Privacy, Speech, and the Law[1]

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If we assume that individuals have *moral* rights to free speech, and that privacy may restrict such expression, then there appears to be a conflict of rights—a conflict where speech or expression may trump privacy concerns. For example, when a musician offers up a song about a romantic affair for public consumption, privacy rights may run headlong into speech and expression rights. Andrew McClurg has noted that judges are not willing to protect privacy if doing so threatens free speech: "Of the forty-nine invasion of privacy cases reported by state courts in 1992, trial courts granted summary judgment to the defendant in twenty-one of the cases and granted the defendant's motion to dismiss the complaint in fifteen of the cases. In other words, in thirty-six of the forty-nine cases (73 percent) trial judges deprived plaintiffs the opportunity to have their privacy claims heard by a jury."[2] McClurg also mentions that the situation is nearly identical in the federal courts.[3]

On the other hand, privacy and free expression may be mutually reinforcing. Anonymous communication, online or otherwise, allows individuals to express themselves freely without fear of censure. Citing precedents dating back to the 1950s, Nadine Strossen, former president of the American Civil Liberties Union, writes, "In all these cases, the Court has recognized that without the cloak of anonymity, many individuals simply will not exercise their First Amendment rights. They will not freely associate with controversial organizations, nor will they express controversial ideas or discuss sensitive subjects."[4] Privacy also reinforces free speech by supporting access to information. When Virginia mandated blocking software to deny access to pornographic materials online and required permission and public disclosure to turn off the blocking

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software, free speech was threatened. Professors and researchers across numerous disciplines were loath to disclose the subject matter of their studies—especially when such disclosures would occur "piecemeal" and unaccompanied by the final written document.[5]

While privacy may strengthen speech or expression in some instances, it seems that in most cases there is conflict. Do we have a right to know the names of rape victims or the sexual preferences of citizens who act heroically? Are the daily events of politicians or entertainers newsworthy? Is privacy less important than freedom of speech? My answer is "no" to each of these questions. In this article I will argue that upon careful analysis there is little conflict between privacy and expression in the *moral* realm. Moreover, if legal systems are to reflect, promote, or protect basic rights, then it is not so clear that speech should nearly always trump privacy. The ascendancy of speech protection in the legal realm, I argue, is due to an expansive and unjustified view of the value or primacy of free expression—this is perhaps understandable, given that privacy has been understood as a mere interest, whereas speech rights have been seen as more fundamental. I have argued elsewhere that this view of privacy is false—privacy, properly defined, is a necessary condition for human well-being or flourishing.[6] Part I will provide an overview of the moral foundations of privacy—while brief, the goal is to establish the claim that privacy is more than a mere interest. Part II will consider several arguments—or strands of argument—purporting to justify free speech rights. While these arguments, taken together, establish that free speech is important, they do not support the view that speech should nearly always trump privacy. In Part III, I will suggest a way to balance free speech and privacy claims in the law.

Part I: Establishing a Moral Presumption in Favor of Privacy

I favor what has been called a "control" based definition of privacy. Privacy is the right to control access to, and uses of, personal information and spatial locations.[7] Privacy may be understood as a right to control both tokens and types. In terms of tokens, privacy yields control over access to one's body, capacities, and powers. A privacy right in this sense is a right to control access to a specific token or object. But we may also control access to sensitive personal information about ourselves. In this sense a privacy right affords control over types or ideas. For example when a rape victim suppresses the dissemination of sensitive personal information about herself, she is exercising a right to control a set of ideas no matter what form they take. It does not matter if the information in question is written, recorded, spoken, or fixed in some other fashion.

To get a sense of the importance of privacy and separation it is helpful to consider similar interests shared by many non-human animals. While privacy

rights may entail obligations and claims against others—obligations and claims that are beyond the capacities of most non-human animals—a case can still be offered in support of the claim that separation is valuable for animals. Even though privacy may be linked to free will, the need for separation provides an evolutionary first step. Perhaps it is the capacity of free will that changes mere separation into privacy. Alan Westin in *Privacy and Freedom* notes,

> One basic finding of animal studies is that virtually all animals seek periods of individual seclusion of small-group intimacy. This is usually described as the tendency toward territoriality, in which an organism lays private claim to an area of land, water, or air and defends it against intrusion by members of its own species.[8]

More important for our purposes are the ecological studies demonstrating that a lack of private space, due to overpopulation and the like, will threaten survival. In such conditions animals may kill each other or engage in suicidal reductions of the population.

Given that humans evolved from non-human animals, it is plausible to think that we retain many of the same traits. For example Lewis Mumford notes similarities between rat overcrowding and human overcrowding. "No small part of this ugly urban barbarization has been due to sheer physical congestion: a diagnosis now partly confirmed by scientific experiments with rats—for when they are placed in equally congested quarters, they exhibit the same symptoms of stress, alienation, hostility, sexual perversion, parental incompetence, and rabid violence that we now find in Megapolis."[9] These results are supported by numerous more recent studies.[10] Overcrowding in prisons has been linked to violence,[11] depression,[12] suicide,[13] psychological disorders,[14] and recidivism.[15] If so, like other basic requirements for living, we may plausibly conclude that privacy is valuable.

Having said something about what a right to privacy is and why it is valuable we may ask how privacy rights are justified.[16] A promising line of argument combines notions of autonomy and respect for persons. A central and guiding principle of western liberal democracies is that individuals, within certain limits, may set and pursue their own life goals and projects. Rights to privacy erect a moral boundary that allows individuals the moral space to order their lives as they see fit. Clinton Rossiter puts the point succinctly:

> Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of the modern society.... It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.[17]

Privacy protects us from the prying eyes and ears of governments, corporations, and neighbors. Within the walls of privacy we may experiment with new ways of living that may not be accepted by the majority. Privacy, autonomy, and sovereignty, it would seem come bundled together.

A second but related line of argument rests on the claim that privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If individuals have rights to control personal information and to limit access to themselves within certain constraints, then the kinds of oppression that we have witnessed in the twentieth century would be nearly impossible. Put another way, if oppressive regimes are to consolidate and maintain power, then privacy rights, broadly defined, must be eliminated or severely restricted. If correct, privacy rights would be a core value that limits the forces of oppression.[18]

Arguably any plausible account of human well being or flourishing will have as a component a strong right to privacy. Controlling who has access to ourselves is an essential part of being a happy and free person. This may be why "peeping Toms" are held up as moral monsters—they cross a boundary that should never be crossed without consent.

