

# FREEDOM OF SPEECH, INFORMATION PRIVACY, AND THE TROUBLING IMPLICATIONS OF A RIGHT TO STOP PEOPLE FROM SPEAKING ABOUT YOU

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## INTRODUCTION

Privacy is a popular word, and government attempts to “protect our privacy” are easy to endorse. Government attempts to let us “control . . . information about ourselves”<sup>1</sup> sound equally good: Who wouldn’t want extra control, especially of things that are by hypothesis personal? And what fair-minded person could oppose requirements of “fair information practices”?<sup>2</sup>

The difficulty is that the right to information privacy—the right to control other people’s communication of personally identifiable information about you—is a right to have the government stop people from speaking about you. We already have a code of “fair information practices,” and it is the First Amendment, which generally bars the government from “control[ling the communication] of information” (either by direct regulation or through the authorization of private lawsuits<sup>3</sup>), whether the communication is “fair” or not.<sup>4</sup> While privacy protection secured by contract turns out to be constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.

Of course, the Supreme Court and even lower courts can always create new First Amendment exceptions or broaden existing ones, and if the courts did this for information privacy speech restrictions, I can’t say that I’d be terribly upset about the new exception for its own sake. Speech restrictions aimed at protecting indi-

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<sup>1</sup> Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (a classic in the field); *see also, e.g.*, Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1155 (1997); Berman & Mulligan, *infra* note 34, at 575; Shorr, *infra* note 81, at 1767.

<sup>2</sup> *See, e.g.*, Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497 (1995); Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553 (1995).

<sup>3</sup> *Cf., e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that the First Amendment applies to “civil lawsuit[s] between private parties,” because such lawsuits involve “[state] courts . . . appl[ying] a state rule of law”).

<sup>4</sup> If “fair information practices” applied only to the government’s control of its own speech, I would have no objection to this. *See infra* Part I. But the government’s decision about which speech by nongovernmental entities is “fair” raises serious First Amendment problems.

vidual privacy just don't get my blood boiling. Maybe they should, but they don't. Perhaps this is because from a selfish perspective, I'd like the ability to stop others from talking about me, and while I wouldn't want them to stop *me* from talking about *them*, the trade-off might be worth it.

Nonetheless, I'm deeply worried about the possible downstream effects of any such new exception, because First Amendment exceptions have a way of supporting restrictions beyond the particular one for which they were created. In fact, most of the justifications given for information privacy speech restraints are directly applicable to other speech control proposals that have already been proposed. If these justifications are accepted in the attractive case of information privacy speech restrictions, such a decision will be a powerful precedent for those other restraints.

Thus, for instance, some argue that information privacy laws are defensible because they protect an intellectual property right in one's personal information.<sup>5</sup> Such arguments don't fit well into the intellectual property exceptions to the First Amendment, which generally don't allow anyone to restrict the communication of facts. And if we are to consider extending the existing intellectual property exceptions, we should also consider that an intellectual property rights rationale is already being used as an argument for other speech restrictions: the proposed database protection law, the attempts to expand the right of publicity, and more. Before wholeheartedly endorsing the principle that calling certain information "intellectual property" lets the government restrict speech communicating that information, we should think about the consequences of such an endorsement.

Similar problems confront the arguments that information privacy speech restrictions are constitutional because they restrain only commercial speech,<sup>6</sup> because they restrain only speech that is not on matters of public concern,<sup>7</sup> because they are narrowly tailored to a compelling government interest in protecting people's dignity, emotional tranquility, or safety,<sup>8</sup> or because they are needed to secure a countervailing civil right.<sup>9</sup> First, for these arguments to succeed, existing First Amendment precedents would have to be substantially stretched. Second, the stretching may make the doctrine loose enough to give new support to many other restrictions, such as bans on sexually themed speech (justified on a "no public concern" rationale), campus speech codes (justified on a "countervailing civil right" rationale or a "narrowly tailored to a compelling government interest" rationale), restrictions on online business discussion or consumer complaints (justified on a broadened commercial speech rationale), restrictions on online distribu-

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<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part IV.

<sup>7</sup> See *infra* Part V.

<sup>8</sup> See *infra* Part VI.

<sup>9</sup> *Id.*

tion of information about encryption, explosives, or drugs (justified on a crime prevention rationale), and many more.

In making these arguments, I will try to identify concrete, specific ways—doctrinal, political, and psychological—in which upholding certain kinds of information privacy speech restrictions could affect the protection of other speech. I will try to avoid making general slippery slope arguments of the “today this speech restriction, tomorrow the Inquisition” variety; the recognition of one free speech exception certainly does not mean the end of free speech generally, or else all would have been lost long ago. But slippery slope concerns are still quite sensible, especially when accepting a proposed speech restriction entails accepting a principle that is broader than the particular proposal and that can logically cover many other kinds of restrictions.<sup>10</sup> Our legal system is based on precedent. Our political life is in large measure affected by arguments by analogy. And many people’s normative views of free speech are affected by what courts say: If the legal system accepts the propriety of laws mandating “fair information practices,” people may become more sympathetic to legal mandates of, for instance, fair reporting practices or fair political debate practices.<sup>11</sup>

This article is an attempt to consider, as concretely as possible, what might be the unintended consequences of various justifications for information privacy speech restrictions. I ultimately conclude that these consequences are sufficiently troubling that I must reluctantly oppose such information privacy rules. But I hope the article will also be useful to those who are committed to supporting information privacy speech restrictions, but would like to design their arguments in order to minimize the risks that I identify; and even to those who welcome the possibility that information privacy speech restrictions may become a precedent

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<sup>10</sup> See text accompanying notes 163 and 164. One of the most eloquent American expressions of this concern with uncabinable principles is also among the earliest:

[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

James Madison, *Remonstrance Against Religious Assessments* (1786), quoted in *Everson v. Board of Educ.*, 330 U.S. 1, 65-66 (1948). I likewise fear that the same authority which can force a citizen to stop speaking on one matter by, for instance, defining it out of the zone of “legitimate public concern” may soon that zone to be smaller and smaller.

<sup>11</sup> For some examples of unsuccessful attempts to restrict such “unfair” speech, see, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974); *Keefe v. Organization for a Better Austin*, 402 U.S. 415 (1971); *Mills v. Alabama*, 384 U.S. 214 (1966).

for other restrictions, because they believe the Court has generally gone too far in protecting, say, nonpolitical speech or speech that injures the dignity of others. Thinking ahead about the possible implications of a proposal—even, and perhaps especially, if it seems viscerally appealing—is always worthwhile.

## I. INFORMATION PRIVACY SPEECH RESTRICTIONS

My analysis throughout this article will focus on the government acting as sovereign, restricting what information nongovernmental speakers may communicate about people. I thus exclude restrictions that the government imposes on its own agencies, for instance Freedom of Information Act provisions that bar the revelation of certain data,<sup>12</sup> or IRS or census rules that prohibit the communication of some tax or census data to other government agencies or to the public.<sup>13</sup> Government agencies do not have free speech rights against their own governments; for instance, federal agencies must comply with Congressional mandates, and creatures of the state such as city or county governments cannot claim rights against the state legislature.<sup>14</sup> Whether speech by state agencies may be restrained by the federal government is a tougher question, but one that's beyond the scope of this article.<sup>15</sup> By focusing on communication by nongovernmental speakers—reporters, businesspeople, private detectives, neighbors—I limit the inquiry to people and organizations who indubitably have free speech rights.

I also exclude restrictions that the government imposes as an employer (*e.g.*, telling its employees that they may not reveal confidential information learned in the course of employment), or as a contractor putting conditions on the communication of information that it has no constitutional duty to reveal (*e.g.*, telling people who want certain lists from the Federal Election Commission that they may only get them if they promise not to use those lists for certain purposes,<sup>16</sup> or telling litigants that they will get discovery materials only if they promise not to reveal them<sup>17</sup>). The government has long been held to have much broader powers when it's acting as employer or contractor, imposing constraints on those who assume them in exchange for government benefits, than when it's acting as sovereign, controlling the speech of private citizens.<sup>18</sup> The unconstitutional conditions

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<sup>12</sup> *E.g.*, 5 U.S.C. § 552(b)(6).

<sup>13</sup> *E.g.*, 13 U.S.C. § 9(a); 26 U.S.C. § 6103(a). *Cf.* Singleton, *infra* note 224 (arguing for strong restrictions on government collection and communication of personal information).

<sup>14</sup> *See, e.g.*, Anderson v. City of Boston, 380 N.E.2d 628, 637 (Mass. 1979).

<sup>15</sup> *See* Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977, 1004 & n.98 (1999) (discussing this issue, and arguing—in my view, persuasively—that state and local agencies should have free speech rights against the federal government).

<sup>16</sup> *See, e.g.*, FEC v. International Funding Institute, Inc., 969 F.2d 1110 (D.C. Cir. 1992) (en banc).

<sup>17</sup> *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

<sup>18</sup> *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality); Rust v. Sullivan, 500 U.S.

doctrine may impose some limits even on the government acting as employer or as contractor, but I will set these matters aside for purposes of this article.

I also focus only on restrictions on communication. Other things that are often called privacy rules—the right to be free from unreasonable governmental searches and seizures, the right to make certain decisions about one’s life without government interference, the right not to have people listening to you or watching you by going onto your property, the right not to have people electronically eavesdropping on your conversations, and such—are outside my discussion.<sup>19</sup> It’s not clear how far the First Amendment protects such nonspeech gathering of information; but it is clear that the analysis of restrictions on information gathering is different from the analysis of restrictions on speech.<sup>20</sup> It is the latter doctrine that is most fully developed, and that provides the most protection against government restrictions.

These three exclusions merely reflect the fact that the strongest protection of free speech has long been seen as arising when the government is acting as sovereign, restricting the speech of private parties. And within this area lie a variety of current and proposed speech restrictions:

1. The “disclosure” tort, which bars the public dissemination of “non-newsworthy” personal information that most people would find highly private,<sup>21</sup> and more specific state laws that forbid some such communications, for instance criminal laws forbidding the publication of the names of rape victims.<sup>22</sup> The uniting principle here is that it is particularly embarrassing to reveal a certain narrow range of information about people, for instance their medical histories, their criminal histories, their sexual practices, the images of their naked bodies, the contents of their conversations with their lawyers or psychiatrists, or possibly some of their reading or viewing habits.<sup>23</sup> These laws generally bar the communication of such information to the public, precisely because it’s the publicizing of such potentially embarrassing information—either to large groups of people or possibly to smaller groups (friends, neighbors, and business associates) whose opinion the subject especially values—that is usually seen as especially offensive.

2. Proposed restrictions on communication of all sorts of information about people, including matters that are not generally seen as particularly private, for in-

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173, 193 (1991).

<sup>19</sup> See, e.g., *Prahl v. Brosamle*, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980) (holding that the First Amendment doesn’t license trespasses in the interests of newsgathering).

<sup>20</sup> See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (4-3).

<sup>21</sup> See RESTATEMENT (SECOND) OF TORTS § 652D.

<sup>22</sup> See, e.g., FLA. STAT. ANN. § 794.03 (1987), held unconstitutional by *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>23</sup> See, e.g., Video Privacy Protection Act, 18 U.S.C. § 2710 (barring video stores from communicating information about their customers’ rental records).

stance the food or clothes they buy, the stores (online or offline) they've shopped at, and so on.<sup>24</sup> Some such information may be embarrassing, but these laws do not focus on that; rather, they cover all information about a person, or at least all information that was gathered in a particular way (for instance, through online business transactions with that person).<sup>25</sup> And because embarrassment isn't the major concern, these laws also apply to communications to fairly narrow groups of recipients about whose opinion most people care little, for instance communications to another business that wants to sell things to you. The felt injury here is the perceived indignity or intrusion flowing from the very fact that people are talking about you or learning about you, and not the embarrassment flowing from the fact that people are learning things that reflect badly on you.

3. Finally, a narrow range of restrictions aimed at preventing people from communicating information that might put others in danger of crime, for instance (in some contexts) the names of witnesses or jurors,<sup>26</sup> or databases of people's social security numbers that some can use to engage in fraud.<sup>27</sup>

Each of these categories covers some restrictions that are imposed only on one's business partners (for instance, bans on lawyers revealing information about their clients, or bans on businesses revealing information about their customers) and other restrictions that are imposed on everyone (for instance, bans on the media publishing embarrassing information that they learned from third parties, or property rights in information that bind everyone without regard to whether they've entered into any contracts). And of course these categories may overlap: Some restrictions aim at preventing embarrassment, preventing crime, and preventing communications about people more broadly.

## II. CONTRACT

### A. *Permissible Scope*

To begin with, one sort of limited information privacy law—contract law applied to promises not to reveal information<sup>28</sup>—is eminently defensible under existing free speech doctrine. The Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amend-

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<sup>24</sup> See, e.g., Gindin, *supra* note 1, at 1157 (urging restrictions on communication of “data on neighboring properties, . . . plane and boat ownership, motor vehicle records, voter registration records, law suits, liens and judgments [and] criminal records”).

<sup>25</sup> See, e.g., *id.* at 1219-22.

<sup>26</sup> See, e.g., cases cited *infra* note 253.

<sup>27</sup> Cf., e.g., Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1197 n.12 (1998) (discussing the flap over Lexis-Nexis's P-Trak database).

<sup>28</sup> See, e.g., *id.* at 1268; Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J.L. & PUB. POL'Y 591 (1994).

ment problems.<sup>29</sup> Enforcing people's own bargains, the Court concluded (I think correctly), doesn't violate those people's rights, even if they change their minds after the bargain is struck. Some have criticized this conclusion on the grounds that it slights the interests of the prospective listeners, and this criticism is not without force. Still, I think that ultimately the free speech right must turn on the rights of the speakers, and that it's proper to let speakers contract away their rights. Insisting that people honor their bargains is a constitutionally permissible "code of fair practices," whether of information practices or otherwise.

And such protection ought not be limited to express contracts, but should also cover implied contracts (though, as will be discussed below, there are limits to this theory). In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract<sup>30</sup>—that part of what their contracting partner is promising is confidentiality. This explains much of why it's proper for the government to impose legal requirements of confidentiality on lawyers, doctors, psychotherapists, and others: When these professionals say "I'll be your advisor," they are implicitly promising that they'll be confidential advisors, at least so long as they do not explicitly disclaim any such implicit promise.<sup>31</sup>

Laws that explicitly infer such contracts from transactions in which there's no social convention of confidentiality are somewhat more troublesome, especially if they require relatively formal disclaimers. Imagine, for instance, that the legislature enacts a law providing that any request from a person for information will be interpreted as implicitly promising not to quote the source by name in a published article, unless the person consents in writing after being given full disclosure of the true purpose for which the quote is to be used. Or consider a law providing that people who buy a product implicitly promise to give the seller equal space to respond to any negative article they publish about the product, unless the seller consents in writing after being given full disclosure of the purpose for which the product is being bought (a purpose which will often be "to write a review of the product").<sup>32</sup> Though journalists could avoid the restriction by getting the req-

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<sup>29</sup> 501 U.S. 663 (1991). The Court also said that promises which do not constitute contracts, but which are enforceable under the law of promissory estoppel, are enforceable; but any contract law differences between contract and promissory estoppel don't affect the principle's key insight, which is that people may promise not to say certain things and thus waive their free speech rights. For convenience, then, I'll talk about this as the "contract" doctrine of First Amendment law.

<sup>30</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a.

<sup>31</sup> See, e.g., *Geisberger v. Willuhn*, 390 N.E.2d 945, 947-48 (Ill. App. 1979) (physician); *Suburban Trust Co. v. Waller*, 408 A.2d 758, 762 (Md. Ct. Spec. App. 1979) (bank); *Doe v. Roe*, 400 N.Y.S.2d 668 (1977) (psychiatrist); *Hammonds v. Aetna Casualty Ins.*, 243 F. Supp. 793, 801-02 (N.D. Ohio 1965) (physician); *Murphy*, *infra* note 41, at 2408-10. Some disclosure tort cases, such as *Vassiliades v. Garfinckel's*, 492 A.2d 580 (D.C. 1985), where a plastic surgeon used his patient's before and after pictures without her consent may have been better analyzed this way.

<sup>32</sup> These examples may seem unusual, but given current hostility towards perceived media over-

website explicit consent, the request for the consent may deter many of the sources and especially many of the sellers; and this in turn may deter journalists from publishing hostile reviews or stories that include quotes which show the sources in a bad light.

These concerns may justify treating the *Cohen v. Cowles Media* principle as applicable only to those implied contracts where confidentiality really is part of most people's everyday expectations. This would mean the implicit contract theory could uphold laws that by default prevent lawyers, doctors, psychiatrists, sellers of medical supplies, and possibly sellers of videos and books from communicating information about their customers; but it wouldn't uphold laws that by default prevent reporters (who are notorious for communicating embarrassing things, not keeping them confidential) from revealing what was said to them, prevent consumers from reviewing products, or prevent sellers of groceries or shoes from communicating who bought what from them. I doubt that most of us expect that someone selling us our food is implicitly promising to keep quiet about what they sold us.<sup>33</sup>

On the other hand, I'm not sure that such a narrow application of *Cohen v. Cowles Media* is proper or ultimately workable. It's often hard to determine exactly what most people expect. When someone buys a video, especially a video whose title he wouldn't want associated with his name, he probably assumes that the video store won't publicize the purchase, at least in part because a video store that does publicize such purchases would lose a lot of business. But is he assuming that the video store is *promising* not to publicize such a purchase? He probably isn't even thinking about this.<sup>34</sup>

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reaching, and the fact that many relatively powerful interests see themselves as victims of out-of-context quotes or unfair product reviews, *see, e.g.*, David J. Bederman, Scott M. Christensen & Scott Dean Quisenberry, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997), they are hardly inconceivable (though, since the media are also a powerful interest group, the laws I describe wouldn't be shoo-ins, either).

<sup>33</sup> Such a view might also be supported by the principle of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which held that the government generally may not engage in content-based discrimination even within a category of unprotected speech; by analogy, one can argue that, even if speech that breaches a contract may be unprotected under *Cohen v. Cowles Media*, the government may not impose default contract conditions in content-based ways or impose different sanctions for breaches of different speech-restrictive contracts. The full scope of *R.A.V.*, though, is not quite clear, in part because of the somewhat mysterious exception for situations where "there is no realistic possibility that official suppression of ideas is afoot," *id.* at 390.

<sup>34</sup> *Cf., e.g.*, Jerry Berman & Deirdre Mulligan, *Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 549, 563 (1999) ("When individuals provide information to a doctor, a merchant, or a bank, they expect that those professionals/companies will base the information collected on the service and use it for the sole purpose of providing the service requested."); Pamela Samuelson, *A New Kind of Privacy?*, 87 CALIF. L. REV. 751, 768 (1997) ("[P]olls show that many people who disclose to others information about themselves for a particular purpose (e.g., to get credit or to be treated for a disease) believe that their disclosures have been made under an implied, if not an explicit, pledge to use the data only for that purpose."). I suspect that this is true of doctors, less true of banks, and least true of merchants, especially given people's knowledge that merchants do sell customer information to each other. On the other hand, I also sus-

If he is assuming such a promise, is he assuming that the video store is promising not to communicate information about such a purchase at all, or only promising not to pass it along to the public or his neighbors, while reserving the right to communicate it to others in the same business? Again, most buyers probably have not even thought about the matter. One advantage of statutory default rules is precisely that they clarify people's obligations instead of leaving courts to rely on guesswork about what people likely assumed.

So I tentatively think that the law may indeed state that certain legislatively identified transactions implicitly contain a promise of confidentiality, unless such a promise is explicitly disclaimed by the offeror, and the contract together with the disclaimer is accepted by the offeree.<sup>35</sup> True, this might justify laws that treat reporters as implicitly promising that they won't reveal or even quote their sources, which troubles me. But so long as the implicit promise is genuinely disclaimable, I'm not troubled too much. Even if this leads eventually to the reporter hypothetical, I don't think too much will be lost; and what is gained is the clear enforceability of promises that often are reasonably inferred by one of the contracting parties, and that can be important parts of the bargain.

