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PRIVACY AND LEGAL RIGHTS

*Ronald A. Cass**

I. PRIVACY AND SECRECY

ONE THING THAT makes learning a foreign language difficult is that subtle differences in the meaning of seemingly similar words can produce startlingly different responses from native speakers. For a stranger to twentieth century America, access to an English dictionary would not explain why "privacy" evokes a very different reaction than "secrecy." Each word denotes shielding something from public view, holding back something of interest to others. With privacy, however, the connotation is that it is proper to hold back this information. With secrecy, the withholding is at least suspicious if not illicit.

The line between these concepts is at once critical and often vanishingly thin. Objective differences in the nature of the information withheld cannot explain the distinction, nor can the consequences of disclosure. Consider, for instance, the dividing line between lawful action and the crime of extortion. Extortion is the threat to reveal private information unless some action is taken. The information may be truthful and of broad public interest, and the action demanded may be perfectly lawful, even laudable. For example, if Jay demands that Marion resign his public office or face exposure as a cocaine user or tax cheat, Jay has criminally invaded Marion's privacy. But when Marion runs for mayor, he may be required to disclose the very same information, and keeping it secret may be illegal even if disclosure would preclude his election as mayor. We might explain this distinction by saying that candidates for public office lose the right to keep certain information private, but that no individual has a right on the public's behalf to force disclosure; that distinction, however, is mere tautology.

This line between privacy and secrecy can be made even more indistinct. If Jay is a prosecutor and has charged Marion

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with the crimes but has not made the information underlying those charges public, it is a lawful exercise of Jay's prosecutorial authority to offer Marion a plea bargain that looks very much like extortion: Jay can offer to discontinue the prosecution and withhold the information from the public if Marion will resign. But what if Jay has not formally charged Marion? Does the same offer then become a crime? Again, we can assert the formal difference between actions that are legally authorized in the public's behalf and actions that have not been so authorized. The more interesting question is why the legal lines have been drawn this way: why do we give legal rights of privacy, violation of which triggers criminal sanctions, in one case and not another?

This question presents what might be called a "thermos" problem. A thermos, as everyone knows, can keep hot liquids hot and cold liquids cold. The question sometimes put by children too young to ask simple ones is, how does it know *which* to do? If law is to play a role in protecting privacy and combatting secrecy, how can it know at any moment which role it should play?

II. PRIVACY CLAIMS

A. Normative Approaches: Ontology and Intuition

The question can be restated in various ways. Putting aside positive claims respecting the evolution of legal doctrine,¹ there are two broad approaches to the question how should legal rights of privacy be defined, or how should protected privacy interests be distinguished from unprotected secrecy interests. The two approaches blend in practice, but they still can present contests over privacy-secrecy in different light.

The question, first, can be approached deontologically, for instance, defining privacy as derivative of personal autonomy—the right of legitimate control over information of special importance to individual identity. Any such definition will face a series of forks in the definitional road. Choices along that road necessarily will be tested against the evaluator's intuitive response to various claims. Principles strongly inconsonant with widely accepted intuitions face considerable difficulty gaining adherents.

1. See, e.g., Hirshleifer, *Privacy: Its Origin, Function and Future*, 9 J. LEGAL STUD. 649 (1980); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

Alternatively, the starting point can be a more intuitive examination of particular cases, with issues of principle—that is, description of generic considerations that explain intuitive solutions to particular controversies and that then guide the solution of others—constituting the trailing edge of privacy analysis. Unfortunately, it is difficult to organize intuitions about privacy claims into guiding principles. Moreover, many privacy claims, viewed alone, elicit no strong intuitive resolution, much less one suggestive of an overarching principle. That is not merely to say that there are hard cases; rather, almost any random selection of privacy claims is apt to consist primarily of cases that are hard to resolve without resort to principles extrinsic to those suggested by intuitive reactions to the particular cases. A few examples may prove helpful.

