

of private property.<sup>78</sup> 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 technology-enhanced means should not be understood as inherently “in” a public space. Rather, allowing nonconsensual use of technology amounts to saying 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 technology 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 are sociologically important, it seems likely that the law ought not automatically treat different technologies or different contexts of their use the same. Certainly, the value of privacy justifies treating some uses of technology as the equivalent of an invasion of a private sphere.

Telephone conversations are typically carried on lines that cross public space – or on electromagnetic radio waves. Technology may allow a non-participants to hear (and record) the conversation. Nevertheless, existing wiretap laws wisely treat conversations floating across these public spaces as private even if the intruding listener is traveling on a public road and the conversationalists are in a public park using cell phones. Technology-aided listeners are as uninvited as if the conversation occurred in one’s private home.

Available technology allows a person called to identify the caller – or, under readily available current technology, to identify the listed owner of the caller’s phone. To protect the caller’s privacy,

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<sup>78</sup> Cf. *Florida Publishing v. Fletcher*, 340 So. 2d 1154 (1976); *Prahl v. Brosamle*, Case No. 152-062, Circuit Court, Dane County, Aug. 28, 1982, cited in Marc A. Franklin et al, *Mass Media Law*, 6<sup>th</sup> ed. (New York, Foundation Press: 2000), 570. Neither the notion of private property or the Constitution requires a trespass doctrine like that common in most American jurisdictions. A court developing an implied consent for reporters’ presence on their 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 their presence as “custom.”

could the government restrict the use of this technology, leaving it to the calling party 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 whether this freedom applies 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 the communications system. 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 the phone company to identify the calling phone so as to route the called person's reply to the right phone – and route the phone bill to a responsible party. That is, the technology required a caller to identify herself (or at least her phone) to the phone company and its record keeping. Any law that limits the phone company's freedom to further use or communicate these records amounts to declaring the phone call private, like treating it as having occurred on visually or aurally secluded private property controlled by the speakers despite the caller (or phone owner) having in a sense "voluntarily" exposed themselves 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 voluntarily exposed in a constitutionally relevant sense. Professor Jerry Kang persuasively argues that the government should make the default rule 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.<sup>79</sup> How this conclusion is understood is important. The default rule could follow from a notion of property in personal information (for example, property maintained until purposefully abandoned in a specific transaction).<sup>80</sup> This property premise, however, strikes too hard at a concept of a First Amendment “commons” where people generally are free to observe and hear what they can and then talk about what they have seen or heard. The better premise is to understand Kang’s default position as treating technology’s capacity to expand this experiential commons or public sphere as subject to policy-based determination. The default rule simply rejects treating disclosures 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 speaking parties. 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 whether this regulation of technology should be permissible. Reporters have argued to no avail that these laws make their reporting less accurate – they have to rely on memory and notes – and, even when accurate, leaves the media much more vulnerable to defamation suits because it becomes more difficult to prove that accuracy of their reports.<sup>81</sup> Even if regulating technology-enhancing means of invading privacy sometimes may be both desirable and not contrary to any notion of speaker/observer autonomy, this

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<sup>79</sup> Kang, *supra* note 56.

<sup>80</sup> See Ann Bartow, “Our Data, Ourselves: Privacy, Propertization, and Gender,” U.San Francisco L.Rev. 34 (2000): 633-704.

<sup>81</sup> *Dietemann v. Time*, 449 F.2d 245 (9<sup>th</sup> Cir. 1971); *Shevin v Sunbeam Television*, 351 So.2d 723 (Fla. 1977).

restriction seems much more problematic.<sup>82</sup> Still, a person may want to control when or how as well as if *she* makes particular information public. Maybe the rule is more legitimate if directed against forcing a person contrary to her will to being herself the (recorded) medium of communication.

## **B. Uses and Users of Information**

Even though a party properly gathers or observes personal information, its use presents a different issue. A person 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. They also may arise when the law restricts the use of the information in guiding further speech – e.g., in choosing to whom to send marketing or political messages. The contexts are variable and sometimes the constitutional issue is controversial. Still, often the restrictions are and should be permitted.

Consider cases where information initially was legally obtained but by means that were not themselves constitutionally protected – e.g., it was not gathered within constitutionally protected conversation or through constitutionally protected observation in a public sphere.. Under this circumstance, the source – the government or private party – may have imposed as a condition of access that the information is only used for particular purposes or is not used in particular ways. Often the government restricts the use of personnel files, sometimes to the uses that justified gathering the information. It regularly provides certain employees with personal or private information about other employees or about members of the public but limits these employees' further disclosure of the records.<sup>83</sup> Similarly, in *Seattle Times v Rhinehart*,<sup>84</sup> the Court upheld a protective order – arguably a “prior restraint” – prohibiting publication of private information that the press obtained through use of

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<sup>82</sup> Diane Leenheer Zimmerman, “I Spy: The Newsgatherer under Cover,” U.Rich..L.Rev. 33 (2000): 1185-1231 (review and tentative First Amendment critique of these restraints).

<sup>83</sup> Cf. *Snepp v. United States*, 444 U.S. 507 (1980) (can require former CIA employee not to disclose information obtained during employment without approval of agency).

<sup>84</sup> 467 U.S. 20 (1984).