Furthermore, though *Cohen v. Cowles Media* involved traditional enforcement of a promise through a civil suit, there should be no constitutional problem with the government enforcing such promises through administrative actions, or with special laws imposing presumed or even punitive damages for breaches of such promises. I suspect that even with purely contractual remedies, the threat of class action suits could be a powerful deterrent to breaches of information privacy contracts by e-commerce sites, especially since the suits would create a scandal: In the highly competitive Internet world, a company could lose millions in business if people hear that it's breaking its confidentiality promises. But I think it would be constitutional for the government to try to increase contractual compliance either by providing an extra incentive for aggrieved parties to sue or by bringing a complaint itself. Though breach of contract has traditionally been seen as a purely private wrong, to be remedied through a private lawsuit, it's similar enough—especially when it's willful—to fraud or false advertising that there's nothing startling about the government prosecuting some such breaches itself.<sup>36</sup>

The great free speech advantage of the contract model is that it does *not* en-

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pect that most people have little expectation about many such transactions—especially transactions with merchants other than doctors and banks—simply because they haven't much thought about the matter.

<sup>35</sup> Cf. Kang, *supra* note 27, at 1267-68, 1280-81 (taking the same view). This might suggest that *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), is mistaken; the FCC regulations struck down by that case could be interpreted as just a default rule implementing customers' assumption that their telephone call data won't be disseminated without their permission.

Singleton, *infra* note 224, criticizes these sorts of default rules on policy grounds; I take no opinion on the policy question, but only argue that such rules are constitutionally permissible.

<sup>36</sup> But see discussion of the possible *R.A.V. v. City of St. Paul* problem, *supra* note 33.

dorse any right to “stop people from speaking about me.” Rather, it endorses a right to “stop people from violating their promises to me.” One such promise may be a promise not to say things, and perhaps there may even be special remedies for breaches of such promises or special defaults related to such promises. But in any event, the government is simply enforcing obligations that the would-be speaker has himself assumed.<sup>37</sup> And such enforcement, in my view, poses little risk of setting a broad precedent for many further restrictions, precisely because it is founded only on the consent of the would-be speaker, and cannot be justified in the many other cases—such as the Communications Decency Act, database protection legislation, and so on—where the speaker has not consented to the speech restriction.

### B. *Limitations*

Contract law protection, though, is distinctly limited, in two ways.

First, it only lets people restrict speech by parties with whom they have a speech-restricting contract, express or implied. If I make a deal with a newspaper reporter under which he promises not to identify me as a source, I can enforce the deal against the reporter and the reporter’s employer, whom the reporter can bind as an agent. But if a reporter at another news outlet learns this information, then that outlet can publish it without fear of a breach of contract lawsuit. Likewise, there are no First Amendment problems with an employer suing an employee for breach of a nondisclosure agreement or even an implied duty of loyalty, but if the employee leaks the information to a newspaper, the employer can’t sue that newspaper, at least under the *Cohen v. Cowles Media* theory. The newspaper simply hasn’t agreed to anything that would waive its First Amendment rights, which is the premise on which *Cohen v. Cowles Media* rests. The disclosure tort would similarly not be justifiable under a contract theory.

Second, *Cohen v. Cowles Media* cannot validate speech-restrictive terms that the government compels a party to include in a contract; the case at most validates government-specified default terms that apply unless the offeror makes clear that these terms aren’t part of the offered deal. Thus, while the government may say “Cyberspace sales contracts shall carry an implied warranty that the seller promises not to reveal the buyer’s personal information,” it may not add “and this implicit warranty may not be waived, even by a prominent statement that is explicitly agreed to by a customer clicking on an ‘I understand, and agree to the contract in spite of this’ button.”

This flows directly from the theory on which *Cohen v. Cowles Media* rests:

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<sup>37</sup> *Cohen v. Cowles Media*, 501 U.S. at 671.

“The parties themselves . . . determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed.”<sup>38</sup> A merchant’s express promise of confidentiality is “self-imposed”; so, one can say, is an implicit promise, when the merchant had the opportunity to say “by the way, I am not promising confidentiality” and didn’t do so. But when someone is told that he must keep information confidential, even if he explicitly told his contracting partner that he was making no such promise, then such an obligation can hardly be said to be “self-imposed” or determined by mutual agreement.

### C. *Government Contracts*

*Cohen v. Cowles Media* does not necessarily decide to what extent the government, acting as contractor, may require people to sign speech-restrictive contracts as a condition of getting data from the government itself. This question raises thorny issues of unconstitutional conditions and often of the government’s right to restrict access to government records that have historically been in the public domain (such as court records). Fortunately, the Court is considering this very issue in *Los Angeles Police Department v. United Reporting Publishing Corp.*,<sup>39</sup> and a decision is expected by July 2000.

### D. *Contracts with Children*

Finally, this whole discussion of contracts presupposes that both parties are legally capable of entering into the contract and of accepting a disclaimer of any implied warranty of confidentiality. If a cyber-consumer is a child, then such an acceptance might not be valid. This is also a difficult issue, but one that is outside the scope of this Article.<sup>40</sup>

## III. PROPERTY

### A. *Intellectual Property Rules as Speech Restrictions*

Partly because of the limitations of the contract theory, many information privacy advocates argue that people should be assigned a property right in personal information about themselves.<sup>41</sup> Such a property approach would bind eve-

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<sup>38</sup> *Id.*

<sup>39</sup> No. 98-678, *cert. granted*, 119 S. Ct. 901 (1999).

<sup>40</sup> *Cf.* Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501 *et seq.*; Matlick, *infra* note 223; Singleton, *infra* note 224, text accompanying notes 76-79.

<sup>41</sup> *See, e.g.*, Lawrence Lessig, *The Architecture of Privacy*, VAND. J. ENT. L. & PRAC., April 1999,

ryone, and not just those who are in contractual privity with the person being talked about. People who find that a database contains information about them would be able to order the database operators to stop communicating this information, even though the database operators have never promised anything, expressly or implicitly. Likewise, people could stop newspapers from publishing stories about them, even if the information was gleaned through interviews with third parties.<sup>42</sup>

Calling a speech restriction a “property right,” though, doesn’t make it any less a speech restriction, and it doesn’t make it constitutionally permissible. Broad, pre-*New York Times v. Sullivan* libel laws can be characterized as protecting a property right in reputation; in fact, some states consider reputation a property interest.<sup>43</sup> The right to be free from interference with business relations, including interference by speech urging a boycott like the one in *NAACP v. Claiborne Hardware*,<sup>44</sup> can be seen as a property right.<sup>45</sup> A recent attempt at banning flagburning rested on the argument that the flag is the intellectual property of the United States, and that flag desecration thus violated property rights.<sup>46</sup> Restrictions on the use of cultural symbols in ways that the cultures find offensive might likewise be reframed as property rights in those symbols.<sup>47</sup> A ban on all unauthorized biographies, whether of former child prodigies,<sup>48</sup> movie stars, or politi-

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at 56, 63 (suggesting that the law should give “individuals the [property] rights to control their data”); Carl Shapiro & Hal R. Varian, *US Government Information Policy*, available at <http://www.sims.berkeley.edu/~hal/Papers/policy/policy.html>, at 16; Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1996)

<sup>42</sup> Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner’s Economic Theory*, 12 GA. L. REV. 429, 439-40 (1978).

<sup>43</sup> Reputation is generally not a property interest for purposes of the federal Due Process Clause, *Paul v. Davis*, 424 U.S. 693 (1976), but it can be a property right for other purposes. *E.g.*, *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) (Florida law recognizes business reputation as a property interest); *Nossen v. Hoy*, 750 F. Supp. 740, 743 (E.D. Va. 1990) (“an individual holds a . . . property interest in his or her reputation” for purposes of Washington and Virginia conversion law).

<sup>44</sup> 458 U.S. 886 (1982).

<sup>45</sup> “[T]he common law has long held that the reasonable expectancy of a prospective contract is a property right to be protected from wrongful interference in the same sense as an existing contract is protected.” *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952, 955 (5th Cir. 1975); *see also, e.g.*, *City of Birmingham v. Business Realty Inv. Co.*, 722 So. 2d 747, 752 (Ala. 1998) (concluding that the “right to conduct a business relationship” protected by the tort of “intentional interference with business relations” “is an intangible property right”).

<sup>46</sup> H.R. 3883, 104th Cong., 2d Sess. (Rep. Torricelli); *see also Texas v. Johnson*, 491 U.S. 397, 429-30 (1989) (Rehnquist, C.J., dissenting) (suggesting that the government could ban flag desecration because it had a “limited [intellectual] property right” in the flag). *But see Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flagburning is protected speech); *United States v. Eichman*, 496 U.S. 310 (1990) (same).

<sup>47</sup> *Cf. Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) (involving the descendants of the Sioux leader Crazy Horse, then 115 years dead, trying to use right of publicity law to stop the marketing of Crazy Horse Malt Liquor; the malt liquor company won on procedural grounds).

<sup>48</sup> *Cf. Sidis v. F.R. Pub. Co.*, 113 F.2d 806 (2d Cir. 1940) (holding that a publisher couldn’t be held liable for publishing an accurate biographical article about a former child prodigy); Bloustein, *infra* note

cians, can be seen as securing a property interest in the details of those people's lives. Similarly, an early right of publicity case took the view that people who aren't public figures have the exclusive right to block all photos and portraits of themselves, with no exceptions for news stories or other such uses.<sup>49</sup>

Each of these "property rights," though, would remain a speech restriction.<sup>50</sup> A property right is among other things the right to exclude others;<sup>51</sup> an intellectual property right in information is the right to exclude others from communicating the information—a right to stop others from speaking. Like libel law, intellectual property law is enforced through private litigation, but like libel law, it's still a government-imposed restriction on speech.<sup>52</sup> Some such restrictions may be permissible because there's some substantive reason why it's proper for the government to restrict such speech, but not *because* they are property rights.

The question isn't (as some suggest) "who should own the property right to personal information"?<sup>53</sup> Rather, it's whether personal information should be treated as property at all—whether some "owner" should be able to block others from communicating this information, or whether everyone should be free to speak about it.

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160, at 66-70 (arguing that the former child prodigy should have won).

<sup>49</sup> *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C.D. Mass. 1894) ("[A] private individual has a right to be protected in the representation of his portrait in any form; . . . this is a property as well as a personal right . . . . A private individual should be protected against the publication of any portraiture of himself . . . .").

<sup>50</sup> See *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc) ("To say that the word Olympic is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause."); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1536 (1993) (expressing concern that in some arguments "the incantation 'property' seems sufficient to render free speech issues invisible"); Dianne Lenheer Zimmerman, *Information as Speech, Information as Goods*, 33 *WM. & MARY L. REV.* 665 (1992) (expressing concern that "[w]ithout better principles for confining the sphere of property rules, the likely outcome is that more and more chunks of communicative activity will fall on the property side of the line").

<sup>51</sup> See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) ("The hallmark of a protected property interest is the right to exclude others."); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("the 'right to exclude' [is] universally held to be a fundamental element of the property right"); *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it").

<sup>52</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); see also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress law applied to speech is a speech restriction even though it's enforced through private lawsuits); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (likewise as to the law of intentional interference with business relations).

<sup>53</sup> See, e.g., *Murphy*, *supra* note 41, at 2393 ("[P]ersonal information is, in fact, property. Thus, the net effect—in economic terms—of the failure of the disclosure tort has been to assign the property right to personal information to the party who uncovers the information, rather than to the party whom the information concerns.").

B. *Existing Restrictions as Supposed Precedents*

The Court has, of course, upheld some intellectual property rights, acknowledging that they are speech restrictions but holding that those restrictions were constitutional. In all these precedents, though, the Court has stressed a key point: The restrictions did not give the intellectual property owners the power to suppress facts. And this power to suppress facts is exactly the power that information privacy speech restrictions would grant.<sup>54</sup>

1. Copyright

*Harper & Row v. Nation Enterprises*, which held that copyright law is constitutional,<sup>55</sup> is the best example of this. Under copyright law, I may not publish a book that includes more than a modicum of creative expression from your book, even though my book is neither obscenity nor libel nor commercial advertising; such a restriction, *Harper & Row v. Nation Enterprises* held, is indeed a speech restriction, but a permissible one.

But the main reason *Harper & Row* gave for this conclusion is that copyright law does not give anyone a right to restrict others from communicating facts or ideas. “[C]opyright’s idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting *free communication of facts* while still protecting an author’s expression.”<sup>56</sup> “No author may copyright his ideas or *the facts he narrates*.”<sup>57</sup> Copiers “posses[s] an unfettered right to use *any factual information* revealed in [the original],” though they may not copy creative expression.<sup>58</sup> There ought not be “abuse of the copyright owner’s monopoly as an instrument to suppress *facts*.”<sup>59</sup> “In view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and *uncopyrightable facts* and ideas,” copyright law is constitutional.<sup>60</sup> Under the copyright exception to free speech protection, then, speech that borrows creative expression is restrictable, but speech that borrows only facts remains free.

This limitation on the copyright exception is both theoretically and practi-

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<sup>54</sup> See generally Rochelle Cooper Dreyfuss, *Warren and Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Lore*, 1999 STAN. TECH. L. REV. VS 8 (concluding that traditional intellectual property law provides little support for informational privacy speech restrictions).

<sup>55</sup> 471 U.S. 539 (1985).

<sup>56</sup> *Id.* at 556 (emphasis added and internal quotation marks omitted).

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> *Id.* at 557-58 (emphasis added).

<sup>59</sup> *Id.* at 559 (emphasis added).

<sup>60</sup> *Id.* at 560 (emphasis added). See also Singleton, *infra* note 224, at text accompanying note 68 (making a similar observation about copyright law).

cally significant. Theoretically, this limitation is what leaves speakers ample alternative channels for communicating their message—speakers still possess “an unfettered right to use any factual information” that they please. Practically, people do indeed take advantage of this limitation all the time. If a historian spent years of effort uncovering some remarkable, hitherto unknown facts, you may use every one of those facts, as historians indeed do (though ethical rather than legal concerns may dictate that they give credit to the original discoverer). Exactly where to draw the line between idea and expression is sometimes uncertain, but there are fewer uncertainties about the line between fact and expression, and in any event people who don’t care about using the original author’s rhetorical flourishes can easily find a way to communicate facts that they’ve learned from others’ work.

## 2. Trademark

Likewise with trademark law. Though trademark law restricts certain uses of trademarks in advertising a product or on the cover of the product, it does not prohibit speech that communicates facts or opinions about the product, even if the speech uses the product’s name. You are free to write a book about the Coca-Cola Company—a book that will be commercially sold, but that is itself not commercial speech because it’s not commercial advertising—or a book describing the nutritional qualities of various soft drinks, or even a novel in which the main character constantly drinks Diet Cokes.<sup>61</sup> Likewise, if you’re distributing or selling product reviews or a table mapping product names to cost and quality, you don’t need permission from the trademark owner. Even in ads, factually accurate statements about the relationship of your products to others’ products are permitted, either because they are in context not misleading or because they fall under the rubric of “nominative fair use.”<sup>62</sup> The new federal trademark dilution statute, which has not yet been considered by the Court, also follows this principle; it is limited to commercial advertising, and even there provides a fair use defense.<sup>63</sup>

Even the *Gay Olympics* case,<sup>64</sup> which involved an unusually broad quasi-trademark law that gave the U.S. Olympic Committee the exclusive right to use the word “Olympic” for advertising and promotional purposes, stressed this point: “By prohibiting the use of one word for particular purposes, neither Congress nor

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<sup>61</sup> See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1512 & n.6 (9th Cir. 1992) (Kozinski, J., dissenting).

<sup>62</sup> See, e.g., *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

<sup>63</sup> See Federal Trademark Dilution Act of 1995, 15 U.S.C. §§ 1125(c)(1), (c)(4).

<sup>64</sup> *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987).

the USOC has prohibited the [plaintiff] from conveying its message.”<sup>65</sup> The case did not involve any congressional attempt to let the USOC stop people from discussing the Olympics, conveying facts about the Olympics, writing fiction about the Olympics, and so on.<sup>66</sup> Even given this limitation, the law in the *Gay Olympics* case has been criticized as going too far,<sup>67</sup> and I generally agree with these criticisms. But even if the law improperly gave the USOC too much power, it didn’t give it the power to stop the communication of facts.

### 3. Right of Publicity

The same is true of *Zacchini v. Scripps-Howard Broadcasting Co.*, in which the Supreme Court endorsed a narrow subset of the right of publicity: a right to block others from retransmitting one’s entire performance.<sup>68</sup> *Zacchini* concluded that a TV station’s rebroadcast of Hugo Zacchini’s entire human cannonball act was restrictable for the same reasons that copyright infringement was restrictable;<sup>69</sup> and, as it would eventually do as to copyright, the Court stressed that the law did not restrict the communication of facts. The case would have been “very different,” the Court said, if “respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television”;<sup>70</sup> liability was permissible because it was based not on mere for-profit “reporting of events” but on “broadcast[ing] or publish[ing] an entire act for which the performer ordinarily gets paid.”<sup>71</sup>

The Supreme Court has never confronted the broader right to restrict speech that uses one’s name or likeness; *Zacchini* explicitly stressed that it wasn’t deciding anything about this right,<sup>72</sup> and though some courts and commentators have

<sup>65</sup> *Id.* at 536.

<sup>66</sup> *See, e.g.*, *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1118-21 (S.D.N.Y. 1980) (holding that the use of an Olympic logo and an Olympic torch on a poster opposing the planned conversion of an Olympic Village into a prison did not violate the statute); *San Francisco Arts & Athletics*, 483 U.S. at 536 & n.14 (stating that the statute might not “restric[t] purely expressive uses of the word ‘Olympic,’” citing *Stop the Olympic Prison*); *id.* at 539-40 (describing the statute as applying to uses of the word “to induce the sales of goods or services” and to other “promotional uses”).

<sup>67</sup> *See, e.g.*, *International Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1320 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131 (1989).

<sup>68</sup> 433 U.S. 562 (1977).

<sup>69</sup> *Id.* at 573, 576-77.

<sup>70</sup> *Id.* at 569.

<sup>71</sup> *Id.* at 574.

<sup>72</sup> “It should be noted . . . that the case before us is more limited than the broad category of lawsuits that may arise under the heading of ‘appropriation.’ Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets to perform.” *Id.* at 573 n.10. “[T]he broadcast of petitioner’s entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner’s ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a ‘right of publicity’

omitted this critical limitation and have cited *Zacchini* as generally “hold[ing] that the right of publicity is constitutional,”<sup>73</sup> such a characterization is mistaken. But even to the extent that lower courts have recognized such a right, they too have adopted limiting principles that keep the right from restraining the communication of facts.

To begin with, though the right of publicity is sometimes described as a right to stop others from using one’s name, likeness, and other attributes of identity “in commerce” or “for trade purposes,”<sup>74</sup> courts and legislatures have long recognized that use of name or likeness in “news reporting, commentary, entertainment, [or] works of fiction or nonfiction”<sup>75</sup> must be excluded. These uses are sold in commerce and in trade, but they are nonetheless protected from right of publicity claims, in large part because of free speech concerns.<sup>76</sup> The right may not stop the communication of facts about a celebrity, even if it blocks advertising or merchandising that merely tries to associate the advertiser or the consumer with a celebrity.