B. Impacted Intuition: Four Examples

First, consider the controversy over Cable News Network's planned broadcast of audio tapes containing phone conversations between General Manuel Noriega and his lawyers while Noriega was in prison awaiting trial on various criminal charges.² The Federal Bureau of Prisons, responding to prisoners' complaints, installed telephones for prisoners' use. The Bureau soon discovered that these phones were used by inmates to direct a variety of criminal enterprises.³ Rather than remove the phones, the Bureau installed a taping system to monitor prisoners' calls.⁴ Prisoners are informed of the system and told that if requested the system will be turned off during conversations between prisoners and their lawyers.⁵ A conversation between General Noriega and his lawyers was recorded and CNN somehow obtained a copy of that recording.⁶

Taken on its own, this case suggests no issue evoking an intuitive response strong enough to "march our sons and daughters off to war" for.⁷ It is by no means clear what rights should be recognized here or what weight the competing interests should carry.

2. See *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990).

3. See Reiss, *Eavesdropping on Noriega*, *NEWSWEEK*, Nov. 19, 1990, at 60, 60.

4. See Malcolm, *Modern Communications Muddy Rights of Criminal Defendants*, *N.Y. Times*, Nov. 10, 1990, § 1, at 8, col. 1.

5. See *id.*

6. *Noriega*, 917 F.2d at 1545.

7. Justice Stevens will, I am sure, forgive the paraphrase. See *Young v. American Mini-Theatres*, 427 U.S. 50, 70 (1976).

How should the interest of General Noriega in keeping these conversations confidential be weighed against the public interest in access to them? How should the interest of the prison and other law enforcement authorities be balanced against the interests of the prisoners?

A second example concerns United States International Trade Commission ("ITC") adjudication of petitions for imposition of duties on imports that are found by the Department of Commerce to have been priced unfairly.⁸ Prior to 1988, parties to these ITC proceedings did not know most of the data before the commission when it made its decision.⁹ The commission routinely withheld information that a party requested be kept private on the grounds that disclosure would reveal confidential proprietary business information. Thus, parties frequently advanced legal arguments in the belief that if their suggested rules were applied to the data on the record before the commission they would secure a favorable decision, only to find that the commission was looking at a very different record.

Again, intuition does not readily indicate the right amount and terms of access to business information in these cases. There are sound arguments for expanding the parties' access to this information. Restricting access to information can increase the risk of error by the parties investing in litigation and by the government decision makers. But release of sensitive business information to competitors can be costly as well. Ultimately, as yet unexplored empirical issues define the appropriate balance between the cost of different approaches to confidentiality before the ITC.

A third example arises from Environmental Protection Agency ("EPA") evaluation of the environmental risks from pesticides and regulation of their contents and use. Since 1972 the EPA has been allowed to consider pesticide registration information submitted by one enterprise when the Agency reviews an application from another enterprise for a similar chemical.¹⁰ The EPA can also publicly disclose information about pesticides, al-

8. These proceedings are discussed in J. BARTON & B. FISHER, *INTERNATIONAL TRADE AND INVESTMENT: REGULATING INTERNATIONAL BUSINESS* 273-381 (1986); see Cass & Schwartz, *Causality, Coherence, and Transparency in Administration of International Trade Laws*, in *FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS* 24, 27 (M. Trebilcock & R. York eds. 1990).

9. The law respecting this aspect of ITC practice was amended by the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 1677f.

10. See 7 U.S.C. § 136a(c)(1)(D) (1988).

though the law prohibits the use of the information without the applicant's consent for a ten year period.¹¹ In *Ruckelshaus v. Monsanto*,¹² a case challenging disclosure of proprietary information by the EPA as an unconstitutional taking, the Supreme Court suggested that the privacy interest of initial applicants had to be weighed against the public interest in a competitive pesticide market.¹³ The Court did not spend much time discussing the law's effect on the quality of EPA decisions.¹⁴ In either the contest defined by the Court or one resolved by reference to a more complete set of the competing considerations, is one resolution intuitively compelling?