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 unconstitutional – the restriction is always potentially subject to attack as unconstitutional condition.<sup>85</sup>

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. The Supreme Court reversed.<sup>86</sup> Justice Rehnquist (never known to worry much about unconstitutional conditions) simply treated the law as a facially permissible restriction on access to information. He distinguished the limit on access from an overtly objectionable prohibition on speaking. Although he reached the right result, his reasoning should be very troubling. The permissibility of such restrictions should depend on both the context of the original receipt and the content of the restrictions. Such restraints should always be potentially vulnerable to an unconstitutional condition attack, which was precisely the correct point of Justices Stevens and Kennedy's dissent. (If imposed by private parties, there is also a reasonable argument that enforcement of the agreement not to use the information in later speech could be denied as state action that violates the First Amendment or as contrary to public policy.<sup>87</sup>) However, if commercial speech as well as other commercial practices either should not be constitutionally protected<sup>88</sup> or, at least under the current doctrinal regime,<sup>89</sup> are more easily subject to limitation, the dissent's final conclusion should be rejected to the extent the restricted uses of the information were all

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<sup>85</sup> See *Seattle Times*; 467 U.S. at 37 (Brennan and Marshall, 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*, 501 U.S. 663 (1991), or information provided by whistle blowers on this non-constitutional ground.

<sup>86</sup> *Los Angeles Police Dep't v United Reporting Publishing Corp.*, 528 U.S. 32 (1999).

<sup>87</sup> See *supra* note 84.

<sup>88</sup> Baker, *Human Liberty*, *supra* note 5, ch. 9.

<sup>89</sup> *Central Hudson Gas & Elec. Corp. v. Public Service Comm. of New York*, 447 U.S. 557 (1980).

commercial.

In addition to regulating certain uses of “private” information – for example, for hiring decisions – and to imposing appropriate conditions on governmentally supplied information, a third basis of restricting use may be especially important. The government has general authority to regulate businesses. Securities laws illustrate that this power extends to regulating speech involved in the business. Disclosures are required – and sometimes prohibited. Insider use of information is forbidden. Although sometimes cast as a disagreement over the propriety of regulating speech that is inconsistent with the defense attorney’s role, arguably a dispute among Justices over the standard for regulating the defense attorney’s out-of-court speech was primarily over their differing vision of that role.<sup>90</sup> Lawyers, doctors, 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 permission for broader uses. 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).<sup>91</sup> Though controversial, I will assume that conclusion here without repeating my prior arguments for this claim. Still, I note that virtually all claims in behalf of speech rights for corporations do not reject my claim directly but rather argue for an alternative, usually marketplace of ideas theory of speech and emphasize the instrumental contribution of corporate speech in supplying people with information.<sup>92</sup>

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<sup>90</sup> *Gentile v. State Bar*, 501 US 1030 (1991) (5-4 decision upholding particular restriction on defense attorney’s out-of-court speech).

<sup>91</sup> See, e.g., Baker, *Human Liberty*, supra note 5, chapter 9.

<sup>92</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 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 Rev.* 55 (1989) 5-63.

If commercial entities can be limited in ways that would be impermissible to restrict non-commercial and media entities, determining what constitutes a media entity will sometimes be crucial 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 *non-individualized* communications as its product and makes it widely available to any interested public. The Investment Act of 1940 restricts who can engage in the investment advice business, but exempts those giving advice by means of a bona fide publication of general and regular circulation. The Court majority in *Lowe v. SEC*<sup>93</sup> found that this exemption covered a publisher of an investment advice newsletter. Rejecting this interpretation, Justice White’s concurrence found the defendant non-exempt under the Act but protected by the First Amendment. Both opinions are plausible on the facts. The interesting question is whether the concurrence’s constitutional analysis could distinguish non-media commercial actors, for example, those selling more individualized investment advice. Justice White said that he does 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 accepts the distinction 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 non-commercially). Moreover, arguably even the press can be regulated when delivering advertising – paid for speech – rather than providing its own information and opinion.<sup>94</sup> In *SEC v Wall Street Publishing Institute*,<sup>95</sup> the D.C. Circuit 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

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<sup>93</sup> 472 U.S.181 (1985).

<sup>94</sup> *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913). See generally, C. Edwin Baker, *Advertising and a Democratic Press* (Princeton: Princeton University Press, 1994), 118-137.

<sup>95</sup> 851 F.2d 365 (D.C. Cir. 1989).

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.<sup>96</sup>

The difficulty of deciding what counts as media may apply to (commercially accessible) data bases. 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*,<sup>97</sup> 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 also taking personal information that is not a matter of public concern outside the constitutional protection of *Gertz*.<sup>98</sup> (*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 truth). 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 it 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 regulatable professions than like the press. Like an accountant, the credit report sells specific, individualized financial information to individual clients who seek the information to guide their commercial transactions.<sup>99</sup> These features distinguish credit reporting from

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<sup>96</sup> 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 is misguided to imply any broad, general governmental authority to regulate individual's non-commercial speech or media speech about the securities industry.

<sup>97</sup> 472 U.S. 749 (1985).

<sup>98</sup> *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

<sup>99</sup> *Hadden View Investment Co. v. Cooper & Lybrand*, 70 Ohio St. 2d 154, 436 N.E. 2d 212 (1982) (accountant malpractice).

both individual's non-commercial speech and media communications.<sup>100</sup> If, but only if, my proposed ground for the decision were accepted, it would be permissible to require credit reporting agencies to allow a person to review her file, to maintain a procedure for challenging inaccuracies, and maybe to require that the agency to include in its report on a person an indication that she disputes certain information contained in the report<sup>101</sup> – 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 data bases raises a somewhat different issue. Modern computer-based technology makes data bases increasingly cheap to construct and easy to use. In finding a “personal privacy” interest in information that had previously been public – information on FBI 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.”<sup>102</sup> But what follows for regulatory power? Consider, for example, four possible contexts: (i) laws generally restricting turning certain types of properly obtained information into data collections; (ii) laws regulating the maintenance of data bases; (iii) laws restricting creation of data bases for certain (commercial) uses; (iv) laws restricting certain (commercial) uses of data-base information.<sup>103</sup>

As to the first, using computer technology in processing and organizing information is in many respects parallel to using technology to gather information not otherwise available to our eyes and ears. Arguably, both uses of technology should be equally subject to regulation. Or maybe an even closer

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<sup>100</sup> *Gutter v. Dow Jones*, 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)..