Surely, each of us has the right to control our own thoughts, hopes, feelings, and plans, as well as a right to restrict access to information about our lives, family, and friends. I would argue that what grounds these sentiments is a right to privacy—a right to maintain a certain level of control over personal information. While complete control of all our personal information is a pipe dream for many of us, simply because the information is already out there and most likely cannot or will not be destroyed, this does not detract from the view of personal information ownership. Through our daily activities we each create and leave digital footprints that others may follow and exploit—and that we do these things does not obviously sanction the gathering and subsequent disclosure of such information by others.

Whatever kind of information we are considering there is a gathering point that individuals have control over. For example, in purchasing a new car and filling out the car loan application, no one would deny we each have the right to demand that such information not be sold to other companies. I would argue that this is true for any disclosed personal information whether it be patient questionnaire information, video rental records, voting information, or credit applications. In agreeing with this view, one first has to agree that individuals have the right to control their own personal information—i.e., binding agreements about controlling information presuppose that one of the parties has the right to control this information. If all of this is correct, then we have a fairly compelling case in support of the view that individuals have moral claims to control access to specific places and things and also to certain kinds of information—i.e., we have established a presumption in favor of privacy.[19]

Part II: Establishing a Moral Presumption in Favor of Speech and Expression

I am always surprised when legal scholars talk of the value of speech or privacy without giving any analysis of the concept of value they are employing. My surprise grows as these same scholars move from *value* claims to *ought* claims—as if the one automatically follows from the other. Balancing free speech and privacy at the legal level without providing foundations for these values and obligations leaves the entire enterprise hanging in thin air. Paraphrasing Jeremy Bentham, such views appear to be "nonsense on stilts."[20]

The American system of government can be understood as a method of maximizing social utility within certain constraints. Thus it may be the case that some rights exist independent of governments, while others are simply created by governments or institutions. The first may be called "bottom-up" rights; the second "top-down" rights. Privacy rights are bottom-up because they exist independent of government or societal institutions. Many have claimed that intellectual property rights are top-down rights because they are created by an act of the state and do not exist prior to or independent of government.[21]

If we take the position that freedom of expression is a top-down right created and dependent on government or society, then it would seem that privacy rights advocates have won an important battle. For while it is the case that we sometimes sanction the overriding of basic rights in the name of social utility, the cases are rare and the burden of proof high. The right to property, for example, is a basic right; eminent domain laws place the burden of showing need on those who would override it, require just and fair compensation for the taking, and give the property owner recourse to the courts if she thinks she has been unjustly treated.[22] Ratified in 1791, the Fifth Amendment of the Constitution holds that "[No person] ... shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Similarly, but not necessarily for the sake of promoting social utility, depriving an individual of life or liberty in terms of imprisonment or capital punishment puts the burden of proof squarely on those who would override these rights. Overriding basic rights within the Anglo-American tradition, or what I have called bottom-up rights, is serious business.

Viewing free speech rights as top-down, state-created entitlements and privacy rights as bottom-up, preexisting rights would turn much of the current debate between privacy rights and free speech on its head. Rather than talking about privacy limitations on speech with nearly all of the cards held by the speech side, we would have privacy holding nearly all the cards. In this case social utility advanced by free speech and eminent domain would be constrained by the more basic rights of privacy and property. More minimally, it would be odd to maintain that free speech and expression should nearly always trump privacy.

The legal right to free speech, on the other hand, might be a reflection of more basic moral norms. If individuals have moral rights to speech and expression, then the playing field will have been leveled — neither set of rights would be, by their nature, more fundamental or weighty. There are at least seven promising strategies for establishing speech rights. After briefly considering and dismissing the absolutist position with respect to free speech, I will present each of these strategies in turn. While brief, this analysis is important because it supports my claim that we should not view speech rights as more important or fundamental than privacy rights.

Absolutism versus Balancing: A False Dichotomy?

The free speech absolutist maintains that there should be no restrictions on speech or expression. On this view, speech is an absolute value that cannot be traded away or balanced against competing values. Justice Hugo Black wrote:

> It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be "absolutes." ... Our First Amendment was a bold effort to adopt this principle — to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny.[23]

Alexander Meiklejohn, in "The First Amendment Is an Absolute," refined the absolutist position in light of several obvious and devastating problems.[24] Quid pro quo sexual harassment, blackmail, extortion, false advertising, and the like cannot be defended on free speech grounds, Meiklejohn concludes, noting that "the First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we govern."[25]

The problem with Meiklejohn's view and this latter move is that the issue is merely sidestepped. It is not at all clear which thoughts and communications are necessary for self-government — or which expressions count as speech. Meiklejohn seems like less of an absolutist when he claims, "Congress may ... 'regulate' the activities by which the citizens govern the nation.... A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on.... We must recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment."[26] Some of these might be non-newsworthy speech that opens up private lives for public consumption, trade secrets and trademarks, or a "recipe" for creating an extremely lethal and easily transferable biological agent — I doubt that Justice Hugo Black would defend the expression or dissemination of such information. It would seem that absolutists do their balancing in coming up with the category of "speech"

or "protected speech" while the balancers, like Meiklejohn, adopt an expanded definition of speech and balance afterward. My proposal presented in Part III could be considered a way to define what counts as speech or as a method for determining the correct balance between speech and privacy.

Truth Discovery

Presumptive claims to free speech and expression are essential for truth discovery. John Stuart Mill argued, "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[27] If we view truth discovery as a social process whereby ideas are freely traded, checked, and analyzed, then we should view speech regulations with suspicion. No one is immune to error, and the "collision of ideas" associated with free speech is the best method we have for determining truth or warranted belief.

At best though, Mill's argument does not support the view that free speech is an overriding value—a value that trumps all others. As Sir James Fitzjames Stephen puts it, "If ... the object aimed at is good, if the compulsion employed such as to attain it, and if the good obtained overbalances the inconveniences of the compulsion itself, I do not understand how, upon utilitarian principles, the compulsion can be bad."[28] In short, other values or strategic rules—like privacy or security—may trump expression in certain cases. Moreover, it is questionable that in the "marketplace of ideas" the truth will win in the end. As a hypothetical case, suppose that God, of whatever form, does not exist. It is doubtful, given our propensity to believe, that truth will triumph over falsehood in this case, regardless of how much discussion we give to the topic.