Finally, consider state laws aimed at preventing publication of the names of rape victims or sexually abused minors. Challenges by news organizations to such laws have routinely been successful.¹⁵ Tort suits based on invasion of privacy following publication of the names of these victims have sometimes failed on constitutional grounds, as in *Cox Broadcasting Corp. v. Cohn*.¹⁶ Here there are obvious, strong reasons for privacy, but the cost of privacy in these cases is suppressing or limiting diffusion of information about accusers. Unlike the prior examples, many people may have strong intuitions about these cases. The intuitions, however, are not at all likely to be consistent—imagine the views that rape counselors and reporters might express.

C. Trying for Balance: Privacy's Costs and Benefits

In addition to illustrating the fuzziness of common responses to privacy claims, these examples also illustrate the difficulty of getting a foothold for addressing these claims without recourse to articulate principles. The latter point is revealed if one essays to resolve these cases with a common-sense, cost-benefit approach. This approach begins easily enough with description of the considerations on each side of these privacy claims but ends with difficulty at the stage where costs and benefits must be compared.

11. *See id.* § 136a(c)(1)(i).

12. 467 U.S. 986 (1984).

13. *Id.* at 1014-16.

14. *Id.*

15. *See, e.g.,* *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (allowing public access to voir dire transcripts in a criminal proceeding); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute excluding the public from sexual offense trials with minor defendants violates the first amendment).

16. 420 U.S. 469 (1975).

The reasons for disallowing cheap access to information are plain. In the ITC example, those asserting privacy claims feared that the information would be used by competitors to undermine the claimant's business.¹⁷ In the EPA case, the information lowered the cost of competing with the claimant and, as in other intellectual property cases, its disclosure arguably diminished incentives to produce that information and the products associated with it.¹⁸ In the sex crime cases, the information was considered embarrassing. The *Noriega* case implicates concerns about private information, legal representation, public knowledge, and public safety; in that particular context, however, the information was seen as potentially undermining the prisoner's bargaining position more than his ability to secure a fair trial.

The sort of costs that accompany privacy protection also are fairly plain. Each case presents a prospect of increased error costs without disclosure—in specific decisions, as in the ITC¹⁹ and EPA examples,²⁰ or in broader classes of social decisions in the *Noriega*²¹ and *Cox Broadcasting* cases.²² Disclosure presents other potential increased costs—for example, discouraging investment in research on pesticides because of free rider problems or increasing the harm to victims associated with their willingness to report and prosecute sex crimes.

The problem is not in articulating the sources of costs and benefits, but in weighing them. The balance between these costs (and benefits) can only be struck by providing values for quite amorphous harms. This alone does not distinguish privacy cases from other cases where we place values on pain and suffering or equally vague costs. But those other costs generally provide the measure of harm *after* a determination has been made that one party is legally protected against harm from another. That is the essence of the problem with privacy cases: they cannot be resolved by weighing costs and benefits until there is a structure for determining at least rough magnitudes of cost and for specification of which costs count and how they count.

17. See *supra* text accompanying notes 8-9.

18. See *supra* text accompanying notes 10-14.

19. See *supra* text accompanying notes 8-9.

20. See *supra* text accompanying notes 10-14.

21. *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990).

22. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

D. On to Ontology

Thus, there is a need for specification of the meaning of privacy and of the reason for protecting privacy. The manner in which privacy is defined and its legal protection justified should supply the structure needed for resolving privacy claims. The choice of privacy principles can dramatically affect disposition of privacy claims. For example, those who see privacy as an aspect of individual human development may categorically exclude from consideration cases where the claimants are corporations, not human individuals.²³

The contribution of ontological precepts to resolution of privacy claims, however, is seldom conclusive. The few concepts that define privacy tend to fragment, not only as different commentators pour divergent meaning into similar terms, but also as individual commentators explore the application of their precepts to more difficult cases. Privacy as an instrument of human development, for example, fractures into concepts linked to autonomous, individual development or to social (group-located) development and fractures again with differing intuitions of proper ends for either development track.²⁴ Depending on what choices one makes within groups of ontologically related principles, one might get different resolutions of particular privacy claims.