<sup>101</sup> Cf. Fair Credit Reporting Act (1970) and Consumer Credit Reporting Act of 1996, 15 U.S.C.A. 1681-1681t.

<sup>102</sup> *Dep't of Justice v Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

<sup>103</sup> My thinking here was prompted by *Cohen*, supra note 6.

analogy is tape recording. Even when a person has a right to hear and publish the contents of a speech, current legal doctrine permits a legal prohibition on recording it without unanimous consent, thereby preventing her from making the most accurate use of information that she rightfully possesses. In both cases, information about the 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 past stories? If not, could it be prohibited from doing so at a lower cost than before? Can individuals – sociologists or historians – be prohibited from engaging in such activities? If the answer to these questions is “no,” then though the issue is not beyond doubt, general restrictions – for example, restrictions that apply to individuals or to the press – on turning information into data banks seem very questionable. Moreover, as to the second possibility, the same arguments apply to regulation of the maintenance of data bases.

As to the third and fourth possibilities, their permissibility may well be the same as regulation of other commercial practices. All commercial practices, including creation and use of data bases, are generally subject to regulation while non-commercial and media uses of information are properly protected unless the particular use – for criminal behavior – is independently outlawed.<sup>104</sup> Certainly, commercial uses of information about a person’s race or sex is 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 usage of a person’s image is equivalent to the media’s 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.<sup>105</sup> Restrictions on collecting information or using information in data bases

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<sup>104</sup> 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, dissenting).

<sup>105</sup> All scope for a right of publicity is critiqued in Michael Madow, supra note 76. My claim here is the constitutional critique should only apply to non-advertising appropriations.

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 their *persona*, that is, in personal information, but it can give them such a right assertable against non-media commercial uses. If this is right, 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 these commercial purposes were limited, major concerns of privacy advocates would be met. These rules could also dramatically reduce the incentives for construction of offending data bases, thereby further reducing the threat to privacy.

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 – access to their site, individualized service, a cheaper or free price, or whatever. Standard reasons to regulate market transactions – e.g., unequal information, structures creating inappropriate amounts of power of one over the other, negative impacts on others not party to the transaction – could possibly justify prohibitions on market alienation of this information. The person would be left free, though, to publish personal information or even to give it to a particular commercial entity except for in exchange for some benefit.

Many privacy advocates will not be satisfied with the protections defended here. Nevertheless, much of the rise in the popular concern about disappearing privacy apparently – and 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 requiring respect for people as autonomous agents in control of their own speech choices dictates that, in this discrete context, privacy claims should lose. Parts V and VI 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: Non-legal Norms**

Probably the greatest protection of informational privacy comes through the decisions not to disclose “private” information about another or, possibly more often, to monitor closely when and to whom to make the disclosures. These decisions are often quite rigidly determined by non-legal social norms – like the injunction not to “snitch.” All communities value privacy, although to varying degrees and in relation to varying information. These communities predictably develop various privacy-protecting social norms or practices that embody their judgments about privacy. Robert Post is surely entirely correct about the necessity of “civility rules” for the maintenance of communities, communities which are themselves necessary for effectively autonomous individuals to develop.<sup>106</sup>

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

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<sup>106</sup> Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*,” *California Law Rev.* 74(1986): 691; Robert Post, *Constitutional Domains* (Cambridge: Harvard U. 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 U. Press, 1989).

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.<sup>107</sup> Rather, liberal theory’s more modest claim is that the 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, 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 as people decide the rules are wrong and act on their rebellious view. Behavioral votes are in a sense much more democratic and engaged than are the government’s official decisions. Each person’s behavioral vote contributes 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.

Language rules’ voluntariness does not mean that grammar and language are not of major significance or not 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 fact is roughly analogous to the point of the two proceeding subsections of this Essay. Information privacy can be a matter of policy embodied in legal rules even if not protected directly by law. 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 non-legal norms protecting privacy can be both extraordinarily important and quite effective. They often protect secretive individuals, adding to their freedom. They often both maintain and are maintained by group solidarity. Randall Kennedy describes how most African Americans

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<sup>107</sup> See Baker, *supra* note 29.

know of other blacks who “pass.” Despite widespread disapproval of this passing by African Americans and despite their capacity to prevent the passing by exposure, social norms effectively prohibit exposure, especially exposure to whites.<sup>108</sup> Even in a world in which “passers” could hardly expect the law to protect them against exposure, these social norms provide 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 rules. When an exclusive “white-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.”<sup>109</sup> In a sense, the paper revealed personal information in order to enforce, and to punish people for violating, the rule against revealing (certain other) personal information.

