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## The Story of Us: Resolving the Face-Off between Autobiographical Speech and Information Privacy

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# The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy

Sonja R. West\*

## *Abstract*

*Increasingly more "ordinary" Americans are choosing to share their life experiences with a public audience. In doing so, however, they are revealing more than their own personal stories; they are exposing private information about others as well. The faceoff between autobiographical speech and information privacy is coming to a head, and our legal system is not prepared to handle it.*

*In a prior article, I established that autobiographical speech is a unique and important category of speech that is at risk of being undervalued under current law. This Article builds on my earlier work by addressing the emerging conflict between autobiographical speech and information privacy. Both interests foster personal autonomy and encourage participation in public debate, and both interests seek to give individuals the power to control if, when, and how their personal information is shared with the world. The conflict between speech and privacy has proven to be a pervasive and especially difficult problem, and prior attempts to balance the two interests—through the lens of property or contract law—have failed.*

*In this Article, I propose a new, workable framework to resolve the conflict by reexamining the tort of public disclosure of private facts. This analysis reveals that the current overemphasis on whether the information disclosed was "newsworthy" is misplaced and likely unconstitutional. The tort's protection of individual privacy, however, can be reconciled with the*

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\* Assistant Professor of Law, the University of Georgia School of Law. I would like to thank Dan Coenen, Paul Heald, Lori Ringhand, and Daniel Bodansky for their helpful comments. Early versions of this article benefited from presentations at the Southeastern Association of Law Schools annual conference and the University of Georgia School of Law. I am also indebted to my research assistants Jessica Cox, Mareasa Fortunato, Molly Levinson, Erica Moreira, and Puja Patel.

*First Amendment by interpreting the "offensiveness" element to include an examination of the purpose of the disclosure. A number of courts have implicitly adopted this view and, in doing so, are reflecting community norms that disclosures made for sufficient justifications—such as sharing newsworthy information or, I submit, engaging in autobiographical speech—are not highly offensive. Disclosures made for purely voyeuristic reasons, however, are highly offensive.*

*This "justified disclosure" approach encompasses community norms and expectations in a way that is more predictable and fairer than other proposed frameworks. It further promises to be applicable not just to the conflict between autobiographical speech and information privacy but also to broader disputes involving privacy and speech.*

### *Table of Contents*

I. Introduction .....	591
II. Exploring the Conflict Between Autobiographical Speech and Information Privacy .....	596
A. Autobiographical Speech is Worthy of Protection.....	596
B. Information Privacy is Worthy of Protection .....	600
C. Is There Room for Both Interests?.....	604
1. Polar Opposites or Mirror Images? .....	604
2. Must Speech Always Win? .....	607
III. Privacy v. Speech: The Search for a Workable Framework.....	613
A. Property .....	614
B. Implied Contract or Duty of Confidentiality.....	619
IV. Proposing a New Approach to the Face-Off.....	625
A. Reexamining the Tort of Public Disclosure of Private Facts .....	627
1. An Overemphasis on Newsworthiness.....	627
2. The Dual Purposes of the "Offensiveness" Inquiry.....	629
a. The Nature of the Information.....	631
b. The Reason for the Disclosure.....	632
3. Focusing on the Purpose of the Disclosure Tort.....	634
B. The Autobiographical Speech Justification .....	636
1. Does the Speech Have an Autobiographical Purpose?.....	637

2. Is the Identifying Information Necessary to Further the Autobiographical Purpose?.....	642
C. The Benefits of the Justified Disclosure Approach.....	647
V. Conclusion.....	649

As she continued to read, Theresa says, she . . . could not believe that Burroughs had revealed details about events in her life that had occurred 20 years earlier and had been horribly painful for her—so painful that she had spent years in therapy trying to overcome them and had never told her own daughter about them.

She continued to read that night, occasionally stopping because she simply could not bear to read anymore . . . Sometimes she had to stop to run to the bathroom and vomit. "I have never vomited so much in my life," she says.

—Account of Theresa Turcotte discussing her reaction to reading the memoir *Running with Scissors*<sup>1</sup> by Augusten Burroughs about the time when Burroughs, as a teenager, lived with Turcotte's family.<sup>2</sup>

This is my story. . . . It's not my mother's story and it's not the family's story, and they may remember things differently and they may choose to not remember certain things, but I will never forget what happened to me, ever, and I have the scars from it and I wanted to rip those scars off of me.

—Augusten Burroughs, describing why he wrote *Running with Scissors*.<sup>3</sup>

### I. Introduction

Emily Gould spent years chronicling her daily life and the people in it.<sup>4</sup> Her personal journals, however, were not diaries that she kept locked and hidden under her mattress. Rather, Emily was a modern kind of diarist; she was a blogger.<sup>5</sup> She shared her personal life in one of the most public ways

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1. AUGUSTEN BURROUGHS, *RUNNING WITH SCISSORS: A MEMOIR* (2002).

2. Buzz Bissinger, *Ruthless with Scissors*, VANITY FAIR, Jan. 2007, at 104, 106.

3. *Id.* at 108.

4. See Emily Gould, *Exposed*, N.Y. TIMES, May 25, 2008, (Magazine), at 32 (explaining the development of Gould's blog and its effect on herself, her friends, and her family).

5. See *id.* ("Back in 2006, . . . almost every day I updated my year-old blog, Emily Magazine, to let a few hundred people know what I was reading and watching and thinking

possible—by posting it on the Internet. Writing about her blogging experiences for the *New York Times*, Emily explained how she and her then-boyfriend, Henry, would argue relentlessly about her hobby of revealing details about their lives for all to see—details that he wished to remain private.<sup>6</sup> "I told him that writing, especially writing about myself and my surroundings, was a fundamental part of my personality, and that if he wanted to remain in my life, he would need to reconcile himself to being part of the world I described."<sup>7</sup> Henry, however, saw things quite differently: "His point of view was just as extreme: I wasn't generously sharing my thoughts; I was compulsively seeking gratification from strangers at the expense of the feelings of someone I actually knew and loved."<sup>8</sup>

The feelings described by Emily and Henry illustrate the potential problem that arises when one person desires to tell her personal story yet, in doing so, publicly reveals private information about another person. The tension here is obvious. While Henry was a major character in Emily's life story, the story clearly was not hers alone—it was theirs. From Emily's point of view she was telling "The Story of Me," but from Henry's she was telling "The Story of Us."

The environment in which this conflict plays out, has been radically shaped by technological changes; the Internet now supplies an accessible and affordable means for almost any speaker to broadcast her story to the world. This modern ability to reach a broad audience is liberating for the speaker. But it also means, as Daniel Solove has observed, that "[w]ithout warning, anyone can broadcast another's unguarded moments or times of youthful awkwardness to an audience of millions."<sup>9</sup> Emily viewed her blogging as a natural extension of her innate desire to share:

Of course, some people have always been more naturally inclined toward oversharing than others. Technology just enables us to overshare on a different scale. Long before I had a blog, I found ways to broadcast my thoughts—to gossip about myself, tell my own secrets, tell myself and others the ongoing story of my life.<sup>10</sup>

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about.").

6. See *id.* ("[W]hat this meant was that he was never particularly thrilled to be written about. Sometimes he was enraged.").

7. *Id.*

8. *Id.*

9. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 969 (2003).

10. Gould, *supra* note 4, at 32.

The appeal of broadcasting personal information on the Internet might be baffling to many, but to others the lure of public self-exposure is irresistible. Emily explained her desire to blog by stating:

I think most people who maintain blogs are doing it for some of the same reasons I do: they like the idea that there's a place where a record of their existence is kept—a house with an always-open door where people who are looking for you can check on you, compare notes with you and tell you what they think of you.<sup>11</sup>

In a prior article,<sup>12</sup> I made the case that truthful autobiographical speech like Emily's plays a valuable role in our public discourse that is at risk of legal underprotection.<sup>13</sup> By truthfully speaking about their life experiences, I argued, autobiographical speakers add crucial information to the public debate that enhances our democracy.<sup>14</sup> At the same time, strong protections for the individual right of autobiographical speech facilitates the autonomy and self-fulfillment of the speaker.<sup>15</sup> These important values of autobiographical speech, however, are not currently protected by courts<sup>16</sup> and, prior to my article, were not recognized by legal scholars. These oversights have produced a system in which the life stories of average citizens are at risk of being silenced.<sup>17</sup> For these reasons, I concluded that the free speech values of autobiographical speech need to be recognized and given strong constitutional protection.<sup>18</sup>

Consider Emily. When she shares her life experiences, openly and truthfully, she is adding something special to the public discourse. What she shares differs greatly from reports of the professional journalist or the seasoned nonfiction writer. Yet the different, highly personal perspective that Emily offers is precisely what makes her speech distinctly valuable. In addition to her individual interest in speaking openly about her life, Emily provides a front-line

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11. *Id.*

12. See Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 905–67 (2006) (explaining the constitutional value of autobiographical speech and arguing that it currently lacks significant protection from statutes and courts).

13. See *id.* at 905 ("An analysis applying the various goals of free speech protection to autobiographical speech establishes that it occupies an exceptional place in the public discourse . . .").

14. *Id.* at 926.

15. *Id.* at 928.

16. See *id.* at 967 ("[T]he narrow aim [of this article] is to bring overdue recognition to a category of valuable speech that heretofore has gone unnoticed by courts and scholars.").

17. *Id.* at 944.

18. *Id.* at 967.

account of the human condition. Our society and our democracy benefit from learning about the personal experiences of people like Emily and from the calls to action that information provokes.<sup>19</sup> As Eugene Volokh has observed, speech about everyday experiences "indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or the editorials we read."<sup>20</sup>

Thus, if Emily wishes to tell what she described as "the ongoing story of my life"<sup>21</sup> by announcing to the world that "this is what I did," or "this is what happened to me," it should be her right to do so. It is disturbing and constitutionally suspect to give anyone, including the government or her ex-boyfriend empowered by the government, censorship power over her desire to proclaim, "I was here."

But there are always two sides to every story. In this case, that other side is Henry's. He is not disputing the truth of what Emily is saying about the lives they share; indeed, his objections to her speech arise precisely because what she seeks to reveal is true. Henry does not want his private personal information broadcast to the world.<sup>22</sup> His desire for privacy is understandable and shared by many. Judge Richard Posner has stated that the desire for privacy "is a mysterious but deep fact about human personality" and that "[e]ven people who have nothing rationally to be ashamed of can be mortified by the publication of intimate details of their life."<sup>23</sup> Thus while it is troubling to give Henry the ability to silence Emily, it is a matter of no small concern that Emily is in a position to destroy Henry's personal zone of privacy. Henry's right to privacy is real and important, and it stands in direct conflict with Emily's right to tell her story.

The general conflict between freedom of speech and the value of privacy is a familiar one, as courts and commentators have struggled with it for more than a century.<sup>24</sup> The Supreme Court rightly has observed that "[t]he face-off is

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19. *See id.* at 967 ("[Autobiographical speech] respects human autonomy. It comments on the human condition. It introduces a diverse society to itself. It records individual lives and collective histories. It empowers the powerless. It promotes understanding and tolerance. It preserves democracy.").

20. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1093 (2000).

21. Gould, *supra* note 4, at 32.

22. *See id.* ("Henry, seemingly alone among our generation, went out of his way to keep his online presence minimal.").

23. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993).

24. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.

apparent"<sup>25</sup> whenever privacy and speech come into conflict.<sup>26</sup> The problem only deepens when the face-off concerns truthful autobiographical speech and information privacy. Cases that involve such speech, after all, involve competing interests that are closely aligned: the right of both the speaker and the subject to have control over if, when, and how personal information about their lives is revealed to the public. What is more, while the personal character of the speech gives it a specialized and intensified communicative value, that same personal character creates a heightened threat to the privacy interests of others. When Warren and Brandeis first envisioned the right of privacy as a shield against personal disclosures, they depicted it as a right to secure "to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."<sup>27</sup> This portrayal of the right to privacy, however, just as accurately describes the right of the autobiographical speaker. Thus, the face-off between autobiographical speech and information privacy presents a direct conflict—either the speaker is silenced and thus loses control over sharing her story, or the speaker is free and the subject of the speech loses control of the disclosure of private information about him.

My analysis of how to resolve this conflict unfolds in three parts. In Part II, this Article briefly reviews the importance of truthful autobiographical speech and the risk it faces of legal underprotection. Then it probes the conflict that emerges when autobiographical speech is pitted against the right of information privacy and rejects the argument proposed by some scholars that the First Amendment rights of the speaker always must prevail over the competing privacy interests. In Part III, this Article considers the most prominent frameworks that have been proposed by others for balancing the competing speech and privacy interests—property law and implied contracts or duty of confidentiality. While these frameworks draw in creative ways from other areas of law, a closer analysis ultimately concludes that neither effectively deals with the challenges of this conflict. Finally, Part IV proposes a new approach for resolving the conflict between autobiographical speech and information privacy. Focusing on the tort of public disclosure leads to the conclusion that there has been an overemphasis on the "newsworthy" exception.<sup>28</sup> This interpretation of the tort is likely unconstitutional because it fails to protect non-newsworthy yet constitutionally

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L. REV. 193 (1890) (describing the lengthy development of the right to privacy).

25. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975).

26. *Id.*

27. Warren & Brandeis, *supra* note 24, at 198.

28. *See, e.g., Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998) ("Both the public disclosure and intrusion torts are subject to a newsworthy privilege, which protects the First Amendment freedom to report on matters of public concern . . .").



valuable speech like autobiographical speech. This Article argues, however, that both the tort and the privacy interest it seeks to protect can be preserved by reexamining the "offensiveness" element of the tort. This analysis reveals that there are two purposes of the offensiveness inquiry: to assess the nature of the information revealed and to examine the reason for the disclosure. Reflecting community norms as to what is "highly offensive" to a reasonable person, courts adopting this dual view have held that it is not highly offensive to reveal information if the disclosure is done for a sufficient reason.<sup>29</sup> Sharing information because it is newsworthy or, I submit, because it furthers an autobiographical purpose, is a sufficient justification. Disclosing personal information purely for a voyeuristic thrill, however, is not. Adopting this "justified disclosure" approach rescues the tort from a potentially fatal constitutional flaw while providing a more workable framework for analyzing speech-versus-privacy conflicts. Because truly autobiographical speech, whether or not "newsworthy" under traditional standards, serves important informative functions, this Article concludes by arguing that this kind of speech should be aggressively protected. Courts should examine speech to determine if it is genuinely autobiographical and if the information it includes is meaningfully linked to the autobiographical nature of the speech. This Article also proposes a limiting definition of autobiographical speech that focuses on the speaker's intent and that requires autobiographical speakers to shield the identity of others unless disclosure is necessary to the telling of one's life story. This approach protects the fundamental constitutional right to engage in autobiographical speech<sup>30</sup> while still according due weight to the important and competing privacy interest in a way that is in line with the case law and more predictable and fairer than other proposals.

## *II. Exploring the Conflict Between Autobiographical Speech and Information Privacy*

### *A. Autobiographical Speech is Worthy of Protection*

In a prior article, I offered an in-depth argument that truthful autobiographical speech deserves greater protection than courts and commentators now recognize.<sup>31</sup> For centuries, this form of speech has been

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29. See, e.g., *Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) (finding that it is not highly offensive to disclose the sick leave records of a public school psychologist to the local taxpayers association because the association has a sufficient reason to verify her compensation).

30. See generally West, *supra* note 12.

31. *Id.* at 905.

valued by historians, scientists, religious leaders, and philosophers,<sup>32</sup> while being all but ignored by legal scholars and the courts. Under current law, only the autobiographical speech that a court is likely to deem "newsworthy"<sup>33</sup> is protected, so that the life stories of the famous and powerful are safe from censorship while disclosure of the life stories of most "ordinary"<sup>34</sup> people remains vulnerable to legal challenge.<sup>35</sup> For decades these differing levels of protection for those with "newsworthy" lives and those with "ordinary" lives has raised few concerns. The development of this distinction corresponded with the rise of the mass media, which focused (understandably) on broadly newsworthy stories. The courts were generally content with this arrangement, and in effect deferred to the media to make gatekeeping choices about newsworthiness.<sup>36</sup> But time brings change. New widespread internet access, combined with the proliferation of weblogs and social networking sites, has led more people to tell their stories to a broad audience.<sup>37</sup> At the same time, shifting attitudes about privacy have revealed the desire of many to tell their stories openly.<sup>38</sup> Without proper recognition of the value of autobiographical speech, there is a risk that willing and truthful speakers will be silenced and that their stories will be lost.