Another impediment to ontological rescue is the paucity of cases strongly resolved by any definitional choice respecting privacy. Few principles solve more than an occasional case within the class of privacy claims at issue in any of the examples discussed above. The human development principle may not protect corporate privacy claimants, but the claims in the ITC and EPA cases, for example, readily could be advanced by individuals, not corporations, making the disposition of competing claims to the information problematic for some variants of individual development principles.

Admittedly some principles are less readily evaded in those examples. For instance, in privacy protection, as in other individual rights analyses, some commentators may categorically disqual-

23. See Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

24. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989) (arguing that the tort of invasion of privacy protects social norms); see Post, *supra* note 23, at 651 (describing two distinct concepts of privacy).

ify all commercial interests from protection.²⁵

The commercial interest exclusion illustrates the problem of squeezing solutions from ontological principles; while this shows that strong principles *can* yield clear solutions to privacy claims, that seems most likely where the principles are most doubtful. Here, as elsewhere, it is difficult to provide a convincing rationale for the restriction of privacy rights to noncommercial interests.²⁶ Taking commercial interests out of the protected sphere also removes interests in fair credit reporting, unless one is prepared to torture the concept of commerciality. Few commentators would assert that credit reporting raises no issues of informational privacy simply because commerce is involved.²⁷

In sum, however privacy is defined and whatever the reason for its protection, neither ontology nor intuition can yield convincing, easy answers for the broad run of cases. The one easy conclusion is that privacy is neither so obvious a concept nor so obviously deserving of protection against all comers as its current good press would suggest.

III. CONSTITUTIONAL RIGHTS

Much of the writing about privacy avoids careful definition of the meaning of privacy, the purposes of privacy protection, or specification of a metric against which competing interests in information can be measured. A common approach to writing about privacy asserts the importance of privacy protection and then spends its real ammunition criticizing failures to protect privacy or promoting new programs for its protection. However, legal con-

25. See C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3 (1989).

26. See F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 158-60 (1982); Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1324-26 (1988).

27. That is not to say that commentators uniformly find a single solution to such issues compelling. Compare Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831 (1991) (favoring individual control over credit information), with Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623, 625-26 (1980) (opposing such control as unduly increasing credit cost). It should be noted that acceptance of a very strong ontological precept still is unlikely to allow quick resolution of most privacy cases. If deontological assertions about privacy resolve some cases by taking specific interests, like commercial interests, out of the decisional balance, examples without those easy "outs" can be substituted readily. Identification of alcoholics so that bars and liquor stores will appreciate the risks (drunk driving, for instance) of serving them presents the same basic issues of definition and purpose as the commercial examples. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

trols depend on the specification of rights and duties; we cannot meaningfully address how privacy is to be protected without first asking what it is and why it should be protected.

Professor Flaherty laments the absence of a general, constitutional right of privacy in the United States,²⁸ a lament senatorial inquisitors of recent Supreme Court nominees might find puzzling. Professor Flaherty, however, is quite correct in stating that no such general right has been found to date by the Court. From explicit constitutional constraints on government's physical intrusion into private residences,²⁹ the Supreme Court moved in the 1960s to recognition of limited rights against electronic surveillance³⁰ and against threatened physical intrusion.³¹

This latter decision, in *Griswold v. Connecticut*, is among the more ambiguous writings of a Court not known for clarity. Justice William Douglas's lead opinion for the Court invoked a series of constitutional rights arguably classified as privacy rights and declared that although none of these privacy rights extended to the case at hand, the "penumbra" of their "emanations" protected the rights at issue.³² Having thus set the stage, Justice Douglas did not, however, go on to define a general right to privacy. Instead, he invalidated Connecticut's ban on the use of contraceptives by married couples (as well as others) on the ground that enforcement necessarily required intrusion into the marital bedroom.³³ Douglas did not explain how a warrant for such intrusion could be obtained, nor did he note that no such intrusion had occurred in *Griswold*.