A Check on Power

A third well-known argument supporting presumptive claims to free speech has to do with accountability and checks on those in power.[29] First, in having their actions scrutinized by a free press and a robust exchange of ideas, those in power are less likely to abuse power. Second, when an official does commit a crime or abuses power, the press may expose the wrong and force corrective actions to be taken. The sentiment of this view was captured nicely by Supreme Court Justice Louis Brandeis when he wrote, "A little sunlight is the best disinfectant."[30]

As with truth discovery, this argument does not support the view that free speech is an overriding value. A free press may indeed be an important check on governmental power, but freedom of the press does not have to be extended to sanction intrusions into the private lives of ordinary citizens. Furthermore, privacy itself may be an important check on governmental power and control.

Self-government

Free speech and expression are also important in relation to self-government and democracy — this is Meiklejohn's view. To be an active citizen and take part in public life, one must be informed about a wide range of issues, policies, and disputes. Conscientious voting, for example, requires information and understanding. Information access is also important for efficient and just democratic institutions.

An often-mentioned variation of Mill's consequentialist argument in favor of expression is that free speech is necessary for democracy and an open society. Representative government requires a robust information flow between voters and public officials. Moreover, suppression and censorship are typically practiced by those in power, and more often than not, in ways that extend, promote, and stabilize the prevailing power relations. A free press works as a check on government run amok and on other information sources.

Michael Curtis has argued convincingly that such considerations have been undermined by current mass-media practices.[31] Curtis notes that in the 1800s, the press provided a wide range of viewpoints, ownership was decentralized, and newspapers typically printed entire debates and covered political issues in great detail. In modern times, media is dominated by television and ownership has become centralized:

> At the end of World War II, 80 percent of American newspapers were independently owned. When Ben Haig Bagdikian published *Media Monopoly* (Beacon Press) in 1982, 50 corporations owned almost all of the major media outlets in the United States. That included 1,787 daily newspapers, 11,000 magazines, 9,000 radio stations, 1,000 television stations, 2,500 book publishers and seven major movie studios. By the time Bagdikian put out the revised edition in 1987, the number was down to 29 corporations. And now there are nine. They own it all.[32]

Moreover, unlike the media outlets of the 1800s, modern media sources devote an ever decreasing amount of time to political, philosophical, and theological positions and issues. "In 1968 the average presidential campaign sound bite on network news was forty-three seconds. In the 1996 election, it dropped to 8.2 seconds."[33] We hear less and less from the candidates themselves, and more from analysts and "talking heads," who focus on the polls and the "horse race"

rather than important content. For example, George W. Bush's arrest for drunk driving, an event that happened twenty-five years before the 2000 election, received more coverage than all the foreign policy issues combined.[34]

Curtis also notes that as serious news coverage has been replaced with trivial fluff, political advertising has increased. In lieu of getting their message out through news services, candidates simply buy television and radio time and fill the airways with political advertisements. This trend makes it difficult for newcomers to enter the political arena because of the vast amount of money needed to become noticed. Furthermore, a cozy relationship emerges between incumbents—who typically have less trouble raising the cash necessary to run a modern campaign—and media sources, which rake in billions in advertising revenue.

The situation appears worse when considering issues connected to corporate interests. Curtis continues: "When the tobacco industry decided to oppose the amended version of the McCain tobacco bill, the industry spent 35 million dollars in television ads attacking the bill. Viewers were regaled with pictures of a cuckoo bird coming out of a clock while an announcer solemnly announced that it was cuckoo time in Washington—with huge taxes on working people, 60 new bureaucracies, etc."[35]

While there were many inaccuracies and falsehoods in the advertisements, few media sources made note of them, and CNN, which aired most of the ads, failed to comment at all. As with paid political ads, the checking function of media outlets appears to be near nonexistent—although there is some hope that Internet-based sources will provide this service.[36] Curtis continues with case after case, each undermining the view that modern media practices provide a checking function against government and other media sources. If such contentions are plausible, then our modified version of Mill's argument is suspect.

For those who continue to doubt, consider the following thought experiment. Imagine a society with numerous media sources and no government restrictions on speech. Each source, however, decides to publish fluff and avoid political and philosophical issues. In this case, we could have total freedom of speech and shoddy democratic institutions built upon false information or no information. Unrestricted freedom of speech is not sufficient to guarantee a robust democracy. It is also not necessary. There are numerous restrictions on freedom of speech currently in place, and even more were in place in the 1800s, yet then and now, our democratic institutions seem fairly robust.

Advancing Autonomy and Promoting Tolerance

Like the self-government argument, the "advancing autonomy" argument holds that free speech is an important part of individual growth and self-realization. Forming our own beliefs, taking stands on issues we find important, and defending our commitments promote autonomy. The claim is not that

insisting on free speech will produce maximally autonomous individuals but that such policies will produce agents with more autonomy compared to systems where speech is suppressed.

Adopting a policy of free speech and expression also promotes tolerance in obvious ways. For example, when individuals are confronted with views, opinions, and ways of living that are different from their own, it is difficult to remain unhesitatingly sure of one's own views. It becomes even more difficult when those with foreign views are successful, happy, and well adjusted. Moreover, in dealing with others, friendships—or at least the basis of respect—will inevitably form.

As with the other views, these arguments do not support the claim that free speech is an overriding value. Privacy also promotes autonomy, toleration, and diversity. It is behind the walls of privacy that individuals grow and experiment with new ways of living. These differences provide the background for tolerance.

The Best Policy Argument

John Stuart Mill's "best policy" argument seeks to show that even if interference with liberty may, in principle, be justified, we ought on consequentialist grounds to adopt the sort of absolute principle he endorses. Mill says: "The strongest of all the arguments against the interference of the public with purely personal conduct is that when it does interfere, the odds are that it interferes wrongly and in the wrong place."[37] When government interferes with speech and expression, it will likely mess things up horribly. Thus, the best policy will be to severely restrict the government's role in this area.

But privacy advocates will quickly note that publishing or broadcasting sensitive personal information about others is not "purely personal conduct"—not on any defensible meaning of that phrase. It would seem that privacy is embedded in the notion of "the public" and "purely personal conduct." Moreover, consider Mill's harm principle: "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[18] If privacy is valuable, then speech that violates privacy may indeed harm—and if individuals have privacy rights, then the harm may be magnified. It seems that in the end Mill's arguments in support of free speech and expression will not provide the near absolute status that speech advocates desire. Mill's justification of moral rights to speech may provide a foundation for legal speech rights. Nevertheless, such justifications open up the possibility that free speech should be traded for more privacy.

The upshot of this discussion is that we should challenge the assumption

that expression is more valuable when compared to other values like privacy. It is not clear that any of the arguments given in support of free speech, taken individually or together, are strong enough to establish the claim that speech is more important than privacy or other important values like security or property.