Moreover, even the use of name or likeness in an advertisement that is incidental to the permitted uses—for instance, a billboard advertising an unauthorized biography, which will necessarily use the subject’s name and probably likeness—is likewise excluded from the right of publicity, even though it’s clearly “in commerce” and “for trade purposes.”<sup>77</sup> This again relates directly to the need to prevent the suppression of facts. Letting Elizabeth Taylor block the unauthorized

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involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.” *Id.* at 576. The Court repeated several times that the case involved the broadcast of “a performer’s entire act,” *id.* at 570, 574, and twice at 575.

<sup>73</sup> See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 80 Cal. Rptr. 2d 464 (Cat App. 1998) (stating, in a context quite unrelated to the one in *Zacchini*, that *Zacchini* “considered, and rejected, a First Amendment defense to liability for infringement of the right of publicity”); Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. REV. 61, 99-100 (1999) (characterizing *Zacchini* as upholding the protection of the “right of publicity,” defined by the author as the right to stop “misappropriation of name or likeness”).

<sup>74</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”).

<sup>75</sup> *Id.* § 47.

<sup>76</sup> See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (App. Div. 1980); *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 455 (Cal. 1979) (Bird, C.J., concurring).

<sup>77</sup> See, e.g., RESTATEMENT (SECOND) OF UNFAIR COMPETITION § 47 cmt. a (stating the same rule as a matter of substantive right of publicity law); *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (“Forum would have been entitled to use Cher’s picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication, because such usage is protected by the First Amendment.”); *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996) (stating that “[p]romotional speech may be noncommercial if it advertises an activity itself protected by the First Amendment,” and upholding against a right of publicity claim the right to advertise videos by using the likeness of one of the stars).

use of her name in ads for clothing would rarely substantially interfere with the perfume manufacturer's ability to convey the facts about the clothing. Letting her block the use of her name in ads for an unauthorized biography, however, would mean that the biographer couldn't communicate to potential buyers the critical fact that the book is about Taylor.

The right of publicity may have gotten too big,<sup>78</sup> but even it basically respects the principle that there ought to be no "abuse of the [intellectual property] owner's monopoly as an instrument to suppress facts";<sup>79</sup> supporters of property rights in facts thus can't get much analogical support out of it. For whatever it's worth, the few cases that have considered right of publicity claims based on the sale of databases containing personal information have rejected such claims.<sup>80</sup>

#### 4. Summary

There are other limitations on many of these intellectual property rights that make any analogies to information privacy speech restrictions quite doubtful: For instance, copyright law and the *Zacchini* right are in large measure justified as necessary incentives for authors to create new works; likewise, most of trademark law and most of right of publicity law apply only to commercial advertising. But the core principle at the heart of all these restrictions is that they create a fairly narrow right that may affect the form of people's speech but ought not prevent people from communicating facts. Any putative right in one's personal information can thus be adopted by analogy only if one is willing to relax this limitation, a limitation that is critical to protecting free speech.

### C. *Functional Arguments for Upholding Information Privacy Speech Restrictions Under a Property Theory*

#### 1. Avoiding "Free-Riding" and Unjust Enrichment

But wait, a common refrain goes, aren't those who communicate personal information about us engaging in a sort of free riding, enriching themselves without compensating the people whose existence makes their enrichment possible? As one article argued, in 1988 three leading credit bureaus made almost \$1 billion put together from selling credit information, but "[h]ow much did these credit bu-

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<sup>78</sup> See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1992) (Kozinski, J., dissenting); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996); *Madow*, *infra* note 94; *Zimmerman*, *infra* note 198.

<sup>79</sup> 471 U.S. 539, 559 (1985).

<sup>80</sup> *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. 1995); *Shibley v. Time, Inc.*, 341 N.E.2d 337 (Ohio App. 1975).

reaus pay consumers for the information about them that they sold? Zero.”<sup>81</sup>

This, though, cannot be the justification for restricting speech, unless we are willing to dramatically redefine free speech law. Newspapers and radio and TV news programs, after all, make billions from stories that are made possible only by the existence of their subjects. The essence of news is precisely the reporting of things that were done or discovered by others; the essence of the news business is profiting from reporting on things that were done or discovered by others. But news organizations generally don’t pay a penny to the subjects of their stories—in fact, it is seen as unethical for news organs, though not entertainment organs, to pay subjects.<sup>82</sup>

Likewise, unauthorized biographers and historians make money from publishing information about others, information that only exists because those people exist. Comedians who tell jokes about people make a living from those they mock.<sup>83</sup>

In a sense, all these speakers are free-riding: They are taking advantage of something that relates to someone else and that exists only because of that other person’s existence, and they aren’t paying that person for it (though they are usually investing a good deal of time, money, and effort in the project—this free-riding is certainly not mere literal copying). But our legal system correctly allows a great deal of free-riding. It has never been a principle of tort law that all free-riding is illegal, or that all such enrichment is unjust: “[T]he principle of unjust enrichment does not demand restitution of every gain derived from the efforts of others. A small shop, for example, may freely benefit from the customers attracted by a nearby department store, a local manufacturer may benefit from increased demand attributable to the promotional efforts of a national manufacturer

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<sup>81</sup> Scott Shorr, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1793 (1995).

<sup>82</sup> See, e.g., Rick Bentley, *Outreach Takes Station off the Sidelines*, FRESNO BEE, Oct. 7, 1999, at E3 (“Local television news teams have a prime directive: No payment for interviews. Checkbook journalism can destroy a news organization’s credibility in an instant.”).

<sup>83</sup> In some of these examples, some (though not all) subjects of the speech do profit from the speech, albeit indirectly. The subject of a story may be pleased by his newfound fame; the producer of a product that’s covered favorably in the newspaper may make money as a result of the coverage. But of course other subjects of news stories are hurt, either financially or emotionally, by those stories; in such cases, the news organ may be making a profit at the same time as the subjects of the stories, without whom the stories would never have existed, are suffering a loss. Free speech law’s response to these subjects is “tough luck,” at least unless the stories say something false.

And in this respect, distribution of personal information databases is no different from the publishing of news. Many, perhaps most, of the subjects of these databases derive indirect benefits just like the subjects of news stories do. If I have a good credit history, I am benefited by the credit history databases—if the databases didn’t exist and would-be creditors had no way of knowing my record, I’d have to pay a higher interest rate. Likewise, while many people are annoyed by having their personal information available to marketers, some people apparently find the targeted marketing useful, or else they wouldn’t buy as a result of this marketing, and the marketing would become unprofitable and stop. Thus, some (but not all) people indirectly benefit as a result of information about them being stored in databases—just as some (but not all) people indirectly benefit as a result of news stories about them or their businesses.

of similar goods, and a newspaper may benefit from reporting on the activities of local athletic teams. Similarly, the law has long recognized the right of a competitor to copy the successful products and business methods of others absent protection under patent, copyright, or trademark law.”<sup>84</sup> And it has certainly not been a principle of free speech law that speech may be restricted simply to assure the subject of the speech a piece of the profits.

What intellectual property law has generally tried to prevent is not free-riding as such, but free-riding of a particular kind: the use not just of something that relates to another, but the use of the product of another’s substantial labor, and even that only in limited cases.<sup>85</sup> Such a use runs the risk of dramatically diminishing the incentive to engage in such labor, which is what makes the defendant’s enrichment not so much unjust in some abstract moral sense, but rather socially harmful. This concern is at the heart of copyright law,<sup>86</sup> of the right to prevent the unauthorized transmission of an entire act,<sup>87</sup> and to a large extent of trade secret law. But this concern does not apply to personal information about people, information that the subjects generally have not invested much effort in creating.

Again, I stress that my critique here only relates to the intellectual property justification for information privacy speech restrictions; perhaps there are some other justifications that can support such speech restraints. But focusing on the fact that information distributors are profiting while the subjects of the information are not strikes me as just not helpful to this inquiry.

## 2. Internalizing Costs and Maximizing Aggregate Utility

Another functional argument is that using a property rights theory to restrict the communication of information about a person would require speakers to “internalize th[e] cost” of their speech “by paying those whose data is used.”<sup>88</sup> Such internalizing, the theory goes, would maximize aggregate social utility: By “recogniz[ing the] diversity” of people’s desires for information privacy, the property rule could make sure that information about each person is communicated only if the benefit to the speaker exceeds the felt cost to the subject.<sup>89</sup>

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<sup>84</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. b.

<sup>85</sup> See Dreyfuss, *supra* note 54 (“American law recognizes a privilege to copy. . . . For intellectual property, the traditional rationale for [departing from this baseline] is incentive-based. . . . Those who merely generate information as a byproduct of activities for which no special incentives are necessary are not, therefore, the traditional beneficiaries of intellectual property legislation.”).

<sup>86</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991).

<sup>87</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

<sup>88</sup> Lessig, *supra* note 41, at 63.

<sup>89</sup> See, e.g., *id.*; Bloustein, *supra* note 42, at 439-40 (endorsing the property rights theory on the grounds that it fosters “a process of voluntary exchange, [that,] like the free market generally, would assure that ‘human satisfaction as measured by aggregate consumer willingness to pay . . . is maximized’”); Murphy, *supra* note 41, at 2395-96.

The principle of free speech law, though, is that speakers do *not* have to internalize all the felt costs that flow from the communicative impact of their speech. The NAACP didn't have to internalize the tangible economic (not just emotional) cost that its boycott imposed on the Claiborne County merchants.<sup>90</sup> Movie producers don't have to internalize the tangible cost that their movies impose on victims of viewers who commit copycat crimes.<sup>91</sup> Cohen, Johnson, and Hustler don't have to internalize the emotional distress cost that their speech inflicted on passersby or its subject.<sup>92</sup>

Again, if there's an independent reason why this speech should be treated differently from other speech, for instance because it falls within some new free speech exception, then the law may require that its costs be internalized. But the desire to maximize aggregate social utility doesn't itself justify a new exception; on the contrary, it's only the new exception that would legitimize restraints aimed at maximizing aggregate social utility.

#### D. *The Potential Consequences*

I have explained why I think that merely calling information privacy speech restrictions "property rights" doesn't advance the First Amendment inquiry, why such speech restrictions aren't justifiable under any existing intellectual property exceptions, and why such monopolies in facts, not just expression, are theoretically troubling.<sup>93</sup> I now want to argue that, though the Court is of course always free to carve out a new intellectual property exception for speech that communicates personal information, it would be a mistake for it to do so.

Speech that reveals private information is not the only speech that some want to restrict under the property rights model. As many leading commentators have recently argued, we are now in the midst of a broad movement that uses intellectual property rhetoric to broaden the rights of owners to restrict others'

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<sup>90</sup> NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

<sup>91</sup> *E.g.*, Olivia N. v. NBC, 178 Cal. Rptr. 888 (Ct. App. 1981) (barring recovery where child was sexually abused by minors who allegedly copied a similar crime shown on television); Bill v. Superior Court, 187 Cal. Rptr. 625 (Ct. App. 1982) (barring recovery where girl was shot outside theater by a moviegoer who was allegedly copying a violent scene from the movie); *see also* DeFilippo v. National Broadcasting Co., Inc., 446 A.2d 1036 (R.I. 1982) (barring recovery for parents whose child hanged himself after watching a mock hanging); Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (barring recovery where child hurt himself while trying to duplicate a sound effect technique demonstrated on a television program).

<sup>92</sup> Cohen v. California, 403 U.S. 15 (1971); Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

<sup>93</sup> *Cf. also* Zimmerman, *supra* note 50, at 733 (arguing that the idea/expression line—which in copyright law also distinguishes facts from expression—"has great merit as a line of demarcation on First Amendment and not merely on intellectual property grounds," and that any property rights in information should respect this line).

speech.<sup>94</sup> The proposed database protection legislation would give database owners property rights in collections of information.<sup>95</sup> Some recent cases have revived the misappropriation tort, recognizing a property right in news.<sup>96</sup> Many (though fortunately not all) recent cases have broadened trademark owners' rights to restrict parodies and other transformative uses.<sup>97</sup> Copyright terms are being lengthened and some argue that fair use is being unduly contracted.<sup>98</sup> The right of publicity is growing to include any advertising, merchandising, and even interior decor that reminds people of a celebrity, even if it doesn't use the celebrity's name or likeness.<sup>99</sup>

Many have criticized this creeping propertization of speech, often on First Amendment grounds.<sup>100</sup> They have decried many courts' tendency to merely label

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<sup>94</sup> See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354, 354 (1999) ("We are in the midst of an enclosure movement in our informational environment."); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 898-99, 902 ("[T]here is currently a strong tendency to 'propertize' everything in the realm of information. Intellectual property law is expanding on an almost daily basis as new rights are created or existing rights are applied to give intellectual property owners rights that they never would have had in an earlier time."); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 DAYTON L. REV. 587, 593 (1997) (arguing that there is a "serious effort . . . afoot to refashion our information policy to give primacy to intellectual property laws"); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 142 (1993) ("In recent decades . . . the law has moved more and more of our culture's basic semiotic and symbolic resources out of the public domain and into private hands."); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 171 (1981); Zimmerman, *infra* note 198, at 51:

Indeed, we live in the era when intellectual property has become king of the hill. Law-makers and creative individuals alike increasingly treat as received truth the contestable intuition that producers of intellectual products should have a "right" to any income stream their labor can generate. They label as immoral and self-serving counterarguments that, except in narrowly tailored circumstances, intangible intellectual contributions with value to the public should be freely appropriable. This pro-property mind set has been further encouraged by the gradual recognition that income from intellectual property makes up a very significant part of the United State's balance of payments in the international trade arena. In short, a claimant who says that someone is "stealing" his intellectual labor is making an assertion of greater attractiveness to the modern legal ear than someone who makes the counter-argument that all these property claims are diminishing the ability of others to express themselves.

<sup>95</sup> See Benkler, *supra* note 94, at 358, 440, 445-46.

<sup>96</sup> See, e.g., *NBA v. Motorola, Inc.*, 105 F.3d 841, 847-48, 853 (2d Cir. 1997) (fortunately limiting the tort to only a narrow range of hot news).

<sup>97</sup> See generally Mark A. Lemley, *The Death of Common Sense*, 108 YALE L.J. 1687 (1999).

<sup>98</sup> See, e.g., Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996.

<sup>99</sup> See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir.) (Kozinski, J., dissenting); *Wendt v. Host Int'l*, 125 F.3d 806 (9th Cir. 1997); Madow, *infra* note 94; Zimmerman, *infra* note 198.

<sup>100</sup> See, e.g., Lemley, *supra* note 97, at 1710-12 ("The expansive power that is increasingly being granted to trademark owners has frequently come at the expense of freedom of expression. As trademarks are transformed from rights against unfair competition to rights to control language, our ability to discuss, portray, comment, criticize, and make fun of companies and their products is diminishing."); Litman, *supra* note 94 (arguing that expansions of copyright law and of other intellectual property rights pose First Amendment problems, and that even existing copyright law may sometimes impermissibly restrict speech); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994) (likewise); Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185, 204-05 (1992) (likewise);

speech restrictions “property rules,” as if such a relabeling could eliminate the First Amendment objections.<sup>101</sup> They have pointed out that cases upholding the propriety of some speech restrictions—such as the core of copyright law, traditional trademark law aimed at preventing consumer confusion, or the right to control the rebroadcast of one’s entire act—don’t necessarily validate all new restrictions that one might call “copyright,” “trademark,” “right of publicity” (much less “intellectual property” generally).<sup>102</sup>

But if the arguments that “it’s not a speech restriction, it’s a property rule” or “the Supreme Court has upheld property rights in information, so property rights in information are constitutional” are accepted as to information privacy speech restrictions, they will be considerably strengthened as to the other restrictions, too. If, for instance, courts hold that information privacy speech restrictions are proper because they merely “internalize th[e] cost” of their speech “by paying those whose data is used,”<sup>103</sup> it will be easy to argue the same as to other “data” that someone may say is his. Likewise, if courts hold that such speech restrictions are permissible because the restrictions encourage “a process of voluntary exchange, [that,] like the free market generally, would assure that ‘human satisfaction as measured by aggregate consumer willingness to pay . . . is maximized,’” the same argument could apply to broad new rights in all sorts of information.<sup>104</sup>

Of course, courts already can, if they really want to, uphold new intellectual property rules by analogy to the existing old ones; but the creation of yet another kind of intellectual property speech restriction—and one that promises to be quite popular—will strengthen the argument. Ask yourself: Would the courts be less

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Malla Pollack, *The Right to Know?: Delimiting Database Protection At The Juncture of the Commerce Clause, The Intellectual Property Clause and The First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999) (arguing that proposed property rights in factual databases violate the First Amendment); Memorandum in Support of Plaintiff’s Motion for Summary Judgment, *Eldred v. Reno*, Case No. 1:99CV00065 JLG, at 31-52, available at <http://cyber.law.harvard.edu/eldredvreno/legaldocs.html> (drafted primarily by Larry Lessig) (arguing that both the prospective and the retroactive extension of the copyright term violates the Free Speech Clause); Zimmerman, *supra* note 50, at 673 (arguing that “better principles for confining the sphere of property rules” are needed to prevent Free Speech Clause violations).

<sup>101</sup> See *supra* note 50.

<sup>102</sup> See, e.g., Zimmerman, *supra* note 50 (approving of properly bounded intellectual property law, but criticizing its recent expansion); Lemley, *supra* note 97 (approving of properly bounded trademark law, but criticizing its recent expansion); Malla Pollack, *Time to Dilute the Dilution Statute*, 78 J. OF PATENT AND TRADEMARK OFFICE SOC’Y 519, 526-32 (1996) (same); Malla Pollack, *Your Image is My Image*, 14 CARDOZO L. REV. 1391, 1397-1448 (1993) (same); Alfred Yen, *A First Amendment Perspective on the Idea-Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel,”* 38 EMORY L.J. 393 (1989) (approving of properly bounded copyright law, but criticizing the vagueness of the standards established by some copyright cases); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (approving of properly bounded substantive intellectual property protections, but criticizing the use of certain remedies in intellectual property cases); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998) (approving of properly bounded copyright law, but criticizing the way courts review copyright judgments).

<sup>103</sup> Lessig, *supra* note 41, at 63.

<sup>104</sup> Bloustein, *supra* note 42, at 439-40; see also Murphy, *supra* note 41, at 2395-96.

likely to accept the notion of property in personal information if trademark and right of publicity had never existed, and the only kind of intellectual property speech restriction were copyright? Probably yes; there are too many distinctions between personal information and copyrightable expression for this one analogy to be that helpful. But as other potential analogies are added, the argument becomes easier—one can say “this proposal is sound because it’s like precedent A in one respect, like precedent B in another respect, and like precedent C in a third respect,” so even if the proposal is unlike any particular precedent, it can be seen by friendly observers as similar to their aggregate. If this is so, then the case for new intellectual property speech restraints would be further strengthened by the recognition of yet one more kind of such speech restriction to which people can analogize.

Moreover, as I’ve argued, a right in personal information would be the first (but I fear not the last) right in pure facts. Right now the database protection proposals are running up against the objection that the law does *not* generally recognize intellectual property rights that restrict communication of facts.<sup>105</sup> The analogy to copyright law actually works against those proposals, because they seek to protect exactly what the Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>106</sup> said copyright doesn’t protect, and they seek to do exactly what the Court in *Harper & Row* said would violate the First Amendment: Use an “[intellectual property] monopoly as an instrument to suppress facts.”<sup>107</sup> But if information privacy speech restrictions are upheld, they would provide an excellent new analogy for the database protection bill supporters. The same is true for the asserted right to property in hot news, which is today subject to powerful free speech attack,<sup>108</sup> but which would be strengthened if the courts accept another right to property in facts.

Now perhaps my parade of horrors isn’t so horrible; maybe we should have more property rights, which is to say speech restrictions, as to information. Or if I am right to be skeptical of such new property rights, perhaps supporters of property rights in personal information can come up with a justification for those particular rights that is narrow enough that it will provide little precedential support for the other proposals. Nonetheless, people who are worried about the general trend towards propertization of information should look very carefully at even those proposals that might at first seem benign and even just; the effect of such

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<sup>105</sup> See, e.g., Pollack, *supra* note 100; Benkler, *supra* note 94; J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

<sup>106</sup> 499 U.S. 340 (1991).