To illustrate how one person's autobiographical speech might be censored while another's is protected under the current law, it is helpful to compare the stories of two women—Susanna Kaysen and Jessica Cutler. Susanna Kaysen is a well-known memoirist, who has won numerous awards for her writing. One of her books, *Girl Interrupted*,<sup>39</sup> concerning the time she spent in a mental institution as a teenager, was a bestseller and gave rise to a major motion

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32. *Id.* at 914–16, 937–39, 939–43, 934–36.

33. Throughout this Article, I use the term "newsworthy" to describe any speech that a court has concluded is newsworthy, a matter of public concern, or a matter in the public interest.

34. This Article places the term "ordinary" in quotations, because the term is used only to suggest the extent that society or the courts might view the speakers' lives as not newsworthy.

35. See *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 478 (Cal. 1998) (explaining that the newsworthy exception shields from liability those who publish intimate details about the lives of public figures).

36. See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1041 (2009) ("For most of the past half-century, courts have resolved the tension between privacy and press freedoms by deferring to journalists in determining news worthiness.").

37. The needs of the ever-expanding media have led to similar results. See Solove, *supra* note 9, at 969 ("Today, the ease of disseminating personal information is unprecedented. The media has grown hungrier for stories, which are needed to fill the vast array of news shows, the growing number of twenty-four hour cable news networks, and the tens of thousands of magazines, newspapers, and websites.").

38. West, *supra* note 12, at 919–22.

39. SUSANNA KAYSEN, *GIRL, INTERRUPTED* (Vintage Books 1994).

picture.<sup>40</sup> In 2001, Kaysen published another memoir titled *The Camera My Mother Gave Me*,<sup>41</sup> in which she discussed her multi-year battle with severe vaginal pain.<sup>42</sup> Among other things, she chronicled the impact that condition had on her intimate relationship with her then live-in boyfriend. Kaysen portrayed her boyfriend as insensitive to her ordeal and impatient about her refusals to have sex.<sup>43</sup> The storyline culminates in a scene in which Kaysen questions whether he might have tried to rape her, although she ultimately concludes that she consented to the intercourse.<sup>44</sup>

Following publication of the book, Kaysen's now-former boyfriend sued her for violating his privacy.<sup>45</sup> There was no dispute about the truth of Kaysen's speech; rather, the question before the court was whether Kaysen had violated her ex-boyfriend's rights by revealing intimate details about their relationship.<sup>46</sup> The court ruled in favor of Kaysen, deeming her discussion of how her medical condition affected their relationship a matter of "legitimate public concern" and therefore constitutionally protected.<sup>47</sup>

Kaysen's case can be compared to that of another woman—Jessica Cutler. Cutler was a 24-year-old Capitol Hill staffer when she decided to start a weblog about her life.<sup>48</sup> In that blog, she wrote about the daily events of her life, her

40. See *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*2 (Mass. Super. Mar. 3, 2004) ("[Susanna Kaysen] gained success and notoriety for her book *Girl, Interrupted* which was made into what has been described to be a critically acclaimed film.").

41. SUSANNA KAYSEN, *THE CAMERA MY MOTHER GAVE ME* (2001).

42. *Id.*

43. *Id.* at 114.

44. *Id.* at 125.

45. See *Bonome*, at \*1 (describing the details of the invasion of privacy action). While Kaysen refers to him as only "my boyfriend," and his occupation and hometown were changed, he argued that he was easily identified by anyone who knew of his relationship with Kaysen. *Id.* at \*2.

46. See *id.* at \*2 ("Whether the book's publication could construe a violation of [Bonome's right against unreasonable or serious interference with his privacy] is a question of law for this court.").

47. See *id.* at \*7 ("Nonetheless, Kaysen's own personal story—insofar as it relates to matters of legitimate public concern—is hers to contribute to the public discourse. This right is protected by the First Amendment.").

48. See Poor Mojo's Almanac(k) presents: *The Story of the Washingtonienne*, <http://poormojo.org/pmjadaily/washingtonienne.htm> (republishing the *Washingtonienne* blog which was removed) (last visited Nov. 5, 2009) [hereinafter *The Story of the Washingtonienne*] ("I have a 'glamour job' on the Hill. That is, I could not care less about gov or politics, but working for a Senator looks good on my resume. And these marble hallways are such great places for meeting boys and showing off my outfits.") (on file with the Washington and Lee Law Review).

friends, and her job.<sup>49</sup> But she also wrote about her ongoing sexual exploits with up to six different men.<sup>50</sup> One man was married, one had a high-ranking government job, another was her superior at work, and at least one, she alleged, paid her for sex.<sup>51</sup> Like Kaysen, Cutler was sued by a former sexual partner for invasion of privacy.<sup>52</sup> Again there was no dispute about the truth of her speech; instead, the question was whether she had the right publicly to reveal intimate information about her relationship with the plaintiff.<sup>53</sup> The case against Cutler survived a series of preliminary motions and proceeded to discovery before the parties settled the case.<sup>54</sup> Yet Cutler, far more so than Kaysen, faced the risk that she could be legally penalized for truthfully speaking about her life.

The comparison between the cases against Kaysen and Cutler is striking. Both women wrote about their sexual relationships and about dimensions of those relationships that concerned power, tradeoffs, and intimate choices. Both women spoke willingly and truthfully. The difference between the two, of course, was that Kaysen was an award-winning author and her speech was published in a book by Random House. Cutler, on the other hand, was a young and unknown woman who published her speech through a personal weblog. Kaysen's life experiences were deemed to be newsworthy and thus protected.<sup>55</sup> Cutler's story, however, was not likely to be found newsworthy and she thus faced punishment for telling it.

Each woman's wish to speak truthfully about her life deserves constitutional protection. Autobiographical speech occupies an exceptional place in the public discourse—a space rivaled perhaps only by political and

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49. *Id.*

50. *Id.* Cutler wrote under a pseudonym and identified the men by their initials only. After only a matter of weeks, however, she and the men were identified by another blogger. See April Witt, *Blog Interrupted*, WASH. POST, Aug. 15, 2004, (Magazine), at 12 (describing how Cutler wrote on her blog for only a couple of weeks before another blogger, known as 'Wonkette,' discovered it and published a link to it on her blog).

51. The Story of the Washingtonienne, *supra* note 48, at (Tuesday, May 11, 2004, 2:21 p.m.).

52. See Complaint at 1, Steinbuch v. Cutler, No. 1-05-cv-00970 (D.D.C. May 16, 2005) ("Cutler's outrageous actions, setting before anyone in the world with access to the Internet intimate and private facts regarding Plaintiff, constituted a gross invasion of his privacy, subjecting him to humiliation and anguish beyond that which any reasonable person should be expected to bear . . .").

53. See *id.* at 2–21 (neglecting to challenge the accuracy of the comments Cutler made on her blog).

54. *Id.*

55. See Bonome v. Kaysen, No. 032767, 2004 WL 1194731, at \*6 (Mass. Super. Mar. 3, 2004) ("These broader topics are all matters of legitimate public concern . . . . Thus, the defendants had a legitimate and protected interest to publish these facts.").

religious speech—in its ability to foster both the autonomy-based and society-advancing values that justify strong constitutional protection of free speech.<sup>56</sup> As to personal autonomy, the value of autobiographical speech is unmistakable. The basic point is hard to miss: By openly and truthfully discussing our life experiences, we are free to reexamine our pasts and develop our minds. Indeed, the work of psychologists and therapists is rooted in the benefits of autobiographical speech.<sup>57</sup> And religious customs have reflected the importance of such speech for centuries.<sup>58</sup>

Autobiographical speech also fulfills the society-based theories of free speech by promoting a national dialogue in which a rich array of voices share personal stories to which others can react in ways that reshape their own attitudes and actions. Protecting the free flow of first-person accounts thus informs our citizenry, promotes effective democracy, and leads to greater tolerance.<sup>59</sup>

Under current law, truthful autobiographical speech is at risk of being undervalued and underprotected. Preoccupation with the value of political speech and exemptions from tort liability only if privacy-threatening speech is deemed to be "newsworthy" too greatly restricts the range of permissible autobiographical speech. Of particular concern, failure to protect such speech risks allowing the voices of the poor, the powerless, and the oppressed to be erased from our public debate. It is, therefore, imperative to give robust First Amendment protection to truthful autobiographical speech.

### *B. Information Privacy is Worthy of Protection*

On the other side of this conflict lies information privacy,<sup>60</sup> a right of such popular appeal that even its critics admit it is "easy to endorse."<sup>61</sup> Dean Prosser observed of the tort of public disclosure of private facts that "no other tort has

56. West, *supra* note 12, at 934–57.

57. *Id.* at 937–39.

58. For a more in-depth discussion of the individual-based values of autobiographical speech, see *id.* at 934–43.

59. For a more in-depth discussion of the society-based values of autobiographical speech, see *id.* at 943–57.

60. See Volokh, *supra* note 20, at 1050–51 (characterizing the right to communication of personally identifiable information about oneself).

61. *Id.* at 1050; see also Warren & Brandeis, *supra* note 24, at 196 ("The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.").

received such an outpouring of comment in advocacy of its existence,"<sup>62</sup> and Harry Kalven warned that "[i]t takes a special form of foolhardiness to raise one's voice against the right of privacy at this particular moment in its history."<sup>63</sup> To be sure, the rights of tell-all bloggers like Jessica Cutler have few apologists,<sup>64</sup> and the idea of regulating their speech is attractive to many. Even Eugene Volokh, who has written critically of information privacy rights,<sup>65</sup> confessed:

Speech restrictions aimed at protecting individual privacy just don't get my blood boiling. Maybe they should, but they don't. Perhaps this is because, from a selfish perspective, I'd like the ability to stop others from talking about me, and while I wouldn't like their stopping *me* from talking about *them*, the trade-off might be worth it.<sup>66</sup>

The legal debate supporting the right to protect our privacy from the "selfish, exploitative, or malicious"<sup>67</sup> people in our lives who might share our secrets is relatively young,<sup>68</sup> but the passion and persistence of the scholarly arguments signal that there is an important interest at stake<sup>69</sup>—one that deserves consideration. Warren and Brandeis articulated the value of privacy of personal

62. WILLIAM L. PROSSER, *HORNBOOK OF THE LAW OF TORTS* 1051 (1st ed. 1941).

63. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 327 (1966).

64. See, e.g., Daniel L. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 *WASH. U. L. REV.* 1195, 1198 (2006) ("Bloggers like Jessica should not have an unfettered free speech right to disclose intimate details about people's private lives that are not of legitimate concern to the public."); see also Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 *U. CIN. L. REV.* 887, 938 (2006) ("There is a world (literally) of difference between oral gossip and Internet gossip. Mass dissemination of private information acquired during an intimate relationship is an indecent and irresponsible breach of trust—and contract.").

65. See Volokh, *supra* note 20, at 1090 ("[S]urely it is not for government agents—whether judges or jurors—to dictate the relevant criteria for people's political choices, and to use the coercive force of law to keep other from informing them of things that they may consider relevant to those choices.").

66. *Id.* at 1051.

67. McClurg, *supra* note 64, at 887.

68. See Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 97, 98 (2000) (explaining that "[p]rivacy as conceived in twentieth century case law is a young legal concept, less developed than the law of free speech"); Solove, *supra* note 9, at 1030 (admitting that information privacy "has not simmered for centuries like much of tort law or criminal law").

69. See Solove, *supra* note 9, at 974 ("In a world of unprecedented information dissemination, with a staggering array of types of media and a profound number of media entities, the issue of why the law should protect against the disclosure of personal information is of paramount importance.").

information in the "most influential law review article of all,"<sup>70</sup> writing: "Of the desirability—indeed of the necessity—of some such protection [of the right of privacy], there can, it is believed, be no doubt."<sup>71</sup> Justice White, writing for the Supreme Court in *Cox Broadcasting Corp. v. Cohn*,<sup>72</sup> an information privacy case, declared that "powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual."<sup>73</sup> He added that "the century has experienced a strong tide running in favor of the so-called right of privacy."<sup>74</sup>

Privacy advocates have made a convincing case that protecting a right of information privacy serves many of the same goals as free speech, such as furthering individual autonomy and public debate.<sup>75</sup> It has been argued frequently, for example, that privacy—like free speech and often in connection with free speech<sup>76</sup>—further the individual interest in autonomy and self-realization.<sup>77</sup> Privacy advocates do not dispute the important role that freedom of speech plays in the development of individual autonomy, but they argue that providing a zone of personal privacy is equally important.<sup>78</sup> Accepting that privacy, in addition to speech, promotes individual autonomy, Daniel Solove contends that "[t]here is no clear reason why the autonomy of speakers or listeners should prevail over that of the harmed individuals."<sup>79</sup>

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70. Kalven, *supra* note 63, at 327.

71. Warren & Brandeis, *supra* note 24, at 196.

72. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) (finding that a rape victim's interest in privacy fades when the information involved appears as part of the public record).

73. *Id.* at 487.

74. *Id.* at 488.

75. See *infra* notes 76–79 and accompanying text (discussing the similar goals served by protecting the rights of information privacy and free speech).

76. See Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 723 (1996) (contending that privacy and free speech "both serve the same interest in individual autonomy").

77. See Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133, 1134–35 (1992) (contending that the right to privacy "at its core" is about giving individuals "a space free from the demands of the larger social order in which to develop beliefs, attitudes, and behavioral norms"); Paul Gerwitz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 165 (2001) (arguing that "people are more likely to express themselves fully, openly, and robustly when they have confidence that what they say will be heard only by a known group of listeners").

78. See Scott, *supra* note 76, at 723 (arguing that "both [speech and privacy] are critical to autonomy, it is desirable to give proper weight to both"); Solove, *supra* note 9, at 992 (stating that "it is difficult to say whether free speech or privacy promotes more autonomy; both further autonomy, just in different ways and in different aspects of life").

79. Solove, *supra* note 9, at 992.

Scholars also have argued that privacy protection, much like free speech, furthers the goal of effective democratic self-governance by facilitating uninhibited public debate.<sup>80</sup> Edward Bloustein, for example, argues that a lack of privacy of thought leads to conformity of ideas.<sup>81</sup> He explains that without personal privacy:

[A]n individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man.<sup>82</sup>

Building on this thought, Sean Scott surmises that "[i]f granting people privacy . . . encourages this participation in public debate, then privacy promotes the First Amendment value of truth."<sup>83</sup>

There are other reasons why dispensing with privacy protection might hurt, not help, the political process. Some scholars point to the deterrent effect on those considering a run for political office.<sup>84</sup> Robert Bellah has argued that

80. See *id.* at 993–94 (noting that "[p]rivacy encourages uninhibited speech [and] . . . [i]mportant discourse, especially communication essential for democratic participation, often takes place in microlevel contexts (between two people or in small groups) rather than in macrolevel contexts (public rallies or nationwide television broadcasts)"); see also James Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 69 (2003) (explaining that privacy "is a public value because it is necessary to the proper functioning of our political system").

81. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) (arguing that the law of privacy attempts to preserve individuality).

82. *Id.*; see also Scott, *supra* note 76, at 717 (arguing that "studies indicate that the threat of continued exposure to adverse public opinion curtails an individual's willingness not only to voice dissenting or nonconformist opinions but also curtails the willingness to entertain such positions privately") citing S.E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN* 177, 181 (Harold Guetzkow ed., 1951)); Knud S. Larsen, *The Asch Conformity Experiment: Replication and Transhistorical Comparisons*, 5 J. SOC. BEHAV. & PERSONALITY 163, 163 (1990) (verifying the Asch conformity paradigm—the principle that individuals tend to conform when under pressure of a unanimous majority); Serge Moscovici, *Social Influence and Conformity*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 347, 347–52 (Gardner Lindzey & Elliot Aronson eds., 1985) (tracing evolution of social conformity research); Nigel Nicholson et al., *Conformity in the Asch Situation: A Comparison Between Contemporary British and U.S. University Students*, 24 BRITISH J. SOC. PSYCHOL. 59, 59 (1985) (finding that although the effects have weakened over time, there still remains an observable minority of university students who will conform to group pressure in an Asch situation).

