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Privacy, speech, and values: what we have no business knowing

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Abstract In the United States the ascendancy of speech protection is due to an expansive and unjustified view of the value or primacy of free expression and access to information. 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 the "mere interest" view of privacy is false. Privacy, properly defined, is a necessary condition for human well-being or flourishing. The opening section of this article will provide an overview of this theory. Next, after a few remarks on speech absolutism, privacy absolutism, and balancing theories, I will sketch several of the dominant argument strands that have been offered in support of presumptively weighty 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 final section I will present and defend a way to balance free speech and privacy claims.

Keywords Privacy · Freedom of speech · Freedom of expression · Privacy rights · Value of privacy · Definition of privacy · Speech absolutism · Speech balancing · Privacy absolutists · Value of speech

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Introduction

With few means to express ideas to other citizens, imagine I grabbed some spray paint from your garage and scrawled my political ideas on the side of your house. Suppose as a dinner guest I continuously foist my religious views on your kids. After reading your play I record a public performance of it and broadcast the results on local television. As your doctor, and in an attempt to educate others about risky sexual behaviour, I post your lab results and sexual history on the web. Certainly such speech or expression may be justifiably prohibited. Moreover, few would find this sort of suppression troubling. Whether it's a matter of property rights, parental rights, intellectual property rights, or privacy coupled with an implied contract, there are lots of compelling reasons that could be offered in support of speech restrictions.

In the United States the ascendancy of speech protection is due to an expansive and unjustified view of the value or primacy of free expression and access to information (Moore 2010, Cha. 7; Hughes and Richards 2016; Solove and Richards 2007). 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 the "mere interest" view of privacy is untenable. Privacy, properly defined, is a necessary condition for human well-being or flourishing and not a mere interest. The opening section of this article will provide a brief overview of this theory. Next, after a few remarks on speech absolutism, privacy absolutism, and balancing theories, I will sketch several of the dominant argument strands that have been offered in support of presumptively weighty 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 final section I will present and defend a way to balance free speech and privacy claims.

Privacy: its meaning and value[1]

While privacy has been defined in many ways over the last century, I favour what has been called a control-based definition (see Warren and Brandeis 1890; Westin 1967; Gross 1971; Parker 1974; Parent 1983; Allen 2003; Gavison 1983). A right to privacy is a right to control access to, and uses of, places, bodies, and personal information (Moore 2003, 2007, 2008, 2010). For example, suppose that Smith wears a glove because he is ashamed of a scar on his hand. If you were to snatch the glove away, you would not only be violating Smith's right to property, since the glove is his to control, but also his right to privacy—a right to restrict access to information about the scar on his hand. Similarly, if you were to focus your enhanced X-ray camera on Smith's hand, take a picture of the scar through the glove, and then publish the photograph widely, you would violate a right to privacy. While your camera might diminish Smith's *ability* to control access to information about the scar, it does not undermine his *right* to control access to this information (Moore 2007).

Privacy also includes rights concerning the downstream use of bodies, locations, and personal information. If access is granted accidentally or otherwise, it does not automatically follow that any subsequent use, manipulation, or sale of the good in question is justified. In this way, privacy is both a shield that affords control over access or inaccessibility, and a kind of use- and control-based right that yields justified authority over specific items, such as a room or personal information (Moore 2007, 2010). For example, by appearing in public, someone might grant access to specific sorts of personal information. We should not conclude, however, that by granting a particular kind of access, the individual has also waived control over any and all future uses of this information. Similarly, in allowing you access to my novel, recipe, or process of manufacture, I have automatically granted you rights to use, control, or sell these intellectual works.

A serviceable definition of "personal information" is provided by the European Union Data Directive. Personal information is "any information relating to an identified or identifiable natural person … one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity" (Directive 95/46/EC of the European Parliament and of the Council [1995] OJ L 281 0031–0050). For example, information about a specific individual's sexual orientation, medical condition, height, weight, income, home address, phone number, occupation, and voting history would be considered personal information on this account.