<sup>107</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (emphasis added).

<sup>108</sup> See, e.g., Zimmerman, *supra* note 50, at 719-23, 726-27, 733; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmts. b & c (largely rejecting the concept of a property right in hot news, and criticizing *International News Service v. Associated Press*, 248 U.S. 215 (1918), which pioneered that right).

proposals could be felt far beyond the context in which they are first suggested.

#### IV. COMMERCIAL SPEECH

##### A. What “Commercial Speech” Means

Some argue that sale of information about customers is restrictable because it fits within the “commercial speech” doctrine.<sup>109</sup> The Court’s definition of “commercial speech,” though, isn’t (and can’t be) simply speech that is sold as an article of commerce: Most newspapers, movies, and books are articles of commerce, too, but they remain fully protected.<sup>110</sup> Likewise, speech can’t be commercial just because it relates to commerce, or else the *Wall Street Journal*, union leaflets or newsletter articles,<sup>111</sup> reviews of commercial products,<sup>112</sup> and speech by disgruntled consumers criticizing what they consider poor service by producers<sup>113</sup> would be deprived of full constitutional protection.

Rather, the Court’s most common definition of commercial speech is speech that explicitly or implicitly “propose[s] a commercial transaction.”<sup>114</sup> Commercial advertisements for products or services are classic examples. So are stock prospectuses, which quite directly propose a commercial transaction (the purchase of stock); this is why fairly heavy SEC regulation of speech in such prospectuses is largely permissible, while similar SEC regulation of newsletters or newspapers that discuss stocks is not.<sup>115</sup> At the outer boundary, a company’s publications that generally discuss a kind of product without mentioning the company by name—for instance, a contraceptive producer’s pamphlets discussing contraception generally, rather than just the producer’s own devices—also qualify as commercial speech,<sup>116</sup> though query how far this goes: It’s not clear, for instance, that a book touting the health benefits of wine should be treated differently depending on whether its author owns a leading winery.

The Court has at times suggested that the commercial speech category may

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<sup>109</sup> This argument is generally not made about the disclosure tort.

<sup>110</sup> *See, e.g.*, *Smith v. California*, 361 U.S. 147, 150 (1959) (“It is of course no matter that the dissemination [of speech by the claimant] takes place under commercial auspices”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”).

<sup>111</sup> *See, e.g.*, *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988).

<sup>112</sup> *See, e.g.*, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

<sup>113</sup> *See infra* notes 131-136 and accompanying text.

<sup>114</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

<sup>115</sup> *See Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., concurring).

<sup>116</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

also generally cover speech that is “related solely to the economic interests of the speaker and its audience,”<sup>117</sup> and some lower courts have taken it up on this definition.<sup>118</sup> But this can’t be right. Consider again the examples of a newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in the business world; a product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying subscribers, and read by readers because they want to know how to best spend their money; and a union buying TV ads urging people to Buy American because that’s the best way of maintaining the viewers’ (and the union members’) standard of living.

Such economic commentary, it seems to me, is as protected as political, religious, social, or artistic commentary. That it has to do with the listeners’ economic interests merely highlights its importance—for most people, economic well-being is more important than politics, art, social concerns, or often even religion, and speech on economic matters often has more effect on the nation than does most art or theology, or even much political debate. The speech may not be “political” in the narrow sense of the word, but (as I discuss further in Part IV), the Court has long recognized that strong First Amendment protection extends far beyond politics. Nor does the speech implicate the concerns about fraud in a particular commercial transaction that have been seen as justifying the regulation of commercial *advertising*. In fact, every one of the Court’s dozens of commercial speech cases has involved speech that advertises a product;<sup>119</sup> and the last decade’s precedents, which have generally been shifting in the direction of more protection even for speech which is classified as “commercial speech,” have stressed the “proposes a commercial transaction” formulation and largely ignored the “solely economic interests” test.<sup>120</sup>

Under the “speech that proposes a commercial transaction” analysis, communication of information about customers by one business to another is not commercial speech. It doesn’t advertise anything, or ask the receiving business to buy anything from the communicating business.<sup>121</sup> It poses no special risk of the

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<sup>117</sup> *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 561 (1980).

<sup>118</sup> *See, e.g.*, *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998); *United Reporting Pub. Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136-37 (9th Cir. 1998) (seemingly endorsing this test, though not explicitly applying it), *cert. granted*, 119 S. Ct. 901 (1999); *Abramson v. Gonzalez*, 949 F.2d 1567, 1574 (11th Cir. 1992).

<sup>119</sup> One of those cases, *Bolger*, involved indirect advertising.

<sup>120</sup> *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993) (stressing that the Court has been shifting away from the “economic interests” formulation and towards the “proposes a commercial transaction” formulation); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (referring to the “proposes a commercial transaction” formula without referring to the “solely economic interests” formula); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (same); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (same); *Edenfield v. Fane*, 507 U.S. 761 (1993) (same).

<sup>121</sup> Sometimes, of course, a business will use customer information that it has bought from another

speaker misleading or defrauding the listener, beyond that present with fully protected speech generally. The recipient business does intend to use the information to more intelligently engage in commercial transactions, but that's equally true of businesspeople reading *Forbes*.<sup>122</sup>

Some might argue that there's something inherently un-speech-like in corporations communicating to other corporations, but there's no reason why this would be so. To begin with, the corporate status of the speaker or the listener can't be relevant; surely it can't matter for privacy purposes whether customer information is communicated by and to corporations, partnerships, or sole proprietorships. And the Court has specifically held that speech doesn't lose its constitutional protection because the speaker is a corporation,<sup>123</sup> which makes sense for various reasons, among them that almost all media organizations are corporations.

But even if we recast the claim as focusing on businesses communicating to other businesses, the fact is that businesses don't communicate: people communicate. When the managers of Acme Software, at their CEO's urging, read the *Wall Street Journal* so they can apply what they learn to their business decisions, this isn't "The *Wall Street Journal* communicating to Acme." It's people at the *Journal*—the editors, who direct the creation of a joint product by many writers—communicating to people who run Acme. When a scientist working in industry sends the result of his experiments to another scientist also working in industry, the communication may be said to be between their employers (since for both scientists it's part of their jobs), but it's also between people. Likewise, it is no less speech when a credit bureau sends credit information to a business. The

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business to send out commercial advertisements to prospective clients. These advertisements would indeed be commercial speech, though the original communication of the customer information is not. *See* U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999).

<sup>122</sup> *Accord* U.D. Registry, Inc. v. California, 40 Cal. Rptr. 2d 228, 230 (Ct. App. 1995):

The test for identifying commercial speech is whether the expression at issue proposes a commercial transaction. Applying this settled definition, it is clear that the expression in this case, truthful information taken from public records regarding unlawful detainer defendants, does not propose a commercial transaction, and hence is not commercial speech. The fact that UDR sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech.

*See, e.g.,* Shorr, *supra* note 81, at 1798-1812 (discussing this question in great detail). *United Reporting Publishing Corp. v. California Highway Patrol* took the contrary view, concluding that "United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price.' This is a pure economic transaction, comfortably within the 'core notion' of commercial speech." 146 F.3d 1133, 1136 (9th Cir. 1998) (alterations in original), *cert. granted*, 119 S. Ct. 901 (1999). This, though, is mistaken—just as the fact that the *New York Times* sells information to subscribers at a certain price doesn't make the *Times* commercial speech, so the fact that United Reporting sells information to clients at a certain price doesn't make its speech commercial. The Ninth Circuit's argument may support the notion that United Reporting's offer to its customers to sell them information is commercial speech; but the state statute in that case regulated the communication of the information, not the offer to communicate it.

<sup>123</sup> *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

owners or managers of a credit bureau are communicating information to decisionmakers, such as loan officers, at the recipient business.<sup>124</sup>

It's true that in such cases, neither the speaker nor the listener intend to communicate an ideological message through the information, but that's just because the information is fact, not idea. Likewise, in many such cases, neither the speaker nor the listener see this factual communication as implementing or furthering some ideology, in part because it's just their job. In some cases, though, the people *will* see the communication as a means of implementing some ideology—"we report the news because the truth is sacred," "we make the wheels of business run more smoothly," "we want to advance the progress of science," "we help protect you from deadbeats because people defaulting on their loans is a form of fraud that we want to stop." Many businesspeople genuinely believe that their work is not just a job but part of a broader mission to improve society; it's a peculiar conceit of some professional would-be opinion molders to think that they alone really believe in what they're doing, and that everyone else is only in it for the money. I suspect that the ideological commitment of a typical newspaper reporter who's writing, say, product reviews or local crime stories is not much different from the ideological commitment of a typical businessperson. And this fact helps explain why speech is protected without regard to the speaker's or the listener's ideological motivations.

Of course, even if speech that communicates personal information is seen as "commercial speech," restrictions on such speech will still have to face considerable scrutiny. Whether they will pass such scrutiny is hard to tell, since commercial speech scrutiny is so notoriously vague.<sup>125</sup> But this question is actually somewhat tangential to my main point. To me, the main problem with treating speech that communicates personal information as "commercial speech" is not that this will put such speech at more risk of restriction. Rather, it is that stretching the definition of "commercial speech" will put a wide range of other speech at risk, too.

### B. *The Risks to Other Speech*

Consider a recent example of the government trying to regulate cyberspace speech on economic matters on the grounds that it's "commercial speech." In

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<sup>124</sup> See *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (treating such business-to-business communication as speech subject to First Amendment protection, though concluding that false statements of fact on matters of private concern are subject to presumed and punitive damages despite the First Amendment).

<sup>125</sup> Cf. *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998) (striking down such a restriction even under commercial speech scrutiny), *cert. granted*, 119 S. Ct. 901 (1999).

*Taucher v. Born*, several operators of commodities-themed Web sites successfully sued to set aside a prior restraint system which barred people from distributing for profit any unlicensed speech that relates “to the value of or the advisability of commodity trading” or that contains “analyses or reports” about commodities.<sup>126</sup> And the license that speakers must get to be allowed to speak isn’t just a modest tax; the Commodities Futures Trading Commission can refuse a license if it finds “good cause” to do so, and speaking without a license is illegal. Nor is this speech restriction limited to individualized, person-to-person professional advice: The regulation is broad enough to cover people who “never engage in individual consultations with their customers” and who “under no circumstances make trades for their customers.”<sup>127</sup>

The Act essentially restricts the Web equivalent of books and newspapers on the subject of commodity trading—it’s as if the government reserved the right to refuse the *Wall Street Journal* a license to publish articles about the market. As it happens, the Act specifically excludes publishers who publish such data “incidental[ly]” to the conduct of a broader news enterprise of “general and regular dissemination,”<sup>128</sup> so the *Journal* can sleep easy, though it might be more accurate to say that this exception helps the CFTC sleep easy without the risk of incurring the ire of established, powerful news organs. But under the logic of the Act, newspapers and book publishers could also be subject to a prior restraint system, just as the small electronic publishers who spoke only about commodities were subject to it until the court’s ruling.

One of the CFTC’s main arguments in support of its restriction was that speech about commodities was mere “commercial speech,” but the court correctly rejected this:<sup>129</sup> “The plaintiffs’ publications in this case do not propose any commercial transaction between the plaintiffs and their customers.”<sup>130</sup> But if the commercial speech doctrine had been extended to cover the sale of speech about a business’s clients, the court’s decision might well have been different. After all, the Web business journalist who writes about commodities is likewise selling information that’s primarily of economic concern, and that has little to do with broad political debates. If that’s enough to deny free speech protection to the communications about customers, it may be enough to deny such protection to the commu-

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<sup>126</sup> 7 U.S.C. § 6m(1).

<sup>127</sup> *Taucher v. Born*, 53 F. Supp. 464, 478 (D.D.C. 1999).

<sup>128</sup> 7 U.S.C. §§ 1a(5)(B)(iv), 1a(5)(C).

<sup>129</sup> The CFTC’s other argument was that the government may regulate speech in the context of a professional-client relationship, but the court adopted Justice White’s response to a similar argument in his *SEC v. Lowe*, 472 U.S. 181 (1985), concurrence: Whatever extra power the government may have to regulate the professional-client relationship, this power arises only when the professional exercises individualized judgment on behalf of a particular client. Personal advice may to some extent be restricted, but books, newsletters, and the like may not be.

<sup>130</sup> *Taucher*, 53 F. Supp. at 480.

nications about commodities.

Consider another example: disgruntled homebuyers putting up signs criticizing the developer that sold them their homes, or consumers leafletting outside a business that they claim gave them bad service or sold them shoddy goods, often hoping that the business will give them a refund or at least will do a better job in the future. In cyberspace, the analogy would be consumers putting up a *http://www.[businessname]sucks.com* site or circulating messages to a long list of acquaintances or to a Usenet newsgroup.

In my view, the First Amendment fully protects such speech that is aimed at creating public pressure on someone to do what you think is right, even in economic contexts—that, after all, is what much advocacy is all about.<sup>131</sup> The fact that the speech exposes alleged problems with a product and aims at redressing an economic harm should not strip it of protection. Again, to many people problems with their homes and redress for shoddy wares are more important than problems with politicians and redress for shoddy policies, and far more important than art, entertainment, or many other kinds of fully protected speech.

If the consumer's speech is an intentional lie (or perhaps in some circumstances if it's merely negligently false), the business can sue for libel; false statements of fact, whether on economic matters or not, lack constitutional protection.<sup>132</sup> But the law shouldn't impose extra restrictions on the speech just because the speech deals with economic issues. It shouldn't, for instance, punish true speech on the grounds that it interferes with a business's prospective economic advantage.<sup>133</sup> It shouldn't impose prior restraints such as preliminary injunctions on the speech, even if the court tentatively concludes that the speech is probably

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<sup>131</sup> See, e.g., *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *Keefe v. Organization for a Better Austin*, 402 U.S. 415 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.").

<sup>132</sup> See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (assuming that the standards for trade libel lawsuits are the same as for libel lawsuits); *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 412 (1995) (establishing a standard for trade libel lawsuits that is similar to that for libel lawsuits, with distinctions drawn between small stores that are treated as private figures and may recover actual damages on a showing of negligence, and large or heavily regulated businesses that are treated as public figures and must show actual malice).

<sup>133</sup> See, e.g., *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 521, 523 (Ct. App. 1991) (describing and rejecting the claim that speech interfering with prospective economic advantage and "involv[ing] solely private issues rather than matters of public concern" may be enjoined even if it is true); *Springfield Bayside Corp. v. Hochman*, 255 N.Y.S.2d 140 (1964) (enjoining tenant picketing of landlord, even assuming that the tenants' allegations were true); *Saxon Motor Sales, Inc. v. Torino*, 2 N.Y.S.2d 885 (1938) (enjoining a car buyer from parking his car in front of the car dealership with a sign alleging that the car is a lemon, without regard to whether the allegations were true).

false.<sup>134</sup> And even if the speech is found to be in error, it shouldn't impose liability without any showing of fault on the speaker's part. Though some such speech restrictions may be permissible as to commercial speech,<sup>135</sup> they're not permissible as to noncommercial speech; and under current doctrine, consumer criticisms aren't commercial speech because they don't merely propose a commercial transaction.<sup>136</sup>

Again, though, a broadening of the commercial speech doctrine would jeopardize speech of this sort. If communicating information about a person's bad credit record is mere "commercial speech," then communicating information about a business's bad service record should be, too. Both, after all, involve speech on economic matters. Both involve speech that's primarily of economic interest to listeners. Both are motivated by the speaker's economic interest—either a desire to get money from the buyer of the information, or a desire to get redress from the business. Either both are commercial speech or neither is.

In a free and competitive economy, people naturally want to talk about economic matters. Often their motives for such speech are largely economic: They want to learn how to make more money. They want to persuade people that some course of action is economically better. They want to alert people to what they think are others' dishonest business practices. Giving the government an ill-defined but potentially very broad power to restrict such speech—not just speech that proposes a commercial transaction between speaker and listener and thus directly implicates the risk of fraud—risks exposing a great deal of speech to government policing.

## V. SPEECH ON MATTERS OF PRIVATE CONCERN

### A. *The Argument*

One feature of virtually all information privacy proposals (except those

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<sup>134</sup> See generally Lemley & Volokh, *supra* note 102, at 169-78.

<sup>135</sup> See *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3rd Cir. 1990) (holding that a libel lawsuit brought by a public figure plaintiff based on a statement on a matter of public concern could succeed without a showing either of actual malice or negligence, because the statement was in a commercial ad and was therefore commercial speech); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (suggesting that the prohibition on prior restraints may be inapplicable to commercial speech cases); *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 772 n.24 (1976) (same); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203-05 (11th Cir. 1985) (interpreting *Friedman* and *Virginia Pharmacy* as meaning that "commercial speech seldom implicates the traditional concerns underlying the prior restraint doctrine").

<sup>136</sup> See, e.g., *Paradise Hills Assocs.*, 1 Cal. Rptr. 2d at 522 ("Nor is [Procel's] speech merely commercial speech which is entitled to less protection under the First Amendment. 'The test for identifying commercial speech is whether the publication in question may be said to do no more than 'propose a commercial transaction.' Procel's speech does not meet that test.") (citations omitted).

built on a contract model) is their distinction between speech on matters of public concern and speech on matters of private concern.<sup>137</sup> Even people who argue that there should be no constitutional protection for newspapers publishing a private person's long-ago criminal history or a politician's sexual orientation would probably agree that they have a right to publish the politician's criminal history, no matter how old. Warren and Brandeis would have called this "matter which is of public or general interest";<sup>138</sup> others call it "political speech" or "speech on matters of public concern" or "newsworthy" material.

Speech that fits within these labels, they would argue, is constitutionally protected, while speech that is merely of private concern is not protected, at least against information privacy speech restrictions. But this approach, I will argue, is theoretically unsound; it is precedentially largely unsupported; in the few circumstances in which it has been endorsed, it has proven unworkable; and, if adopted, it would strengthen the arguments for many other (in my view improper) speech restrictions.

### B. *Theoretical Objections*

Under the First Amendment, it's generally not the government's job to decide what matters speakers and listeners should concern themselves with.<sup>139</sup> A private concern exception essentially says "you have no right to speak about topics that courts think are not of legitimate concern to you and your listeners," a view that's inconsistent with this understanding.<sup>140</sup>

A clear example of the danger of such government power comes in a dis-

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<sup>137</sup> See, e.g., among many others, Edelman, *infra* note 240, at 1229-30.

<sup>138</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890). Warren and Brandeis didn't confront exactly this example, but they did say that "publish[ing] of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted . . . infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety." *Id.* at 215.

<sup>139</sup> See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). The Court has recognized some exceptions to this principle, but this presumption is still the basis for the Court's analysis of speech restrictions imposed by the government as sovereign.

<sup>140</sup> Cf. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (Marshall, J., dissenting) ("[A]ssuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject [and thus on] what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30 (1990); Robert Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 603, 670-79 (1990). Estlund's and Post's pieces are classics in the field. See also Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 753 (1997).

closure tort case, *Diaz v. Oakland Tribune*.<sup>141</sup> Diaz, the first woman student body president at a community college, was a transsexual, and the Oakland Tribune published this fact. Diaz sued, and the court of appeals held that her lawsuit could go forward; if a jury found that Diaz's transsexuality wasn't newsworthy, she could prevail.<sup>142</sup> As usually happens in these cases, the court didn't define newsworthiness but left it to the jury, subject only to the instruction that "[i]n determining whether the subject article is newsworthy you may consider [the] social value of the fact published, the depth of the article, [its] intrusion into ostensibly private affairs, and the extent to which the plaintiff voluntarily acceded to a position of public notoriety."<sup>143</sup> But the court did stress that a jury may well find that the speech wasn't newsworthy: "[W]e find little if any connection between the information disclosed and Diaz's fitness for office. The fact that she is a transsexual does not adversely reflect on her honesty or judgment."<sup>144</sup>

Now I agree with the court's factual conclusion; people's gender identity strikes me as irrelevant to their fitness for office. But other voters take a different view. Transsexuality, in their opinion, may say various things about politicians (even student body politicians): It may say that they lack attachment to traditional values, that they are morally corrupt, or even just that they have undergone an unnatural procedure and therefore are somehow tainted by it. All these views may be wrong and even immoral, but surely it is not for a government agency—whether judge or jury—to dictate the relevant criteria for people's political choices, and to use the coercive force of law to keep others from informing them of some things that they may consider relevant to those choices.<sup>145</sup> I may disagree with what you base your vote on, but I must defend your right to base your vote on it, and the right of others to tell you about it.