83. Scott, *supra* note 76, at 711.

84. See Gerwitz, *supra* note 77, at 183 ("[I]t is widely believed that many talented people are being deterred from running for office or assuming senior political appointments because of a concern about the extreme loss of privacy."); Scott, *supra* note 76, at 710 n.171 (speculating



"the treatment of public figures by the media [might] have a 'chilling effect' on the decision of individuals to enter the public sphere because they fear what the relentless scrutiny may do to them."<sup>85</sup>

For all of these reasons, I agree with Richard Murphy that "the benefits to privacy should not be lightly dismissed," but rather "need to be taken into account when trumpeting unrestricted disclosure of personal information."<sup>86</sup> And I join Harry Kalven, Jr. in embracing the premise that "privacy is surely deeply linked to individual dignity and the needs of human existence."<sup>87</sup>

### C. Is There Room for Both Interests?

#### 1. Polar Opposites or Mirror Images?

Once we establish that both autobiographical speech and information privacy are significantly valuable interests that cannot be easily dismissed, the conflict between the two becomes obvious. Both rights<sup>88</sup> are valuable and function to further many of the same goals of individual autonomy and public debate.<sup>89</sup> They are also, however, difficult to reconcile in large part because they are in essence the same interest. Both the autobiographical speaker and the privacy plaintiff<sup>90</sup> wish to control whether, when, and how personal information about them is revealed publicly. The Georgia Supreme Court was

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that intense public scrutiny has a deterrent "chilling effect" on potential public servants (citing Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 746 (1986))).

85. Bellah, *supra* note 84, at 746; see also Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1078–79 (1994) (examining how increased media scrutiny has altered the judicial nomination process).

86. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383 (1996).

87. Kalven, *supra* note 63, at 326.

88. There is some debate over whether the right of information privacy should be treated as a constitutional right. Compare Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1150 (2002) (discussing the case of *Bartnicki v. Vopper*, 532 U.S. 514 (2001) and arguing that in "the premise that the conflict posed between speech and privacy is a conflict between two rights of constitutional stature. By this important measure, all nine Justices in *Bartnicki* were in agreement"), with Volokh, *supra* note 20, at 1107 ("The fact that the proposed statutory or common-law right [in information privacy] is in one way analogous to a constitutional right does not give it constitutional stature.").

89. *Supra* notes 76–79 and accompanying text.

90. Throughout this Article, I use the term "privacy plaintiff" to refer to any individual who might have a claim that private personal information about him was unlawfully disclosed.

early to recognize this symbiotic relationship between the two, observing that "the right to withdraw from the public gaze at such times as a person may see fit," and "the right of one to exhibit oneself to the public" are in actuality flip sides of the same personal liberty coin.<sup>91</sup>

From the beginning, the right of privacy as envisioned by Warren and Brandeis did not simply entail the "right to be let alone,"<sup>92</sup> or, for that matter, the right of an individual to keep personal facts from public view. Rather, Warren and Brandeis spoke of securing "to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."<sup>93</sup> An early, well-known privacy case reflected the same approach, stating that "[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze."<sup>94</sup>

The modern right of "information privacy"<sup>95</sup> has maintained this focus on the individual's ability to control if, when, and how personal facts are revealed.<sup>96</sup> The U.S. Supreme Court, for example, has stated that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."<sup>97</sup> Paul Gerwitz has noted that "[p]rivacy is ultimately about our power to choose our audience."<sup>98</sup> Sean Scott has observed that the disclosure of private information "violates the individual's right to choose who shall be privy to such information."<sup>99</sup> And others have described information privacy as "the right of decision over one's private personality;"<sup>100</sup> individuals' "general right to control the use of information about themselves;"<sup>101</sup> the "legal power to control the

91. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

92. Warren & Brandeis, *supra* note 24, at 195. While Warren and Brandeis frequently are credited for coining this famous phrase, they borrowed it from Judge Thomas M. Cooley. Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 174 n.124 (citing THOMAS M. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888)).

93. Warren & Brandeis, *supra* note 24, at 198.

94. *Pavesich*, 50 S.E. at 70.

95. Throughout this Article, I adopt the term "information privacy" as shorthand to refer to an individual's interest in not having facts that he considers to be private revealed to anyone without his consent.

96. See *infra* notes 97–103 and accompanying text (explaining that the right of information privacy focuses on an individual's ability to control personal facts about herself).

97. *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989).

98. Gerwitz, *supra* note 77, at 155.

99. Scott, *supra* note 76, at 722.

100. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 324 (1967).

101. Singleton, *supra* note 68, at 122.

flow of information about one's self to other people,"<sup>102</sup> and "our ability to control who has access to us, and who knows what about us."<sup>103</sup>

All of these formulations suggest that it is the control over the disclosure of information, and not only the maintenance of its secrecy, that lies at the heart of the legal protection for information privacy.<sup>104</sup> Clearly if the information were totally secret, there would be no potential privacy invasion because no one else would have access to it.<sup>105</sup> Thus, the question is not simply who should have access to personal information, but, more precisely, who else. And who gets to decide if, when, and with whom it is shared.

This inescapable bond between the right to choose privacy and the right to choose publicity of one's personal life is of key importance to the complexity of the autobiographical speech versus information privacy debate. Both the privacy plaintiff and the autobiographical speaker seek the right to control the release of information about themselves. The autobiographical speaker desires to share his story and has chosen his time, method, and audience. The privacy plaintiff, meanwhile, wishes to wait until a different time, or to select another venue, or to limit the number or type of listeners, or to remain quiet altogether. From each party's perspective, the question focuses on control over personal information. Thus, simply accepting that control over one's personal information is a valuable right does nothing to help resolve the conflict when—because of shared lives and experiences—more than one person wishes to control the same piece of information. Is the conflict between autobiographical speech and information privacy, therefore, a zero-sum game—must one person always lose and another always win?

102. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983).

103. James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF., 323, 329 (1975).

104. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1983) ("[W]hen people today decry lack of privacy, what they want . . . is mainly something quite different from seclusion: [T]hey want more power to conceal information about themselves that others might use to their disadvantage.").

105. See *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989) ("In an organized society, there are few facts that are not at one time or another divulged to another."); Kenneth L. Karst, *"The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342, 343–44 (1966) ("Hardly anyone in our society can keep altogether secret very many facts about himself. . . . Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure."); Warren & Brandeis, *supra* note 24, at 198 (acknowledging that a man may choose to share his personal thoughts with select others, yet "he generally retains the power to fix the limits of the publicity which shall be given them").

## 2. *Must Speech Always Win?*

One possible solution to the clash between autobiographical speech and information privacy is to award the privacy plaintiff total control over his personal information.<sup>106</sup> This approach, however, entails denying the autobiographical speaker the anonymity to share her story. Eugene Volokh "reluctantly" has concluded that such an approach has "troubling implications"<sup>107</sup> by giving the privacy plaintiff too much power—a power he defined as the "right to have the government stop you from speaking about me."<sup>108</sup> And Tom Gerety has cautioned against an overly broad right of information privacy, observing that privacy for some theorists "includes *all* control over *all* information about one's self, one's group, one's institutions"<sup>109</sup> and that "[s]urely privacy should come, in law as in life, to much less than this."<sup>110</sup>

While privacy advocates do not argue for an absolute right of information privacy, some scholars have embraced the opposite conclusion—when speech clashes with information privacy, the speech always wins. At its core, these commentators argue, this question pits a vague, undefined and untested interest in privacy against the venerable constitutional right to speak.<sup>111</sup> For them, to state the issue this way is in effect to resolve it: The revered speech interest necessarily must trump the nebulous privacy claim.<sup>112</sup>

Critics of privacy regulations argue that allowing such an ill-defined interest to interfere with the long-recognized and celebrated First Amendment right to speak is constitutionally unacceptable. The most common criticisms of

106. Volokh, *supra* note 20, at 1050–51.

107. *See id.* at 1053 (opposing information privacy speech restrictions because of the troubling nature of their possible unintended consequences).

108. *Id.* at 1050–51; *see also* Singleton, *supra* note 68, at 124–25 (describing the right to control information about oneself as allowing the plaintiff "a right to control a thought in someone else's mind, even when that thought may later become an observation in a notebook, a comment to a coworker, or an email to a company"); Zimmerman, *supra* note 102, at 293 (noting the problems with awarding anyone "the right to govern authoritatively both the nature of personal information exposed to public view and the conditions under which others may discuss those personal facts").

109. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 262–63 (1977).

110. *Id.* at 263.

111. *See* Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823, 828 (1991) ("It is difficult to argue, as a constitutional matter, that protection against publication of ill-defined 'private' facts, causing entirely intangible harms, should outweigh for example a defendant's [constitutional] right to publish material acquired through personal observation or other fair means.")

112. *Id.*

information privacy regulations are that the interest they seek to safeguard is too new and undefined to deserve such strong protection.<sup>113</sup> Particularly troublesome to critics is the lack of consensus on a definition of "privacy," a difficulty that increases the risk of self-censorship. For example, Diane Zimmerman has argued that the right of privacy is "rich in symbolic value but has little particularized meaning."<sup>114</sup> Even defenders of privacy law admit that there is no real agreement about what core values are at stake,<sup>115</sup> and their "[a]ttempts to define the concept of 'privacy' have generally not met with any success."<sup>116</sup> William Beaney has commented that "even the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right."<sup>117</sup> Spiros Simitis has noted that "the more the need for a convincing definition of privacy based on criteria free of inconsistencies has been stressed, the more abstract the language has grown."<sup>118</sup> And Daniel Solove has acknowledged that it is "a concept in disarray" because "[n]obody can articulate what it means."<sup>119</sup>

Thus, the right of privacy has been described as "exasperatingly vague and evanescent,"<sup>120</sup> "highly malleable,"<sup>121</sup> and "infected with pernicious ambiguities."<sup>122</sup> Robert Post confessed: "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."<sup>123</sup> Judith Jarvis Thomson summed up the problem with

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113. See *supra* note 68 and accompanying text (discussing the brief history of the right of information privacy).

114. Zimmerman, *supra* note 111, at 826.

115. See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1153 (2004) ("[H]onest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define . . . . [M]any of them feel obliged to concede that privacy, fundamentally important though it may be, is an unusually slippery concept.")

116. COLIN J. BENNETT, *REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES* 25 (1992).

117. William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 255 (1966).

118. Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 708 (1987).

119. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 1 (2008).

120. ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 25 (1971).

121. JOHN T. SOMA & STEPHEN D. RYNERSON, *PRIVACY LAW IN A NUTSHELL* 7 (2008).

122. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967).

123. Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L. J. 2087, 2087 (2001).

defining privacy by declaring that "nobody seems to have any very clear idea what it is."<sup>124</sup>

The lack of consensus on what, exactly, privacy law seeks to protect raises alarms for free speech scholars. Uncertainty about what is and is not allowed inevitably leads to a chilling effect.<sup>125</sup> Volokh has argued that relevant standards are "so vague . . . that accepting them may jeopardize a good deal of speech that ought to be protected,"<sup>126</sup> and Zimmerman has warned that a constitutional privacy regulation "would have to be defined precisely and clearly enough that a publisher would have fair warning of the approximate location of the line between protected and unprotected revelations."<sup>127</sup>

These commentators argue that the constitutional interest at stake with truthful speech is simply too strong to allow these types of restrictions.<sup>128</sup> Diane Zimmerman, for example, has contended that the tort of public disclosure of private facts is unconstitutional and incompatible with our free speech jurisprudence.<sup>129</sup> According to Zimmerman, the right of privacy as developed by Warren and Brandeis "has actually had a pernicious influence on modern tort law because it created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press."<sup>130</sup>

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124. Judith Jarvis Thomson, *The Right to Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 272, 272 (Ferdinand David Schoeman ed., 1984).

125. See, e.g., ROBERT M. O'NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 167 (2001) (noting that, from a free speech standpoint, the decision to settle a lawsuit concerning true private facts "may . . . set a much more ominous precedent, than would losing the case in court"); BRUCE W. SANFORD, *DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US* 8 (1999) ("Judges, dismayed by the media's newsgathering practices, are cutting back on constitutional protections for the press . . . . The U.S. Supreme Court maintains a stony silence.").

126. Volokh, *supra* note 20, at 1116.

127. Zimmerman, *supra* note 102, at 342.

128. See Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 195 (1997) ("Speech must often be protected even though protecting it unavoidably causes substantial costs to compelling government interests—even though there are *no* less restrictive but pretty much equally effective alternatives to speech suppression." (citations omitted)). *But see* Matthew J. Coleman, *The "Ultimate Question": A Limited Argument for Trafficking in Stolen Speech*, 55 OKLA. L. REV. 559, 560–61 (2002) ("The Supreme Court has wisely declined 'to answer categorically whether truthful publication may ever be punished consistent with the First Amendment . . .'" (citations omitted)).

129. See Zimmerman, *supra* note 102, at 294 ("[H]armonizing privacy with free speech has attracted many outstanding scholars of tort and constitutional law . . . . [A]ttempt[ing] to justify the tort, however, they have often underplayed its serious constitutional problems and have overlooked the fact that genuine social values are served by encouraging a free exchange of personal information.").

130. *Id.* at 292.

The "speech always wins" approach is further supported by the argument that there are certain types of intimate human relationships that are simply ill-suited for legal rules.<sup>131</sup> As Zimmerman has explained, "we refuse to resolve some human problems by law because we are unwilling to bear the cost that legal solutions would impose."<sup>132</sup> Because of the complexities of human interaction, Zimmerman concluded that the answer lies with "social evolution" rather than "an enunciation of new legal restraints."<sup>133</sup>

This argument contends that the law should not silence a truthful speaker, but instead it should place the burden on the privacy plaintiff to exercise care when deciding to whom he reveals personal information.<sup>134</sup> The Supreme Court has, to some degree, adopted this approach to privacy by stating that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community."<sup>135</sup> Zimmerman agrees, noting that "[p]erhaps the best defense against the effects of public gossip is a willingness to be more discreet in revealing personal information about ourselves and in exposing our intimate behavior to public view."<sup>136</sup>

There is an appealing simplicity to this "caveat emptor"<sup>137</sup> style approach to privacy and speech. If a person does not want his personal information revealed publicly, then he should take greater care in choosing the people to whom he reveals that information. Susanna Kaysen's boyfriend, for example, presumably knew that his long-time girlfriend wrote memoirs for a living.<sup>138</sup> Is

131. See *id.* at 364 ("If the balance [between privacy and free speech] has really tipped too far and redress is needed, it may be better to rely on the same processes of social evolution that initially created our excessive taste for personal details, rather than to leap into the breach with an enunciation of new legal restraints." (citations omitted)).

132. *Id.* at 365.

133. *Id.* at 364.

134. See *id.* at 364 n.382 ("Some recent writers on privacy have lamented that self-invasion is growing dangerously in American society . . . . What will happen to respect for privacy, it is asked, when people blurt out their views . . . ?" (citations omitted)).

135. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

136. Zimmerman, *supra* note 102, at 364.

137. See, e.g., Zhulei Tang et al., *Gaining Trust Through Online Privacy Protection: Self-Regulation, Mandatory, or Caveat Emptor*, 24 J. MGMT. INFO. SYS. 153, 155–56 (2008) ("The first category is *caveat emptor*—literally, 'let the buyer beware.' Under this approach, retailers are under no obligation to post a privacy notice or to obey fair information practices. However, if they post privacy policies, they are required by law to abide by them."); see also Mark F. Kightlinger, *The Gathering Twilight? Information Privacy on the Internet in the Post-Enlightenment Era*, 24 J. MARSHALL J. COMPUTER & INFO. L. 353, 368 (2007) ("If, consistent with his or her own values, an individual decides to provide [information] to a Web site that makes no representations about whether and how it will protect the [information], then the individual must live with the consequences of his or her decision. The rule is *caveat emptor*.").

138. See *supra* notes 39–44 and accompanying text (describing Susanna Kaysen's career as

it not proper to consider him on notice that some personal aspects of their lives might end up in the public domain? In similar fashion, why should Jessica Cutler's paramours,<sup>139</sup> specifically if they had only episodic contact with her, rest in her a faith to keep quiet about sexual and other aspects of their relationships? And the "assumption of risk" argument becomes even stronger if we view the acts the plaintiffs wish to conceal as involving possible wrongdoing such as violent behavior, illegal activity, or immoral acts like infidelity.<sup>140</sup>

It is not uncommon in tort law to examine the plaintiff's behavior before determining whether or not he is eligible for recovery from the defendant.<sup>141</sup> In defamation law, for example, the courts consider whether the plaintiff has thrust herself into the public arena before determining the burden for recovery.<sup>142</sup> Warren and Brandeis took a similar approach in their initial view of the privacy right.<sup>143</sup> They stated that a person who was active in "public life" would have less of a privacy right about the disclosure of information that had bearing on their fitness for a public role, even if the information in question was about their private life.<sup>144</sup>

The difficulty with this approach is that it goes too far. It is unrealistic to expect every person to bear the responsibility of not revealing to anyone

a memoir author).