Larry Gross’s account of the history and debates over “outing” of gays makes the point even more powerfully.<sup>110</sup> The rule against exposing another person’s homosexuality has incredible strength, especially among gays and lesbians. “Outing” had long been considered as a possible political strategy. It was debated by what Gross describes as the first homosexual emancipation movement, but this Scientific Humanitarian Committee, founded in Germany in 1897, quickly rejected the “frequently suggested ‘path over corpses.’”<sup>111</sup> The history of outing and especially the debate over outing in the

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<sup>108</sup> Randall Kennedy, “Racial Passing,” *Ohio St. L.J.* 62 (2001): 1145-1193, 1171-73. Even if African Americans mostly condemn passing, many of these critics 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.*

<sup>109</sup> *Id.* at 1171 (citing Shirlee Taylor Haizlip’s account). Cf. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (among constitutionally protected methods of exercising power, boycotters of white businesses applied pressure on Black “violators” by publishing their names in the church newspaper).

<sup>110</sup> This paragraph is based entirely on Gross, *supra* note 2.

0. *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.

1980 and 90s 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 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 lesbians 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, identifying major sports or entertainment or business figures who were potential role models. Interestingly, these people typically argued their case for this view within the 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 rules are non-legal and unwritten, the possibility to propose “amendments” or repeal existed within a large gay and lesbian public sphere and the rule remained generally effective – with occasional and usually very limited radical attempts at civil disobedience – when not “amended.”

The lesson of this history of outing as well as of passing might be three-fold. 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 power<sup>112</sup> to violate informational privacy, social norms protecting privacy can be extraordinarily effective.<sup>113</sup> Third, the existence of speech freedom allows for both

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<sup>112</sup> 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. “Don’t ask, don’t tell” had not yet been invented by the military when Larry Gross wrote but he fully explained its appeal. Gross, *supra* note 2, at 144-152. 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 have indicated a person’s heterosexuality. Similarly, it often refused to report as “news” that a major figures who assumed a public heterosexual image was actually gay while routinely reporting any other personal “news” about such figures.

<sup>113</sup> This point should not obscure the fact that “outing” in neighborhoods, employment, and social contexts of gays, usually by a non-gay, also occurs and often has tremendously harmful consequences. At the end of my later discussion of gossip, I note that gossip has overtly negative as well as useful consequences.

participatory debate and practice that can challenge and change – or defend and maintain – these rules.

## V. OVER-VALUATION OF PRIVACY

My abstract thesis is that formal autonomy – or free speech rights – should operate as a side constraint on policy formulation, that is, should “trump.” Rights of speech should prevail even when they run roughshod over people’s desire to keep information private. This thesis rejects giving people any property right in information that can be used to control the communicative choices of other individuals or the media.

Nevertheless, informational privacy is admittedly extraordinarily important to individuals and to the nature of a community. The information that should be kept private and the appropriate methods of guarding this privacy are, however, matters on which people and communities will differ. Societal self-definition concerns creating particular types of communities, encouraging certain values and practices, and even supporting certain images of persons. In formulating privacy policies, all 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 societal self-definitional concerns, even as goals, are properly contested. Nevertheless, elsewhere I have argued that their appropriate elaboration would lead to considerable legal protection for the privacy of persons – and much less for the privacy of instrumentally valued, institutional creations such as corporations (or governments).<sup>114</sup> 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 such a personal privacy right. But possibly most important is the contribution 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

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<sup>114</sup> Baker, *supra* note 40. This argument responds to the opposite conclusion offered in Richard Posner, “The Right of Privacy,” *Georgia L. Rev.* 12 (1978): 393-422.

egalitarian or democratic social policy should be hesitant about unnecessarily increasing their power, including their own privacy and their capacity to invade the privacy of individuals. Thus, Part IV drew on the work on 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.

Here, I want to take a different tack. This Part suggests that privacy, no matter how essential for people's flourishing, currently is in danger of being seriously over-rated, 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" or, if the trump conception is resisted, that it justifies great caution before being compromised by pro-privacy policies.

Warren and Brandeis' accolades for a right of informational privacy have succeeded better in the court of public opinion than in the courts of law. Currently, great popular support exists for privacy from the snooping eyes of government, the media, and of corporate marketers, as well as common but somewhat differently based disapproval of the neighborhood or office "gossip." Although I certainly can not prove it, I am inclined to believe that there has been a relatively recent surge in the popular appeal of informational privacy.<sup>115</sup> Not only is the informational privacy tort a twentieth century invention, but my impression is that in the twenty years since Diane Zimmerman's "requiem" for the tort,<sup>116</sup> it has found greater judicial backing.

Greater popularity may reflect the plausible view that increasing commercial use of newly cheapened, individualized marketing strategies and increased overreaching by governments have put privacy in greater danger today than ever before. Resistance to these "disciplinary agencies" is surely progressive and justified. Possibly the central factor in their greater power – as well as a central generator of increased fears – is the incredible advance in computer and related digital technologies that dramatically reduce the cost of collecting and, possibly more ominously, reduce the cost of indexing,

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<sup>115</sup> Zimmerman, *supra* note 81.

<sup>116</sup> Zimmerman, *supra* note 62.

storing, and retrieving information.<sup>117</sup> If this power is the concern, it 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 be outside the controlling eye 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 in the defense of informational privacy and reject, for example, the advice of right wing demagogues who recommend giving up civil rights, including rights of privacy, in an irrational reaction to September 11. 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 individual 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 a public world. My fear is that the current positive valuation of privacy reflects a society in which all value is increasingly seen as located in private life. Increasingly people seem to find all meaning in private interactions of family and other personal/private associations or, even more troublingly, in a more purely commodity-oriented world of private consumption with value largely based on wealth and material goods.<sup>118</sup> In this account, the value-orientation of commercially-oriented

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<sup>117</sup> Oscar H. Gandy, Jr., The Panoptic Sort (Boulder: Westview Press, 1993).