Part III: Balancing Privacy and Free Speech

In determining the correct balance between free speech and individual informational privacy John Rawls's notion of placing individuals behind a veil of ignorance may be of some service.[39] Imagine that we are trying to determine if some bit of information unnecessarily crosses into private domains—here we are trying to produce a method that will mark appropriate from inappropriate domains of free speech and expression. Behind this veil of ignorance individuals do not know any specific facts about themselves, such as age, race, gender, political affiliation, life goals, profession, subjective desires, and the like. What individuals do know, however, is that freedom of expression is valuable and important for stable democratic institutions and that privacy is valuable and necessary for human flourishing. From this vantage point we can ask two important questions. What information is necessary for stable democratic institutions and what speech or expression violates informational privacy? Some may argue that these questions do not mark out distinct kinds—that is, some information may fall into both domains. For example, Republicans may argue that character is an important consideration related to stable democratic institutions, and thus the speech about former president Clinton's extramarital activity was justified. But the objectivity forced upon us by Rawls's veil of ignorance would seemingly rule out such reasoning. Countless personal vices have been a part of the political landscape at all levels of government since the founding of this country, and they have not destabilized its institutions in any obvious way. An elected official breaking the law would be another matter. To refine and further clarify this view, consider the following cases.

Case 1. *Cape Publications, Inc. v. Bridges*

> A woman is kidnapped, taken to an apartment, stripped, and terrorized. The police—and the media—surround the apartment. The police eventually overcome the kidnapper and rush the woman, who clutches a dish towel in a futile attempt to conceal her nudity, to safety. A photograph of her escape is published in the next day's newspaper. She sued for invasion of privacy and eventually lost the case.[40]

From an unbiased position we can easily split the information found in this case into two types. First, there is a host of information surrounding the good deeds and works of the police and other public officials. Facts like "the attacker

was subdued," "the victim was unharmed," and "the police lieutenant Jane Smith organized the rescue" are each appropriate items for publication and discussion. On the other hand, facts like the information found in the photo of the escape and the sex, name, address, and workplace of the victim and the names of the victim's family clearly invade private domains and are not obviously important in maintaining democratic institutions.

To put the point another way, if we were to consider this case from behind the veil of ignorance, remembering that privacy and speech are important human values, then perhaps an unbiased vantage point will have been obtained — we have no compelling need to access personal information about the victim.

Case 2. ***DeGregorio v. CBS, Inc.***

> Two construction workers, male and female, were walking hand in hand down Madison Avenue in New York City when they noticed that they were being filmed by a television crew. The couple told the television crew to stop filming, as they were both involved in other relationships. Nevertheless, the film aired twice on a CBS broadcast entitled "Couples in Love." The suit brought by the couple was dismissed. The court held that the subject matter — romance — was of public interest.[41]

Assuming that the identities of the couple were discernible from the footage, we may wonder what socially important information was being made available in this case. The idea that romance was alive and kicking in our society — hardly something that anyone would need convincing of — could have been conveyed without disclosing the identities of the individuals involved. Identifying markers could have been blurred or not shown at all. Moreover, the notion of "public interest" employed in the decision is troubling. It is as if the court reasoned that just because a bunch of people find romance interesting, content providers have a blank check on gathering and publishing such information — especially when the information is captured in a public setting.

Given that interests can be manipulated, manufactured, and arbitrary, it seems suspect at best to base law on such a test. Furthermore, such a test would allow the dissemination of information that has little to do with truth discovery, autonomy, self-government, or the other rationales for free speech.[42] Following *Paulsen v. Personality Posters*[43] the court in *DeGregorio* adopted an extremely liberal notion of "public interest," going well beyond what might be considered newsworthy.

> The scope of the subject matter which may be considered of "public interest" or "newsworthy" has been defined in most liberal and far-reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.

> An even more liberal view of the permissible limits of such privileged expression has recently been enunciated by the *United States Supreme Court in Time, Inc. v. Hill* (385 U.S. 374) which involved the application and construction of the New York "Right of Privacy" statute here relied upon. The court there made clear that such statute must be construed in light of the primacy of the far-reaching constitutional protections for speech and press which afford immunity even to false or fictional reports of matters of public interest unless published with knowledge of their falsity or in reckless disregard of the truth. Its expansive construction of the vast range of matter, both informative and entertaining and irrespective of timeliness or importance of the ideas seeking expression, which comes within the ambit of constitutional protection is consistent with its conviction that, "A broadly defined freedom of the press assures the maintenance of our political system and an open society" [*Time, Inc. v. Hill*].[44]

Clearly such an expansive definition of "public interest" and "newsworthiness" is not necessary for the maintenance of our political system or for an open society. No one would argue that the chilling effect of prohibiting certain kinds of speech and expression—such as sexual harassment, child pornography, and publishing trade secrets—undermines the stability of government and freedom of thought and discussion. Robust defenders of free speech would have us believe that each speech restriction erodes the very foundations of our society.

Arguably Western democracies promote open societies because such openness is thought to secure individual liberty and rights. A free press may be an essential check on government run amok, but when that power is used to open up private lives for public consumption, it would seem that privacy rights are violated, media agencies make money, certain individuals get a "gossip fix"—and nothing more.

Case 3. *Sipple v. San Francisco Chronicle Inc.* (1975)

> In a split second, a decorated Vietnam veteran deflects a gun aimed at President Gerald Ford. The media celebrates the man as a hero. A reporter discovers that the man is a homosexual, a fact of which his family was not aware. A motion to suppress is denied, and the reluctant hero's sexuality becomes part of the national story.[45]

As with the first two cases the information found in this case is easily split into two categories. Facts like "an assassination attempt on the president occurred" and "James Smith, a Secret Service agent, did his job removing the president from a potentially dangerous situation" are certainly appropriate to disseminate and would be deemed as such from an unbiased position. Sensitive personal information about the citizen-hero—his sexual preferences, home address, favorite place to eat, and medical history—would be categorized as "personal" and not relevant to stable democratic institutions or an open society.

In response, a critic could argue that the societal good of forcibly "outing"

Sipple outweighed his privacy rights. In this case, we have a Vietnam veteran and citizen-hero who also happens to be gay. Publishing this information would have a positive effect on the "gay rights" movement and show how gay men could be heroes just like anyone else.