139. See *supra* notes 48–52 and accompanying text (discussing the controversy surrounding Jessica Cutler and her blog).

140. See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399 (1978) ("We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people 'sell' themselves as well as their goods."); see also Zimmerman, *supra* note 102, at 327 ("[W]e . . . tacitly recognize that the cohesiveness and durability of any social organization depends upon the ability of its members to evaluate each other accurately and to use their observations to exert, modify, or develop social controls." (citations omitted)).

141. See Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1767 (2007) ("In the common-law privacy tort of public disclosure of private facts, a plaintiff's efforts to keep certain facts private are assessed in determining liability.").

142. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (noting that "public figures usually . . . have a more realistic opportunity to counteract false statements than private individuals" and that individuals who "seek governmental office must accept . . . the risk of closer public scrutiny").

143. See Warren & Brandeis, *supra* note 24, at 213 (describing "the right of one who *has remained a private individual*, to prevent his public portraiture" as the "simplest case" for extension of the right of privacy (emphasis added)).

144. See *id.* ("Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office."). The authors go on to explain that "[s]ome further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se.*" *Id.*



information that they do not wish revealed to everyone. The interest in information privacy is not necessarily about protecting complete solitude but rather, as Randall Bezanson explained, it is about a "space of intimate associations."<sup>145</sup> Privacy, Bezanson argued, is "a space occupied by others, but only by *some* others."<sup>146</sup>

Zimmerman's approach is not only unduly dismissive of the intimacy that does and should exist in human relationships, it also fails to deal with many potential scenarios that give rise to information-privacy problems.<sup>147</sup> Of particular importance, many privacy plaintiffs will have had little or no choice in their shared experiences with a future speaker.<sup>148</sup> They might have crossed paths because of the accident of birth, the necessity of work, or a random act of fate. For these privacy plaintiffs, it is not helpful to speak about exercising care in choosing with whom one enters into intimate relationships. As Judge Posner explained when discussing the Supreme Court's decision in *Florida Star v. B.J.F.*,<sup>149</sup> which involved a newspaper's publication of the identity of a rape victim, "[t]o be identified in the newspaper as a rape victim is intensely embarrassing. And it is not invited embarrassment. No one asks to be raped."<sup>150</sup>

A final point going against the "speech always wins" approach is that the U.S. Supreme Court has never, despite repeated opportunities, ruled out the possibility that a privacy interest could prevail over a speech right. In *Florida Star v. B.J.F.*, for example, the Court emphasized that it was not holding "that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press."<sup>151</sup> Similarly, the Court in *Cox*

145. Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133, 1135 (1992).

146. *Id.*

147. See Zimmerman, *supra* note 102, at 364 (describing much modern information disclosure as "reflexive[]" and advocating a guarded approach to personal information sharing).

148. See Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1207 (1990) ("If the lawfulness of the acquisition . . . is the standard for disclosure of private facts . . . the Court's peculiar definition of the lawfully obtained criterion will deny the privacy that plaintiffs claim in virtually any case imaginable."). Edelman specifically describes the situation of B.J.F.: "Regardless of the strength of a state's policy against disclosure, a moderately diligent reporter can find a source who will share the name of a rape victim or a juvenile suspect." *Id.*

149. See *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (holding that because of the First Amendment, a newspaper could not be held liable for damages for reporting the name of a rape victim).

150. *Haynes v. Knopf*, 8 F.3d 1222, 1232 (7th Cir. 1993).

151. *Florida Star*, 491 U.S. at 541.

*Broadcasting Corp. v. Cohn*<sup>152</sup> refused to answer "the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments."<sup>153</sup>

Although any bright-line approach has its appeal, the conflict between speech and information privacy cannot convincingly be resolved through a rule that always favors speech. The privacy interest at stake is too valuable to dismiss quite so easily.

### III. *Privacy v. Speech: The Search for a Workable Framework*

In Part II, I suggest that it is overly simplistic to take an absolutist approach to the problem posed by autobiographical speech and information privacy by concluding that either the speech right or the privacy right always must prevail.<sup>154</sup> The question then becomes how to balance the two diametrically opposed interests. Is there a framework that protects the important speech right of the autobiographical speaker while still giving appropriate deference to an individual's interest in privacy of personal information? One thing is certain: Any potential resolution will not be simple. The rejection of an absolutist viewpoint necessarily means adopting a more complicated approach.<sup>155</sup>

A number of commentators have attempted to push the speech-versus-privacy conflict into preexisting legal frameworks—most commonly either

152. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (citing prior precedent to explain the decision not to "address . . . whether the State may ever define and protect an area of privacy free from unwanted publicity in the press").

153. *Id.* at 491; see also *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001) (describing the case about the disclosure of an intercepted telephone conversation as "a conflict between interests of the highest order," including freedom to share information and individual privacy); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (referring to the right of privacy as "'a basic of our constitutional system'" (citations omitted)).

154. See *supra* Part II (discussing the dichotomous approaches of other scholars to the problem of free speech versus privacy).

155. See Edelman, *supra* note 148, at 1229 ("When speech is truthful, balancing its value against the privacy rights of an individual is assuredly a complex task."). It also means that courts must engage in some kind of balancing of the two interests. See Solove, *supra* note 9, at 1031 ("[N]ot all speech is of equal value, nor is speech a value superior to all others. It is imperative to balance. Balancing means assessing the value of particular forms of speech against their costs."). But see Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1412 (2000) ("The *U.S. West* [*v. FCC*] decision nicely illustrates Peter Edelman's observation that judges balancing speech and privacy claims reveal themselves to be 'absolutists in balancers' clothing." (quoting Edelman, *supra* note 148, at 1223)).

property or contract law.<sup>156</sup> These approaches, however, suffer from many flaws. They do not adequately take into account the dual interests at stake and raise the risks of underprotection.<sup>157</sup> And, even if workable in other contexts, these frameworks are ill-suited for dealing with the special problem posed by autobiographical speech.

### A. Property

One of the most popular approaches among commentators is to argue that individuals maintain a property interest in their own life stories or personal information. Warren and Brandeis began by framing their concept of information privacy as one that arises out of "[t]he right of property in its widest sense,"<sup>158</sup> although they ultimately abandoned the property analogy and declared privacy to be a distinct right.<sup>159</sup> Other privacy scholars, however, have not given up so easily. For example, Alan Westin stated that personal information "should be defined as a property right, with all the restraints on interference by public or private authorities and due-process guarantees that our law of property has been so skillful in devising."<sup>160</sup>

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156. See, e.g., Vera Bergelson, *It's Personal but Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 384 ("[T]he property regime is the most appropriate regime for regulating rights in personal information . . ."); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 26 (1996) ("While not always apparent, the balance [between public self and private identity] was traditionally sought in the recognition of varying property rights in the resource of the persona."); Smolla, *supra* note 88, at 1164 (finding a correlation between privacy law and property law in the Supreme Court's "specific[] analogizing [of] the state-created privacy-property right and federal intellectual property law, and noting that protection of the privacy-property right . . . actually worked to foster and enhance First Amendment values" (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–64 (1977))); Volokh, *supra* note 20, at 1122 ("[R]estrictions on speech that reveals personal information are constitutional under current doctrine only if they are imposed by contract.").

157. See Candice L. Kline, *Security Theater and Database-Driven Information Markets: A Case for an Omnibus Data Privacy Statute*, 39 U. TOL. L. REV. 443, 464 (2008) ("[C]ontract law are not the only substantive law sources that fail to adequately protect individual privacy interests. Under both substantive property law and fourth amendment jurisprudence, the theory of personal data as property also achieves limited success in affirming an individual's right to data privacy.").

158. Warren & Brandeis, *supra* note 24, at 211.

159. See *id.* at 213 (concluding that privacy rights are "rights as against the world"); Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 417 (1990) ("In discussing [the property] aspect of the original concept of the right to privacy, Warren and Brandeis . . . argued that these intangible property rights should be seen as *part* of a larger category of legal right, the right to privacy . . .").

160. WESTIN, *supra* note 100, at 324–25; see also Lawrence Lessig, *The Architecture of*

Looking at information privacy as a type of property right suggests that each individual has an ownership interest in his or her life story and personal facts.<sup>161</sup> Viewing personal information this way is attractive to privacy advocates because it opens up a constitutional end-run around the First Amendment. The recognition of intellectual property rights, whether in copyright or trademark, has given rise to broad exceptions to the free speech rights of individuals.<sup>162</sup> Thus, once private information is defined as a property right, the "circulation of personal information by someone other than the owner is handling a dangerous commodity in interstate commerce."<sup>163</sup> As Julie Cohen has argued, once we accept that personal information "is the property or quasi-property of the individual to whom it refers, then . . . speech rights cannot be absolute, and may not prevail at all."<sup>164</sup>

The problem with applying the property rubric to information privacy is that it is not a good fit with current law.<sup>165</sup> Viewing the right of information privacy through the lens of copyright, trademark, or patent,<sup>166</sup> for example, is not helpful because these are far narrower rights than a right to own your life experiences. Mere facts are not copyrightable as a form of original expression;<sup>167</sup> trademarks only guard against consumer confusion;<sup>168</sup> and patent law protects inventions implementing new technical ideas.<sup>169</sup>

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*Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 63–64 (1999) (arguing in favor of applying a property regime to private information).

161. See, e.g., Bergelson, *supra* note 156, at 383 ("[I]n order to protect privacy, individuals must secure control over their personal information by becoming its real owners.").

162. See Volokh, *supra* note 20, at 1051 ("[A]n intellectual property rights rationale is already being used as an argument for other speech restrictions . . .").

163. WESTIN, *supra* note 100, at 325.

164. Cohen, *supra* note 155, at 1420.

165. See Smolla, *supra* note 88, at 1164 (acknowledging that intellectual property is not "some kind of anti-First Amendment talisman . . . guaranteed to keep the free speech doctor away," and suggesting an understanding of the First Amendment negating "an absolute bar against information contraband"); Volokh, *supra* note 20, at 1051 ("Such arguments [that information privacy laws protect intellectual property rights] don't fit well into the intellectual property exceptions to the First Amendment, which generally don't entitle anyone to restrict the communication of facts.").

166. The law of trade secrets is more likely to have some relevancy to the speech versus privacy debate. This area, however, is discussed *infra*, Part III.B, because of its similarities to contract law.

167. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) ("That there can be no valid copyright in facts is universally understood.").

168. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 744 (2004) ("Legal protections for trademarks are doctrinally justified by the need to prevent consumer confusion, which potentially disadvantages both individuals who are tricked by confusing or deceptive trademarks . . . and the providers of goods and services who lose sales when consumers are confused or deceived.").

169. See Singleton, *supra* note 68, at 126 ("Patent law . . . creates a property right in ideas,

While some scholars support applying the property framework to information privacy,<sup>170</sup> the courts for the most part have rejected this approach.<sup>171</sup> In *Melvin v. Reid*,<sup>172</sup> for example, one of the first and most famous information privacy cases, the Supreme Court of California rejected the idea that a former prostitute had a property right in her personal life story.<sup>173</sup> The court said it could find "no authorities sustaining such a property right in the story of one's life"<sup>174</sup> and that right of privacy "is an incident of the person and not of property."<sup>175</sup>

The courts are reluctant to embrace a property view of information privacy, according to Singleton, because the concept of privacy is so complex and because property interests seldom give rise to damages "for purely emotional injuries" such as those at issue in public disclosure cases.<sup>176</sup> Intellectual property rights, moreover, have been given explicit constitutional approval, found in Congress's express powers of Article I, Section VIII,<sup>177</sup> but "property rights in privacy do not have constitutional sanction."<sup>178</sup> Margaret Radin has explained that "in the language of the First Amendment, 'expression' is something that is not propertized and indeed is something whose value requires it not to be propertized."<sup>179</sup>

The property framework, moreover, is not helpful in resolving the conflict between information privacy and autobiographical speech. Even if we accept that individuals have an intellectual property ownership interest in their life

but only in certain new ideas within a narrow technical sphere.").

170. See, e.g., Lessig, *supra* note 160, at 63 ("A better solution, I suggest, is one that links the protection of architecture with the incentives of the market. Information is an asset . . . the market could negotiate these rights."); Murphy, *supra* note 86, at 2383 ("[P]rivacy protection for information conveyed incident to a contractual relationship has increased both in the common law and in statutory law.").

171. See Singleton, *supra* note 68, at 112 ("The tort of public disclosure of embarrassing public facts comes closest, in theory, to embracing a broad view of property rights in personal privacy. But in practice, skeptical courts have curtailed it.").

172. See *Melvin v. Reid*, 297 P. 91, 94 (Cal. Ct. App. 1931) (holding that no authority exists for a property right in one's life story).

173. *Id.*

174. *Id.*

175. *Id.* at 92–93.

176. Singleton, *supra* note 68, at 114.

177. See U.S. CONST. art. I, § 8 (describing Congress's power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

178. Singleton, *supra* note 68, at 133.

179. Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 176 (2003).

stories, this acknowledgement fails to answer questions raised when one person exercises a right to disclose or not disclose a shared life experience. The property framework does not suggest how to resolve the tie between shared owners of the same personal information. Treating the privacy plaintiff and the autobiographical speaker as co-owners of the property might strongly favor the speaker, for example, because copyright law allows one co-owner to use the copyrighted material however she wishes without the permission of the other.<sup>180</sup> Intellectual property law also recognizes a public need for access to certain expressions and all facts and ideas, which is evident in the doctrine of fair use,<sup>181</sup> the idea/expression dichotomy,<sup>182</sup> the merger doctrine,<sup>183</sup> and the time limitations on ownership.<sup>184</sup>

Publicity law is another area which, in theory, might fit with information privacy and autobiographical speech because, as discussed above, they all involve control over if, when, and how personal information is made public.<sup>185</sup> Yet again, however, the law in this area is a poor match with the privacy and speech interests at stake.

Publicity law focuses on the commercial exploitation of a person's name, likeness, and persona that most commonly arises in cases involving celebrities.<sup>186</sup> The issue is the right to control the pecuniary interest in one's identity.<sup>187</sup> Thus, while the right of publicity (or appropriation) is one of

180. See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067–68 (7th Cir. 1994) (explaining that in a joint work, a joint author has the right to use or license the work, subject only to an obligation to account to the other for any profits).

181. See 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

182. See *Baker v. Selden*, 101 U.S. 99, 104 (1879) ("[W]hilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practise [(sic)] and use the art itself which he has described and illustrated therein.").

183. See *id.* ("The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.").

184. See 17 U.S.C. § 302 ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.").

185. See *supra* Part II.C (discussing attempts to form a rule that reconciles the conflict between information privacy and autobiographical speech).

186. See, e.g., CAL. CIVIL CODE § 3344(a) (2006) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.").

187. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.3, at 43 (4th ed. 1992) (explaining that the publicity right is protected because "whatever information value a

Prosser's four privacy rights,<sup>188</sup> it is generally treated like a property right in one's personality.<sup>189</sup> Because the right of publicity is about protecting the commercial value of one's identity, courts have concluded that it "does not include a person's life story"<sup>190</sup> or "general incidents from a person's life."<sup>191</sup> The Fifth Circuit Court of Appeals further explained:

The narrative of an individual's life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects. Unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use.<sup>192</sup>

In an autobiographical speech context, it is the individual life experiences that are usually of value, not the commercial value of the plaintiff's identity. The autobiographical speaker is trying to share his life story and not seeking to profit from the plaintiff's celebrity.<sup>193</sup>

Recognizing a property right in our own life experiences is appealing because of a shared sense that these personal stories are something we own. In practice, however, privacy and property are a poor fit. Intellectual property law has developed around a concept of personal ownership in expression, not facts, and is designed primarily to compensate the plaintiff for revenues that were lost due to the unauthorized acts of others. Both autobiographical speech and information privacy, on the other hand, involve intensely personal interests that,

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celebrity's endorsement has to consumers will be lost if every advertiser can use the celebrity's name and picture").

188. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401 (1960) ("[T]his form of invasion has bulked rather large in the law of privacy. It consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.").

189. See *Phillips v. Scalf*, 778 N.E.2d 480, 483 (Ind. Ct. App. 2002) ("The alleged chattel in this case is Scalf's right of publicity associated with Dillinger. Ind. Code § 32-36-1-7 creates a 'property' right in a personality's right of publicity.").

190. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

191. *Id.* at 438.