Cultural universals have been found in every society that has been systematically studied (see Murdock 1955; Nussbaum 2000). Based on the Human Relations Area Files at Yale University, Alan Westin has argued that there are aspects of privacy found in every society—privacy *is* a cultural universal (Westin 1967; Roberts and Gregor 1971). While privacy may be a cultural universal necessary for the proper functioning of human beings, its form—the actual rules of association and disengagement—is culturally dependent (see Spiro 1971). The kinds of privacy rules found in different cultures will be dependent on a host of variables including climate, religion, technological advancement, and political arrangements. Nevertheless, I think it is important to note that relativism about the forms of privacy—the rules of coming together and leave-taking—does not undermine the claim regarding the objective need for these rules.

In an important article dealing with the social psychology of privacy, Barry Schwartz (1968) provides interesting clues as to why privacy is universal (also see Mill 1859; Rachels 1975). According to Schwartz, privacy is group preserving, maintains status divisions, allows for deviation, and sustains social establishments (1968).

Additionally, there is compelling evidence that the ability to control access to places, bodies, and personal information is important for human well-being or flourishing. Household overcrowding and overcrowding in prisons have been linked to violence, depression, suicide, psychological disorders, and recidivism (see Moore 2010, 2003). Growing up can be understood as the building of a series of walls—the walls of privacy. A recent article presents additional compelling evidence that privacy is essential for flourishing and well-being (Moore et al. 2015). Children who are monitored by parental solicitation or with the use of rule sets (you have to be home by 7 p.m.; no playing with this or that kid; etc.) have the same rate of problematic behaviour as kids who are not monitored at all. "[C]ross-sectional and longitudinal studies show that poorly monitored adolescents tend to be antisocial, delinquent, or criminal … [they] also tend to use illegal substances … tobacco … do worse in school … and engage in more risky sexual activity" (Stattin and Kerr 2000, 1072). However, where there is two-way communication between parents and children, when all are actively participating, including the voluntary sharing of information, there is an associated drop in the behaviours mentioned above.

[1] Parts of this section draw from material originally published in Moore, A., *Privacy Rights: Moral and Legal Foundations,* Cha. 2–3 (2010); and "Privacy: Its Meaning and Value" (2003).

Having said something about what a right to privacy is and why it is valuable, we might ask how privacy rights are justified. Since a detailed defence has been offered elsewhere, I'll only present a brief sketch (Moore 2007, 2010). The autonomy and respect for persons argument connects privacy with self-government. Rights to privacy erect a moral boundary that allows individuals the space to order their lives as they see fit. Privacy protects us from the prying eyes and ears of governments, corporations, and neighbours. 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 strand of argument rests on the claim that privacy rights stand as a bulwark against governmental oppression and totalitarian regimes. If despotic regimes are to consolidate and maintain power, then privacy rights, broadly defined, must be eliminated or severely restricted. If this is correct, privacy rights are a core value that limits the forces of oppression (Westin 1967; DeCew 1997; Rössler 2005; Moore 2011; Allen 2011; Nissenbaum and Brunton 2015).

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 and uses of specific places and things, as well as certain kinds of information—i.e., we have established a presumption in favour of privacy (Moore 2010; Westin 1967; DeCew 1997; Rössler 2005; Nissenbaum 2009; Allen 2011).

Defending freedom of speech and expression

There are numerous promising strategies for establishing speech rights (Moore 2010, 2013). After briefly mapping three general positions that one could take regarding the tensions between privacy and speech, I will present several argument strands that support speech rights. This analysis is important because it supports my claim that we should not view speech rights as more important or fundamental than privacy rights.

Free speech absolutists

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. Whether the values or incommensurate or if speech is just presumptively weighty, speech always trumps (Black 1960). Alexander Meiklejohn, in "The First Amendment Is an Absolute" (1961) refined the absolutist position in light of several obvious and devastating problems. 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" (1961, 255).