<sup>118</sup> 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 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

advertisers have virtually won. My concern is not that people recognize that privacy and private life have true value but that they have lost the sense of value in public life, of life in a public sphere that they increasingly devalue and disinherit. Though the point requires more discussion, my claim is that as a normative matter, the classical vision of society and of life is more appealing and the newer vision of “withdrawal” represents a distinct and dangerous decline.

This withdrawal represents a direct threat to First Amendment values of dissent and challenge to the status quo.<sup>119</sup> Often people will not merely withdraw themselves but will also seek to enforce withdrawal. An active public sphere could disrupt conventional norms and private life.. Not everyone loves a parade – if, for example, it is a civil rights or antiwar or Nazi march. In his useful study of gay politics, Larry Gross notes how central protection of privacy has been to the gay agenda. In the years immediately after the “liberal” 1957 British *Wolfenden Report*,<sup>120</sup> which recommended decriminalizing private homosexual behavior, the new conforming British policy resulted in an increase in prosecutions for (arguably public) homosexual behavior as the government tried to enforce closeting. Gross explains that mainstream orientations were often most adamant about the *public* prevalence of their heterosexual norms. Conservative policy could tolerate the practice and instead primarily aimed at the suppression

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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. The only reports in mainstream American media of a recent Finnish election of a Prime Minister emphasized the lack of policy differences or issues, other than increased unemployment, between the two dominant parties, which produced a voter turnout of only 70%. Lizette Alvarez, “Finnish Center Party Edges Past Social Democrats in Election,” New York Times A-2, March 17, 2003. Only by going beyond U.S. media, for example, by viewing of BBC online, could one discover that another prominent issue was the losing Social Democrats’ inadequate opposition to 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 (both the leading leftist parties picked up seats), which apparently fell from favor because of its unpopular promise of a tax cut.

<sup>119</sup> Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America (Princeton: Princeton U. Press, 1999).

<sup>120</sup> Report of The Committee on Homosexual Offenses and Prostitution, The Wolfenden Report (Authorized American ed, 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 U. Press, 1965); H.L.A. Hart, Law, Liberty, and Morality (Stanford: Stanford U. Press, 1963).

of any public expression of the existence of homosexuality.<sup>121</sup> In one example, the *Houston Post*, which apparently accepted the *private* homosexuality of its star minority columnist, then fired the columnist when it became known how the paper had forced him to delete from an article his *public* disclosure of being a gay man. Eventually, the paper rehired him but only after *public* protests by the Houston Hispanic community and the local Queer Nation chapter.<sup>122</sup>

During the period in 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 notes two views. 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.”<sup>123</sup> Opposition to “outers” was shrill, as illustrated even by some very thoughtful, important gay advocates. Randy Shilts characterized outers as “lavender fascists who would force their ideology on everyone.”<sup>124</sup> Others described outing as immoral, McCarthyism, terrorism, cannibalism, a “bunch of Jews lining up other Jews to go to a concentration camp.”<sup>125</sup> On “(the left) hand,” others saw the issue as about gays’ “right to create communities and their right to publicity” and arguing that “[i]t is primarily our *public* existence, and not our right to privacy, which is under assault by the right.”<sup>126</sup>

Gross observes that publicity played a key role in the process of societal change in attitudes toward heterosexual cohabitation. He concludes 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 Rotello

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<sup>121</sup> Gross, *supra* note 2, at 144-150. 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 L. Rev.* 45 (1993): 755-802.

<sup>122</sup> Gross, *supra* note 2, at 149-150.

<sup>123</sup> *Id.* at 146.

<sup>124</sup> *Id.* at 152.

<sup>125</sup> *Id.* at 127.

<sup>126</sup> *Id.* at 146.

prefers to call it, equalizing – is a means to this end.”<sup>127</sup> 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 ... we are ... fighting less for the right to privacy than for the right not to have to be private.”<sup>128</sup>

A telling illustration of devaluing 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 that public life. Although such a society would maintain and respect a private sphere to which all people would repair for relief, provisions, contemplation, and various amusements, it would hardly encourage a total retreats to a “purely” private life. People in public life share with people who shun public roles a legitimate interest in maintaining their reputation and in maintaining a private life 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 is of little instrumental significance for a purely private person. To over simplify, reputation is truly valuable for a private person only among her private compatriots, while for the public person it is also extraordinarily valuable among unknown strangers. Media libels, however, create a greater risk of controlling perceptions of strangers than of friends. Strangers will have fewer first hand alternative bases 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 interests in protection from media libels seem much greater in the case of people in public life.

Existing defamation law reverses both the normative premises and the descriptive hypotheses. Rather than reward a person for becoming a public official or public figure by specially honoring her

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<sup>127</sup> Id. at 169-170.