192. *Id.*; see also *Groden v. Random House, Inc.*, 61 F.3d 1045, 1050 (2d Cir. 1995) (explaining that speakers are free to use another person's identity as long as the use was only "incidental" to a matter of public interest); see Sarah M. Konsky, *Publicity Dilution: A Proposal for Protecting Publicity Rights*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 371 (2005) ("[P]rivacy law is intended to deal with use of a person's name or likeness that causes emotional harms or offends the expectation of solitude—the very injuries suffered by nonfamous people.").

193. If the speaker's goal were to profit financially, the speech would likely not be purely autobiographical as defined *infra* in Part IV.B.1. If, however, a case arose where a true autobiographical speaker was nonetheless profiting off of the identity of the plaintiff, then some compensatory damages for right of publicity might be appropriate.

if violated, yield emotional harms. Thus, property does not appear to be the appropriate framework for this conflict.

### B. *Implied Contract or Duty of Confidentiality*

A much more promising avenue for balancing the interests of information privacy versus the freedom of speech is to analyze the situation as an implied contract or a duty of confidentiality. The theory here is that individuals in certain relationships could be seen as having an implied contract with each other that neither will reveal publicly certain private information about the other.<sup>194</sup> Closely related to the implied contract approach is the theory that some people who possess personal information about others have an enforceable duty of confidentiality preventing them from disclosing it.<sup>195</sup>

Securing an express promise not to disclose private information is clearly one way for a privacy plaintiff to get around the free speech protections of the First Amendment because the Supreme Court has stated that a person may bargain away their constitutional rights to speak.<sup>196</sup> It is also generally accepted that certain relationships embody an implied promise of confidentiality.<sup>197</sup> These relationships include an individual's dealings with her doctor, her banker, her clergy member, or her lawyer.<sup>198</sup> As Volokh has explained, "[w]hen these professionals say 'I'll be your advisor,' they are implicitly promising that they'll be confidential advisors, at least so long as they do not explicitly disclaim any such implicit promise."<sup>199</sup>

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194. See, e.g., McClurg, *supra* note 64, at 888 (proposing that in intimate relationships, there is an implied contract that the parties will not disseminate private, embarrassing information about the other that was acquired during the relationship).

195. See, e.g., Bezanson, *supra* note 77, at 1135 (suggesting that there is an enforceable duty of confidentiality that is based on the individual's control of the information rather than social controls on it); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1308 (2000) (suggesting that disclosure of personal information should be actionable as a "breach of trust").

196. See *Cohen v. Cowles*, 501 U.S. 663, 670 (1991) ("There can be little doubt that the Minnesota doctrine of promissory estoppel is . . . generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.").

197. See Volokh, *supra* note 20, at 1058 ("In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality.").

198. See *id.* (discussing confidentiality in doctor-patient and lawyer-client relationships).

199. *Id.*



To say that one set of relationships gives rise to a duty of confidentiality, however, is a far cry from saying that other, very different relationships entail the same obligation. What is more, even if a duty of confidentiality exists, the question arises of how far it extends. Nonetheless, Andrew McClurg has argued the law should presume that "an implied contract of confidentiality arises in intimate relationships that the parties will not disseminate through an instrument of mass communication private, embarrassing information (including photos or videotapes) about the other acquired during the relationship."<sup>200</sup>

Similarly, Neil Richards and Daniel Solove have argued that the courts should read a duty of confidentiality into intimate relationships to resolve these disputes.<sup>201</sup> They point to the British breach of confidentiality tort—which they argue has the same common law origins as American privacy law—as a model.<sup>202</sup> Under English law, a duty of confidentiality attaches "whenever information is imparted, either explicitly or implicitly, for a limited purpose."<sup>203</sup> This system allows recovery by a plaintiff against a number of people if they reveal information of a personal nature because "[t]he information about the relationship is for the relationship and not for a wider purpose."<sup>204</sup> English law, Richards and Solove argue, "serves as a useful example of an alternative way that the common law can conceptualize and regulate unwarranted disclosures of personal information."<sup>205</sup> Thus, this view suggests that, based on societal norms, most individuals have an implied duty not to reveal certain private information about others with whom they have a personal relationship.<sup>206</sup>

Even critics of the public disclosure tort or other information privacy protections, such as Zimmerman and Volokh, have suggested that expanded

200. McClurg, *supra* note 64, at 888.

201. See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 157 (2007) ("A plaintiff can prove . . . the existence and breach of a duty of confidentiality. Courts have found the existence of such a duty by looking to the nature of the relationship between the parties, by reference to the law of fiduciaries, or by finding an implied contract of confidentiality.").

202. See *id.* at 158 ("English law, like American law, also developed a law of 'private' information. As in America, this English strand of the common law also traces its origins back to *Prince Albert v. Strange*.").

203. *Id.* at 159.

204. *Id.* (quoting *Barrymore v. News Group Newspapers, Ltd.*, (1997) F.S.R. 600 (Ch.) (U.K.)).

205. *Id.* at 181.

206. See *id.* ("Unlike the American tort, which thus far has been limited to particular relationships, the English tort has a much more open-ended applicability based on the expectations of the parties in any given relationship.").

contract liability might be an appropriate method for addressing problems posed by the unauthorized disclosure of private information.<sup>207</sup> Volokh has conceded that at least to some limited degree, applying contract law to promises not to reveal personal information "is eminently defensible under existing free speech doctrine."<sup>208</sup>

While the implied-contract framework is a promising approach to some speech-versus-privacy problems, it is insufficient to resolve the conflict with autobiographical speech. For this approach to work it would need to hinge significantly on the contextual intricacies of the relationship, making it difficult to predict whether a duty exists and leading to a highly subjective analysis. This subjectivity is inherently threatening to the constitutional rights of the autobiographical speaker.<sup>209</sup>

As an initial matter, the origin of this duty of confidentiality is questionable. Do we really have such societal customs against disclosure? Does a reasonable person assume a sibling or child will not someday, through the telling of her life story, reveal private information about the family? Is it reasonable for someone entering into a relationship, even an intimate relationship, to presume the other person will not reveal private matters that occurred? The concept of "kissing and telling" is nothing new,<sup>210</sup> and neither is autobiography.<sup>211</sup> And while the concept that a person has a right to control what information about himself or herself is released publicly is found in areas such as the doctor-patient relationship or the attorney-client privilege, "[t]he individual's right to control information is far from implicit in other human

207. See Volokh, *supra* note 20, at 1057 (agreeing with the Court in *Cohen v. Cowles Media*, 501 U.S. 663 (1990), that it is proper to allow people to contract away their right to speak, and that a disclosure of private information under such circumstances should give rise to breach of contract); Warren & Brandeis, *supra* note 24, at 211 (concluding that the doctrines of breach of confidence and implied contract "could not afford all the protection required"); Zimmerman, *supra* note 102, at 363 (observing that more attention should be given "to increasing the use of legal sanctions for the violation of special confidential relationships, in order to give individuals greater control over the dissemination of personal information").

208. *Id.*

209. See *infra* note 224 and accompanying text (discussing the possibility that a contextual approach to the speech-versus-privacy conflict with respect to autobiographical speakers risks creating a chilling effect on speech and encouraging self-censorship).

210. According to William Safire, "[t]he original meaning of the infinitive phrase to kiss and tell was 'to boast of one's sexual exploits.' It was coined, or first used in print, by the playwright William Congreve in his 1695 comedy, 'Love for Love': 'O fie, Miss,' said a swain worried about his love's indiscretion (she was in the process of blabbing all to her stepmother), 'you must not kiss and tell.'" William Safire, *On Language: Kissing and Telling about Kiss-and-Tell*, N.Y. TIMES, June 5, 1988, Sunday, Late City Final Edition § 6, at 16.

211. West, *supra* note 12, at 914–15.

relationships."<sup>212</sup> As Singleton has observed, "[g]enerally, people do not feel obligated to ask for anyone's permission before relaying the information they have collected to a third party, however embarrassing the subject of the information might be."<sup>213</sup> The Ninth Circuit Court of Appeals suggested that society accepts that when we allow another into our home, that person "may repeat all he hears and observes when he leaves."<sup>214</sup> In keeping with this thinking, most states and the federal government have enacted "one-person consent" laws that allow a conversation to be recorded as long as one person in the conversation is aware of the recording.<sup>215</sup> Thus, rather than embracing a web of implied contracts or duties not to disclose, both legal and societal customs suggest the contrary—that we accept that we are free to talk about others and they are free to talk about us. As one court has noted, "[a] cause of action can not lie each time someone succumbs to the temptation to break a confidence and whisper a juicy rumor."<sup>216</sup>

Discerning the parameters of a duty of confidentiality in personal relationships is also problematic. How many dates are required before the duty kicks in? Does a one-night stand qualify? Assuming a marriage creates the duty, does a divorce nullify it? How can a person desiring to share his or her story (and therefore reveal parts of others' lives) cancel an implied promise not to tell or refuse to make it? Must a potential future speaker declare her intentions at the outset of the relationship? Must the other person consent? Clearly an adult member of a family who wishes to speak about his childhood, including revealing personal information about other family members, cannot be forced into silence because he did not negate the implied duty at birth or as a young child.

A realistic and workable contract or confidentiality framework, therefore, would need to embrace a highly contextual approach to these relationships and employ a fact-based inquiry into the particular relationship at issue. Thus, in some intimate relationships there might be facts suggesting an implied promise existed while in others there are not. Each relationship is different and

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212. Singleton, *supra* note 68, at 123.

213. *Id.*

214. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *see also* Singleton, *supra* note 68, at 124–25 (arguing that it is "a default rule of human interactions, and not something to which we consent" that all individuals may share opinions and observations about others).

215. *See* The Reporters Committee for Freedom of the Press, *Can We Tape? A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C.*, available at <http://www.rcfp.org/taping/quick.html> (revealing that only twelve states require the consent of all parties to tape telephone calls).

216. *Blair v. Union Free Sch. Dist. No. 6, Hauppauge*, 324 N.Y.S.2d 222, 228 (N.Y. Dist. Ct. 1971).

therefore broad norms are insufficient to set the rule. Sometimes ten dates would be enough to invoke the duty, but sometimes less and sometimes more. What we are looking for, in other words, would be an implied-in-fact contract not one that was implied-in-law.<sup>217</sup>

This implied-in-fact contract analysis is similar in many ways to trade secret law, which requires a case-by-case factual inquiry into issues such as whether the information at issue was actually secret;<sup>218</sup> whether the owner of the secret took adequate protective measures;<sup>219</sup> and whether the defendant knew that the information was a trade secret.<sup>220</sup> Only in "extreme cases," according to Judge Posner, can a trade secret dispute be settled on summary judgment because there are so many factual considerations that must be examined by a trial court judge or a jury.<sup>221</sup> Ultimately, the question in trade secrets cases is whether the defendant disclosed information that he "knew or had reason to know" was a trade secret.<sup>222</sup> In other words, was there an implied understanding between the two parties that the defendant would not disclose the information?<sup>223</sup>

The difficulty with applying such a highly contextual approach to the speech-versus-privacy conflict is the lack of predictability and fairness and, most significantly, the highly subjective nature of such an inquiry. Clearly,

217. See 17 C.J.S. *Contracts* § 6 ("A contract implied in fact is one not expressed by the parties, but implied from facts and circumstances showing a mutual intention to contract . . . . Contracts implied in law . . . are distinguishable in that such contracts do not rest on assent of the parties, but may exist regardless of assent.").

218. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."); see also Warren & Brandeis, *supra* note 24, at 212 (discussing the problems with viewing privacy through a trade secrets framework).

219. See *id.* § 40 ("One is [liable] for the appropriation of another's trade secret if . . . the actor knows or has reason to know that the information is a trade secret . . . unless the acquisition was the result of the other's failure to take reasonable precautions to maintain the secrecy of the information.").

220. See *id.* ("One is subject to liability for the appropriation of another's trade secret if . . . the actor acquires by means that are improper under the rule stated in § 43 information that the actor knows or has reason to know is the other's trade secret . . .").

221. See, e.g., *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (observing that determining whether reasonable precautions were taken "depends on a balancing of costs and benefits that will vary from case to case and so require estimation and measurement by persons knowledgeable in the particular field of endeavor involved").

222. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b)(1).

223. See *id.* ("One is subject to liability for the appropriation of another's trade secret if . . . the actor knows or has reason to know that the information is a trade secret that the actor acquired under circumstances creating a duty of confidence owed by the actor to the other . . .").

replacing broad rules with case-by-case inquiries comes at the cost of predictability for the parties. An autobiographical speaker would have a difficult time discerning in advance whether the particular relationship she wishes to discuss involved an implied-in-fact contract or duty of confidentiality. The number and types of factors found in human relationships that could be relevant to this analysis are overwhelming and unclear. As is always the case whenever there is uncertainty with speech regulations, this would raise concerns of a chilling effect where valuable speech is wrongly silenced.<sup>224</sup> That concern of self-censorship is especially high here. The implied-in-fact contract approach, moreover, is also highly subjective for many of the same reasons it is unpredictable.<sup>225</sup> With so many factors to consider and so little guidance on how to evaluate them, the judge or jury would have too much power to protect the speech of some based on subjective opinions about the speaker and not based on the law.

Applying this framework to intimate human relationships, furthermore, is less fair than in the trade secret context. With trade secrets, the inquiry is into whether the defendant genuinely knew or had reason to know that the information at issue was a secret that he was obligated not to reveal.<sup>226</sup> It is appropriate to apply this standard to the arms-length relationships between employers and employees or among business competitors. Participants in these relationships are more likely to be on notice that their interactions are triggering legal duties and that those duties might include obligations not to disclose.<sup>227</sup> In the context of personal relationships, however, it is far less likely that the parties knew they were invoking a legal obligation to keep a secret. Applying such a duty to them would require embracing a legal fiction that goes against

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224. See *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of th[e] statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools . . .").

225. See, e.g., Rachel Leiser Levy, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 719 (2005) (discussing employee handbooks as implied-in-fact contracts and finding it troubling that "increased judicial application of common law exceptions to employment at will has caused the law surrounding employment termination to become increasingly confused and unpredictable").

226. See *supra* notes 218–23 (discussing the legal standard for determining when a trade secret has been appropriated, which is based on an actual or implied understanding between the two parties).

227. MELVIN F. JAGER, *TRADE SECRETS* § 4.1 (2010) (noting that a number of states follow a quasi-theory of trade secrets in which there is an "implied obligation of an employee to protect trade secrets of an employer").

our societal norms and fails to give the parties adequate notice of their potential liability.

Ultimately, autobiographical speech made by the "ordinary" person would be particularly vulnerable under the contract or confidentiality approach. Individuals who desire to speak publicly about their life experiences will most assuredly be speaking about others as well. If they are bound by an implicit promise not to disclose information about the people with whom they have developed a relationship, their stories simply cannot and will not be told. One might respond that this limiting duty will extend only to other persons with whom the would-be speaker has developed an intimate relationship. Yet the closer a relationship is, the more central it becomes to the speaker's story. The consequences of muzzling autobiographical speakers are grave because silencing autobiographical speech prevents people from giving witness to their life experiences. The result is that their stories are erased from the public dialogue.

#### *IV. Proposing a New Approach to the Face-Off*

The foregoing analysis suggests that previous efforts to deal with speech-versus-privacy conflicts involved trying to shove a square peg into a round hole. The power to disclose, or not to disclose, personal information should not be transmuted into something it is not—whether that something is a property right, an implied contract, or a duty of confidentiality. In this Part, I return to the world of tort law in search of a resolution. Through a reexamination of the tort of public disclosure of private facts, I conclude that its overemphasis of the "newsworthiness"<sup>228</sup> of the disclosure is constitutionally fatal for the tort because it leaves valuable speech unprotected. But by taking a new look at the requirement that the disclosure be "highly offensive to a reasonable person,"<sup>229</sup> I argue that both the tort and the privacy interest it seeks to protect can be saved. I propose a new "justified disclosure" approach that directs the focus away from the problematic newsworthiness inquiry. This approach accepts that the core purpose of the tort is not to separate information based on newsworthiness but rather to prevent unjustified disclosures.<sup>230</sup> It is unjustified

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228. I note again that I use the term "newsworthiness" to refer to a court's inquiry into whether speech is newsworthy, a matter of public concern, or a matter in the public interest.

229. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

230. *See id.* § 652D cmt. h ("The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a . . . sensational prying into private lives for its own sake, with which a reasonable member of the public . . . would say that he had no concern.").

disclosures, and not non-newsworthy ones, that are "highly offensive to a reasonable person."<sup>231</sup>

Analyzing the tort through the lens of whether the disclosure was justified or unjustified (as opposed to newsworthy or not newsworthy) is consistent with one view of the case law, adequately balances the competing interests of speech and privacy, fits within our cultural norms, and is constitutionally sound. It protects autobiographical speech while providing some security for information privacy. It is also arguably more predictable and fair than other suggested frameworks. And while my analysis focuses on autobiographical speech, its sliding scale approach promises to be applicable in other broader conflicts between free speech and privacy.