From this decision, the Court has recognized rights to some forms of sexual liberty,³⁴ and to secure an abortion under particular conditions.³⁵ These sexual liberty and abortion rights do not fit

28. See Flaherty, *supra* note 27, at 837.

29. See U.S. CONST. amends. III, IV.

30. See *Katz v. United States*, 389 U.S. 347 (1967) (government recording of conversations from a telephone booth violates the privacy protected by the search and seizure clause of the fourth amendment).

31. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

32. *Id.* at 485.

33. *Id.* at 486.

34. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state statute allowing married persons to buy contraceptives but prohibiting purchases by single persons violates the equal protection clause). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (state statute criminalizing sodomy is not unconstitutional because the Constitution does not include a fundamental right to engage in homosexual sodomy).

35. See *Roe v. Wade*, 410 U.S. 113 (1973); *cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding a state statute banning the use of public employees

easily within definitions of privacy based on insulation of information or of places against intrusion. Notwithstanding their characterization as privacy rights, these really are rights to other sorts of liberty.

It does not seem unfair to read the sexual liberty and abortion cases as direct descendants of *Meyer v. Nebraska*³⁶ and to assert that the cases were decided from the result—judges who knew that government should not be allowed to restrict certain individual activity sought a basis for invalidating such restrictions. *Meyer*'s protection of a broad, amorphous collection of privileges from state interferences lays the groundwork for a series of constitutionally unspecified liberty interests that can trump state regulation.³⁷ The natural argument is whether the new liberties are well-grounded in *Meyer*'s natural right vision of constitutional liberty. The terms of argument, however, have been over the connection of sexual and abortion liberties to privacy concerns (not broader liberty concerns) and especially their relation to privacy rights recognized in prior authorities.³⁸

The fierce debate that has taken place over *Roe v. Wade*³⁹ and over interpretive methodologies that support or that cast doubt on it suggests the importance of understanding what would be subsumed within a general constitutional right of privacy. The flavor of Professor Flaherty's paper is that the right would be whatever judges make of it, the broader the better but with no guarantee just how broad that will be. Flaherty's manifest concern over the ultimate terms of a right to privacy is not mirrored in any analytical concern about defining how the constitutional right would be framed or its interpretation governed. If these questions

and facilities for nontherapeutic abortions).

36. 262 U.S. 390 (1923). Justice McReynolds, writing for the Court, gave the liberty clause of the fourteenth amendment perhaps its broadest definition. Invalidating a state statute prohibiting instruction of young children in modern foreign languages, his opinion declared that constitutionally protected "liberty" was "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Id.* at 399.

37. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

38. See, e.g., R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95-101 (1990); Ackerman, Book Review, 99 *YALE L.J.* 1419, 1419-21 (1990); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 947 (1973).

39. 410 U.S. 113 (1973).

hold slight interest for historians like Flaherty, they nonetheless must command lawyers' attention. The meaning of a general, constitutional privacy right is not a trivial issue, nor one with obvious answers. The intertwined questions of what we are protecting and why we are protecting it remain, although the fulcrum about which the decision is contested changes.

IV. PRIVACY RIGHTS: AN ANALYTIC PRIMER

A. Qualities of Information: Two Strains

Resolution of argument over the what and why of privacy protection (or, as here, simply modest progress on those issues) will not put to rest the constitutional debate over privacy, which implicates broader issues of constitutional construction as well.⁴⁰ It is nonetheless a necessary step toward understanding all contentions respecting legal protection of privacy.