<sup>128</sup> Id. at 172 (quoting Benjamin Schatz, “Should We Rethink the Right to Privacy?” Advocate (Feb.1991)).

legitimate interests (e.g., being spoken about truthfully), defamation law burdens such a person with greater legal vulnerability to libelous falsehoods.<sup>129</sup> 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 (negligence). (The same greater vulnerability apparently also applies in the context of intentional infliction of emotional distress through public ridicule.<sup>130</sup>)

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 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 largely because the private person has 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.” The fallacies in this argument are two-fold. First, the consequence at issue, non-protection from damaging falsehoods, is not *necessary* – rather, it results specifically from the Court-made doctrine that denies protection. The Court chose to impose the greater danger on 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 be rewarded. Instead, the Court implicitly concluded that the state appropriately burdens this choice to become a public figure (it believed virtually all such people only become so voluntarily) by requiring that they give up much of their legal claim not to be subjected to reputational and emotional injuries. Essentially, it says 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

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<sup>129</sup> *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

<sup>130</sup> 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 *NYT* standard of “actual malice” to inflictions of emotional distress, the Court emphasized that the case involved public figures.

contrast, defamation law introduces a somewhat different, dual conception of “private.” First, it raises the question about whether the information involves matters of public importance, a characteristic similar to that which concerns informational privacy analyses. However, courts usually wish to avoid apparent ideological regulation of some marketplace of ideas. Such a court should be, and courts often have been, loath to say that content that a newspaper decides to publish is not about a matter of public importance.<sup>131</sup> Defamation law, however, also raises a second question, and here courts are more active in offering conclusions. It asks whether the person about whom the information refers is a public figure or private person.

These two usages, privacy of the person and of the information, are connected in at least two ways. First, a person might want not to be a public figure precisely because she particularly values control over 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 is 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 participation in a 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 provide a reason for caution about maintaining too great an emphasis on informational privacy – except, as noted in Part IV, when that emphasis relates specifically to preventing manipulation and control by governmental or corporate entities.

## VI. 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

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<sup>131</sup> *Dun & Bradstreet v. Greenmoss*, 472 US 749 (1985), is a rare exception at the Supreme Court level and the dissent critique on this point was devastating.

the activity of the idle<sup>132</sup> in that at least some researchers make its idleness part of its definition.<sup>133</sup> Other characteristics are relevant here. Gossip is generally both about people and behind their backs – presumably personal information that they would not want known, suggesting the clash between gossip and informational privacy.<sup>134</sup> Actually, though, the focus in this Essay is broader. The Essay covers speech involving this information even when it is used more overtly and more purposefully than usually the case when called gossip. As noted above, the formal conception of autonomy as a trump – or a requirement of full protection of speech – would protect gossip. The claim here is that this protection is not an unfortunate aspect of an initial commitment, so unfortunate as to plausibly justifying a reconsideration of the original normative impulses favoring speech freedom, but rather is a valuable aspect of free speech.<sup>135</sup>

Even if gossip occurs most often when people are idle, so does most of most people's *other* political discussion. 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 multiple, 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 official, weight. Professors John Sabini and Maury Silver observe that gossip is almost surely the way most people would unpack the ambiguities implicit in an abstract ethical injunction such as: "sex must be part of a meaningful relationship."<sup>136</sup> Gossip is also a major device for enforcing

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<sup>132</sup> Warren & Brandeis, *supra* note 1, at 196.

<sup>133</sup> John Sabini & Maury Silver, *Moralities of Everyday Life* (Oxford: Oxford University Press, 1982), 92-94.

<sup>134</sup> Nothing here turns on a more precise definition – Sabini and Silver devote most of a chapter to describing the concept. *Id.* at 89-106. I should emphasize 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.

<sup>135</sup> This section draws heavily on Sabini & Silver, *supra* note 132; Gluckman, *supra* note 3.

<sup>136</sup> Sabini & Silver, *supra* note 132, at 100-101.

group norms – it is central means of social control. Professor Max Gluckman, one of the leading anthropologists of the twentieth century, emphasizes how gossip, which is a duty of membership in small groups, plays a crucial role in maintaining the unity of a group and of its norms as well as in establishing and policing the borders of the group.<sup>137</sup> Yale English Professor Patricia Meyer Spacks adds that gossip is not only “a crucial means of self-expression, a crucial form of solidarity,” but it also “provides a resource for the subordinated.”<sup>138</sup> – a theme she frequently reasserts.<sup>139</sup> 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.”<sup>140</sup> Larry Gross, who observes the use of gossip about celebrities in the “crafting of gay subcultural identity,”<sup>141</sup> 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.’”<sup>142</sup> Relatedly, gossip is often a form of exercise of both power over, and sometimes a method of partially removing oneself from the power of, dominant figures in the relevant community.

Formulating or debating, teaching, and changing norms of social life may be the most important social function of gossip. Certainly, there is more to be said for gossip, more even than also noting its apparent universal appeal – an appeal almost as universal as that of sex, which is often its subject. It is communication. “[S]ex and gossip alike comprise modes of intimate communication,” both of which

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<sup>137</sup> Gluckman, *supra* note 3.

<sup>138</sup> Patricia Meyer Spacks, Gossip (New York: Alfred A. Knopf, 1985), 5. See also James C. Scott, Domination and the Arts of Resistance (New Haven: Yale U. Press, 1990), 142-43.

<sup>139</sup> See e.g., Spacks, *supra* note 85, at 46. She claims that “gossip gives voices to the dominated as well as the dominant.” *Id.* at 263.

<sup>140</sup> *Id.* at 256.

<sup>141</sup> Gross, *supra* note 2, at 125.

<sup>142</sup> *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.

are widely available to the dispossessed and marginalized as well as the powerful, are self-expressive, and are thereby “unpredictable and uncontrollable.”<sup>143</sup> Gossip’s democratic qualities should not be ignored. People’s ubiquitous and roughly equal ability to gossip makes 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 is often used against people in positions of authority, sometimes bringing them 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.<sup>144</sup> In contrast, democratic participation is often praised as appropriately and overtly oriented toward the public. Some scholars contrast the first, “the liberty of the moderns,” unfavorably with the second, “the liberty of the ancients.”<sup>145</sup> The two are connected, however, in both being about self-determination, which necessarily involves both individual choices and participation in inherently collective choices. Gossip, like all political speech, brings the individual and collective together in a second 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 or 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.<sup>146</sup>

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<sup>143</sup> Spacks, *supra* note 137, at 40. The role of sex as a form of communication is the reason that I have given for providing consensual sex First Amendment protection. See, e.g., C. Edwin Baker, “Op-Ed: First Amendment Protection for Gays,” New York Times (July 27, 1991).