Assuming the social good calculation is correct — that the good of outing Sipple clearly outweighed his rights to privacy — I would still argue against allowing such disclosures for several reasons. First, rights are typically understood to be resistant to social good arguments. We don't incarcerate innocent individuals — thus violating liberty rights — even if we have good reason to believe that doing so would promote social utility. Second, there is the further violation of outing Sipple against his will and using him as a tool in a nationwide gay rights movement. In using individuals this way, a movement could not capture or hold our reflective endorsement. Finally, when placed behind Rawls's veil of ignorance it is not at all clear we would adopt a policy that would allow such disclosures.

Case 4. Video Voyeurs

Consider a case of video voyeurism.

> The Plaza security observed via the video surveillance system a subject carrying a shopping bag, riding the escalator up and down on several occasions. As security observed the subject, they noticed he was entering the escalator to ride up to the second story behind women wearing skirts. The subject placed a shopping bag on the step below the female wearing the skirt, and would ride up the escalator until it reached the top floor. The subject would then ride down the escalator and wait [for] another female wearing a skirt.... Plaza security contacted the subject and found that he had an 8mm video camera hidden in a shoebox within the shopping bag ... and he] admitted to videotaping the women wearing skirts in order to sell the videotape to an Internet website.[46]

It is shocking that such activity was neither criminally nor civilly prohibited in many states prior to 1999. To push things a bit further though, some may object to such activity on the grounds of the commercialism involved — imagine that the subject published the tapes on the Internet along with the names of those taped and a story entitled "Information Availability in Public Places." Would such a linkage between the tapes and the story in any way mitigate the wrongness found in the privacy violation? I believe the answer is "no." Again, if there was any important content to the expression, it could have been conveyed in a noninvasive manner. Moreover, when placed behind the veil of ignorance, we could more readily determine the kinds of information important for upholding individual rights from information that undermines these rights.

While contested by many legal scholars, the courts have recognized a distinction between low-value and high-value speech or expression.[47] In *Barns v. Glen Theater, Inc.*[48] the court noted that while nude dancing is expressive, it is

"marginally and on the outer perimeters" of First Amendment protection. Such expression is "low-value" expression—low-value in terms of promoting an open society and stable democratic institutions. Commercial speech is also protected less vigorously than political speech.[49]

On my view, speech that is low-value and violates informational privacy rights should be more readily liable to prior restraint and, once broadcast, should expose its publishers to civil and criminal damages. Given that we have no general moral right not to be offended, low-value speech that simply offends would still be protected. When censorship is based on "offensiveness" standards, we should proceed with great caution. When censorship is based on rights violations, as with restrictions placed on divulging trade secrets or on child pornography, we should proceed aggressively.

Case 5. Photographs and the Protest Against the War in Vietnam

> On June 8, 1972, the nightly news broadcast the photograph of several screaming Vietnamese children fleeing a napalm strike in South Vietnam. The little girl in the center of the photograph was stark naked and badly burned; she had torn off all of her clothes in a futile attempt to escape the searing effects of the napalm. This photograph became "the last major icon" of the antiwar movement and "probably did more to increase public revulsion against the war than a hundred hours of televised barbarities."[50]

To be sure, this sort of case is extremely difficult. Here we have an expression that had a profound political impact on the course of the war pressing against the rights of the girl not to be violated and exploited in a moment of great pain and agony. First note, if there were no identifying features, nothing that would link the photograph to the girl in later life, then there may be no privacy violation. Moreover, this result may be achieved by manipulating the image in some way. This is exactly what happened in a more recent case dealing with Iraqi prisoners at Abu Ghraib prison outside Baghdad. In a shocking turn of events, shocking because the United States, in part, invaded Iraq to liberate Iraqi citizens from rights abuses, numerous U.S. guards were photographed attacking, humiliating, and torturing bound Iraqi prisoners. In addition, many of these prisoners were rounded up without probable cause. Without diminishing the power and effect of the photographs, the identities of the Iraqi prisoners were shielded through the use of blurring and white-out techniques.

To return to the case of the napalm strike in Vietnam, if the political impact somehow rested on the identifying markers found in the photograph and if no consent was given by the girl or her legal guardians, then I believe we should proceed with great caution. American democracy is founded on the notion that individuals are not to be sacrificed in terms of life, liberty, or property for mere increases in social utility—no matter how great the benefit, society does not get to kill or incarcerate individuals without first guaranteeing due process and

recourse to the courts. To put the point another way, those in the Rawls's original position would likely forgo the benefits of publishing an uncensored photograph in favor of a modified version that protects the privacy and life prospects of a minor.

A right to free speech and expression is not a license to do or say whatever one wills. Other individuals have rights that restrict the kinds of expressions that we may create and broadcast. Finally, from an unbiased vantage point, behind the veil of ignorance, few would so clearly come down on the side of free expression in this case and similar ones. The refrain "What if you were the girl in the photograph?" and assuming what we know about the value of privacy, would silence all but the most fanatic defenders of free speech.

Conclusion

As a "first-stab," consider the following table which maps legally actionable privacy intrusions on a right-left scale.

Motives

Pure	Suspicious
A father takes a picture of his son and inadvertently captures someone else in the picture as well.	A pedophile videotapes children at play with the intent to sell the images to other pedophiles.

Magnitude:
Duration, Extent, Means

Slight	Profound
Person A accidentally bumps into person B.	A "Watcher" videotapes and uploads to the web your every move while in public.

Context

Little Expectation of Privacy	Reasonable Expectation
You and a date go to Times Square in New York to celebrate New Year's Eve.	You and a date find a secluded spot in a public park that is well off the beaten path.

Consent	
Consented to Acquisition	**Evaded or Did Not Consent**
A "Watcher" videotapes and uploads to the web your every move while in public — with your consent.	A "Watcher" videotapes a person who is wearing a disguise and verbally requesting not to be videotaped.
Public Interest	
Of Great Public Importance	**Of Little Public Importance**
Taking pictures of a government official who is taking a bribe.	Taking pictures of a government official who is having a romantic dinner with a spouse.

Behavior that falls on the left of each scale — the motives are pure, the infraction slight, the action was performed in an area where there was little expectation of privacy, the acquisition was consented to, and the matter was of great public importance — would clearly not be legally actionable. Behavior that falls on the right of each scale — the motives are suspicious, the invasion profound, the action was performed in an area where there was a high expectation of privacy, the acquisition was evaded, and the matter of little or no public importance — would warrant judicial action. The extremes are easy — that is, if along each dimension, an action falls clearly to the right or the left, then it is clearly the case that legal action is warranted or not. In these all-or-nothing examples, the dimensions of motive, magnitude, and the other factors, operate as a set of sufficient conditions for or against judicial relief.