Admittedly, the justified disclosure approach does mean that the privacy interest will outweigh the speech right only in a small number of cases where the autobiographical speech interest is minimal and the privacy interest is exceedingly high. The Supreme Court's approach to any regulation on the content of the speech—requiring that the government establish that the regulation was necessary to further a compelling government interest<sup>232</sup>—is purposely difficult to overcome.<sup>233</sup> The result is a system in which proper protection of the free speech interests necessarily leaves only a narrow path to victory for privacy plaintiffs.<sup>234</sup> General constitutional protections for speech combined with the unique value of autobiographical speech suggest that establishing liability should be difficult, yet the special importance of information privacy argues that recovery not be entirely foreclosed.<sup>235</sup>

231. *Id.*

232. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (explaining that to defend content-based restrictions on speech, the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end").

233. *See* Burson v. Freeman, 504 U.S. 191, 199–200 (1992) ("To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest. . . . [W]e readily acknowledge that a law rarely survives such scrutiny . . .").

234. *See* Diane Leenheer Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured into New Jugs*, 51 BROOK. L. REV. 355, 366 (1985) (observing that "occasions when competing social values are found to outweigh the interest in unrestricted freedom of speech are highly exceptional").

235. The Court struck a similar speech-favoring balance in the conflict with defamation and reputational harm by allowing a limited path for recovery in an attempt to safeguard the community's interest in protecting reputation "while diminishing as little as possible the constitutionally guaranteed right of free speech." *Id.* at 367.

## A. Reexamining the Tort of Public Disclosure of Private Facts

### 1. An Overemphasis on Newsworthiness

The centrality of the newsworthiness defense in cases involving speech and privacy is difficult to overstate. Warren and Brandeis exempted "matter[s] which [are] of public or general interest"<sup>236</sup> from their fledgling privacy right,<sup>237</sup> and Dean Prosser built on this idea by defining the tort as including only "not newsworthy" disclosures.<sup>238</sup> Recognition of the newsworthiness defense by the courts developed later in keeping with the expanding view of press freedoms generally.<sup>239</sup> Today, consent and newsworthiness are repeatedly listed as the primary two defenses to a disclosure charge.<sup>240</sup> In fact, much of the scholarship on the privacy-versus-speech debate presupposes that the conflict is between private plaintiffs and the media so that the ultimate question is whether the speech is newsworthy.<sup>241</sup>

This focus on newsworthiness by courts and scholars has led to an incorrect assumption by many that a disclosure of a private fact is either newsworthy and therefore constitutionally protected or not newsworthy and therefore of lesser or no First Amendment value.<sup>242</sup> The Ninth Circuit has declared as much, stating that "unless it be privileged as newsworthy . . . the

236. Warren & Brandeis, *supra* note 24, at 214.

237. There is an irony in the overemphasis on newsworthiness today, however, which is that Warren and Brandeis were concerned with revelations by the press. See Kalven, *supra* note 63, at 330 ("Warren and Brandeis were concerned only with public disclosure in the press of truthful but private details about the individual which caused emotional upset to him."). Indeed, it is now well known that it was the press's coverage of his daughter's wedding which first led Warren to write the article. *Id.* at 329 n.22. See generally Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage That Led to "The Right to Privacy,"* 2008 MICH. ST. L. REV. 35 (arguing that negative press coverage of Warren's family influenced him to define the right of privacy).

238. PROSSER, *supra* note 62, at 299.

239. See generally Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1044–61 (2009) (discussing the rise of the newsworthiness exception).

240. See Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 151 (1997) ("The primary two defenses to the public disclosure tort are consent and newsworthiness.").

241. See, e.g., Solove, *supra* note 9, at 1029 ("It is the media's dark underbelly—reporting on the latest celebrity scandal—that will be in the gray zone and might be chilled. And this consequence is not as terrible as the free speech critique proponents make it out to be.").

242. See, e.g., Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 283, 295 (2000) (observing this dichotomy in the fair use exception to right of publicity cases).



publicizing of private facts is not protected by the First Amendment."<sup>243</sup> The Tenth Circuit has agreed that "dissemination of non-newsworthy private facts is not protected by the first amendment."<sup>244</sup> Rodney Smolla has interpreted the Court's decision in *Bartnicki v. Vopper*<sup>245</sup> as holding that the newsworthiness defense "separate[s] that which deserves protection from that which does not."<sup>246</sup>

I propose that this is a false dichotomy and an unconstitutional approach. While newsworthy speech certainly is deserving of constitutional security, a finding that speech is not newsworthy should not strip it of all First Amendment protection. There are important constitutional values in non-newsworthy speech that deserve attention even when facing off against information privacy. Nothing in First Amendment law even remotely suggests that only speech on "newsworthy" subjects merits judicial protection.<sup>247</sup> All sorts of communicative activity, ranging from the expression of group pride,<sup>248</sup> to musical performance,<sup>249</sup> to nude dance<sup>250</sup> have been wrapped in the mantle of the First Amendment.<sup>251</sup> My work suggests one additional category has constitutional value—autobiographical speech—and there certainly may be more. The key point is that autobiographical speech, even with respect to non-

243. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975).

244. *Gilbert v. Med. Econs. Co.*, 665 F.2d 305, 308 (10th Cir. 1981); *see also* *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 484 (Cal. 1998) ("The contents of the publication or broadcast are protected only if they have 'some substantial revelant [sic] to a matter of legitimate public interest.'" (quoting *Gilbert*, 665 F.2d at 308)).

245. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern . . .").

246. Smolla, *supra* note 88, at 1152.

247. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.").

248. *See id.* at 557 ("The [South Boston Allied War Veterans] Council refused a place in the 1993 event to respondent GLIB, an organization formed for the purpose of marching in the parade in order to express its members pride in their Irish heritage as openly gay, lesbian, and bisexual individuals . . .").

249. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

250. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (holding that nude dance is "expressive conduct within the outer perimeters of the First Amendment").

251. *See id.* at 573 ("[The] use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.").

newsworthy subjects, advances the individual and societal goals of the freedom of speech. It, therefore, deserves constitutional protection.

Not only is the law's existing emphasis on newsworthiness constitutionally unsound, it generates confusion because it shifts attention away from the actual type of disclosures of private information that society finds highly offensive and with which the public disclosure tort is concerned. The tort is not about the protection of newsworthy speech, but about protecting individuals from unwarranted and emotionally painful disclosures of private information. In other words, as courts balance autobiographical speech and information privacy, it is critical that they keep in mind what the tort is trying to prevent—extremely harmful disclosures made without an adequate justification. Newsworthiness is one such adequate justification, but it is not the only one. Disclosures done for purely voyeuristic reasons, however, are not sufficiently justified. The appropriate question in a speech-versus-privacy conflict is thus not whether the speech is newsworthy, and therefore protected, but rather whether the defendant's *reason* for disclosing the information was strong enough to outweigh the emotional harm to the plaintiff.

## 2. *The Dual Purposes of the "Offensiveness" Inquiry*

While supporters of the tort argue that individuals should have a right to control if, when, and how private information is revealed,<sup>252</sup> the tort on its face does not allow individuals to keep any fact in their lives private at any time. As Dean Prosser explained, "[t]he law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity."<sup>253</sup> Rather, the tort places several limitations on what kind of personal information can be protected from disclosure and under what circumstances. For example, there is no privacy violation if the information revealed was already known by many people<sup>254</sup>—even if someone has gone to great lengths to keep it secret from a certain segment of society or acquaintances—because "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."<sup>255</sup> Likewise there is no recovery if the disclosure was not

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252. See *supra* Part II.C.1 (discussing how both autobiographical speech and information privacy protect the individual's ability to control personal information).

253. *Id.* at 396–97.

254. See, e.g., *Sipple v. Chronicle Publ'n Co.*, 154 Cal. App. 3d 1040, 1047–48 (1984) ("[T]here can be no privacy with respect to a matter which is already public.").

255. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

"public" in the sense that it was revealed to a large audience.<sup>256</sup> And, of course, the "newsworthiness" exception means that persons might find themselves at the center of a public controversy concerning even the most private matter, with no recourse whatsoever.<sup>257</sup> As Judge Posner has explained:

People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.<sup>258</sup>

All of these limitations on recovery embrace an understanding that all individuals must live with the risk that, at times, they might involuntarily lose control over personal information.<sup>259</sup>

The most significant limitation on recovery is the requirement that the disclosure must be "highly offensive to a reasonable person."<sup>260</sup> Dean Prosser explained that "[a]ny one who is not a hermit must expect the more or less casual observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities."<sup>261</sup> A privacy violation, thus, must involve a revelation of a greater magnitude than this and be something that a reasonable person would conclude has crossed the line.<sup>262</sup>

The offensiveness element plays a key role in defining the private-facts tort, and close inspection reveals that courts view it as serving two different purposes. The first purpose is to ensure that the sensitive and personal content of the information revealed is of a nature that a reasonable person would find it highly offensive. The second function of the offensiveness element is to examine the purpose of the disclosure and discern whether the reason for the

256. See *id.* § 652D cmt. a ("[I]t is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.").

257. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("[T]he First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal.").

258. *Id.*

259. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977) ("Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.").

260. *Id.* § 652D.

261. Prosser, *supra* note 188, at 396–97.

262. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. c ("The rule stated in this Section gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man.").

disclosure was of such minimal social or personal value that it does not justify the harm it has caused.

*a. The Nature of the Information*

The first type of "offensiveness" is fairly straightforward. In order to prevail on a public disclosure claim the plaintiff must show that a reasonable person would conclude that the content of the information is of a kind that its disclosure qualifies as highly offensive.<sup>263</sup> Mere embarrassment or humiliation alone is not considered sufficient to meet this standard.<sup>264</sup> Rather, the publicized information must be "deeply shocking to the average person subjected to such exposure."<sup>265</sup> As a general matter, a reasonable person would be offended to have nude photos revealed publicly, but not offended to have revealed a photo of her walking down the public sidewalk. Dean Prosser pointed out that "[t]he ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit, or gone camping in the woods, or that he has given a party at his house for his friends."<sup>266</sup>

Certain categories of information are frequently found to be highly offensive under this standard—such as sexual matters and medical information.<sup>267</sup> Judge Posner declared in one case that protecting "intimate physical details" is at "[t]he core" of the public disclosure tort.<sup>268</sup> Yet even in

263. RESTATEMENT (SECOND) OF TORTS § 652D.

264. *See id.* § 652D cmt. c ("Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section.").

265. *Haynes*, 8 F.3d at 1234–35.

266. Prosser, *supra* note 188, at 396–97; *see also* *Koussevitsky v. Allen, Towne & Heath*, 68 N.Y.S.2d 779, 782 (N.Y. App. Div. 1947) ("The [right of privacy] statute likewise has been held not to apply to articles which, though not strictly news, are informative and educational and which make use of the names or pictures of living persons . . . . [T]he use must be of such a nature as would not outrage a common ordinary decency.").

267. *See* Prosser, *supra* note 188, at 397 ("It is quite a different matter when the details of sexual relations are spread before the public gaze, or there is highly personal portrayal of his intimate private characteristics or conduct." (citations omitted)); *see also* *Banks v. King Features Syndicate*, 30 F. Supp. 352, 353–54 (S.D.N.Y. 1939) (determining the liability for publishing the x-rays of a woman's pelvic region); *Myers v. U.S. Camera Pub. Corp.*, 167 N.Y.S.2d 771, 773–74 (N.Y. City Ct. 1957) (analyzing the liability of publishing a nude full body photograph of a model).

268. *See Haynes*, 8 F.3d at 1234–35 ("The core of the branch of privacy law with which we have been dealing in this case is the protection of those intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average

cases that involve disclosure of this type of intimate information, the identity of the plaintiff and the context of the information could affect the analysis. For example, it might not be offensive for nude photos to be released of a celebrity who has made a name for herself as a sex symbol even if it would be highly offensive for most individuals.<sup>269</sup> Conversely, the release of generally banal information like addresses and telephone numbers is unlikely to be offensive for most people but could be highly offensive if it were the personal information of abortion providers who have been the target of death threats.<sup>270</sup>

### *b. The Reason for the Disclosure*

The second function of the "offensiveness" element examines the *reason* for the disclosure and then determines whether that reason provides a sufficient justification for disclosure in the eyes of a reasonable person. Several courts, for example, have suggested that a reasonable person would not find it highly offensive for personal information to be publicly disclosed if it were newsworthy,<sup>271</sup> surmising that "the public's interest in the news and the absence of less invasive methods of reporting the story may mitigate the offensiveness of the intrusion."<sup>272</sup> Similarly, the California Supreme Court has held that an intrusion into a person's privacy might not be highly offensive, or might be less offensive, "when employed by journalists in pursuit of a socially or politically important story"<sup>273</sup> than if done purely for the purpose "of harassment, blackmail or prurient curiosity."<sup>274</sup> The point is that the purpose of the invasion

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person subjected to such exposure.").

269. See, e.g., *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (discussing whether the contents of a tape disclosure of which reasonable persons would find objectionable as not objectionable when the person has made herself a sex symbol).

270. See *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) ("[W]hat our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee . . . as a serious expression of intent to inflict bodily harm upon that person.").

271. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("[T]he First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal."). In *Bonome v. Kaysen*, the court found that it was not "offensive" to have personal information revealed only to the extent it shared a logical nexus with a matter of legitimate public concern. *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*7 (Mass. Super. Mar. 3, 2004).

272. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1190 (D. Ariz. 1998).

273. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

274. *Id.*

of privacy is vital to determining whether the act was sufficiently offensive to trigger liability.

By examining the justifications for disclosure of personal information, the courts reveal that a disclosure is most likely to be deemed highly offensive—or unjustified—when it arises out of simple nosiness about other people's lives.<sup>275</sup> Warren and Brandeis wrote in favor of a right of privacy to prevent the publication of "unseemly gossip," arguing that "[w]hen personal gossip attains the dignity of print, [it] crowds the space available for matters of real interest to the community."<sup>276</sup> Judge Posner described the offense as being about preventing "gratuitous" disclosures,<sup>277</sup> explaining that the goal is to prevent "the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger."<sup>278</sup> The Restatement explains that we are most offended by the "morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."<sup>279</sup> The Ninth Circuit observed that disclosures that satisfy nothing more than our "prurient curiosity"<sup>280</sup> are not protected while the Sixth Circuit has decried invasions of privacy that are nothing more than "obvious exploitation[s] of public curiosity."<sup>281</sup>

It is when an individual suffers substantial emotional harm because his private information was exposed for the purpose of gawking, prying, or gossiping that the courts are concluding that the privacy interest can prevail. Thus, the public disclosure tort, at its core, is aimed at protecting us from extreme cases of this sort of "gratuitous" speech.<sup>282</sup> Some gossip might

275. See *Haynes*, 8 F.3d at 1232 ("[A]ll the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element.").

276. Warren & Brandeis, *supra* note 24, at 196.

277. *Haynes*, 8 F.3d at 1229.

278. *Id.* at 1232.

279. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977). "However, the newsworthy privilege is not without limitation. Where the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection." *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983) (internal quotations omitted); see also *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h).

280. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

281. *Cantrell v. Forest City Publ'g Co.*, 484 F.2d 150, 156 (6th Cir. 1973), *rev'd on other grounds*, 419 U.S. 245, 252 (1974).

282. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) ("Publicizing personal facts that while true and not misleading are so intimate that their disclosure to the public is deeply embarrassing to the person thus exposed and is perceived as gratuitous by the

nevertheless be protected because the information revealed is not highly offensive. And some gossip might be protected because it is found to be newsworthy. But there is a category of gossip that is highly offensive to us because its disclosure was unjustified, and this is where the public disclosure tort bares its teeth. There are commentators who have suggested that gossip (at least in certain forms) is socially valuable,<sup>283</sup> but the constitutional argument for regulation of this type of voyeuristic disclosure is far sounder than is the current system targeting all non-newsworthy speech. The states' interest in protecting their citizens from these types of disclosures is more compelling, the First Amendment value of the speech is lower, and the tort is more narrowly drawn.