The problem with Meiklejohn's view 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. For example, non-newsworthy speech that opens up private lives for public consumption, trade secrets and trademarks, or "recipes" for creating extremely lethal and easily transferable biological agents, may each be considered types of communication but not speech related to self-government. It would seem that absolutists do their balancing in coming up with the category of "speech" or "protected speech."

A related worry befalls speech absolutism of Eugene Volokh. In assigning hate speech, sexual harassment, blackmail, extortion, and false advertising, to the domain of unprotected speech it appears that content restrictions on expressions, the very thing that absolutists decry, are being proposed (Volokh 2000). Moreover, it is not as if determining what counts as hate speech or sexual harassment is somehow easier than the sorts of privacy-based prohibitions that I will suggest later. Imagine that while miming and dancing an artist engaged in a legitimate political protest and sexually harassed nearby citizens at the same time. If it were impossible to pull apart the political expression from the harassment without diminishing the expressive content, it is unclear which policy absolutists would endorse. I think the answer is rather easy. Those engaging in speech activity don't get to sexually harass others, broadcast state secrets, or violate privacy rights, just because the expression includes information that is relevant to self-government. As I will go on to argue, these latter ideas can 'get out' in other ways that do not also impact privacy.

Privacy absolutists

At the other extreme is the view that privacy is incommensurate with or presumptively weighty when compared to speech or expression. Information about the private lives of politicians, entertainers, or other citizens, has little or nothing to do with the role of the press to report on official government functions (Phillipson 2016). We simply have no business knowing how may sex partners some politician has had, the drug rehabilitation histories of our preferred musicians, or the sexual orientation, medical condition, height, weight, income, phone number, occupation, and voting history of our neighbours. None of this has anything to do with self-government or stable democratic institutions. In fact, one could argue the contrary—the continual

peering into the private lives of the powerful, connected, or popular, fixes our gaze and reinforces our desires for trivial, banal, petty, and unimportant information.

Note as well how this is not actually an absolutist position. For example, consider a politician accepting a bribe while engaging in sex. Caught on video it would be hard to imagine a more private context. Nevertheless, most would argue that this information should be made available assuming there was no way to pull apart the private content from content needed for the public oversight. As with speech absolutism, it is always easy to imagine a case where privacy gives way to some other value.

Speech and privacy balancers

If I am correct so far, it is exceedingly difficult to advance and defend true absolutist views of speech or privacy. A middle ground position is one that does not advantage privacy or speech—both are given equal standing. This view is summed up nicely by Lord Hoffman in *Campbell* v *MGN* (2004) 2 AC 457. Given the equal standing of both rights, Hoffman maintains that both should be balanced against the other in a way that protects the underlying value of each (Phillipson 2016). If individuals have moral rights to speech along with rights to control access to, and uses of, places, bodies, and personal information, then the playing field will be level—neither speech nor privacy would be more fundamental or weighty. Before presenting a process for balancing privacy and speech, we first need to examine the case for free speech. So far, little has been said about the value of speech and why it should be considered equal to locational and informational privacy.

Consequentialist justifications

Five prominent consequentialist justifications for speech rights are truth discovery, power checking, self-government, advancing autonomy and tolerance, and the best policy argument (Greenawalt 2005; Redish 1981, 1982; Alexander 1984; Schauer 1982). 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… of exchanging error for truth… the clearer perception and livelier impression of truth, produced by its collision with error" (1859). Moreover, since the censor is fallible as well, suppression of speech will likely lead to suppression of truth.

A second well-known argument supporting presumptive claims to free speech has to do with accountability and providing a check on those in power (Stewart 1974; Blasi 1977). First, in having their actions scrutinized by a free press and a robust exchange of ideas, those in positions of authority 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. This view was captured nicely by Supreme Court Justice Louis Brandeis when he wrote, "A little sunlight is the best disinfectant" (1914, 98).

A third strand of justification is that free speech is important for 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. Representative government requires a robust information flow between voters and public officials. Free speech and expression is important for promoting self-government.