By itself, consent has great importance, in that behavior that falls clearly to the right in terms of motive, magnitude, context, and public interest would become legally excusable if consent was obtained. In this case, consent appears to be a sufficient condition for excluding legal culpability. Notice that this relationship does not hold when we slide to the other extreme on the consent scale. That is, if someone did not consent or evaded notice and yet there were pure motives, little magnitude, and so on, we should not conclude that legal action is warranted. By themselves, evasion or express non-consent would not be a sufficient condition for legal action. In this way consent is a "difference maker" while evasion or verbal non-consent is not.

The public interest dimension has this form as well. If the matter is of great public importance, then even in cases of suspicious motives, profound invasions, and target evasion, there would not likely be an actionable cause.

Notice as well that if the matter in question was of little public importance, and yet there were pure motives, little magnitude, and so on, we should not conclude that legal action is warranted. Like consent, a matter of great public importance is a "difference maker" when determining legal culpability.

The magnitude of the invasion has a similar form to public interest and consent. If the infraction is slight, then judicial relief is unwarranted even if suspicious motives, evasion, and private contexts are present. Setting aside the dimensions of consent and public interest, if the invasion is profound, then purity of motive and contexts of diminished privacy would have little force. Assuming that consent is not present and that the matter is not of great public importance, magnitude becomes a "difference maker." In this case, a slight infraction would not be actionable while a profound one would—independent of motive and context.

Putting consent, public interest, and magnitude aside, motive appears to be a mitigating factor when compared to the dimension of context. That is in cases where the motive is pure but there is a high expectation of privacy there would be little grounds for legal action. This kind of case is difficult because it is hard to imagine how consent, public interest, and magnitude would not be relevant. These other dimensions would play an important, if not deciding role, in any example.

Crudely put, when determining legal culpability it would appear that motive is more important than context, magnitude is more important than motive, public interest is more important than magnitude, and consent is more important than public interest. These relations appear transitive as well—that is, consent trumps everything, public interest is next, and so on.

To determine whether or not an event or disclosure of information is newsworthy and of public importance, I have used Rawls's notion of the original position. Again, we are to ask from an unbiased position, "Is the information or access in question necessary or clearly relevant to the maintenance or promotion of democracy, autonomy, self-government, and so on?" If not, then motive, magnitude, context, and consent will be the deciding factors. If so, we should not hastily conclude that dissemination or access is automatically justified independent of privacy considerations. Perhaps the matter could be published without identifying markers—allowing both privacy and speech to flourish.

It is clear that my view runs counter to prevailing attitudes about the First Amendment. I would place more prohibitions on speech or expression than are currently found in the law. Not only should we be prohibited from yelling "fire" in a crowded theater when there is no fire, we should be prohibited from publishing sensitive personal information without permission. Politicians and entertainers, in a sense, sanction a more limited sphere of privacy by choosing a certain career path, and a similar point can be made with respect to criminals. While the sphere of privacy protection may be more limited in these cases,

there are still boundaries that cannot be crossed. Becoming a "public figure" does not sanction continual harassment for autographs, pictures, and interviews. Access, in many ways, is still left to the individual—and this is how it should be.

In my view, an important part of a right to privacy is the right to control personal information; "control" in the sense of deciding who has access to this information and the uses to which such information can be put; "personal" in the sense of being about some individual as opposed to being about inanimate objects, corporations, institutions, and the like. Against this backdrop, what sense can be made of the public's "right to know"? A newspaper may publish information about a kidnapping and rescue, but this does not sanction publishing sensitive personal information about the victim. Right-to-know arguments may carry some weight in cases where public funds are being spent or when a politician reverses his stand on a particular issue, but they seem to be suspect when used to justify intrusions. Sissela Bok echoes these concerns when she writes,

> Taken by itself, the notion that the public has a "right to know" is as quixotic from an epistemological as from a moral point of view, and the idea of the public's "right to know the truth" even more so. It would be hard to find a more fitting analogue to Jeremy Bentham's characterization of talk about natural and imprescriptible rights as "rhetorical nonsense—nonsense upon stilts." How can one lay claim to a right to know the truth when even partial knowledge is out of reach concerning most human affairs, and when bias and rationalization and denial skew and limit knowledge still further? So patently inadequate is the rationale of the public's right to know as a justification for reporters to probe and expose, that although some still intone it ritualistically at the slightest provocation, most now refer to it with a tired irony.[51]

The social and cultural benefits of free speech and free information are generally cited as justification for a free press and the public's right to know. But information technology has changed the playing field, and such arguments seem to lose force when compared to the overwhelming loss of privacy that we now face. The kinds of continual and systematic invasions by news services, corporations, data-mining companies, and other individuals that is now possible is quite alarming. Moreover, consider the restrictions placed on speech in many European countries—restrictions that do not obviously leave the commons of thought and discussion impoverished.

Judge Cooley, in *Atkinson v. Detroit Free Press Company*, stressed that everyone must exercise their rights with due regard for the rights of others. "This is as true of the right to free speech as it is of the right to the free enjoyment of one's property."[52] Just as there is no tension between liberty rights and property rights—your liberty rights do not include the freedom to use someone else's property—there is no tension between free speech and informational pri-

vacy rights. Your freedom of speech, within obvious exceptions, does not include the liberty to shout someone else's credit card number from the mountaintop or broadcast private facts about his or her life without consent.

Notes

1. This article draws from material originally published in Adam D. Moore, *Privacy Rights: Moral and Legal Foundations*, Penn State University Press, 2010, Chap. 7. The author would like to thank Bill Kline, James Stacey Taylor, and Robert Hauptman for comments and suggestions.

2. Andrew Jay McClurg, "Bringing Privacy Law Out of the Closet," 73 N.C.L. Rev. 1000–1002 (1995). See also *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Ross*, 456 U.S. 798 (1982); *Michigan v. Long*, 463 U.S. 1032 (1983); and *Oliver v. United States*, 466 U.S. 170 (1984).

3. Andrew Jay McClurg, "Bringing Privacy Law Out of the Closet," 1000–1002. See also James Goodale, Robert Sherman, Paul Schwartz, Deirdre Mulligan, and Steven Emmert, "Privacy Laws and the First Amendment: A Conflict?" panel discussion, 11 *Fordham Intellectual Property, Media and Entertainment L.J.* 21 (2000), and Christopher Slobogin, "Public Privacy: Camera Surveillance of Public Places and the Right to *Anonymity*," 72 *Mississippi L.J.* 213 (2002).