This is the clearest example of a court using the public concern test to usurp what should be a listener's and speaker's choice, but other public disclosure cases raise similar problems. Consider, for instance, the criminal history cases, in which

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<sup>141</sup> 188 Cal. Rptr. 762 (Ct. App. 1983).

<sup>142</sup> The court set aside the verdict for Diaz because of a jury instruction error, but remanded for a new trial.

<sup>143</sup> *Id.* at 770 n.15.

<sup>144</sup> *Id.* at 773; *cf.* Warren & Brandeis, *supra* note 138, at 216 (urging the "repress[ion]" of revelations that "have no legitimate connection with [a person's] fitness for a public office which he seeks or for which he is suggested").

<sup>145</sup> Peter Edelman suggests, as to a somewhat different hypothetical, that "[p]erhaps a useful idea with regard to newsworthiness is that the media may not rely on satisfying popular prejudices as a justification for a news decision," and some might argue that this should apply to the *Diaz* case. It seems to me, though, that whatever power the courts may have to set aside government action that is based on or gives effect to people's prejudices—Edelman cites one such case, *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984), as support for his argument—the courts have no business deciding whether a voter's potential decision about a candidate is "prejudiced" or not. In a democratic government, it is for the voters to pass judgment on government officials' reasons for action, not for government officials to restrict speech in order to control voters' reasons for action.

some courts held that it was illegal for newspapers to print information about “long past” criminal activity by people who are now supposedly rehabilitated and are leading allegedly blameless lives. The leading such case is *Briscoe v. Reader’s Digest Association*, where the *Reader’s Digest* was held liable for revealing that Briscoe had 11 years earlier been convicted of armed robbery (a robbery that had apparently involved him fighting “a gun battle with the local police”).<sup>146</sup>

The court acknowledged that the speech, while not related to any particular political controversy, was newsworthy; the public is naturally concerned with crime, how it happens, how it’s fought, and how it can be avoided.<sup>147</sup> Moreover, revealing the identity of someone “currently charged with the commission of a crime” is itself newsworthy, because “it may legitimately put others on notice that the named individual is suspected of having committed a crime,”<sup>148</sup> thus presumably warning them that they may want to be cautious in their dealings with him.

But revealing Briscoe’s identity 11 years after his crime, the court said, served no “public purpose” and was not “of legitimate public interest”; there was no “reason whatsoever” for it.<sup>149</sup> The plaintiff was “rehabilitated” and had “paid his debt to society.”<sup>150</sup> “[W]e, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime” by revealing his past.<sup>151</sup> “Ideally, [Briscoe’s] neighbors should recognize his present worth and forget his past life of shame. But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life.”<sup>152</sup> And to assist Briscoe in what the court obviously thought was a worthy effort at concealment, the law may bar people from saying things that would interfere with Briscoe’s plans.

Judges are of course entitled to have their own views about which things “right-thinking members of society” should “recognize” and which they should “forget”; but it seems to me that under the First Amendment members of society have a constitutional right to think things through in their own ways. And some people do take a view that differs from that of the *Briscoe* judges: While criminals can change their character, this view asserts, they often don’t. Someone who was willing to fight a gun battle with the police 11 years ago may be willing to do

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<sup>146</sup> 483 P.2d 34, 36 (Cal. 1971); *see also* *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931) (involving the revelation that an upstanding citizen had been a prostitute and an alleged murderer seven years earlier); *Roshto v. Hebert*, 413 So. 2d 927, 930 (La. App. 1982) (involving the republication of the 25-year-old front page of a newspaper, which contained an article describing plaintiffs’ cattle theft convictions).

<sup>147</sup> 483 P.2d at 40.

<sup>148</sup> *Id.* at 39.

<sup>149</sup> *Id.* at 40, 43.

<sup>150</sup> *Id.* at 37, 41, 43.

<sup>151</sup> *Id.* at 41 (quoting and endorsing *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931)).

<sup>152</sup> *Id.* at 41-42.

something bad today, even if he has led a blameless life since then (something that no court can assure us of, since it may be that he has continued acting violently on occasion, but just hasn't yet been caught).

Under this ideology, it's perfectly morally proper to keep this possibility in mind in one's dealings with the supposedly "reformed" felon. While the government may want to give him a second chance by releasing him from prison, restoring his right to vote and possess firearms, and even erasing its publicly accessible records related to the conviction, his friends, acquaintances, and business associates are entitled to adopt a different attitude. Most presumably wouldn't treat him as a total pariah, but they might use extra caution in dealing with him, especially when it comes to trusting their business welfare or even physical safety (or that of their children) to his care.<sup>153</sup> And, as Richard Epstein has pointed out, they might use extra caution in dealing with him precisely because he has for the last 11 years hidden this history and denied them the chance to judge him for themselves based on the whole truth about his past.<sup>154</sup> Those who think such concealment is wrong will see it as direct evidence of *present* bad character (since the concealment was continuing) and not just of past bad character.

Revealing Briscoe's name, under this view, may have little to do with broad political debates, but it is still of intense and eminently legitimate public concern to one piece of the public: people who know Briscoe, the very same group whose ignorance Briscoe seemed most concerned about preserving.<sup>155</sup> These members of the public would use this information to make the decision, which is probably more important to them than whom they would vote for next November, about whether they could trust Briscoe in their daily dealings.

This isn't speech on political matters, but rather on what I might call "daily life matters." Under the First Amendment, which protects movies, art, jokes, and reviews of stereo systems,<sup>156</sup> such speech on daily life matters is at least equally

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<sup>153</sup> If you were deciding whether to leave your children for the day in a neighbor's care, would you consider his 11-year-old conviction for a violent crime involving a gun battle with police relevant (not necessarily dispositive, but relevant) to your decision? Would you advise your daughter to consider a prospective date's armed robbery conviction when deciding whether and under what conditions to go out with him?

<sup>154</sup> Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 471 (1978).

<sup>155</sup> *Briscoe*, 483 P.2d at 36 ("As the result of defendant's publication, plaintiff's 11-year-old daughter, as well as his friends, for the first time learned of this incident. They thereafter scorned and abandoned him.").

<sup>156</sup> See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (treating product review of stereo equipment as fully protected); *Winters v. New York*, 333 U.S. 507, 510 (1948) (same as to entertainment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection").

Some argue that First Amendment doctrine should be dramatically revised so that only speech that is directly relevant to self-government would be constitutionally protected. Thus, for instance, Bloustein, *infra* note 160, takes an explicitly Meiklejohnian view that speech is protected only if it's relevant to self-

worthy. At least as much as those kinds of protected speech, daily life matter speech—communication related to “the real, everyday experience of ordinary people”<sup>157</sup>—indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or the editorials we read. Consider how much our view of crime and punishment, secrecy and publicity, and many other topics would be indirectly influenced—towards greater liberalism, conservatism, or something else—by the knowledge that some of our seemingly law-abiding neighbors have been concealing a criminal past.<sup>158</sup>

In any event, which viewpoint about our neighbors’ past crimes is “right-thinking” and which is “wrong-thinking” is the subject of a longstanding moral debate. But surely it is not up to the government to conclude that the latter view is so wrong, that Briscoe’s conviction was so “[il]legitimate” a subject for consideration, that the government can suppress speech that undermines its highly controversial policy of forgive-and-forget. I can certainly see why all of us might want to suppress “information about [our] remote and forgotten past[s]” “to change . . . other’s definitions of [ourselves].”<sup>159</sup> But in a free speech regime, others’ definitions of me should primarily be molded by their own judgments, rather than by my using legal coercion to keep them in the dark.<sup>160</sup>

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government, and concludes that much personal information can therefore be suppressed. Meiklejohn’s own experience with such a test, though, should sound a note of caution: Meiklejohn originally articulated this as a narrow standard that seemed to demand some serious connection of the speech to particular political questions; when people pointed out that this might deny protection to discussions of art, literature, science, and society, Meiklejohn revised his test to one that demanded a far looser connection to self-government, which ensured protection for literature but only at the expense of making the category virtually all-inclusive and thus doctrinally useless. *See, e.g.,* Estlund, *supra* note 140, at 45 (describing Meiklejohn’s migration). In any event, the First Amendment we have is definitely not limited to Meiklejohn’s original vision.

<sup>157</sup> *See* Estlund, *supra* note 140, at 37.

<sup>158</sup> *See id.* at 38 n.220; Post, *supra* note 140, at 674; *cf.* STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 48 & n.12 (1990) (citing evidence that voters assess the character of candidates “based in large part upon experiences with others in private life and on values formed through communications about other individuals in private life”).

<sup>159</sup> Fried, *supra* note 1, at 485 n.18 (crediting Irving Hoffman with this argument).

<sup>160</sup> Even focusing only on the newsworthiness of the story (acknowledged by the *Briscoe* court) as a means of informing the public about crime, including the criminal’s name still serves the important purpose of helping assure the public about the story’s credibility. We all know how much easier it is to slant the presentation, omit important details, and even fudge the facts in stories that can’t be corroborated; and when we see a story that we know can’t be corroborated, we are naturally suspicious of it (and unfortunately but unsurprisingly the behavior of journalists, fallible humans that they are, often confirms the wisdom of such suspicion). True, few readers will personally check newspaper stories even if all the facts are given, but they know that the journalists know that such facts *could* be checked: A rival news organization, or a reader with personal knowledge of the details, can call them on their error. If the story omits the necessary details, people will quite properly discount its accuracy. *Cf.* *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 303 (1979) (“[A]t a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy”); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 356 (1983) (“A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems.”). *But see* Edward J. Bloustein, *The*

The same goes for databases of personal information as much as for news stories about such information. Many such databases—for instance, credit history databases or criminal record databases—are used by businesspeople to help them decide whom it is safe to deal with and who is likely to cheat them. Other databases, which contain less incriminating information, such as a person's shopping patterns, may be less necessary for self-protection; but of course this is precisely because the data stored in them is also much less embarrassing to their subjects, which makes the supposed harm to the subjects of the communication of such data much smaller. And in any event, even this data is of direct daily life interest to its recipients, since it helps them find out whom they should do business with.

In some instances, it may be quite unlikely that certain speech would be useful to the listeners either for political purposes or for daily life purposes; this largely has to do with information that shows people in ridiculous, embarrassing, or demeaning contexts without revealing any useful new information about them. Everybody knows that I go to the bathroom; printing a picture of me on the toilet would embarrass me not because it reveals something new about me, but because it shows me in a pose that by cultural convention is seen as a ridiculous or undignified.

This may explain cases such as *Daily Times Democrat v. Graham*,<sup>161</sup> where a newspaper was held liable for printing a picture of a woman whose dress was accidentally blown up over her waist, and it may partly explain why most people would gladly restrict the nonconsensual publication of photographs of people naked or having sex with their spouses.<sup>162</sup> These pictures aren't embarrassing because of the facts they reveal (except in rare cases where they show embarrassing deformities); everyone knows that we're all naked underneath our clothes, and that spouses generally have sex. Rather, they are embarrassing because these poses are conventionally seen as lacking in dignity. Whatever else sex may be, it isn't dignified, and while we may have little concern about our dignity while engaging in the act privately, this lack of concern may stem precisely from the fact that we know other people aren't watching.

But while there may be a narrow zone of clearly non-public-concern topics, the danger is that the vague, subjective "public concern," "newsworthiness," or "legitimate public interest" test will flow far beyond this zone; and as *Briscoe* and *Diaz*, among others, show, this danger has materialized. This risk may be enough to abandon the test altogether, and it is certainly enough to demand that the test be rephrased as something much clearer and narrower before it is accepted.

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*First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 93 (1974) (taking the opposite view).

<sup>161</sup> 162 So. 2d 474 (Ala. 1964).

<sup>162</sup> See, e.g., Melville Nimmer, *The Right to Speak from Times to Time*, 56 CALIF. L. REV. 935, 961 (1968).

We can all think of examples of entertainment that has no connection to public issues, but *Winters v. New York* was right to conclude that entertainment should be protected despite this, because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right [of free speech].”<sup>163</sup> If the word “fuck” were forcibly expurgated from public debate, discussion would likely not be substantially impoverished, but *Cohen v. California* was right to conclude that the word should be protected despite this, because otherwise “no readily ascertainable general principle [would] exist for stopping short of” far broader restrictions.<sup>164</sup> Likewise, the notion that otherwise protected speech should be restrictable when it doesn’t relate to matters of public concern strikes me as so potentially broad and so vague that it deserves to be abandoned, even if it would yield the right results in a narrow subset of the cases in which it would be applied.<sup>165</sup>

### C. Doctrine

That, then, is why I think the public concern test is theoretically unsound. The doctrinal discussion is easier: Though the Court has often said in dictum that political speech or public-issue speech is on the “highest rung” of constitutional protection,<sup>166</sup> it has never held that there’s any general exception for speech on matters of “private concern.” Political speech, scientific speech, art, entertainment, consumer product reviews, and speech on matters of private concern are thus all formally entitled to the same level of high constitutional protection, restrictable only through laws that pass strict scrutiny.

The two situations where the Court has adopted a public concern / private concern distinction are narrow exceptions to this general principle. The first such exception, established in *Connick v. Myers*, is that the government acting as employer may freely restrict speech on matters of private concern by its employees.<sup>167</sup> The government’s power as employer to fire its employees for what they say has always been far greater than its power to fine or imprison private citizens for what they say, and the *Connick* Court explicitly stressed that private-concern speech remains protected against the government acting as sovereign.<sup>168</sup> The restriction

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<sup>163</sup> 333 U.S. 507, 510 (1948).

<sup>164</sup> 403 U.S. 15, 25 (1971). See also Madison, *supra* note 10.

<sup>165</sup> Even Peter Edelman, a bitter critic of the Court’s undermining of the tort in *Florida Star v. B.J.F.*, acknowledges that “the private-fact disclosure cases create the slipperiest of slippery slopes.” Edelman, *infra* note 240, at 1233.

<sup>166</sup> *Carey v. Brown*, 447 U.S. 455, 466 (1980).

<sup>167</sup> 461 U.S. 138 (1983).

<sup>168</sup> “We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons [and not just government employees] in its jurisdiction.”

on such speech by government employees was justified only by the special role of the government acting as employer, in which the government's interest in efficient day-to-day operation would make it infeasible to let people sue the government over every discharge that was based on any sort of speech.

The second exception, established held in *Dun & Bradstreet v. Greenmoss Builders*, is that plaintiffs in libel cases involving false statements on matters of purely private concern may be awarded punitive and presumed damages without a showing of actual malice.<sup>169</sup> This, though, also came in a context where the government has special power to restrain speech: restrictions on false statements of fact.<sup>170</sup> Such statements, the Court has held, have “no constitutional value”<sup>171</sup> in any case; any protection they get stems from the need to prevent the undue chilling of true statements, which are indeed constitutionally protected.<sup>172</sup>

And *Dun & Bradstreet's* reasoning confirmed that the lower protection given to private-concern speech flowed precisely from the speech being false and thus presumptively unprotected. The economic interests of the speaker and its audience, the Court argued, warrant no special protection when “*the speech is wholly false.*”<sup>173</sup> Likewise, the “chilling” effect on constitutionally protected true statements would be minimal because accurate credit reports involved in the case were “hardy and unlikely to be deterred,” were “more objectively verifiable,” and were in any case likely to be heavily verified by successful credit agencies.<sup>174</sup> Neither verifiability nor the market pressure for accuracy is relevant outside the context of false statements of fact; *Dun & Bradstreet* thus says little about the propriety of applying the “private concern” test to speech that, unlike false statements of fact, is presumptively constitutionally valuable.<sup>175</sup>

#### D. *The Experience Under the Doctrine*

In practice, neither of these exceptions have been success stories for the public concern test. As many critics have pointed out, the government employee private concern doctrine has proven both vague to the point of indeterminacy and

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*Id.* at 147.

<sup>169</sup> 472 U.S. 749 (1985).

<sup>170</sup> See Estlund, *supra* note 140, at 12 (“The First Amendment was a late entrant into the fields of public employee speech and defamation law and has never held full sway within the two areas.”).

<sup>171</sup> See 472 U.S. at 767 (White, J., concurring in the judgment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>172</sup> 418 U.S. at 340-41.

<sup>173</sup> 472 U.S. at 762 (emphasis added).

<sup>174</sup> *Id.*

<sup>175</sup> *Cf., e.g., U.D. Registry, Inc. v. California*, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (“While the distinction between [private and public concern speech] may be significant in the area of defamation, it does not define the parameters of permissible regulation for truthful reporting.”).

extremely broad.<sup>176</sup> Much speech that would clearly fit within a normal reading of the words “public concern” has been found to be of purely private concern and therefore unprotected, with seemingly little justification other than the desire to make life easier for government employers confronted with troublemaking employees.

*Connick* itself found that speech among District Attorney’s office coworkers about “the confidence and trust that [employees] possess in various supervisors, the level of office morale, and the need for a grievance committee” was “not of public concern,” hardly a commonsense reading of the term “public concern.” And in trying to flesh the test out further, the Court could only say that it was supposed to turn on the “context, form, and content” of the speech, an approach that virtually guarantees that the inquiry will be both unpredictable and little related to the phrase “public concern.”<sup>177</sup>

Later cases have likewise found, for instance, that speech criticizing the way a dean runs a public university department,<sup>178</sup> alleging race discrimination by a public employer,<sup>179</sup> and criticizing the way the FBI decides whom to lay off<sup>180</sup> was not “of public concern,” though other cases reached opposite results on seemingly similar facts.<sup>181</sup> Whether or not the government should have the power to dismiss employees for such speech, surely the government ought not have the power to censor such speech by citizens at large on the grounds that it’s supposedly of insufficient “public concern.”

Under *Dun & Bradstreet*, the concept of “speech of purely private concern” has ended up similarly vague, and has sometimes covered speech that clearly seems to be of public concern under any normal definition of the term:<sup>182</sup> for instance, speech discussing the competence of psychologists to whom children are sent by government-run schools,<sup>183</sup> the business practices of car dealers,<sup>184</sup> and alleged misconduct by the owner of a gymnastics school.<sup>185</sup> Again, perhaps it’s permissible to allow presumed and punitive damages for *false* statements on such topics, but surely it would be unconstitutional to restrict *true* statements on these

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<sup>176</sup> See, e.g., Estlund, *supra* note 140, at 7 n.40, 34, 45; Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988).

<sup>177</sup> Cf. Estlund, *supra* note 140, at 34, which aptly describes the “content, form, and context” formulation as “strikingly vacuous.”

<sup>178</sup> *Landrum v. Eastern Ky. Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984).

<sup>179</sup> *Lipsey v. Chicago Cook County Criminal Justice Commission*, 638 F. Supp. 837 (N.D. Ill. 1986).

<sup>180</sup> *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984).

<sup>181</sup> See generally Allred, *supra* note 176.

<sup>182</sup> See Robert E. Drechsel, *Defining “Public Concern” in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1, 17-18 (1990).

<sup>183</sup> *Saunders v. Van Pelt*, 497 A.2d 1121 (Me. 1985).