### 3. *Focusing on the Purpose of the Disclosure Tort*

From what has been said so far it appears that the tort, as reflected in the courts' views of "offensiveness," is concerned with protecting disclosures that are done for the "right" reasons as well as with stopping disclosures that are done for the "wrong" ones.<sup>284</sup> There are a number of "wrong" reasons that raise few constitutional concerns; blackmail and harassment, for example, have been mentioned.<sup>285</sup> The remaining "wrong" reasons are described in various terms but tend to converge on the same idea—private individuals should not have to suffer the severe emotional harm of having a deeply personal fact about them revealed publicly if the purpose of the disclosure is not sufficient to a reasonable person. The simple desire of some to pry into the private lives of others, these cases reveal, is not a sufficient justification. It is this type of unwarranted disclosure that the community finds "highly offensive" and for which constitutional protections are at their weakest or perhaps nonexistent. And despite repeated predictions of its demise, the public disclosure tort perseveres in order to prevent and punish this type of harmful disclosure.

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community.").

283. See, e.g., Posner, *supra* note 140, at 396 ("Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational."); see also Zimmerman, *supra* note 102, at 334 ("Gossip . . . appears to be a normal and necessary part of life . . ."). But see Solove, *supra* note 9, at 1064 ("As for gossip, although some of the time it can educate people about human nature, often it functions only to entertain. . . . If the purpose of gossip is to teach us lessons about human nature in general, there is often no need to identify individuals who desire privacy.").

284. See *supra* Part IV.A.2.b (discussing the justifications that permit individuals to release information that otherwise would be offensive).

285. See *Shulman*, 955 P.2d at 493 (stating that information collecting techniques done for purposes such as harassment, blackmail or prurient curiosity are generally unprotected reasons).

This analysis suggests that the common approach to the disclosure tort as requiring a simple separation of the newsworthy from the non-newsworthy disclosure is incorrect. Instead, the focus should be on the justification for the disclosure and whether it is sufficient to overcome the harm to the plaintiff. As Daniel Solove recently suggested, it is the "context in which it is gathered and disseminated, and . . . the purpose or the use of the data" that should decide whether the disclosure is protected or not.<sup>286</sup> Solove explained that "[a] focus on uses means that the law must examine the purpose of the disclosure, not just the nature of the information disclosed."<sup>287</sup> Yet Solove—like most others—places emphasis on trying to separate out the speech that involves a matter of public concern, which he calls "high value" speech, from that of purely private concern, which he considers "low value" speech.<sup>288</sup> This analysis is in essence the same as the newsworthiness inquiry. He concludes that "[o]ften, the same piece of information is of both private concern and public concern—it just depends on the context."<sup>289</sup> Under this approach, personal information that is revealed for a newspaper article is more likely to be considered high value speech than is personal information used for commercial marketing.<sup>290</sup>

This view of the "high" versus "low" value of speech is particularly concerning for the autobiographical speaker. Indeed, the value of autobiographical speech emanates largely from its immensely personal nature. Most autobiographical speakers experience the rewards of self-realization and fulfillment by telling their stories to a broad audience. At the same time, they add to the public discourse and debate by commenting on life in our society and on the human condition as lived by the individual in real terms. For this reason, our individual and collective understanding is enhanced by hearing their voices. The autobiographical speech concept is aimed at protecting this type of seemingly non-newsworthy speech by ordinary citizens. Yet there is a great risk that the value of hearing about life experiences of "ordinary" people, particularly members of minority and oppressed groups, will not be recognized by courts or by society. Thus drawing a legal line based on a judge's or jury's view of whether their stories are a matter of "public concern" or of "high value" is exceedingly troubling.<sup>291</sup> The ultimate decision as to what is or is not a

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286. Solove, *supra* note 9, at 975.

287. *Id.* at 1019.

288. *Id.* at 1031.

289. Solove, *supra* note 9, at 1031.

290. *See id.* at 1019 (describing the low value of placing information in other sources of publication compared to the high value of publishing information in a news source).

291. *See, e.g.,* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (rejecting a standard that "would allow a jury to impose liability [on speech] on the basis of the jurors'



significant part of a person's life story should rest with that person alone. Much like deciding what constitutes great art,<sup>292</sup> autobiographical speech is an area in which "no official, high or petty"<sup>293</sup> should be given the power to decide the worth of any individual's life story. With Solove, I share the view that looking at the context of the speech and the use of the information is helpful.<sup>294</sup> I disagree, however, that the proper touchstone for analysis concerns whether the speakers' purpose focuses on sharing newsworthy information versus non-newsworthy information. The proper approach would take account of both aspects of the "offensiveness" inquiry—focusing not only on the nature of the information itself but also the purpose of the disclosure.

### B. *The Autobiographical Speech Justification*

When private information is disclosed publicly, therefore, the proper question is not simply whether the information was newsworthy—which is a constitutionally underinclusive inquiry—but whether there was a sufficient justification for the disclosure such that a reasonable person would not find its revelation highly offensive.<sup>295</sup> Taking into consideration the individual and public value of autobiographical speech, I propose that it is not highly offensive

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tastes or views, or perhaps on the basis of their dislike of a particular expression").

292. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (noting the dangers of allowing judges to assess the value of pictorial illustrations). The *Bleistein* Court stated:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.

*Id.*

293. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

294. See Solove, *supra* note 9, at 1019 ("In addition to examining the relationships in which information is transferred, privacy law must also account for the uses to which it is put.").

295. See *supra* Part IV.A.2 (discussing the requirements and purpose of the newsworthiness exception).

to have personal information revealed when that information is substantially related to the speaker's autobiographical purpose. In the context of core autobiographical speech, much like in the context of newsworthiness, the privacy interest should yield to the speech interest if the speech is truly autobiographical and if the information is substantially linked to this autobiographical purpose. If, however, the privacy interest is high, yet the autobiographical interest is tangential or minimal, then there is room for the privacy interest to prevail.

In determining the autobiographical justification of the speech, two inquiries should be made that are drawn, in part, from the case law discussing "newsworthiness." Was the speech, as a whole, truly autobiographical? And, if so, was the personal information, including the person's actual name and identifying information, sufficiently related to the autobiographical purpose of the speech to warrant the invasion of privacy?

### 1. *Does the Speech Have an Autobiographical Purpose?*

To discern whether one person's speech justifies violating another person's information privacy because of its autobiographical purpose, the first matter to resolve is whether the speech at issue is indeed autobiographical. Just as "all information is arguably 'newsworthy,'"<sup>296</sup> or "political,"<sup>297</sup> virtually all speech can be described in some manner as "autobiographical." A news reporter who overhears an account of the stranger's sexual tryst, for example, logically could argue that that account is now part of his life story. Such a broad definition of "autobiographical," however, trivializes the unique and valuable category of speech that deserves protection.

Any attempt to define a category of speech is difficult and destined to be imprecise. The definition of "political" speech, for example, which is famously declared to be at the core of the First Amendment,<sup>298</sup> is still much-debated and subject to ongoing refinement. This is, as Lawrence Lessig described, "the contingency of present First Amendment doctrine."<sup>299</sup> The problems with

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296. Zimmerman, *supra* note 102, at 351.

297. West, *supra* note 12, at 924–26.

298. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("'Political speech,' of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))); see also West, *supra* note 12, at 957 n.316 ("'[T]here is a practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

299. Lawrence Lessig, *The Path of CyberLaw*, 104 YALE L.J. 1743, 1753 (1995).

defining autobiographical speech are no different. A definition that is too broad will protect more speech than is necessary to further the goals of autobiographical speech, while a definition that is too narrow leaves valuable speech unprotected. Meanwhile, a definition that is too complex risks chilling speech, while one that is too simple might be imprecise and vague. These are the unavoidable intricacies of human communication, however, and must be accepted in order to proceed. With these caveats and limitations in mind, I offered in my earlier article this inaugural definition of autobiographical speech: "[A]utobiographical speech is speech that is substantially related to the story of the speaker's life and that a reasonable person would presume was communicated with the primary intent of sharing information about the speaker."<sup>300</sup>

This definition attempts to capture the speech that should be protected because of the value it contributes to the individual and to society while, at the same time, setting forth limiting principles to exclude speech that does not further these goals. The definition also pulls from existing case law.<sup>301</sup> The "substantially related" element requires that there be a significant nexus between the information communicated and the speaker's life."

My proposed definition, however, also includes elements that reflect the unique nature of autobiographical speech. For example, the definition requires the speech to be about "the story of the speaker's life." The value of autobiographical speech arises out of individuals choosing to truthfully share their life experiences. The further the speech strays from this core purpose, the less valuable it becomes as far as an instance of autobiographical speech.

Finally, the definition includes a requirement that "a reasonable person would presume [the speech] was communicated with the primary intent of sharing information about the speaker."<sup>302</sup> An inquiry into the intent of the speaker can be a controversial proposition and, in some cases, the Supreme Court has rejected this approach. In a criminal libel case, for example, the Supreme Court rejected a standard found in many state laws, which limited the defense of truth to only those "utterances published 'with good motives and for justifiable ends.'"<sup>303</sup> The Court explained that public discourse will be harmed if a speaker "must run the risk that it will be proved in court that he spoke out

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300. *Id.*

301. *See id.* ("This is borrowed in part from the law of privacy torts, which protects the publication of facts that are substantially related to topics that are newsworthy or in the public interest in order to prevent 'a morbid and sensational prying into private lives for its own sake.'" (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977))).

302. *Id.* at 960.

303. *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964) (citations omitted).

of hatred."<sup>304</sup> The Court further noted that "even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."<sup>305</sup> Likewise, the Court stated in a campaign finance case that it is inappropriate to have a test based on the speaker's intent because it "could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."<sup>306</sup> The Court further explained that "'First Amendment freedoms need breathing space to survive.' An intent test provides none."<sup>307</sup> Martin Redish agrees, claiming that "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."<sup>308</sup>

In other areas of speech, however, the Court repeatedly has allowed an inquiry into the intent of the speaker to determine whether certain speech was part of a constitutionally protected category. When faced with speech that is arguably an unlawful incitement of violence, for example, the Court looks to whether the advocacy was "directed to inciting or producing imminent lawless action."<sup>309</sup> In defamation cases, the Court will decide whether a false statement was made knowingly or not,<sup>310</sup> and a speaker's "economic motivation" is a factor in determining whether speech can be qualified as "commercial."<sup>311</sup> In determining whether a public employee's speech is protected, the Court will look to the purpose of the speech. The Seventh Circuit interpreted the Court's test in *Connick v. Myers*<sup>312</sup> as stating that "[t]he test requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private

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304. *Id.* at 73.

305. *Id.*

306. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007).

307. *Id.* at 469 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

308. MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 91 (2001).

309. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

310. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . .").

311. *Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (Cal. 2002).

312. *See id.* at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

interest?"<sup>313</sup> The Court has declared that a "true threat," moreover, "encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>314</sup> The Court also examined the speaker's motive when determining whether government speech violates the Establishment Clause.<sup>315</sup> The Court explained:

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. . . . Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.<sup>316</sup>

As discussed above, when individuals choose to speak truthfully and publicly about their life experiences, their speech contributes significantly to the public discourse and to their own personal growth.<sup>317</sup> It is these unique values of intentional autobiographical speech that my work is attempting to protect. Of course, speech undertaken for non-autobiographical purposes may well be constitutionally protected, as the newsworthiness precedents reveal.<sup>318</sup> In addition, a privacy challenge might fail because it cannot establish all elements of the claim.<sup>319</sup> Those matters are outside the scope of this Article. For my purposes, an inquiry into the intent of the speaker is helpful and,

313. *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985); *see also* *Martin v. Parrish*, 805 F.2d 583, 585–86 (5th Cir. 1986) ("Appellant has not argued that his profanity was for any purpose other than cussing out his students . . . to 'motivate them' . . . . [The] language is unprotected . . . because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification."); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995) ("The court must ask to what purpose the employee spoke.").

314. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

315. *See* *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (discussing whether a "secular purpose" existed for including a nativity scene in a city's Christmas display).

316. *Id.* at 690; *cf.* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1995) (suggesting that the definition of political speech is "when it is both intended and received as a contribution to public deliberation about some issue").

317. *See supra* Part II.A (arguing that autobiographical speech is worthy of protection because among other things, it contributes to the public discourse).

318. *See, e.g.,* *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("People who do not desire the limelight . . . have no legal right to extinguish it if the experiences that have befallen them are newsworthy . . .").

319. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

indeed, indispensable, in identifying the types of speech that are most deserving of protection.

The intent of the speaker can be analyzed in two ways—subjectively and objectively. A subjective approach would look to the actual intent of the speaker regardless of how the speech was perceived by her audience.<sup>320</sup> Because of the inherent difficulty in discerning someone's thoughts, a subjective intent test most likely would require courts or juries to defer to the speaker's representation of whether the intent was autobiographical or not.

When it comes to deciding whether disclosure of a private fact is newsworthy, many courts simply defer to the media.<sup>321</sup> This approach has been both lauded<sup>322</sup> and criticized.<sup>323</sup> Deferring to the media to tell us what is and is not newsworthy has its advantages. Most notably, it keeps the courts out of the business of deciding the value of speech and making decisions that could amount to judicial censorship.<sup>324</sup> The media, it is assumed, has outside pressures from its readers, viewers, and listeners to report on only matters that are of public interest, otherwise their business will fail.<sup>325</sup> These checks on the media might be insufficient when, however, "[w]hat is of interest to most of society is not the same question as what is of legitimate public concern."<sup>326</sup> Warren and Brandeis most certainly would not have supported a "defer to the

320. See BLACK'S LAW DICTIONARY 1441 (8th ed. 2004) (defining the subjective standard as "[a] legal standard that is peculiar to a particular person and based on the person's views and experiences").

321. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) ("To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined [newsworthiness], as a glance at any morning paper will confirm."); Kalven, *supra* note 63, at 336 ("[S]urely there is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness."). But see Gajda, *supra* note 239, at 1072 (arguing that "the modern position of deference to journalists in the legal definition of newsworthiness, especially in publication privacy cases" has been weakening in recent years).

322. See Volokh, *supra* note 20, at 1089 ("Under the First Amendment, it's generally not the government's job to decide what subjects speakers and listeners should concern themselves with.").

323. See Solove, *supra* note 9, at 1008 (stating that "the media should not have a monopoly on determining what is of public concern").

324. See *Heath v. Playboy Entm't*, 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990) ("[W]hat is newsworthy is primarily a function of the publisher, not the courts."). The Fifth Circuit has explained that judges "must resist the temptation to edit journalists aggressively. . . . Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists." *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989).

325. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (stating that privately owned newspapers are checked by "the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success").

326. Solove, *supra* note 9, at 1003.

media" approach; they had little faith in the press's ability to know the line.<sup>327</sup> They complained that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious but has become a trade, which is pursued with industry as well as effrontery."<sup>328</sup>

Deferring to the autobiographical speaker to tell us whether speech is or is not a necessary part of their life story is similarly flawed. Indeed, the potential pitfalls of deferring to the speaker only intensify with autobiographical speakers, who may lack profit motives and have no pressure to self-regulate.

For these reasons, an objective intent standard provides the proper approach for dealing with autobiographical speakers. A standard that asks whether a reasonable person would conclude that the speaker's primary intent was to share information about the speaker effectively captures the speech that furthers the valuable contributions of autobiographical speech while excluding speech that, while arguably autobiographical, was spoken for an ulterior motive. This approach also guards against efforts by speakers purposely to inflict emotional harm on others by revealing personal information while attempting to hide behind the "autobiographical speech" defense.

## *2. Is the Identifying Information Necessary to Further the Autobiographical Purpose?*

Just because the speech is primarily autobiographical does not necessarily suggest that someone should be free to broadcast another person's personal information with impunity. The second part of the inquiry thus examines whether the information is sufficiently linked to the autobiographical purpose to warrant the invasion of privacy. More specifically, when are the plaintiff's name and other identifying information necessary to further the autobiographical purpose of the speech?

There is much to be drawn here from the courts' current approaches to the newsworthiness inquiry, because many courts have demanded that there be a link between the privacy plaintiff's personal information and the overall "newsworthiness" of the speech before allowing the exemption. The Fifth and Tenth Circuits, for example, ask whether "a logical nexus exist[s] between the complaining individual and the matter of legitimate public interest."<sup>329</sup>

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327. See Warren & Brandeis, *supra* note 24, at 196 (discussing the press's use of salacious details in its stories).