4. Nadine Strossen, "Protecting Privacy and Free Speech in Cyberspace," 89 *GEO.* L. J. 2107 (June 2001).

5. Ibid., 2108.

6. See Adam D. Moore, *Privacy Rights: Moral and Legal Foundations*, Penn State University Press, 2010, Chaps. 2–3 and "Privacy: Its Meaning and Value" 40 A. *Phil. Q.* (2003): 215–227.

7. See also, Anita Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (Lanham, MD: Rowman & Littlefield, 2003) and Ruth Gavison, *Information Control: Availability and Control, Public and Private in Social Life*, Benn, Stanley and G. Gaus eds. (New York: St. Martin's Press, 1983), p. 113–134; Charles Fried, *An Anatomy of Values* (Cambridge, MA: Harvard University Press, 1970) Chap. 9; Richard Wasserstrom, *Privacy: Some Assumptions and Arguments, Philosophical Law*, R. Bronaugh ed. (Westport, CT: Greenwood Press, 1979): p. 148; Hyman Gross, *Privacy and Autonomy, Privacy: Nomos XIII* (1971), p. 170; Ernest Van Den Haag, *On Privacy, Privacy: Nomos XIII* (1971): p. 147; and Richard Parker, "A Definition of Privacy," *Rutgers Law Review* 27 (1974): 280.

8. Westin, *Privacy and Freedom* (New York: Atheneum, 1968): p. 8.

9. Lewis Mumford, *The City in History* (New York: Harcourt Brace, 1961), p. 210 cited in Theodore D. Fuller, et al. "Chronic Stress and Psychological Well-being: Evidence from Thailand on Household Crowding," *Social Science Medicine*, 42 (1996): 267. This view is echoed by Desmond Morris who writes, "Each kind of animal has evolved to exist in a certain amount of living space. In both the animal zoo and the human zoo [when] this space is severely curtailed ... the consequences can be serious." D. Morris, *The Human Zoo* (New York: McGraw Hill, 1969): p. 39.

10. See for example: A. Baum and S. Koman, "Differential Response to Anticipated Crowding: Psychological Effects of Social and Spatial Density," *Journal of Personality and Social Psychology* 34 (1976): 526–36; Jes Clauson-Kaas, et al., "Urban Health: Human Settlement Indicators of Crowding," *Third World Planning Review*, 18 (1996): 349–63; J. N. Edwards and A. Booth, *Crowding and Human Sexual Behavior, Social Forces* 55 (1977): 791–808; Theodore D. Fuller, et al. "Chronic Stress and Psychological Well-

Being: Evidence from Thailand on Household Crowding," *Social Science Medicine*, 42 (1996): 265–80. Morgan, Griscom, "Mental and Social Health and Population Density," *Journal of Human Relations*, 20 (1972): 196–204; D. Farrington and C. Nuttal, "Prison Size, Overcrowding, Prison Violence and Recidivism," *Journal of Criminal Justice* 8 (1980): 221–231; P. Paulus, V. Cox, and G. McCain, "Death Rates, Psychiatric Commitments, Blood Pressure and Perceived Crowding as a Function of Institutional Crowding," *Environmental Psychology and Nonverbal Behavior* 3 (1978): 107–116; B. Ruback and T. Carr, "Crowding in a Woman's Prison," *Journal of Applied Social Psychology* 14 (1984): 57–68. http://dx.doi.org/10.1111/j.1559-1816.1984.tb02220.x

11. E. I. Megargee, "The Association of Population Density Reduced Space and Uncomfortable Temperatures with Misconduct in a Prison Community," *The American Journal of Community Psychology* 5 (1977): 289–298 and F. Porporino and K. Dudley, *An Analysis of the Effects of Overcrowding in Canadian Penitentiaries* (1984). Ottawa, Ontario: Research Division, Programs Branch, Solicitor General of Canada.

12. V. Cox, P. Paulus, and G. McCain, G. "Prison Crowding Research: The Relevance of Prison Housing Standards and a General Approach Regarding Crowding Phenomena," *American Psychologist* 39 (1984): 1148–1160.

13. G. McCain, V. Cox, and P. Paulus, *The Effect of Prison Crowding on Inmate Behavior*, Washington D.C.: U.S. Department of Justice (1980).

14. P. Paulus, V. Cox, and G. McCain, "Death Rates, Psychiatric Commitments, Blood Pressure and Perceived Crowding as a Function of Institutional Crowding," *Environmental Psychology and Nonverbal Behaviour* 3 (1978): 107–116. http://dx.doi.org/10.1037/0003-066X.39.10.1148

15. D. Farrington and C. Nuttal, "Prison Size, Overcrowding, Prison Violence and Recidivism," *Journal of Criminal Justice* 8 (1980): 221–231. http://dx.doi.org/10.1016/0047-2352(80)90002-1

16. For a different justification and defense of privacy rights see Adam D. Moore, *Toward Informational Privacy Rights* 44 *San Diego L. Rev.* (Spring 2007): 809–845 and *Privacy Rights: Moral and Legal Foundations*, Penn State University Press, 2010, Chaps. 4–5.

17. C. Rossiter, *Aspects of Liberty* (Ithaca, NY: Cornell University Press, 1958) quoted in Westin, "Privacy in the Modern Democratic State," D. Johnson and J. Snapper, *Ethical Issues in the Use of Computers* (Wadsworth Pub., 1985), p. 188.

18. For more about privacy rights see: Charles Fried, "Privacy," *Yale Law Journal* 77 (1968): 477; J. Rachels, "Why Privacy Is Important," *Philosophy and Public Affairs* 4 (Summer 1975): 323–33; *The Right to Privacy*, Ellen Frankel Paul, Fred Miller Jr., and Jeffrey Paul, eds. (Cambridge: Cambridge University Press, 2000); Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge University Press: New York, 1992); Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY: Cornell University Press, 1997).

19. For an in-depth defense of these claims see Adam D. Moore, *Privacy Rights: Moral and Legal Foundations*, Penn State University Press, 2010, Chaps. 2–6.

20. Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1981). Even those who would defend legal positivism — the view that there is no necessary connection between morality and the law — appeal to moral norms by positing that the purpose of legal systems is to ameliorate the human condition and provide for security and stability. See, for example, H. L. A. Hart, *The Concept of Law* (1961).