<sup>184</sup> *Vern Sims Ford, Inc. v. Hagen*, 713 P.2d 736 (Wash. App. 1986).

<sup>185</sup> *Ramirez v. Rogers*, 540 A.2d 475 (Me. 1988).

matters on the grounds that they aren't of "public concern."

The experience of the public concern test in these two areas thus suggests that the theoretical criticisms of the public concern / private concern distinction are sound: There's a substantial practical risk of the courts finding too much speech to be of "private concern," and while some facially vague and broad tests have the merit of being tied to an existing body of explanatory and narrowing caselaw, that's hardly the case here. Maybe for want of anything better, the public / private concern distinction may remain sensible as to the genuinely hard and necessarily vague government employee speech cases, but its track record seems hardly to encourage expanding it elsewhere.

### *E. Potential Consequences*

#### 1. Direct Analogies

All this discussion is not just academic or just applicable to information privacy speech restrictions. The argument that certain speech should be more restrictable because it's not "political speech," not "high-value speech," or not of "legitimate public interest" is routinely marshaled in favor of a broad range of speech restraints.

The classic example is sexually themed speech. A recurring argument in favor of restrictions on such speech, from pornography to art to sexual humor, is that such speech has little to do with self-government, politics, or any of the important, legitimate topics of public debate.<sup>186</sup> What, after all, is lost if such speech is restrained, especially if the restraint serves noble goals such as preserving morality, preventing antisocial attitudes, and shielding children against improper influences? Not political debate, not scientific discourse, just people saying and listening to things that they have no really good reason to say and listen to.

The more courts endorse restrictions on speech that's "not of legitimate public interest," the stronger this pro-restriction argument will be. Right now, the

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<sup>186</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality) (arguing that "patently offensive sexual and excretory language" may be restricted because it generally has lower "social value"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality) ("even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate"); Amicus Brief of Morality in Media in *Reno v. ACLU*, 521 U.S. 844 (1997) ("[T]he CDA provisions only affect speech which, in context, depicts or describes, in terms patently offensive, sexual or excretory activities or organs. Only a tiny fraction of communications necessary for government, research, education, politics, business and other matters of public concern, as well as for matters of private concern, may be indecent."); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 797 (1993) ("Certain forms of pornography count as speech, but they are not plausibly intended or received as a contribution to political deliberation, and they fall within the low-value category.").

two areas where the courts have accepted a “public concern” test are at least cabinable as involving areas outside the core of First Amendment protection: restrictions imposed by the government acting as employer, where the government has always had a relatively free hand, and restrictions on false statements of fact, which already constitute a First Amendment exception. Analogies between, say, the Communications Decency Act and those restrictions can be rebutted by pointing out that the CDA involves the government acting as sovereign, restricting otherwise constitutionally protected speech.

Say, though, that courts accept a private concern justification for restrictions on speech that reveals private information, which *are* restrictions on otherwise constitutionally protected speech imposed by the government acting as sovereign. Supporters of restrictions on sexually themed speech would then acquire several useful related arguments.

First, they would be able to argue that there is already a general “no public concern” exception to free speech protection.<sup>187</sup> Second, they could point to the information privacy speech restrictions as a specific precedent in favor of similar restrictions on sexually themed speech: Both, after all, will involve restrictions on otherwise valuable speech imposed by the government acting as sovereign, and sexually themed speech, they’d argue, is no more important than are politicians’ sexual identities or neighbors’ criminal pasts. What’s more, information privacy speech restrictions are likely to prove quite popular; what better way to support your argument for restrictions on other “no public concern” speech than by analogizing not just to technical, little-known restrictions but to a widely liked and viscerally appealing one? Third, the precedential value of the government employee speech cases and libel cases would itself be strengthened. Right now these cases can be limited on the grounds that they don’t involve the government as sovereign restricting otherwise valuable speech, but once those cases are accepted as an analogy for information privacy speech restrictions, such a limitation will be lost.

Those who want to protect sexually themed speech will try to distinguish it from speech that reveals private information. The definition of sexually themed speech, they’ll argue, is either so vague or so broad that it includes matters that *are* of clearly legitimate public interest—discussions of sexually transmitted diseases, political statements about sexual matters that rely on graphic sexual imagery for their force, or moral or scientific statements about certain sexual subjects that are

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<sup>187</sup> Even now, when the private/public concern distinction is limited to only two peripheral areas of free speech jurisprudence, Cindy Estlund warns that “the significance of the public concern test reaches well beyond the arenas of defamation and public employee speech; for what the Court did in *Connick* and *Dun & Bradstreet* could be done just as deftly in many other areas of First Amendment doctrine.” Estlund, *supra* note 140, at 23-25. If Estlund is proven right, and the test works its way into decisions about what truthful statements newspapers may publish or database operators may communicate, then the risk of it being adopted in still other places will greatly increase.

best made frankly and not through sanitized euphemism.<sup>188</sup> But the same, of course, is true of speech that communicates others' personal information, which often can be either of public interest or of daily life interest. If this argument is rejected for private information speech, it will also be easier to reject for sexually themed speech.

Likewise, opponents of restrictions on sexually themed speech will argue that the government has no business deciding which topics are "legitimate" and which aren't—that the First Amendment leaves this decision to speakers and listeners, not government officials. But again, if this argument is rejected for speech that reveals private information, and the government does get to decide that people really have no business talking about this or that topic, it will also be much easier to reject for sexually themed speech.

Any new "no public concern" exception will help support other restrictions, too. Restrictions on profanity and on flagburning have been urged on the grounds that the speech is not really necessary for the communication of important ideas;<sup>189</sup> campus speech codes have often been defended on the same grounds.<sup>190</sup> Though people have the right to express offensive or bigoted ideas, the argument goes, profanity, flagburning, and slurs don't really add anything much to such expression; the idea can still be expressed just as well without this valueless component. Bans on speech, the argument might go, "would not damage the communication of a message," just as some argue that information privacy speech restrictions are constitutional because "[r]estraints on the circulation of personal information would not damage the communication of a message."<sup>191</sup> The more the courts accept the notion that publishing people's names in news stories can be restricted because the "need of the people to be informed of matters of general or public interest" could be "served as well without identifying" "the people concerned,"<sup>192</sup> the more likely they would be to uphold other government attempts to excise offensive and supposedly valueless components of other speech.<sup>193</sup>

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<sup>188</sup> See, e.g., Amicus Brief of the American Association of University Professors in *Reno v. ACLU*, 521 U.S. 844 (1997) (arguing that discussion of certain subjects "necessarily entails frank and even graphic descriptions").

<sup>189</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality); *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

<sup>190</sup> See, e.g., Delgado, *infra* note 232.

<sup>191</sup> Reidenberg, *supra* note 2, at 540.

<sup>192</sup> Bloustein, *supra* note 160, at 93.

<sup>193</sup> Consider also Sean Scott's proposal that "to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest." Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 705 (1996). If the government may compel speakers to excise from their speech statements that lack "substantial relevance to a matter of legitimate public interest," then all sorts of bans on offensive forms of speaking would become permissible: Cohen's conviction for wearing a "Fuck the Draft" jacket could be upheld, for instance, on the theory that though his overall statement was on a matter of public concern, the word "Fuck" wasn't *substantially* relevant to ex-

Similarly, businesses criticized by disgruntled consumers have already argued that such consumer criticism doesn't relate to speech on matters of genuinely "public concern," and should therefore be restrictable even if it's true or if it's mere opinion.<sup>194</sup> Allowing tort liability under the disclosure tort for speech on "private matters" (such as a person's criminal history or failure to pay his debts<sup>195</sup>) would provide strong support for allowing tort liability under the intentional interference tort for speech on "private matters" (such as a business's unfair practices or breaches of warranty).

## 2. Indirect Influence

So far, I've discussed the purely doctrinal ways that accepting a "speech on matters of private concern" theory in the information privacy context can support other proposed speech restrictions. Let me now suggest three other less direct but still significant ways in which this can happen.

First, "privacy" is a word with many meanings, and both judges and laypeople shift from one meaning to the other even in cases where the two meanings have little in common. Consider how often privacy arguments commingle the *Griswold / Roe* constitutional right of decisional privacy, the Fourth Amendment right to privacy from physical government intrusion, and the four distinct privacy torts, even though these doctrines are at best very distant cousins.<sup>196</sup> Or consider how often *Zacchini v. Scripps-Howard Broadcasting Co.*, which upheld only a narrow and unusual subset of the right of publicity—the right to block the re-broadcast of an entire act—on grounds that are specific to this narrow right and with the specific statement that it wasn't deciding the constitutionality of the broader right of publicity,<sup>197</sup> is cited for the proposition that the broader right of publicity is indeed constitutional.<sup>198</sup> Our legal system (and perhaps human nature) operates by analogy, and analogies that rely on multiple meanings of the same word are unusually powerful.

Because of this, once restrictions on people's speech are accepted in the name of "privacy," people will likely use them to argue for other restrictions on "privacy" grounds, even when the matter involves a very different sort of "privacy." For instance, many people have already urged restrictions on sexually

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pressing the "matter of legitimate public interest" at the core of Cohen's idea.

<sup>194</sup> See, e.g., *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 521 (Ct. App. 1991).

<sup>195</sup> See, e.g., *Masson v. Williams Discount Ctr., Inc.*, 639 S.W.2d 836 (Mo. App. 1982).

<sup>196</sup> Cf. e.g., Edelman, *infra* note 240, at 1211 n.82 (suggesting, in my opinion without any support, that Justice Scalia's and Justice Kennedy's refusal to let privacy concerns trump free speech in *Florida Star v. B.J.F.* was tied to their hostility to the very different constitutional privacy right).

<sup>197</sup> See *supra* note 72 and accompanying text.

<sup>198</sup> See *supra* note 73; see also Diane Lenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 J. ART & ENT. LAW 35, 49-50 (1998) (discussing this phenomenon).

themed speech on the grounds that it invades people's "privacy" by being accessible in their homes (and thus in a way intruding on their seclusion), by being accessible to their children (and thus interfering with their "privacy" right to familial autonomy), or by lowering the moral tone of society in a way that affects people's most private relationships.<sup>199</sup>

Second, a strong free speech principle necessarily requires the protection of speech that many sincerely believe is evil and dangerous. One way of mustering support for this principle, both among courts and among the public, is to stress that all sorts of groups are in this boat: If people are upset that the speech they hate is protected, they should take comfort in the fact that speech that they may like and that other people hate is protected, too.<sup>200</sup>

But the converse of this is that people's willingness to accept protection of the speech they hate decreases as they see courts uphold restrictions on other speech, which they may see as much less harmful. We see this reaction already: Why should the harm that racist advocacy imposes on its victims remain unremedied, some supporters of campus speech codes ask, when harms to copyright owners, to libel victims, and the like have been found to justify punishment?<sup>201</sup> And

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<sup>199</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality) ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983) (considering and rejecting the federal government's argument that the mailing of contraceptive ads may be banned because it intrudes on recipients' privacy); Amicus Brief of Morality in Media in *Reno v. ACLU*, 521 U.S. 844 (1997) ("Amicus would also argue that not just the well-being of children but also the privacy of the home needs protection from Internet indecency"); Sam Richards, *City of Livermore, Calif., Faces Internet Censorship Suit*, KNIGHT-RIDDER TRIB. BUSINESS NEWS, Dec. 24, 1998 (describing lawsuit claiming that libraries had a constitutional duty to block access by children to sexually themed material, on the grounds that such access violates "guarantees of a parent's fundamental rights to determine what their children learn"—this right is often described as a "privacy" right, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting)); Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, 22 THE PUBLIC INTEREST, Winter 1971, at 25, 25-26 ("A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. . . . [W]hat is commonly read and seen and heard and done intrudes upon us all, want it or not."), quoted approvingly in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973).

<sup>200</sup> Cf. the famous quote from Justice Black cited *infra* note 264.

<sup>201</sup> Martin E. Lee, *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography*, NAT'L CATHOLIC REP., Oct. 4, 1996, at 17 (book review) ("Noting routine exceptions to free speech absolutism (copyright, trademark and such) that hew to business interests, the essays cite studies that document the heavy toll inflicted by the multibillion dollar porn industry, as it profits from a kind of hate speech that degrades women and children. . . . This book provides a sober rejoinder to cliché-ridden thinking by highlighting the profound power imbalance and social inequities that dim the luster of the First Amendment."); Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 484 (1996) ("Powerful actors like government agencies, the writers' lobby, industries, and so on have always been successful at coining free speech 'exceptions' to suit their interest, copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus."); Richard Delgado & David H.

the longer the list of permissible restrictions, the more likely people are to feel this way. Why should the harm to my child and my family stemming from the child's exposure to online indecency remain unprevented, when the indignity that someone feels from having his shopping habits communicated by one business to another justifies restriction? Both, after all, involve nonpolitical speech. Neither involve threat to life or limb, or false statements of fact, or any other traditionally accepted reason why the speech should be treated differently. If your favorite restriction is accepted on "private concern" grounds, some will ask, why not mine?

Finally, and relatedly, free speech is not always an intuitively appealing or intuitively delineated principle. Many people's commitment to protection of speech is neither ideologically very deep nor at the forefront of their thoughts. In this situation, the law as it is profoundly influences people's evaluation of the law as it should be (what some call "the normative power of the actual"<sup>202</sup>)—just recall how often you've heard people argue "well of course this restriction should be permissible, look how many similar restrictions there are." As more restrictions of a particular genre are in fact allowed, many people will become more used to the notion that such restrictions are normatively proper, and will become more sympathetic to other restrictions of that genre. In Madison's words, once the power to enact certain restrictions "strengthen[s] itself by exercise, and entangle[s] the question in precedents," it becomes far more likely to generate other, still broader restrictions. This is why a "prudent jealousy" of government restraints on constitutional rights, even when the restraints are urged in a seemingly good cause, is indeed "the first duty of citizens."<sup>203</sup>

The law of course already allows quite a few restrictions, including speech restrictions justified on a "not of public concern" theory. But the Court was careful to draw even those restrictions narrowly: The plurality opinions in *Young v. American Mini Theatres* and *FCC v. Pacifica Foundation*, for instance, upheld certain restraints on supposedly not very important speech such as pornography or profanity, but at the same time stressed that the restraints only regulated the time and place where the speech is communicated.<sup>204</sup> The restrictions on speech that

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Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 892 (1994) ("Perhaps . . . in twenty or fifty years we will look upon hate speech rules with the same equanimity with which we now view defamation, forgery, obscenity, copyright, and dozens of other exceptions to the free speech principle, and wonder why in the late twentieth century we resisted them so strongly.").

<sup>202</sup> See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582 (1933) (attributing the phrase to E.M. Jellinek).

<sup>203</sup> See Madison, *supra* note 10.

<sup>204</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality) ("what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited"); *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (plurality) (stressing "the narrowness of our holding," which applies only to broadcasting); 760 (1978) (Powell, J., concurring in the judgment) (stressing that the ruling applies only to broadcasting, and "does not prevent respondent Pacifica Foundation from broadcasting the

reveals personal information would impose much broader bans than those approved in *Young* and *Pacifica*.

And more importantly, the precedential influence that I describe is never all or nothing. Arguing by analogy to one restriction is hard, both because that restriction looks like an unusual exception and because there will be few other restrictions that are closely analogous to it. Arguing by analogy to two restrictions is easier, by analogy to several restrictions easier still. Political tacticians know this, which is why they are often willing to proceed step by step, building a body of political precedent that will make further steps easier and easier. Legal tacticians know this, too; consider the NAACP's successful campaign to erode "separate but equal" one step at a time. Those who want to defend legal principles from erosion should also keep it in mind.

## VI. COMPELLING INTEREST

The last argument for many proposed information privacy speech restrictions is that the government interest behind the restriction is just so great. Speech that reveals personal information about others, the argument goes, violates their basic human rights, strips them of their dignity, causes serious emotional distress, interferes with their relations with family, friends, acquaintances, and business associates, and puts them at risk of crime. Moreover, such speech itself undermines other rights of constitutional stature, such as the right to privacy or free speech itself. The government must be able to step in and prevent this, even at the cost of creating a new free speech exception.

### A. *Countervailing Constitutional Rights*

Let me begin by discussing the "constitutional tension" argument, which comes in two flavors: (1) Because the Constitution has been interpreted as protecting privacy (possibly including information privacy<sup>205</sup>), attempts to restrict speech in the name of protecting information privacy involve a "tension" between

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monologue during late evening hours when fewer children are likely to be in the audience"); *see also* *Action for Children's Television v FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (striking down a 24-hour ban on broadcast indecency). Moreover, recent cases seem to have in some measure undermined the precedential value of *Young* and *Pacifica*. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (stressing that the *Young* and *Pacifica* pluralities "did not command a majority of the Court"); *Reno v. ACLU*, 521 U.S. 844 (1997) (applying strict scrutiny, the test used to protect high-value speech, to strike down a restriction on the same sort of speech that *Pacifica* described as "low value," and distinguishing *Pacifica*); *cf.* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 182 n.145 (arguing that *Reno*'s distinction of *Pacifica* is unsound, though ultimately concluding that *Pacifica* was mistaken).

<sup>205</sup> *See Whalen v. Roe*, 429 U.S. 589, 605 (1977) (stating that "in some circumstances that duty [of government nondisclosure] arguably has its roots in the Constitution").

two constitutional values.<sup>206</sup> (2) “The private facts tort . . . promotes some of the same values protected by the First Amendment,” because “[g]ranting people privacy, recognizing that despite their entering into the public debate on an issue . . . they remain a private person to some degree, encourages people to come forward and engage in the debate.”<sup>207</sup>

I have elsewhere argued at length against this sort of “constitutional tension” argument,<sup>208</sup> but for now let me make two observations about it. First, the speech vs. privacy (or speech vs. speech, as some suggest) tension is not a tension between constitutional rights on both sides. The Constitution presumptively prohibits government restrictions on speech and perhaps some government revelation of personal information, but it says nothing about interference with speech or revelation of personal information by nongovernmental actors.<sup>209</sup>

If, for instance, a private group organizes a boycott of a newspaper to pressure it into dropping a columnist whose work the group finds offensive,<sup>210</sup> the group is not thereby violating the columnist’s First Amendment rights; he has a constitutional right to speak free from government restraint, but not free from private censure or private pressure. Likewise, information privacy speech restrictions involve a tension between a *constitutionally secured* right to speak free of government restriction and a proposed *statutory or common-law* right to speak free of private revelation of private information. The fact that the proposed statutory or common-law right is in one way analogous to a constitutional right does not give it constitutional stature.

Second, as the boycott example shows, changing First Amendment doctrine to let free speech rights be trumped by other “constitutional values” derived by analogy from constitutional rights would permit a broad range of speech restrictions. Lots of speech has the effect, and often the purpose, of discouraging people

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<sup>206</sup> Cf. also *Melvin v. Reid*, 112 Cal. App. 2d 285, 291 (1931) (recognizing the disclosure tort in part on the theory that the California Constitution protects “[t]he right to pursue and obtain happiness,” which is jeopardized even by true revelations that “unwarranted[ly] attack . . . one’s liberty, property, and reputation,” but not explicitly discussing the free speech question).

<sup>207</sup> Scott, *supra* note 193, at 687, 710.

<sup>208</sup> Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223 (1996).

<sup>209</sup> Some state constitutional provisions might bar “invasions of privacy” by private actors, *see, e.g., Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633 (Cal. 1994), but this fact can’t justify a violation of federal free speech rights. *See Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981).