<sup>144</sup> I have replied to this criticism when leveled against John Rawls in Baker, *supra* note 29.

<sup>145</sup> Benjamin Constant, “The Liberty of the Ancients Compared with That of the Moderns,” (1819), in Political Writings (Cambridge: Cambridge U. 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.

0. C. Edwin Baker, “Campaign Expenditures and Free Speech,” Harv. Civ.Rts-Civ.Lib.L.Rev 33

Thomas Emerson listed four functions or values of speech that justified constitutional protection. His third emphasizes political participation in decision making by all members of society. But this significance aspect of speech freedom, Emerson argued, “carries beyond the political realm. It embraces the right to participate in the building of the whole culture...”<sup>147</sup>. This extension is surely right. People make their individual decisions within and are greatly influenced by their social total 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 behavioral standards and action possibilities. Thus, the potential democratic contributions of both individuals’ informal, apparently private speech and their behavioral choices provide an important reason, beyond formal respect for individual liberty, for broad protection of self-expressive autonomy. New logics and new norms frequently seem, especially to dominant groups, as the height of irrationality when first expressed.<sup>148</sup> Often these logics and norms can only develop and gain appeal and plausibility when actually embedded in new practices, usually of some dissenting subgroup or avant-garde.<sup>149</sup>

Beyond the observation that individual behavioral choices, including speech choices, create the social realm that in turn influences individual choice, is the more “dialogic” question: how do people discuss and evaluate these choices? Possibly the most common and maybe most central means is the discourse called “gossip”: “Sally did ‘x’; that’s pretty bad! Or is it? She was faced with ... 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, the conclusion could be to reject or relax the official prohibition on ‘x.’

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(1998): 1-55.

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

<sup>148</sup> See Kenneth Karst, “Boundaries and Reasons: Freedom of Expression and the Subordination of Groups,” Illinois L.Rev. 1990 (1990): 95-149.

<sup>149</sup> Baker, Human Liberty, supra note 5, ch 4.

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*,<sup>150</sup> the Court gave constitutional protection both to a newspaper and to various individuals whose advertisement purportedly defamed a public official. *NYT* 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 – libel of the government and its leaders. Harry Kalven treats rejection of this offense as definitive of a free society. And rejection of seditious libel, he says, represents “the central meaning of the First Amendment.”<sup>151</sup> In contrast, the theory assumed in this Essay suggests a broader scope to speech rights based on respect or 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.<sup>152</sup> No major modern First Amendment justification of speech freedom distinguishes speech about public officials from speech about other prominent or powerful people.<sup>153</sup> Thus, Brennan quickly lead the Court to apply the *NYT* standard to public figures. Even more obviously, the ultimately valuable public discourse that is essential to democracy could hardly be limited to occasions when it concerns important people – the discourse needs to consider all

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<sup>150</sup> 376 U.S. 254 (1982).

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

<sup>152</sup> See Harry Kalven, Jr., “The New York Times Case: A Note on ‘The Central Meaning of the First Amendment,’” *Supreme Court Rev.* 1964 (1964): 191-221, 221.

<sup>153</sup> This may be a slight overstatement. Vince Blasi suggests that the checking function of the First Amendment argues for the propriety of giving challengers a right-to-reply such as the one struck down in *Miami Herald 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 5. However, Kalven who might imply this view by suggesting rejection of seditious libel as 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 86.

important matters. Thus, Brennan, first bringing the Court within him and then in dissent, extended the application of the *NYT*'s actual malice standard to matters of public importance.<sup>154</sup> This extension might be the end of the formal progression. Under that 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 *NYT* and claimed that they would absolutely protect speech about public matters, seemed willing to allow defamation judgments if about matters sufficiently private.<sup>155</sup>) In fact, this is one of two doctrinal areas (the other being government employment) that routinely distinguishes speech content that is or is not on matters of public concern. The argument here, however, is that gossip's discussion of so-called private persons and private matters are political in creating, maintaining, enforcing, and critiquing or changing the societal norms that regulate and guide people's behavior. As such, even under a political theory of the First Amendment, *NYT* ought to apply here, too. Of course, the formal autonomy theory does not make that concession. 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.<sup>156</sup> In the media context, the predictable and arguably only acceptable answer is that if the press thinks a matter

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<sup>154</sup> *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (Brennan, dissenting).

<sup>155</sup> A possible explanation is that an absolutist does not credit "lies" as speech under the First Amendment. These absolutists never suggest, for example, 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. Many people observe that they find that 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.

<sup>156</sup> Post, Constitutional Domains, *supra* note 105, 119-178.

worth presenting to the public, and if the public willing buys the paper, 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, Judge 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.”<sup>157</sup>

Linde’s point illustrates not only how judgements about newsworthiness are controversial and ideological, but also how the capacity to contradict those judgments is a central to the capacity to use speech to challenge the status quo – a point made more concrete earlier in the discussion 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 conventions<sup>158</sup> will likely be condemned as at best pandering and at worst evil<sup>159</sup> – but the fact of their choice will have potentially changed the social world. The debate about the propriety of their choice, as opposed to suppression or legal punishment of their choice, to challenge conventional norms is always appropriate.