The "advancing autonomy and tolerance" argument, like the self-government argument, holds that free speech is an important part of individual growth and self-realization. In good consequentialist fashion, ensuring individual autonomy within democratic institutions advances human well-being or flourishing. 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 or beliefs.

The final consequentialist argument in favour of freedom of speech is John Stuart Mill's "best policy" argument. 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" (1859 Cha. 4). The best policy will be to severely restrict the government's role in this area. The essence of Mill's argument is that so long as conduct does not violate the obligations you have toward others or their rights, the conduct should be permitted. The reason for this anti-paternalist stance is that when government interferes with speech and expression, it will likely mess things up horribly. Just consider for a moment the sorts of behaviour that have been deemed immoral by the public and enforced by laws in the United States: masturbation, pre-marital sex, interracial sex, viewing pornography, having too many self-pleasuring devices, sodomy, homosexual sex; the list goes on and on.

Fallibility is also important to Mill's best-policy argument. To require that sovereign adults limit their behaviour or expressions because government officials or some majority deems such conduct to be immoral, unwise, or imprudent is to assume infallibility. Moreover, there is an inherent conservatism in such thinking. Arguably, many of the most revolutionary ideas and practices would have been stamped out if we had adopted this sort of paternalistic and conservative impulse. The nineteenth-century philosopher Herbert Spencer once said, "The ultimate effect of shielding men from the effects of folly is to fill the world with fools" (Spencer 1904, 354). I think Mill would agree. As genetics and environment shape our characters, we are

fundamentally undermining individual autonomy by proscribing any but the safest course of action picked by the public or the wise.

Deontological justifications

Social contract arguments and appeals to autonomy or dignity typically ground non-consequentialist or deontological justifications for free speech (Greenawalt 2005; Scanlon 1972; Alexander 1984; Schauer 1982). Social contract theorists defend individual rights, liberty, and self-government, as part of a bargain that determines the contours of social interaction. Within democracies this contract would include the free flow of information necessary for autonomy and informed choice. For example, Thomas Scanlon argues that, "autonomous individuals, in something like a Rawlsian 'original position,' would refuse to cede authority to government either to decide what the individual should believe or to prevent the individual from weighing reasons for action" (Alexander 1984, 1326; Scanlon 1972).

Obviously, social contract arguments in support of speech rest upon the inviolate dignity and autonomy of individuals. One reason for viewing speech prohibitions with suspicion is that we lose the very autonomy we are trying to promote and enhance (Scanlon 1972). Treating adults like kids, saving them from failure and their own bad choices, because we know better, is not to treat them with the respect that fully autonomous moral agents deserve. Part of what is interesting in Kant's account is the idea that freedom of speech is necessary for the social contract. To deny freedom of speech to citizens would be to deny politicians access to information necessary for governing according to the general will. We want our politicians to govern affectively but speech restrictions would deny them the necessary information (Kant 1974).

Problems for consequentialist and deontological justifications for speech and expression

The problem with these consequentialist and deontological strands of justification is that they are no where near strong enough to privilege speech over other values or rights such as property or privacy. The very idea that someone could use speech to invade the sanctity of private spheres thereby undermining dignity and autonomy flies in the face of the deontological impulse and may well lead to bad consequences. To put the point another way, privacy also promotes autonomy, toleration, and diversity.

If the conclusions about the connection between privacy and flourishing sketched earlier are correct, then Mill's best policy argument could not be used to privilege expression over privacy. Moreover, if privacy, autonomy, and the sovereignty to set the course and direction of our own lives are basic rights, then it would seem that certain sorts of expressions would be ruled out of the social contract. It is hardly the case that such information is necessary for governing in accordance with the general will. Broadcasting private facts about someone, their medical records, sexual habits, or web browsing histories, is not necessary information for good government.

The upshot of this discussion is that we should challenge the assumption that expression should be privileged 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 values like security or property.