328. *Id.*

329. *Id.*; see *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 309 (10th Cir. 1981) (requiring

Sometimes the inquiry is whether the private fact itself was a necessary part of the overall newsworthy story.<sup>330</sup> But more often the question is whether the plaintiff's name, photograph, or other identifying information was sufficiently relevant to the newsworthiness of the speech to justify the intrusion on the plaintiff's privacy. The California Supreme Court, for example, asks whether the private facts disclosed by the speaker "were substantially relevant to the segment's newsworthy subject matter."<sup>331</sup>

Frequently, courts have concluded that while the information in general was newsworthy, the plaintiff's identifying information was not.<sup>332</sup> In one of the most famous personal information cases, *Melvin v. Reid*,<sup>333</sup> the California Court of Appeals said that it was the use of the plaintiff's "true name in connection with the true incidents from her life" that crossed the legal line of privacy.<sup>334</sup> Merely using "those incidents from the life of appellant which were spread upon the record of her trial," however, would not give rise to a cause of action.<sup>335</sup> In *Briscoe v. Reader's Digest Association*,<sup>336</sup> the California Supreme Court held in similar fashion that "reports of the facts of past crimes are newsworthy,"<sup>337</sup> but "identification of the actor in reports of long past crimes usually serves little independent public purpose."<sup>338</sup>

At times, however, courts have concluded that the media need to use actual names and identifying information in order to substantiate their reporting and thus "strengthen the impact and credibility of the article."<sup>339</sup> The Tenth

either "independent newsworthiness or any substantial nexus with a newsworthy topic").

330. See, e.g., *Nobles v. Cartwright*, 659 N.E.2d 1064, 1076 (Ind. Ct. App. 1995) ("When dealing with the disclosure of such allegedly 'private' fact about a plaintiff, courts generally require an appropriate nexus or some sufficient degree of relatedness between the fact or information disclosed and a matter which was . . . of legitimate public interest.").

331. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 488 (Cal. 1998).

332. See Jared Lenow, Note, *First Amendment Protection for the Publication of Private Information*, 60 VAND. L. REV. 235, 272 n.152 (2007) (gathering cases).

333. *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931) (finding that the use of "unsavory" incidents in appellant's past life was not justified and was an invasion of appellant's right "to pursue and obtain happiness").

334. *Id.*

335. *Id.*

336. See *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43-44 (Cal. 1971) (finding that a complaint alleging that plaintiff's name was published in connection with criminal activity eleven years after plaintiff's involvement stated a cause of action).

337. *Id.* at 39.

338. *Id.* at 40.

339. *Gilbert v. Med. Econs. Co.*, 665 F.2d 305, 308 (10th Cir. 1981); see also *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989) (finding that reporting the identity of an alleged rape victim was of "unique importance to the credibility and persuasive force of



Circuit, for example, said that using a plaintiff's photograph and actual name established that the issue was not merely hypothetical and "provid[es] an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed."<sup>340</sup> The Fifth Circuit agreed, stating that "[t]he infamous Janet Cooke controversy (about the fabricated, Pulitzer-Prize winning Washington Post series on the child-addict, Jimmy) suggests the legitimate ground for doubts that may arise about the accuracy of a documentary that uses only pseudonyms."<sup>341</sup>

The analysis of when use of someone's actual name or other identifying information is sufficiently linked to the autobiographical purpose of the speech is very similar to the newsworthiness inquiry.<sup>342</sup> In some cases, the use of this identifying information is only tangentially related to the autobiographical nature of the speech, so that requiring the speaker to omit it would not significantly affect the speaker's autobiographical goals. Yet, in other cases, asking the speaker to leave out this information would so fundamentally alter the story that the speaker no longer would be accounting truthfully about her life experiences, or the omission could give the appearance that her story is fabricated.

The most common way to shield a plaintiff's identity would be for the speaker to use a pseudonym. One problem with requiring the use of pseudonyms is that they are not always effective. Consider the subject of Judge Posner's decision in *Haynes v. Alfred A. Knopf, Inc.*<sup>343</sup>—Ruby Lee Daniels. She was the protagonist of author Nicholas Lemann's historical study of the black migration north in his book, *The Promised Land*.<sup>344</sup> Daniels spoke to the historian about her personal experiences willingly and truthfully.<sup>345</sup> She told of the disastrous effects of the government's policies on her relationship with her then-husband Luther Haynes.<sup>346</sup> In his analysis, Judge Posner discussed the possibility that Lehman could have used a pseudonym instead of Haynes's real

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the story"); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 303 (Iowa 1979) (finding that the use of actual names of persons who were involuntarily sterilized "strengthen[ed] the accuracy of the public perception of the merits of the controversy").

340. *Gilbert*, 665 F.2d at 308.

341. *Ross*, 870 F.2d at 274.

342. *See, e.g., Gilbert*, 665 F.2d at 309 (requiring "either independent newsworthiness or any substantial nexus with a newsworthy topic").

343. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993).

344. NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (Vintage Books 1991).

345. *Haynes*, 8 F.3d at 1227.

346. *Id.* at 1230.

name.<sup>347</sup> But the effort, Judge Posner concluded, would have been futile.<sup>348</sup> He explained: "The details of the Hayneses' lives recounted in the book would identify them unmistakably to anyone who has known the Hayneses well for a long time (members of their families, for example), or who knew them before they got married . . . ."<sup>349</sup>

Indeed, the scenario Judge Posner described is precisely what occurred in *Bonome v. Kaysen*.<sup>350</sup> In that case, the author Susana Kaysen did not reveal her live-in boyfriend's name, but rather referred to him throughout the book simply as "my boyfriend."<sup>351</sup> She also changed certain potentially identifying information about him such as his occupation and hometown.<sup>352</sup> Despite these efforts to hide his identity, her boyfriend's friends, family, and business contacts were able to identify him as the person depicted in the book.<sup>353</sup>

Thus, in some cases the use of pseudonyms will not be effective because too many people will be able to identify the plaintiff. In order to hide the plaintiff's identity successfully, the speaker would need to change numerous details about the person and the incident being discussed. But such significant alteration of identifying information could alter the speaker's true story so much that it becomes more fabrication than fact. Judge Posner came to this conclusion in the *Haynes* case, noting that forcing an historian to change identifying information about one of his subjects would mean that eventually "he would no longer have been writing history. He would have been writing fiction."<sup>354</sup>

If a requirement to conceal all potentially identifying information about the plaintiff is taken too far, moreover, there is a risk that the autobiographical speaker will be unable to tell her story at all. Again, this was the case with *Kaysen*.<sup>355</sup> She wished to write about the effects that her medical condition had on her long-term, intimate relationship with her former boyfriend.<sup>356</sup> Yet there was really no way for her to tell this part of her life story without disclosing at

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347. *Id.* at 1233.

348. *Id.*

349. *Id.*

350. *See Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*1 (Mass. Super. Mar. 3, 2004) (reviewing an invasion of privacy action against an author of a memoir).

351. *Id.*

352. *Id.*

353. *Id.* at \*2.

354. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993).

355. *See Bonome*, 2004 WL 1194731, at \*4–5 (balancing the plaintiff's interest in privacy with the defendant's First Amendment rights).

356. *Id.* at \*2.

least some identifying information about him. If she faced liability for including any potentially identifying information, then she would likely be forced not to speak at all.<sup>357</sup>

Thus, in some autobiographical speech cases there will be a legitimate autobiographical purpose and no effective way to conceal the plaintiff's identity without compromising the speaker's ability to tell her story. In these cases, the autobiographical speaker's right to speak truthfully must prevail. But there remain other instances where the use of pseudonyms or altered identifying information would be effective at protecting the plaintiff and the changes would not interfere significantly with the autobiographical nature of the speech. These are the cases where the plaintiff's privacy interest can and should be recognized and given force.

Take, for example, the Capitol Hill staffer Jessica Cutler.<sup>358</sup> While she attempted to hide the identities of the men in her life by not using their names and by writing anonymously, her efforts were exceedingly simple and easily decipherable.<sup>359</sup> She used their real initials and offered bits of information about their jobs, religions, and families.<sup>360</sup> This proved to be sufficient information for amateur internet sleuths to uncover the identities of the men.<sup>361</sup> The identifying information was not necessary to Cutler's autobiographical purpose of sharing her myriad relationship experiences. Indeed, it is possible that she could have hidden their identities even if she had not written anonymously.<sup>362</sup> A standard that looks to whether the identifying information was necessary for the speaker to tell her story will require speakers like Cutler to be more diligent about protecting the identities of those they discuss. But it also protects speakers *ex ante*, thus reducing the risk of a chilling effect, if they take steps to reveal only identifying information that is necessary to tell their

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357. *See id.* ("Because the First Amendment protects Kaysen's ability to contribute *her own* personal experiences to the public discourse on important and legitimate issues of public concern, disclosing Bonome's involvement in those experiences is a necessary incident thereto.").

358. *See* The Story of the Washingtonienne, *supra* note 48, at (May 5, 2004, 5:32 p.m.) (republishing the Washingtonienne blog created by Jessica Cutler).

359. *See id.* at (May 11, 2004, 2:21 p.m.) (describing each man by their initials and nature of their employment).

360. *Id.*

361. *See* April Witt, *Blog Interrupted*, WASH. POST MAG., Aug. 15, 2004, at 13–14 (describing how "amateur Internet sleuths . . . searched electronic databases looking for likely suspects, then posted names and photographs on the Internet").

362. *See* Solove, *supra* note 64, at 1199 ("Jessica certainly has a right to speak about her life, but she should do it more carefully by concealing the identities of the people she blogs about.").

story. The end result is that the plaintiffs' privacy interests are protected yet the speakers still can share their stories.

Whether a speaker takes steps to conceal identifying information about others can play another important role in this analysis by providing insight into the speaker's intent.<sup>363</sup> Efforts by the speaker to hide the plaintiff's identity, whether successful or not, can show that the speaker's primary intent was to share information about himself and not about the plaintiff. The Kaysen case is, again, an example.<sup>364</sup> Susana Kaysen could not completely conceal her former boyfriend's identity and still tell her story, but she nonetheless chose to reveal only the smallest amount of identifying information about him that was necessary.<sup>365</sup> Her efforts suggest that it was not her intent to expose him or subject him to "unnecessary publicity or attention."<sup>366</sup> The court in *Bonome v. Kaysen* recognized the importance of Kaysen's choices and noted that Kaysen's efforts to conceal his identity reduced the extent of his exposure and, therefore, the harm to him.<sup>367</sup>

Thus, in addition to establishing whether the speaker was speaking with an autobiographical purpose, courts should inquire whether the use of the plaintiff's name or other identifying information was necessary to further that purpose. If it is not necessary, the burden can be placed on the speaker to take efforts to conceal the plaintiff's identity. Using the speaker's efforts to hide the plaintiff's identity as evidence of a true autobiographical intent, moreover, will incentivize speakers to reveal only identifying information if it is necessary for them to tell their story.

### *C. The Benefits of the Justified Disclosure Approach*

The justified disclosure approach picks up where the current legal system and other potential frameworks break down. Under current law, there is a risk that many truthful autobiographical stories will be silenced because of an overemphasis on the "newsworthiness" inquiry.<sup>368</sup> Identifying these speakers,

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363. See *supra* Part IV.B.1 (discussing the relevance of the speaker's intent with respect to an autobiographical purpose).

364. See *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*1 (Mass. Super. Mar. 3, 2004) (explaining that Kaysen did not reveal her boyfriend's name in her book but referred to him only as her "boyfriend" as well as changing his hometown and occupation).

365. *Id.*

366. *Id.* at \*7.

367. *Id.*

368. See *supra* Part II.C (examining the overemphasis on "newsworthiness" in the tort of public disclosure of private facts).

while excluding those with non-autobiographical motives, protects both their constitutional rights and their unique contributions to the public discourse. This approach, however, leaves room to recognize the privacy interests of individuals who could be harmed by unwanted publicity in cases where the speech was not primarily autobiographical or where their identities were not necessary to the autobiographical purpose of the speech.

The traditional focus on "newsworthiness" when dealing with public disclosure cases allows courts to punish truthful, but non-newsworthy, autobiographical speech—an approach that is constitutionally unsound.<sup>369</sup> Because the Constitution does not exclude all non-newsworthy speech from the protections of the First Amendment, adhering to the "newsworthiness" framework could be fatal for the tort. The justified disclosure approach, however, solves this problem by separating the constitutionally valuable speech from the more harmful unjustified disclosures. This analysis is in line with the majority of the case law in which courts have concluded that it is not "highly offensive" under the tort to have personal information disclosed if it is for a sufficient reason.<sup>370</sup>

Through their interpretation of what is "highly offensive" to a reasonable person, courts are reflecting community norms and expectations. The courts have concluded, for example, that it is highly offensive to have personal information revealed for purely voyeuristic reasons.<sup>371</sup> In this way, the justified disclosure approach has many of the same benefits of Richards's and Solove's duty of confidentiality framework.<sup>372</sup> Yet it also has the advantage of being more predictable *ex ante* than the complex, fact-based analysis that is inherent

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369. See *supra* Part II.C (arguing that the tort of public disclosure of private facts may be in violation of the Constitution because free speech is left unprotected).

370. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) (finding newsworthiness might be a sufficient justification for public disclosure of "highly offensive" information); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1190 (D. Ariz. 1998) (suggesting that if "offensive" information is newsworthy, it might "mitigate the offensiveness of the intrusion"); *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*7 (Mass. Super. Mar. 3, 2004) (finding that "offensive" personal information may be revealed if it shares a nexus with a matter of legitimate public concern); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (concluding that an invasion of a person's privacy might be less "offensive" when done "in pursuit of a socially or politically important story").

371. See, e.g., *Haynes*, 8 F.3d at 1232 (identifying the appropriate goal as preventing "the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger").

372. See Richards & Solove, *supra* note 201 (arguing that courts should impose a duty of confidentiality on intimate relationships to resolve disputes regarding embarrassing information acquired during the relationship).

in a duty of confidentiality framework.<sup>373</sup> It involves only a two-step inquiry into the objectively autobiographical intent of the speaker and the link between the plaintiff's identity and the autobiographical purpose of the speech. A would-be autobiographical speaker, moreover, can protect himself *ex ante* by taking every reasonable step to conceal the identities of others and only reveal as little personal information about others as is necessary to tell his story. This approach is also arguably fairer because no factfinder will have the power to judge the value of the speech—only whether the identifying information was necessary to further an objectively autobiographical purpose.

And while the justified disclosure approach favors the speaker, it remains respectful of the significant information privacy interest at stake and provides real, if limited, privacy protection. Privacy plaintiffs can prevail under this framework if they can establish that the disclosure of their personal information was unjustified and thus highly offensive or, in the case of autobiographical speech, if they can show that their identifying information was not necessary to further the autobiographical purpose.

This Article is focused on resolving the autobiographical speech versus information privacy conflict, but the justified disclosure approach promises to be useful in a number of speech-versus-privacy disputes. Its focus on the reason for the disclosure and its goal of identifying and punishing emotionally harmful yet unjustified disclosures such as pure voyeurism potentially has a much broader application.

### V. Conclusion

There are few things more valuable to human beings than our own life experiences—they embody our fondest memories, our deepest shames, our greatest fears and our most enduring loves. We all wish to control these stories and decide for ourselves if, when, how, and to whom they will be revealed. Some of us find it cathartic to share them broadly, while others of us wish to hold them close. Sometimes these conflicting desires are irreconcilably at odds.

The best approach to the autobiographical speech versus information privacy dilemma is to recognize the inherent value of speaking about life experiences while, at the same time, remaining aware of the potential harms some public disclosures bring. Both autobiographical speech and information privacy promote individual autonomy and foster our democracy. Yet prior

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373. *See id.* at 157 ("Courts have found the existence of such a duty [of confidentiality] by looking to the nature of the relationship between the parties, by reference to the law of fiduciaries, or by finding an implied contract of confidentiality.").

attempts to balance the two significant interests have failed. Privacy and speech are not property rights that we own, sell, and trade. And it would be a complicated legal fiction to say that we have undeclared contracts with each other about when to speak and when to stay quiet.

What we do have, however, are shared understandings about when it is acceptable to disclose personal information about others and when it is highly offensive. The courts, through an interpretation of the tort of public disclosure, have begun to recognize this by declaring that it is not highly offensive to a reasonable person to have private information revealed for a sufficient justification. Pure voyeurism, the courts have concluded, is not a sufficient reason to inflict the emotional harm of a public disclosure on an individual.<sup>374</sup> Sharing newsworthy information is a sufficient justification as is, I submit, engaging in truthful autobiographical speech. In addition to resolving the autobiographical speech versus information privacy face-off, this approach promises to be applicable to a broad range of speech versus privacy disputes.

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374. See, e.g., *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (observing that disclosures that satisfy nothing more than "prurient curiosity" are not protected).

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# NOTES

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