Both informational privacy and the right to gossip can support or meaningful autonomy. Both privacy and the ability to expose are resources or forms of power. Unlike material wealth or law making power or instruments of violence, the direct or “natural” connection to the person of both privacy and the ability to expose necessarily result in their being distributed comparatively equally.

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<sup>157</sup> Anderson v Fisher Broadcasting, 300 OR. 452 (1986).

<sup>158</sup> Gross noted that in the debates on outing at the first national convention of gay and lesbian journalists, “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.” Id. at 151. Still, one wonders which were most committed to “official” journalistic norms, which 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 women friend as his lover ... is applauded,” but “if you print the truth you are deemed ‘frightening and offensive.’” Id. at 60 (quoting Signorile).

<sup>159</sup> Karst, supra note 147; Shiffrin, supra note 118.

Thus, a commitment to a democratic or egalitarian distribution of power and capabilities would have reason to value legal recognition of both. This point, however, may 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, initially people usually can choose 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. Respect for autonomy should be seen as requiring that the choice between these alternatives be left to the individual – 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 make the world different. The debates and practices around “outing” suggest not necessarily that people will make the right choices – that issue is inherently contestable – but that they will take their responsibilities in the exercise of this 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 subject justice. Gossip is often unfair in two ways and questionable in a third. First, gossip is often inaccurate. Moreover, in contrast to falsehoods published in the media, these inaccuracies are often particularly hard for the unfairly treated person to discover and, thus, to answer. 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 the *NYT*’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 a autonomy notion of individual speech freedom or a standard conception of the media’s speech right.<sup>160</sup>

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. It can report out-of-context. Most unfairly, even true gossip can provide a hard to challenge opportunity for prejudices to operate or can stimulate or reinforce prejudices, often to the distinct disadvantage of members of vulnerable groups.

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<sup>160</sup> *Time v. Hill*, 385 U.S. 374 (1967).

Third, gossip can unfairly divert attention from what should be important about a person or dysfunctionally divert attention from society's real issues. Is gossip the opiate of the masses? Personally, I find sensationalism, a part of the news at least since the time of ancient Romans,<sup>161</sup> hard to justify. A plausible characterization of most news content of modern media is that its focus on individuals and dramatic events detract from vital but less sexy, more complicated structural issues. Still, limitation of individual or media speech on these grounds seems at quite paternalistic. For reasons noted above, maybe people become clearer about what they consider important by being able to explore the issues in ways made possible by gossip or gossip's media equivalent. Providing a more vivid impression of actual private practices may itself be valuable and do more for increasing justifiable toleration (and critique) than does closeting information. Of course, maybe politics should be more about issues and less about personalities. Still, if most office holders try to steer toward whatever current public opinion apparently recommends and if they exercise little power over this opinion, political candidates' personality, integrity, competence, and honesty, which are more the focus of sensationalist news and gossip, may be the most significant matters 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 lots can be said – and too much was said – about the Clinton/Lewinsky affair, a common observation is that the affair and the drawn-out exposé fascinated and engaged even many people who reported that the affair and the reported cover-up did not determine, possibly was not even relevant, to their view of whether Clinton should be in office. I am hesitant here, partly because of not following either discussion closely. Still, I wonder about differences between the impact of discussions of purported sexual activities of Clinton and earlier discussions of Justice Clarence Thomas at the time of his nomination. Arguably, discussions of Thomas helped put sexual harassment on the cultural map, a desirable result. Arguably those related to Clinton constituted an implicit debate about how society ought to react to the intersection of personal roles with powerful public roles, possibly a debate moving

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<sup>161</sup> John D. Stevens, Sensationalism and the New York Press (New York: Oxford U. Press, 1991), 6-7.

in a direction favorable to toleration. If so, this privacy-invading gossip and media sensationalism may have constituted 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 playful) foci. Still, the affirmative reasons favoring gossip suggest 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.

### 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 or of profit-oriented enterprises is often desirable. This conclusion, however, must exempt the press as the major institution that should be treated as a crucial part of public sphere as well as the systems’ realms. The propriety of this limitation on the power of government and market institutions is equivalent that of keeping from these agencies the power to be secretive. Limits on market’s use of private information and Privacy Acts applied to governments have the same legitimacy as Freedom of Information Acts, open meeting laws, and modern demands for transparency. Marketers’ capacity to have easy, cheap, and not really consensual access to data base information containing vast profiles of a person is just a step behind a governmental decision to make a person wear an identifying star or government practices that help create a timorous, docile population trying to avoid behavior that might fit the profile of a terrorist. Surely both are contrary to any pragmatic notion of individual empowerment.

In contrast, Randall Kennedy’s stories of “passing” and Larry Gross’s account of b“outing” illustrate how both privacy and exposure are forms of power that are often used by members of marginalized groups to pursue cultural, political, personal goals. Of course, both are also used by dominant groups to help maintain their favored norms. Gossip teaches, maintains, but also helps change

rules of social relations. It likewise serves other purposes relating to group identity and cohesion, often a crucial resource of the oppressed.

My moral claim has been that speech freedom, including freedom to expose any private information that a person knows, is an aspect of the formal autonomy that the government must respect if it is to remain legitimate in its pursuit of conditions that support meaningful autonomy. My pragmatic claim has been that society and, especially, its oppressed segments benefit by leaving the negotiation of speech choices that arbitrate between privacy and exposure free of legal limitation. Speech freedom is a relatively egalitarian power that people can and inevitably will claim and use.

End