Balancing privacy and free speech

In determining the correct balance between free speech and individual privacy John Rawls's notion of placing individuals behind a veil of ignorance may be of some service (Rawls 1971, pp. 136–142). 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 allow us to determine the appropriate domain 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 or self-government and that privacy is valuable and necessary for human flourishing.

From this vantage point we determine if a particular expression is important for self-government and stable democratic institutions. Next, we determine if privacy is impacted. Socially important expressions that do not impact privacy may, nonetheless, be restricted for other reasons like property rights or contracts. If privacy is a consideration and the expression has little social value, then the presumption would be in favour of privacy. The important cases, the ones where balancing must occur, are cases where an expression is both important for self-government and violates privacy. In these latter cases, we need to determine the strength of the values in conflict and come up with a balanced approach for adjudication. Behind the veil of ignorance in the original position there may be several serviceable strategies or methods that would ensure mutual protection and, in cases of conflict, minimize loss to either of these values. Whatever strategy is adopted it is arguably the case that the dimensions listed below would be relevant for appropriate balancing. Consider the following table adapted from the work of McClurg (1994–95) and Moore (2010, 2013).

Motives

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

Magnitude :

Duration, Extent, Means

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

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 his/her spouse

Behaviour 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 be morally and legally permissible. Behaviour 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 be immoral and warrant judicial action. The extremes are easy. 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 moral culpability and perhaps judicial relief.

In the balance between privacy and expression consent has great importance. Behaviour that falls clearly to the right in terms of motive, magnitude, context, and public interest may become morally and legally excusable if consent was obtained. Anita Allen has argued against this view, noting that there are areas of privacy that are fundamental and should be protected by liberal egalitarian governments despite the wishes of those who would like to waive these rights (2015). Allen's worries aside, in this case, consent appears to be a sufficient condition for excluding culpability. I would also like to reiterate that consenting that others access private information is not also to waive all control over downstream uses of this information. Privacy, understood as a right to control access to and uses of bodies, locations, and personal information, would allow rights holders control after initial access has been granted.

Like consent, the public interest dimension, aided by our deliberations in the original position, has a similar form. If the expression is of great public importance, then even in cases of suspicious motives, profound invasions, and target evasion or non-consent, there would not likely be justification for legal action—although we may certainly cast moral aspersions based on these other factors.

The magnitude of the privacy invasion is also important. 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".

Illustrations

To refine and further clarify this view I'll consider three cases taken from US law. In *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" (Alderman and Kennedy 1995, 171). Included with the photograph was a story of the rescue along with personal information about the victim.

To start, assume that the motives were pure related to access, storage, and broadcasting of the information. A reporter simply wanted to tell a good story, highlighting effective police actions, noting that the suspected criminal is in custody, and informing the public that the victim was okay. Given the picture and the private information found in the accompanying story, the magnitude is arguably profound. Extent, duration, and means are all relevant. The extent of the intrusion included a partially nude photograph along with the victim's name and other personal information. In terms of duration, even though this case happened in 1982, the picture and the story can be found in a few minutes with a simple web search. Even at the time, the story and picture would have been preserved at various libraries. The means of dissemination started with The Naples Daily News paper which served a community of about 20,000 people and now is available to everyone via the Web.

The context of the information acquisition was public as was most of the information found in the accompanying story. But note that there was no consent. In fact, one could argue that by clutching a dishtowel while being forced to exit the front door of an apartment building, the victim actively tried to evade having some of this information captured by others. Certainly she did not consent to having her partially nude image published or agree to broadcasting personal information in the associated story.

From an unbiased 'Rawlsian' 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 organised 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, 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 or enhancing self-government. 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 equally 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. The principles of mutual protection and loss minimization would point toward publishing this case while omitting various private facts.

In *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" (Alderman and Kennedy 1995, 220).

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.

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. Following other cases the *DeGregorio* court adopted an extremely broad notion of "public interest," going well beyond what might be considered newsworthy.

> 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 (DeGregorio v. CBS, Inc.).