<sup>210</sup> *See, e.g., Jill Stewart, Free This Man: Can Black Conservatives Speak Their Minds in America? Ask KABC Talk-Show Host Larry Elder, The Target of a Black Nationalist Group in L.A.*, L.A. NEW TIMES, July 3, 1997 (describing boycott of sponsors of black conservative talk show host Larry Elder’s radio show, aimed at getting the radio station to take him off the air); James Warren, *Andy Rooney Suspended, But Denies Racist Comment*, CHI. TRIB., Feb. 9, 1992, § 1, at 3 (describing public pressure that caused CBS’s suspension of 60 Minutes commentator Andy Rooney for allegedly making a racist comment); Jerry Berger, *Kennedy Decries Reagan Civil Rights Policies*, UPI, Jan. 18, 1988, available in LEXIS, News Library, UPI File (describing public pressure that caused CBS’s firing of Jimmy “The Greek” Snyder on similar grounds).

from exercising their speech rights in certain ways. Political bullies try to silence their opponents not only by revealing embarrassing private information about them, but also by calling them nasty (but nonlibelous) names,<sup>211</sup> citing their interracial marriages as evidence that they are traitors to their race,<sup>212</sup> attacking them with bitter and unfair parodies,<sup>213</sup> or saying things aimed at undermining their business affairs.<sup>214</sup> Depending on the era, the risk of having your arguments called “Communist,” “un-American,” “racist,” or “sexist” (even if your arguments do not in fact fall into those categories) has discouraged many people from expressing viewpoints that might draw such rhetoric; and I suspect that the rhetoric was often used precisely to deter people from expressing certain viewpoints.<sup>215</sup> Who among us hasn’t at times decided to stay quiet rather than have to hear and rebut our opponents’ vituperation?

Consider a telling example from an article arguing that restrictions on speech that reveals personal information serve free speech values: “[S]tudies indicate that the threat of continued exposure to adverse public opinion curtails an individual’s willingness not only to voice dissenting or nonconformist opinions but also curtails the willingness to entertain such positions privately.”<sup>216</sup> Exactly right—the threat of *adverse public opinion*, whether it flows from the revelation of

<sup>211</sup> See, e.g., John L. Mitchell, *Larry Knows Best*, L.A. TIMES, May 31, 1998, Magazine sec., at 12 (“Out of the black community came anonymous fliers accusing [conservative black talk show host Larry] Elder of hate speech, describing him as a ‘White Man’s Poster Boy’ and a ‘boot-licking Uncle Tom.’”); *The News No Longer With Keith*, HOTLINE, Dec. 3, 1998 (quoting MSNBC anchor Keith Olbermann as saying, while criticizing Ken Starr’s investigation of Bill Clinton, “It finally dawned on me that the person Ken Starr has reminded me of, facially, all this time was Heinrich Himmler, including the glasses”); Rick Pearson & Graeme Zielinski, *Senator Apologizes for Epithet*, CHI. TRIB., Sept. 8, 1998, at 1 (quoting Sen. Carol Moseley-Braun’s response of columnist George Will’s criticism of her: “‘I think because he could not say ‘nigger,’ he said the word ‘corrupt,’” Moseley-Braun said, although the word ‘corrupt’ did not appear in the conservative commentator’s column. ‘George Will can just take his hood and go back to wherever he came from,’ she added, apparently alluding to hoods worn by members of the Ku Klux Klan.”).

<sup>212</sup> See, e.g., Amy Wallace, *He’s Either Mr. Right or Mr. Wrong*, L.A. TIMES, Mar. 31, 1996, at 12 (“State Sen. Diane Watson of Los Angeles accused [Ward Connerly, leader of the California anti-race-preference campaign] of selling out his own people. ‘He probably feels this makes him more white than black, and that’s what he really wanted to be,’ she said, adding, ‘He married a white woman.’”).

<sup>213</sup> See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>214</sup> Cf., e.g., Jill Hodges, *Planned Parenthood List of Donors in Rivals’ Hands*, MINN. STAR-TRIB., Mar. 19, 1992, at 1A (describing plans of anti-abortion activists to boycott and picket corporations that contribute to Planned Parenthood); Charles V. Zehren, *Caught in Abortion Crossfire; Both Sides Pressure Firms*, NEWSDAY, Aug. 13, 1989, at 6 (describing National Organization for Women boycott of Domino’s Pizza, whose chief executive was giving money to anti-abortion groups).

<sup>215</sup> Calling a person a “Communist” or “racist” might be seen as a legally actionable false statement of fact, since it may imply that the person has certain specific views or has engaged in certain specific acts, though even that isn’t certain. See *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (Easterbrook, J.) (“Accusations of ‘racism’ no longer are ‘obviously and naturally harmful.’ The word has been watered down by overuse, becoming common coin in political discourse. . . . In daily life ‘racist’ is hurled about so indiscriminately that it is no more than a verbal slap in the face. . . . It is not actionable unless it implies the existence of undisclosed, defamatory facts.”). In any event, though, calling an argument or a viewpoint “Communist” or “racist” does not contain such a factual implication, and is thus a statement of opinion and not punishable by libel law.

<sup>216</sup> Scott, *supra* note 193, at 717.

embarrassing personal information about the speaker, demagoguery about the supposed heinousness of his views, pure insults, or for that matter reasoned counter-argument, does deter speech. The logic of the argument I quote, if accepted, would thus justify restriction on all these kinds of speech.<sup>217</sup> And yet our right to use speech to pressure others into not speaking is a fundamental aspect of the First Amendment; recall that a recurring (and correct) argument of those who fight against racist advocacy—even advocacy that most people agree should be constitutionally protected—is that such speech should be deterred by social ostracism and condemnation.

Likewise, accepting the other constitutional tension argument, which urges that speech be restricted when it undermines the unwritten constitutional “value” of privacy, would provide strong support for restrictions on speech that vehemently criticizes a religion and thereby discourages people from publicly adhering to it (and thus supposedly undermines the explicitly constitutionally described values of religious freedom), speech that urges people to treat others unequally (and thus undermines equality), speech that tries to pressure people into not exercising their property or contractual rights (and thus undermines private property rights or the obligation of contracts), and so on. A doctrine that constitutional rights to protection from the government may be turned into justification for government restrictions on speech by private actors would have a broad effect indeed.

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<sup>217</sup> The article making this argument doesn’t confront this point. It does try to distinguish its proposed restrictions from libel law, but there too the argument undercuts, not strengthens, its general point. The article argues that in disclosure actions the burden of proof of newsworthiness should be on the defendant; in libel actions, the Court has held that the burden of proof of falsity should be on the plaintiff, but such a requirement, the article maintains, shouldn’t apply to disclosure actions:

The value protected by defamation is an individual’s interest in her reputation. The First Amendment values protected [by constitutional restraints on libel law] can include the search for truth, self-governance, and any number of other values. In essence, individual rights are being weighed against societal rights. With privacy, on the other hand, the interest protected is not merely the interest in one’s dignity, but rather the interests in the search for truth, autonomy and self-governance. Because the values being served by the plaintiff’s privacy actions are First Amendment values rather than simply human dignity, it is inappropriate to adopt the defamation model.

Scott, *supra* note 193, at 726.

But of course one standard argument for broad libel law is precisely that falsehoods interfere with the public’s “search for truth” and well-informed “self-governance,” and with the victim’s “autonomy” (which the article defines as “[s]elf-realization and [i]ndividuality,” Scott, *supra* note 193, at 717). See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 392, 401 (1974) (White, J., dissenting) (arguing that libel “may frustrate th[e] search [for truth]” and contribute to “assaults on individuality and personal dignity”). In fact, Justice White, the Court’s most vocal exponent of decreasing constitutional protections against libel actions, has explicitly argued that First Amendment protections in libel cases should be reduced because the risk of defamation may deter people from entering public life, see, e.g., *id.* at 400 (“It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head.”); elsewhere the article repeats a similar argument, see Scott, *supra* note 193, at 712-13. Speech restrictions created in the name of information privacy are far harder to distinguish from other speech restrictions than some might think.

B. *Dignity, Emotional Distress, and Civil Rights*

Other arguments for information privacy speech restrictions claim that the speech injures people's dignity or emotional distresses them. This injury is sometimes also characterized as an interference with people's basic "civil right" not to have others know or say certain things about them.<sup>218</sup>

Some of the more extreme claims put this in rather extravagant terms: "[A] rampant press feeding on the stuff of private life would destroy individual dignity and integrity and emasculate individual freedom and independence."<sup>219</sup> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different . . . Such a being, although sentient, is fungible; he is not an individual."<sup>220</sup> Without privacy, "intimate relationships simply could not exist."<sup>221</sup> "Privacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own. And this is a precondition of personhood."<sup>222</sup>

It's not entirely clear what exactly these claims mean. If the assertion is simply that *complete* lack of privacy, a situation where people are indeed compelled to live "every minute" among others and where their "every . . . thought" is indeed subject to public scrutiny would dramatically affect freedom and intimacy, that might be true. It would be grim indeed to live in a hypothetical environment where there is no private property, where the government constantly listens and watches every conversation, where some thought-reading device reaches into people's heads (the only way in which literally "every . . . thought" would be subject to scrutiny), and where there are no market pressures, contracts, or social conventions that prevent monitoring or revelation of private information.

But of course this grim vision tells us little about any supposed need for extracontractual prohibitions on nongovernmental speech that reveals personal information. Even if all such speech restrictions were unconstitutional, we'd still

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<sup>218</sup> See, e.g., *Online Privacy*, NPR, June 30, 1998 (quoting Todd Lappin, senior associate editor of *Wired* magazine) ("[I]t's really the job of all of us to get a consensus in Congress that'll give us basic legal rights so we have some control over our names and over our personal information. This is a civil rights and a human rights struggle . . .").

<sup>219</sup> Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, 39 NYU L. REV. 962 (1964), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY 156, 163 (Ferdinand D. Schoeman 1984) (characterizing Warren & Brandeis as implicitly taking this view, and ultimately endorsing the view himself).

<sup>220</sup> *Id.* at 1003.

<sup>221</sup> Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76, 76 (1978).

<sup>222</sup> Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976).

have a world where much of our privacy can be protected by legal rules that restrain private trespass, wiretapping, and electronic eavesdropping; by constitutional restraints on government searches; by statutory restraints on government collection and revelation of personal information; by contractual obligations on the part of people to whom we must reveal data; by market pressure on certain businesses not to reveal data about their customers;<sup>223</sup> by technological self-protection that can hide our identity in many online transactions;<sup>224</sup> and by social norms. Some might still think that this world permits undue intrusions on privacy, but it hardly seems to risk the actual destruction of dignity, integrity, freedom, and independence, or the impossibility (not just difficulty, but impossibility) of intimacy and even personhood.

Claims about what would happen if privacy were totally destroyed tell us nothing about which particular privacy rules (and especially which restrictions on others' constitutional rights) are indispensable. To give an analogy, one might plausibly argue that a society where "every minute of [one's] life"—at home, in public, reading a newspaper, or watching television—one is constantly confronted with nongovernmental proselytizing of a particular religion and with warnings of hellfire and damnation if one doesn't conform would rob people of dignity, integrity, freedom, individuality, and intimacy. But such an argument provides no support for the government banning nongovernmental proselytizing in the society we have today.<sup>225</sup>

On the other hand, if the claim is that the ability of private parties to communicate personal information about others *by itself* "destroy[s] individual dignity and integrity and emasculate[s] individual freedom and independence," "deprive[s] people] of [their] individuality," makes it impossible for "intimate relationships [to] exist," or denies that a person's "existence is his own," such a claim is simply false. We live today in a world where private parties do have very broad rights to communicate personal information about us, but because of the other protections described above, our dignity, freedom, individuality, and capacity for intimacy still seem largely intact. Perhaps at some unknown future time information technology might get so powerful that these values will indeed be threatened with "destruction" by such speech. I doubt it, but who can know for certain? Still, it seems to me that free speech—whether it's speech that reveals personal informa-

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<sup>223</sup> See, e.g., Justin Matlick, *Governing Internet Privacy: A Free-Market Primer* (Pacific Research Institute, July 1999), available at <http://www.pacificresearch.org>, Introduction.

<sup>224</sup> See, e.g., Kang, *supra* note 27, at 1241-46; Gindin, *supra* note 1, at 1176-77; Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, CATO POLICY ANALYSIS NO. 295, Jan. 22, 1998, available at <http://www.cato.org/pubs/pas/pa-295.html>, text accompanying notes 74 & 75.

<sup>225</sup> Cf. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that such proselytizing, even when it vitriolically condemns other religions, is constitutionally protected); *Kunz v. New York*, 340 U.S. 290 (1950) (same).

tion, speech that communicates socially harmful ideas, or speech that allegedly coarsens public discourse<sup>226</sup>—ought not be restricted today merely on the grounds that it’s conceivable that some decades hence such speech might “destroy individual dignity.”<sup>227</sup>

Once the hyperbole is set aside, there remain some more modest claims. Speech that reveals private information about people may not destroy individuality or dignity, but some argue that it does diminish their dignity,<sup>228</sup> that it can severely distress them, that it fails to properly respect them,<sup>229</sup> and that it interferes with a basic civil right not to have people communicate such information.

The question, though, is whether the government may constitutionally suppress certain kinds of speech in order to protect dignity, prevent disrespectful behavior, prevent emotional distress, or to protect a supposed civil right not to be talked about. Under current constitutional doctrine, the answer seems to be no. Though the Supreme Court has sometimes left open the door to the possibility of restricting truthful speech simply on those grounds,<sup>230</sup> the general trend of the cases cuts against this: Even offensive, outrageous, disrespectful, and dignity-assaulting speech is constitutionally protected.<sup>231</sup>

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<sup>226</sup> Cf., e.g., *Kingsley Int’l Pictures v. Regents*, 360 U.S. 684 (1959) (holding that advocacy of adultery is constitutionally protected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that even advocacy of violence is constitutionally protected); *Cohen v. California*, 403 U.S. 15 (1971) (holding that profanity is constitutionally protected).

<sup>227</sup> Some might possibly argue—similarly to the way that I argue about free speech—that while nongovernmental revelation of personal information does not by itself “destroy individual dignity,” it can set precedents that will over time lead to greater and greater trespasses on other kinds of privacy, and thus eventually destroy dignity. But while this is a possible argument, I have not seen it made in any detail, and my tentative reaction to it is skeptical: I just don’t see how people’s ability to freely speak about others would lead to, for instance, more unreasonable searches and seizures, more governmental intrusions on reproductive decisions, or more private wiretaps or trespasses. Perhaps there is a persuasive, concrete argument explaining the mechanisms through which this long-term destruction of individual dignity might take place; but I haven’t seen it.

<sup>228</sup> Cf. Melville Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 959 (1968) (arguing that public disclosure of private information “degrad[es] a person by laying his life open to public view”).

<sup>229</sup> Cf. Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 223, 228-29 (Ferdinand D. Schoeman ed. 1984).

<sup>230</sup> See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989) (leaving open the possibility that speech that reveals highly embarrassing information might be punished if it does not involve matters of private concern); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (holding that otherwise protected speech about a public figure may not be restricted on the grounds that it is outrageous and inflicts severe emotional distress, but not discussing speech about private figures); *Garrison v. Louisiana*, 379 U.S. 64, 72 n.8 (1964) (holding that truth must be an absolute defense as to matters of public concern, but leaving open the possibility that it may not be a defense to charges that a statement on matters of private concern has injured someone’s reputation).

<sup>231</sup> See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (public profanity); *Texas v. Johnson*, 491 U.S. 397 (1989) (flagburning); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (scurrilous and personal attack in print); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (racist advocacy); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (Nazi parade in a part of town where many Holocaust survivors lived); *Kunz v. New York*, 340 U.S. 290 (1950) (vitriolic attacks on Catholicism and Judaism); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

And this is for good reason. All of us can imagine some speech that is so offensive and at the same time so valueless that we would not feel any loss if it were restricted, but the trouble is that each of us has a somewhat different vision of which speech should qualify. The more courts conclude that avoidance of disrespect or emotional distress is a “compelling interest” that justifies restricting the speech we find worthless, the more likely they will be to accept the same arguments for restricting the speech we value.

Just consider how many proposed new exceptions have been urged on the grounds that they protect “basic human rights” or people’s “dignity.” Proposed bans on “hate speech,” on university campuses or elsewhere, have been defended on exactly these grounds, and their supporters have likewise argued that such speech causes serious emotional distress, interferes with the target groups’ social and business opportunities, and lacks constitutional value to boot.<sup>232</sup> The same has been said for sexually themed speech, which many people argue strips all women of their dignity, interferes with the personal and business relationships of women who have to deal with men who watch such speech, and is irrelevant to matters of public concern.<sup>233</sup>

Jerry Falwell quite plausibly argued that Hustler’s criticisms of him were extremely undignified, disrespectful, and distressing, and interfered with a legally recognized right to freedom from intentional infliction of severe emotional distress.<sup>234</sup> Proposed flagburning bans are defended on the grounds that such speech insults the dignity of veterans and of all Americans, is unnecessarily disrespectful, lacks substantial constitutional value, and inflicts severe emotional distress on those whose relatives died defending the nation for which the flag stands. Parents claim a civil right in not having their kids exposed to certain kinds of speech.<sup>235</sup>

If the government can declare it to be a “civil right” to coercively block others from saying the truth about me behind my back, then the arguments for these proposed restrictions and for many others would be considerably strengthened. The government could similarly declare it a civil right to have others not say insulting things about me (and my kind) in print or in broadcast, where I may directly see or hear such speech; other countries have indeed done this. Similarly, say that *true* statements—statements about past crimes, current sexual orientation, credit history, and the like—can be restricted because of the danger that they will change people’s attitudes about their subject. Why wouldn’t sociological or po-

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<sup>232</sup> See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17 (1993); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *id.* at 53; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

<sup>233</sup> CATHERINE A. MACKINNON, *ONLY WORDS* (1993).

<sup>234</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>235</sup> See, e.g., Richards, *supra* note 199.

litical claims that the government considers false or misleading (group libel or seditious libel<sup>236</sup>) or statements of opinion (general bigoted advocacy) be likewise restrictable, on the grounds that they may change people's attitudes about a group, and that there's a "compelling governmental interest" in preventing such changed attitudes?

The same applies to sexually themed speech. Many people are offended by the very knowledge that men are reading and watching things that lead them to see women as sexual objects.<sup>237</sup> Many women rightly suspect that many men think of them in crude sexual terms, and perhaps may make sexually themed remarks about them behind their backs (which some see as an "invasion of privacy"). It's plausible that much sexually themed speech fosters such attitudes, and that sexually themed speech may influence its consumers' personal and business relationships with women. If the government has a compelling interest in preventing people from thinking highly offensive thoughts and saying highly offensive things about us behind our backs in the information privacy context, why not in the sexually themed speech context?<sup>238</sup>

Proponents of information privacy speech restrictions might argue that such restrictions are different because speech that reveals private information about someone is of no legitimate public concern, or is not necessary to public debate. But many equally think that there's no legitimate reason for people to spread harmful opinions (and misleading sociological claims) about groups, or to display nude pictures to each other. Likewise, many argue that even if racist opinions are a legitimate subject of public debate, racial slurs, profanities, sexually themed art, and explicit discussion of sexual subjects are not necessary to such debate, since it's possible to express one's views without such speech.

On the other side of the comparison, as Part V argued, a good deal of speech that reveals information about people, including speech that some describe

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<sup>236</sup> Cf., e.g., *United States v. Cooper*, 25 F. Ca. 631, 639 (C.C. D. Pa. 1800).

<sup>237</sup> See, e.g., *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430, 1440 (C.D. Cal. 1994) (involving claim that even "quiet reading" of sexually themed magazines by firefighters should be banned because women coworkers were "offended . . . by the knowledge that men who read Playboy might entertain degrading thoughts about their coworkers").