21. I have argued at length that this view of intellectual property is false. See Adam D. Moore, *Intellectual Property and Information Control* (2004), "A Lockean Theory of Intellectual Property," 21 *The Hamline L. Rev.* (January, 1998): 65–108, and "Intellectual Property: Theory, Privilege, and Pragmatism," 16 *Can. J. L. & Juris.* (Fall 2003): 191–216.

22. For an in-depth analysis of the "takings clause," see Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). By my lights, the scope of eminent domain takings has been unjustifiably expanded since the Kelo decision. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

23. Hugo L. Black, "The Bill of Rights," 35 *N.Y. Univ. L. Rev.* 866, 881 (1960); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Whitney v. California*, 274 U.S. 357, 374–77 (1927). See also Jed Rubenfeld, "The First Amendment's Purpose," 53 *Stanford L.Rev.* 767 (2001); Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Rev.* 245 (1961); Harry Kalven Jr., "Privacy in Tort Law — Were Warren and Brandeis Wrong?" *Spring Law and Contemporary Problems* 31 (1966); Diane L. Zimmerman, "Requiem for a Heavyweight" 68 *Cornell L.Rev.* 291 (1983); Solveig Singleton, "Privacy Versus the First Amendment: A Skeptical Approach," 11 *Fordham Intellectual Property, Media and Entertainment L.J.* 97 (2000); and Eugene Volokh, "Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You," 52 *Stanford L.Rev.* 1049 (2000).

24. Meiklejohn, *First Amendment Is an Absolute*, 245.

25. Ibid., 255.

26. Ibid., 257, 258.

27. J.S. Mill, *On Liberty*, 16–17 (1978).

28. Sir James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1873).

29. See Vincent Blasi, "The Checking Value in First Amendment Theory," *American Bar Foundation Research Journal* 521(1977).

30. Louis Brandeis, *Other People's Money, and How the Bankers Use It*, 92 (1914).

31. Michael Kent Curtis, "Democratic Ideals and Media Realities: A Puzzling Free Press Paradox," 21 *Social Philosophy and Policy* 385–487 (2004). http://dx.doi.org/10.1017/S0265052504212122.

32. Molly Ivins, "Three New Books Offer Suggestions for Fixing the Media Mess," Charleston Gazette, November 2, 1999, A-4; cited in Michael Kent Curtis, "Democratic Ideals and Media Realities," 21 *Social Philosophy and Policy* 406 (2004).

33. Steven Hill, *Fixing Elections: The Failure of America's Winner Take All Politics*, 68 (2002).

34. Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty*, 48 (2002); cited in Curtis, *Democratic Ideals and Media Realities*, 408.

35. Bill Moyers, *Free Speech for Sale*, PBS Television, June 8, 1999; cited in Curtis, *Democratic Ideals and Media Realities*, 410.

36. While Internet sources may be able to provide a checking function on government, these same sources may become relatively useless if governments control the pipeline or the initial disclosure of information. A government that keeps its secrets safe while employing censorship-enhancing technologies may be able to minimize the effects of a free Internet-based press.

37. Mill, *On Liberty*, chap. 4.

38. Ibid., 1.

39. John Rawls, *A Theory of Justice*, 136–42 (1971).

40. *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982); cited in Ellen Alderman and Caroline Kennedy, *Right to Privacy* 171 (1995).

41. *DeGregorio v. CBS, Inc.*, 473 N.Y.S.2d 922 (N.Y. Sup. Ct. 1984); cited in Alderman and Kennedy, *Right to Privacy*, 220.

42. See Adam D. Moore, *Privacy Rights: Moral and Legal Foundations*, Penn State University Press, 2010, Chap. 3 for several arguments for why "interest," "preferences," or "desire satisfaction" accounts of moral value are unworkable.

43. *Paulsen v. Personality Posters*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

44. Ibid. See *Gautier v. Pro-Football*, 304 N.Y. 354 (1952); *Julian Messner, Inc. v. Warren E. Spahn*, U.S. Supreme Court, May 22, 1967, 87 S. Ct. 1706; 387 U.S. 239; 18 L.Ed.2d 744; *Dallesandro v. Holt and Co.*, 4 A.D.2d 470 [1st Dept 1957], 166 N.Y.S.2d 805; and *Goelet v. Confidential, Inc.*, 5 A.D.2d 226 [1st Dept 1958], 171 N.Y.S.2d 2235 A.D. 2d 226.

45. *Sipple v. San Francisco Chronicle, Inc.* (1975). This case is cited in Alderman and Kennedy, *Right to Privacy*, 171.

46. Eatonto Ackerman, June 7, 1999; cited in Lance Rothenberg, "Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in Public Space," 49 *Am. Univ. L.Rev.* 1127 (2000).

47. See, for example, Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech," 76 *Virginia L.Rev.* (1990).

48. *Barns v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

49. Alex Kozinski and Stuart Banner, "The Anti-History and Pre-History of Commercial Speech: A Problem in the Theory of Freedom," 62 *Iowa L.Rev.* (1976). See also *Valentine v. Chrestensen*, 316 U.S. 52, 42, 54 (1942).

50. Vicki Goldberg, *The Power of Photography: How Photographs Changed Our Lives*, 7 (1991).

51. Sissela Bok, *Secrets* (1984), 254.

52. *Atkinson v. Detroit Free Press Company*, 46 Michigan 341; 376, 9 N.W. 501, 520 (1881) (Judge Cooley dissenting).

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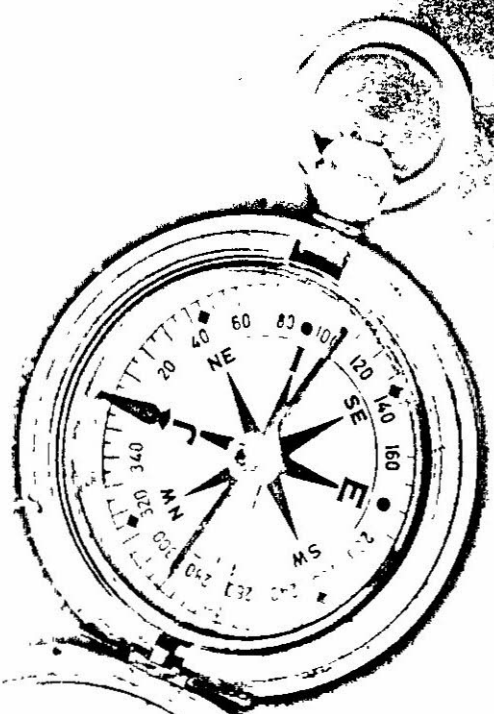

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