Clearly such an expansive definition of "public interest" and "newsworthiness" is not necessary for the maintenance of democracy 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. While robust defenders of free speech would have us believe that any speech restriction erodes the very foundations of democratic society, there is little evidence in support of this view.

Again let us consider this case from a Rawlsian position and in light of motives, magnitude, context, consent, and expressive content. As already noted, I think that the expressive content in relation to self-government is vanishingly small. While the context is public and perhaps the motives pure, there was no consent and the magnitude of the intrusion was rather profound. The expressive point being made in this film, if it had one, could have been advanced in ways that did not impact privacy. For example, there are plenty of folks involved in romantic relationships or even polyamorous relationships that would happily consent to broadcasting this information to the world.

Many theorists have recognized a distinction between high-value, low-value, and no-value speech or expression (Bickel 1975; Wright 1985; Sunstein 1986, 1989; Kozinski and Banner 1990). In *Barns v. Glen Theater, Inc.* a US court noted that while nude dancing is expressive, it is "marginally and on the outer perimeters" of First Amendment protection. The distinction between high-value, low-value, and no-value expression corresponds to information that is necessary, less relevant, or irrelevant, to democracy and self-government. One way to view the Rawlsian exercise of placing ourselves behind a veil of ignorance is that we are attempting to adopt an unbiased vantage point whereby the categories of high-value, low-value, and no-value can be determined. In the typical case, the subject matter of expressions that intrude into private domains will likely be categorized as low-value, thus failing to trigger the 'public interest' aspect of the process I have advanced.

Consider one final case. "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 anti-war movement and "probably did more to increase public revulsion against the war than a hundred hours of televised barbarities (Goldberg 1991, 7)." While there are many other such cases, this one is especially difficult because of the connection between the anguish seen on a child's face, her identity, and a political statement about the horrors of war.

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 case dealing with pictures of Iraqi prisoners at Abu Ghraib prison outside Baghdad. Returning 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 because the magnitude of this intrusion is clearly profound.

American and European democracies are founded on the notion that individuals are not to be sacrificed in terms of life, liberty, or property for mere increases in social utility. I have argued that privacy should be included in this list. Whether we echo Kant's principle that individuals are not to be used as mere tools to promote social good or Mill's view that individuals should have the liberty to set the course and directions of their own lives, we have good reason to resist such imposed sacrifices. To put the point another way, those in the Rawls's original position would likely forgo the benefits of publishing this uncensored photograph in favour of a modified, perhaps less expressive, version that protects the privacy and life prospects of a minor.

Conclusion

A right to free speech and expression is not a license for others to paint graffiti on your car, foist unwanted views on your kids, violate intellectual property rights, or broadcast your medical records and sexual history to the world. Other individuals have rights that restrict the kinds of expressions that we may create and broadcast. I have argued that privacy is one of these important rights. While it is true that politicians and entertainers endorse a more limited sphere of privacy by choosing a certain career path, it is not as if this choice sanctions unlimited intrusions into private domains (Moore 2010; Mokrosinska 2015; Phillipson 2016).

Following George Wright we may hold the view that "for something to be speech it must embody or convey a more or less discernible idea, doctrine, conception, or argument of a social nature, where "social" is understood to include broadly political, religious, ethical, and cultural concerns. For language or gesture or conduct to be speech, it must carry implications beyond the speaker's individual and immediate circumstances. Speech must communicate; it must be, at least potentially, socially "fertile"… (1985). At one extreme we have political, philosophical, and social arguments or information clearly important for self-government while at the other we have communication with little or no social value. This range corresponds to high-value, low-value, and no-value speech. Nevertheless, just because some expression has been deemed high-value with clear public importance does not mean that privacy, or other speech restrictions like property or contracts, are automatically set aside. If the argument presented in this article is correct, we should view speech, suitably defined, and privacy as having equal weight. Moreover, in cases of

conflict we should balance privacy and speech in a way that promotes both of these important values.

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