<sup>238</sup> My concerns apply equally to proposals that frankly "prioritiz[e] privacy over speech," e.g., Joseph Elford, Note, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 745 (1995); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. CIV. RTS.-CIV. LIBS. L. REV. 329, 341 (1979). The more rights are prioritized over the constitutionally secured right to free speech, the likelier it is that courts will hold that other rights, new and old—freedom from intentional interference with emotional distress, freedom from interference with business relationships, freedom from speech that undermines equality, and the like—similarly trump free speech. And this is especially so when the reasons for treating privacy as superior to free speech are so generalizable: Consider the Elford article's argument that "speech has a greater propensity than privacy to cause individual harm" and that "[u]nlike the right to speech, which serves both individual and social interests, the benefits of privacy are entirely individual" and therefore more worthy; this argument could equally be made to justify the constitutional free speech right being trumped by any of the statutory or common-law rights I mention earlier in this footnote. The Emerson argument suffers from the same problem.

as of merely “private concern,” is actually of eminently legitimate interest. Some of it is directly relevant to the formation of general social and political opinions; most of it is of interest to people deciding how to behave in their daily lives, whether daily business or daily personal lives—whom to approach to do business, whom to trust with their money, and the like. True, this speech isn’t a candidates’ debate, or an editorial regarding a ballot measure; allowing restrictions on this speech will only minimally jeopardize such intensely political advocacy. But the speech I describe is at least as relevant to people’s lives as is much speech that is today constitutionally protected, be it art, product reviews, or humor; restricting it on “compelling interest” grounds will indeed set a precedent for restricting those other kinds of speech, too.

Beyond the purely legal precedent, though, I am especially worried about the normative power<sup>239</sup> of the notion that the government has a compelling interest in creating “codes of fair information practices” restricting true statements made by nongovernmental entities. The protection of free speech generally rests on an assumption that it’s not for the government to decide which speech is “fair” and which isn’t; the unfairnesses, excesses, and bad taste of speakers are something that current First Amendment principles generally require us to tolerate. Once people grow to accept and even like government restrictions on one kind of supposedly “unfair” communication of facts, it may become much easier for people to accept “codes of fair reporting,” “codes of fair debate,” “codes of fair filmmaking,” “codes of fair political criticism,” and the like.

It is conceivable that as to some kinds of speech, for instance the revelation of the names of rape victims or the unauthorized distribution of pictures of a person naked or having sex, courts will find that the speech is so valueless and so distressing that there is indeed a compelling interest in restricting it.<sup>240</sup> Though I

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<sup>239</sup> See *supra* text accompanying note 192.

<sup>240</sup> The names of rape victims can often be quite relevant to discussions of public affairs. Even Peter Edelman, a strong supporter of allowing tort recoveries for media speech revealing rape victims’ names, lists a variety of cases where this may be so:

The speech interest is stronger when a question exists about the legitimacy of the rape complaint or whether the right person has been accused. An article that examines patterns in the attitudes of police and prosecutors concerning rape might capture reader attention more effectively if it names the actual rape victims whose cases the article addresses. Likewise, if numerous rapes occurred and aroused suspicion that the authorities were attempting to conceal their inability to make arrests, it might be important to the political process to state the names of the victims.

Peter J. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990). Given this long, diverse, and doubtless expandable catalog of cases where the name is newsworthy, it becomes hard to see how a clear, objective line can be drawn between “newsworthy” naming of the victim and “unnewsworthy” naming. Perhaps this should cut in favor of a per se rule barring the publication of rape victims’ names, or perhaps we can tolerate a vague rule with the expectation (and perhaps desire) that newspapers will be chilled from publishing the victim’s name even when this information would be newsworthy. But it can’t be denied that either kind of rule will indeed suppress speech that’s substantially related to matters of serious public concern.

empathize with the reasons for such restrictions, I reluctantly oppose them, precisely because of the dangers discussed in Part V and earlier in this section—“lack of legitimate public concern” and “severe emotional distress,” while intuitively appealing standards, are so vague and potentially so broad that accepting them may jeopardize a good deal of speech that ought to be protected.

But while these narrow restrictions would merely increase the risk that more speech might be restricted in the future, other proposed restrictions cheerfully embrace this possibility. Broad readings of the disclosure tort would, as Part V argues, restrict speech about elected officials that many voters would (rightly or wrongly) find quite relevant, or restrict speech about people’s past crimes, which many of the people’s neighbors may find important.

Likewise, many of the proposals to restrict communication of consumer transactional data would apply far beyond a narrow core of highly private information, and would cover all transactional information, such as the car, house, food, or clothes one buys. I don’t deny that many people, perhaps most people, may find such speech vaguely ominous and would rather that it not take place, and that some people get extremely upset about it. But knowing that some business somewhere knows what car you drive<sup>241</sup> is just not in the same league as, say, knowing that all your neighbors (and thousands of strangers) have heard that you were raped. If such relatively modest offense or annoyance is enough to justify speech restrictions, then the compelling interest bar has fallen quite low. And watering down the threshold for when an interest becomes “compelling” will of course have an impact far beyond information privacy speech restrictions.

Finally, on the purely doctrinal level, *Florida Star v. B.J.F.* made clear that information privacy speech restrictions ought not be underinclusive.<sup>242</sup> One of the reasons *Florida Star* gave for striking down the statutory ban on publishing the names of rape victims is that such a ban applied only to the media and not to the victim’s acquaintances or neighbors. “[T]he communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers,” the Court pointed out; and this “facial underinclusiveness . . . raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance.”<sup>243</sup> This argument casts into doubt most states’ disclosure torts, which also apply only to broad dissemination, and not

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<sup>241</sup> Cf., e.g., Gindin, *supra* note 1, at 1157.

<sup>242</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996) (discussing the underinclusiveness inquiry in detail).

<sup>243</sup> *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989); see also *id.* at 542 (Scalia, J., concurring) (relying primarily on this point, and concluding that “This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest ‘of the highest order.’”).

communication to a small group of acquaintances,<sup>244</sup> as well as bans on merchants (and not others) communicating clients' personal data.

### C. Preventing Misconduct and Crime

#### 1. Discrimination

Speech that reveals some kinds of information about people may make it easier for the listeners to act illegally or supposedly unfairly towards those people. One common example that advocates of such restrictions give is the risk that certain health-related information might fall into the hands of your health insurance company. "Say that the insurance company learns that you eat a lot of pizza and steak, and therefore concludes that you'll probably have higher cholesterol and a higher risk of heart disease," a common argument goes; "it might then raise your rates." Another example is the risk that information about people's past crimes, alcoholism, or drug abuse will become known to employers, who will then refuse to hire these people.<sup>245</sup>

I can certainly see why people might be offended by their insurance company "snooping" on them this way. I can also see why it might be in the unhealthy eaters' financial interest (and I should mention that I love meat and cheese) not to be identified as such, so they can be subsidized by the healthy eaters with whom they pool their risk.<sup>246</sup> Similarly, closet smokers would prefer, if possible, that life insurance companies not be able to identify them as smokers. But the question is not just whether this kind of communication is offensive or financially costly to its subjects, but rather whether the government may suppress such communication.

If discrimination in insurance based on the insureds' eating habits is legal, as it is with respect to smoking habits, then it's hard to see how the risk of such lawful discrimination can justify restricting speech.<sup>247</sup> True, one's buying habits are not a perfect proxy for one's eating habits (maybe the buyer is a vegan who is buying this entirely for his omnivorous roommate), but insurance is all about using imperfect but lawful predictors. Being above 25 and being a good student don't

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<sup>244</sup> See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 5.9[C](1), at 5-100 (1999).

<sup>245</sup> See, e.g., James Rachels, *Why Privacy is Important*, PHIL. & PUB. AFF., Summer 1975, at 323, 324 ("Revealing a pattern of alcoholism or drug abuse can result in a man's losing his job or make it impossible for him to obtain insurance protection").

<sup>246</sup> Cf. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395, 399 (1978) (more generally discussing people's desire to conceal discreditable information about themselves).

<sup>247</sup> See *U.D. Registry, Inc. v. California*, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (condemning an information privacy speech restriction that "seeks to limit the free flow of information for fear of its misuse by landlords," on the grounds that such a "paternalistic approach" is an impermissible ground for restraining either commercial or noncommercial speech).

perfectly predict whether someone will drive safely; smoking and being older don't perfectly predict whether someone will die soon; but virtually nothing perfectly predicts anything else. Likewise, many employers might consider a person's criminal record, alcoholism, or drug abuse relevant to whether they should entrust their property, their clients' well-being,<sup>248</sup> or a \$100 million oil tanker to that person.

But even if the government outlaws discrimination based on insureds' eating habits, or discrimination based on a person's alcoholism, drug use, or criminal past,<sup>249</sup> the basic First Amendment rule is that while the government may restrict illegal conduct, it generally can't restrict speech simply because some people may at some time be moved by the speech to act illegally.<sup>250</sup> The law has plenty of tools to fight such discrimination directly. They are not perfect tools, but under the First Amendment the government may not try to compensate for their imperfection by suppressing speech. The government may not suppress advocacy of discrimination based on race, criminal history, alcoholism, drug use, or pizza consumption, even though such advocacy may lead some people to actually engage in such discrimination. Likewise, the government may not suppress speech about particular people's criminal history, alcoholism, drug use, or pizza consumption, even though such speech may lead some people to engage in the discrimination.

## 2. Fraud and Violent Crime

In a few cases, revealing certain information about people may make it easier for people to defraud them or even to commit violent crimes against them. Thus, LEXIS/NEXIS was faulted for putting people's social security numbers in a searchable online database; market pressure promptly led it to change its policy.<sup>251</sup> Likewise, the authors of the anti-abortion *Nuremberg Files* Web site were found civilly liable for, among other things, putting online the names, addresses, and other personal and family information about abortion providers.<sup>252</sup> A few disclosure tort cases have also punished the publication of the identity of witnesses who were vulnerable to attack by the criminals.<sup>253</sup>

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<sup>248</sup> Employers not only have moral and business reasons to make sure that they don't hire people who might abuse their customers, but legal reasons, too: A negligent failure to discover that an employee has a criminal record may lead to liability for negligent hiring if the employee later attacks a customer. *See, e.g.,* Carlsen v. Wackenhut Corp., 868 P.2d 882, 888 (Wash. App. 1994).

<sup>249</sup> *See* N.Y. CORR. LAW §§ 752, 753 (generally barring employment discrimination based on criminal record); WISC. STAT. ANN. §§ 111.31, 111.32 (same).

<sup>250</sup> *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969).

<sup>251</sup> *See supra* note 27.

<sup>252</sup> *See* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Ore. 1999).

<sup>253</sup> *See* Capra v. Thoroughbred Racing Ass'n of North America, 787 F.2d 463 (9th Cir. 1986) (name of person in federal witness protection program); *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr.

Under what circumstances the government may restrict speech that facilitates the commission of crime is a difficult and so far largely uninvestigated question.<sup>254</sup> It arises in many cases which have nothing to do with revelation of personal information, because personal information is just one of many kinds of information that can make it easier for people to commit crimes. The most prominent recent case that upheld a restriction on crime-facilitating speech involved a lawsuit against the publisher of a murder-for-hire manual.<sup>255</sup> The most prominent recent case striking down such a restriction involved a scientist trying to put his source code on a Web site, contrary to arms export laws.<sup>256</sup> The most prominent recent legislation aimed at such speech was a ban on certain online speech that described bombmaking techniques.<sup>257</sup> And the most famous cases that implicate this issue are the classic hypothetical of the publication of the sailing dates of troopships and the attempt to enjoin the publication of information about building an H-bomb.<sup>258</sup>

Moreover, even crime-facilitating speech that's focused on particular targets may involve information that few would consider especially private: For example, if a criminal is still at large, knows what a witness looks like, and would like to kill her in order to silence her, publicizing the name of the small business at which the witness works—hardly intimate information—may jeopardize her life almost as much as publishing her home address would. Similarly, if we're concerned about speech that facilitates fraud or theft, publishing information about a business's security vulnerabilities or a list of the business's computer passwords may create as much risk of fraud as publishing a person's social security number.

I will not try to resolve this question here, but only want to offer three observations. First, the fact that speech facilitates crime doesn't always justify restricting the speech (even if it sometimes might): Consider, for instance, normal chemistry books, which may be used by criminals to learn how to make explosives, or detective stories that describe particularly effective ways to commit a crime.

Second, the strongest argument for restricting speech that reveals crime-facilitating personal information is that the speech facilitates crime, not that it reveals personal information. It is therefore probably most useful to analyze such

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556 (Ct. App. 1988) (name of crime victim and witness where the criminal was still at large).

<sup>254</sup> See Eugene Volokh, *Crime-Facilitating Speech* (in progress).

<sup>255</sup> See *Rice v. Paladin Press*, 128 F.3d 233 (4th Cir. 1997).

<sup>256</sup> See *Bernstein v. United States Dep't of Justice*, 176 F.3d 1132 (9th Cir. 1999), *reh'g en banc granted*, 1999 U.S. App. LEXIS 24324.

<sup>257</sup> Pub. L. No. 106-54, sec. 2(a), *amending* 18 U.S.C. § 842 (enacted Aug. 17, 1999).

<sup>258</sup> *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed as moot*, 610 F.2d 819 (7th Cir. 1979). These cases (and to some extent *Bernstein*) involved speech that may facilitate foreign attack on the United States, rather than crime, but the principle is quite similar.

speech as a kind of crime-facilitating speech, rather than as a specimen of revelation of personal data.

Third, as *Florida Star v. B.J.F.* held, the crime facilitation concern at most supports narrow restrictions on the particular kinds of speech that materially risks facilitating crime.<sup>259</sup> Whatever support there may be for a general right to suppress either speech that reveals embarrassing personal information or speech that reveals information about a person's purchases, the fact that a few kinds of such speech may facilitate crime can't justify these broad restrictions.

#### D. *Keeping the Internet Attractive to Consumers*

Finally, I've heard some argue that privacy restrictions are needed to keep Internet access attractive to consumers: Consumers are so concerned that online sites will collect and reveal information about them, the argument goes, that they are being deterred from engaging in e-commerce, and thus e-commerce in particular and the economy in general is suffering.<sup>260</sup>

It seems to me, though, that fostering economic growth and increasing Internet use, while laudable goals, can hardly be "compelling government interests" justifying content-based bans on certain kinds of speech, at least if the "compelling" threshold is to have any meaning. And the potential consequences of accepting this sort of justification for restricting speech are both clear and dire: The same rationale, after all, would easily justify bans on TV broadcasts that warn of cyberspace privacy risks, since such speech even more directly frightens consumers away from e-commerce and other Internet use.

Furthermore, if this is really such a great concern—which is far from clear, given the explosive growth of e-commerce even in the absence of noncontractual information privacy speech restrictions—it stands to reason that many Internet businesses would invest a lot of effort into preventing such consumer alienation: They'll promise not to communicate consumer information, set up enforcement mechanisms aimed at giving consumers confidence that such promises will be kept, distribute software that helps protect people's privacy through technological means, and so on. I'm not sure whether these tools will work quite as well as a total ban on speech about customers, but I suspect they'll eventually go a long way towards assuaging consumer fears, precisely because online businesses have such

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<sup>259</sup> Cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 537, 539 (1989) (acknowledging the concern about protecting "the physical safety of [rape] victims, who may be targeted for retaliation if their names become known to their assailants," but concluding that the law banning the publication of the names of rape victims was too broad); *id.* at 542 (Scalia, J., concurring in part and concurring in the judgment) (explicitly concluding that the interest in protecting victims' physical safety would justify only a law that applied to cases where the attacker was still at large).

<sup>260</sup> Cf. generally Joel R. Reidenberg & Françoise Gamet-Pol, *The Fundamental Role of Privacy and Confidence in the Network*, 30 WAKE FOREST L. REV. 105 (1995).

an economic stake in reassuring consumers.<sup>261</sup> And the availability of these tools further undercuts the case for restricting First Amendment rights in order to protect e-commerce.<sup>262</sup>

## CONCLUSION

This article has made three arguments. First, despite their intuitive appeal, restrictions on speech that reveals personal information are constitutional under current doctrine only if they are imposed by contract, express or implied. There may possibly be room for restrictions on revelations that are both extremely embarrassing and seem to have virtually no redeeming value, such as unauthorized distribution of nude pictures or possibly the publication of the names of rape victims, and perhaps for speech that makes it substantially easier for people to commit crimes against its subjects. Even these, though, pose significant doctrinal problems.

Second, expanding the doctrine to create a new exception may give supporters of information privacy speech restrictions much more than they bargained for. All the proposals for such expansion—whether based on an intellectual property theory, a commercial speech theory, a private concern speech theory, or a compelling government interest theory—would, if accepted, because strong precedent for other speech restrictions, including ones that have already been proposed. The analogies between the arguments used to support information privacy speech restrictions and the arguments used to support the other restrictions are direct and powerful. And accepting the principles that the government should enforce a right to stop others from speaking about us and that it's the government's job to create "codes of fair information practices" controlling private parties' speech may shift courts and the public to an attitude that is more accepting of government policing of speech generally. The risk of unintended consequences thus seems to me quite high.

Third, this leaves people who are trying to make up their mind about information privacy speech restrictions with several options:

They can wholeheartedly embrace some of the arguments for these restrictions, precisely because these arguments provide precedent for cutting back certain free speech protections. Thus, for instance, those who argue that the First Amendment should primarily cover speech that fairly directly furthers self-

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<sup>261</sup> On the other hand, if one believes that online businesses are investing little in reassuring consumers about cyber-privacy, this would be pretty strong evidence that consumers aren't really being frightened away from e-commerce by the millions, and that e-commerce can survive quite well without speech restrictions.

<sup>262</sup> Cf. *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (rejecting on similar though slightly different grounds a similar argument in support of restrictions on sexually themed speech).

government<sup>263</sup> may want to adopt information privacy speech restrictions as their poster child. These restrictions are popular, they can to a large extent be defended using the “First Amendment only strongly protects speech relevant to self-government” theory, they are hard to defend under a more inclusive theory, and they can therefore produce substantial support for the theory among those who like the restrictions.

Others, who generally oppose any broad retrenchment of free speech protections, but who think information privacy speech restrictions must be upheld, can try to set forth their proposed new exception and its supporting arguments as carefully and narrowly as possible. I hope their attempt to craft such a well-cabined, narrow rationale for any such new exception will be helped by this Article, which highlights some of the analogies that generally pro-speech-restriction forces might use to expand any exception that is created. Maybe with a very carefully drawn exception, my fears about the unintended consequences of recognizing such exceptions won’t come to pass.

Still others may reluctantly conclude that the risk is just too great. We protect a good deal of speech we hate because we fear that restricting it will jeopardize the speech we value.<sup>264</sup> Some may likewise conclude that it’s better to protect information privacy in ways other than speech restriction—through contract, technological self-protection, market pressures, restraints on government collection and revelation of information, and social norms—than to create a new exception that may eventually justify many more restrictions than the one for which it is created. Perhaps the Michigan Supreme Court’s decision 100 years ago, when first faced with the Brandeis & Warren privacy tort proposal, was correct:

This “law of privacy” seems to have obtained a foothold at one time in the history of our jurisprudence,—not by that name, it is true, but in effect. It is evidenced by the old maxim, “The greater the truth, the greater the libel,” and the result has been the emphatic expression of public disapproval, by the emancipation of the press, and the establishment of freedom of speech, and the abolition in most of our States of the maxim quoted, by constitutional provisions . . . .

We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.<sup>265</sup>

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<sup>263</sup> See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992).

<sup>264</sup> *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (“I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”).

<sup>265</sup> *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 289 (Mich. 1899). The facts of *Atkinson* involved what today might give rise to a right of publicity claim, but in this quote the court was discussing the Warren & Brandeis right of privacy, which was primarily focused on what today would be called the disclosure tort.

All three of these approaches have their strengths; the one approach, though, that I think is entirely unsound is to simply ignore the potential free speech consequences. The speech restrictions that courts validate today have implications for tomorrow. Only by considering these implications can we properly evaluate the true costs and benefits of any proposed information privacy speech restriction.