For that step, let us return to Marion and Jay. The hypothetical regarding these figures does not provide a basis for understanding all forms of privacy or all reasons for its protection. Nevertheless, revisiting the interests and options of these players and comparing the problems they face with those presented in other contexts suggests a framework for the evaluation of privacy claims.

The line between Marion's protected privacy interest and illicit secrecy or between Jay's lawful negotiation and criminal extortion can be illuminated by reference to two characteristics of information. One is the public good aspect of information, or more accurately the obverse of that aspect. This characteristic is critical to understanding the criminalization of extortion. The other characteristic is the frequent attachment of idiosyncratic value to information. This second characteristic is important to privacy tort law.

40. The constitutional construction issues are explored, inter alia, in B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

B. Nonexcludability: The Public Side of Public Information

Economically oriented commentary frequently notes that information, once produced, can be consumed by many people without additional cost and without necessarily affecting the value of the information, and the disseminator cannot exclude people from access to it in the same way that sellers of ordinary private goods can.⁴¹ First amendment scholars often make the same point in different terms.⁴² The point must be qualified by noting that information can be costly to produce but also can be disseminated in ways that reach different numbers of people at different costs. While government officials must continually relearn the lesson that three people can keep a secret in Washington, D.C., only if two are dead, others become just as painfully aware of the difficulty of informing the people they want to reach of the information they want known. Both sides of this coin—nonexcludability of information once it is made public and frequent costliness of securing nonpublic information—are important to the delineation of privacy rights.

Consider nonexcludability first. The concern of anyone in Marion's position, as the holder of "private" information, is that any person who succeeds in putting the information before the public can make it available to a potentially limitless audience. Unlike other truly private goods, Marion cannot effectively protect the information by buying it from Jay or contracting with Jay in the ordinary course of dealing. Purchasing the information from Jay is to no avail, because Jay will not unlearn the information; he could return a watch, which Marion could lock in a vault, but the nonexcludability property of information does not allow such a transaction. Marion could purchase Jay's right to reveal the information, as is done, for example, with employment contracts that

41. See, e.g., K. ARROW, *THE ECONOMICS OF INFORMATION* 142 (1984) (information differs from other commodities because it is "(1) . . . indivisible in its use; and (2) it is very difficult to appropriate."). *But see* Stigler, *supra* note 27, at 640-41 (the production and dissemination of information are not inseparable).

42. See generally Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209, 211 (suggesting that the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), protects the core of the first amendment because it safeguards speech that is important to the public, that will be subject to attack by government officials, and that, because of its public value, is easily "chilled."); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685 (1978) (analyzing the chilling effect doctrine as an influence on the resolution of defamation, obscenity, and incitement cases).

provide for protection of trade secrets.⁴³ This protection is not fully effective, however, for two reasons: (1) because Marion cannot possess the information exclusively, his contract with Jay cannot necessarily prevent someone else from gaining the information; (2) if Jay breaches the contract, any enforcement action by Marion might exacerbate the harm by giving greater exposure to the information he wants kept private.

These "contract failures" in dealing with information rights are not absolute. An agreement on information rights might, for instance, contain a liquidated damages provision that is painful enough to deter breach by Jay or to soothe Marion's wounded pride from the further disclosure accompanying enforcement if a breach occurs. So, too, the agreement with Jay, if not ironclad protection against others' access to the information, may delay such access long enough to be worth its cost. Moreover, Marion's contract with Jay should reflect the expected risk of someone else gaining access to the information from another source, thus reducing the amount Marion would pay to secure Jay's silence. In this way, Marion's contract regarding rights to information about Marion resembles a standard contract about ordinary, private goods.

That said, Marion's position still differs substantially from that of one contracting for standard private goods. The subject of embarrassing information has fewer practical options in combating release of that information than most contract parties enjoy in minimizing harm from breach—as former United States Senator William Scott discovered after holding a press conference to rebut a little-read poll naming him "dumbest Senator." The higher cost of designing effective remedies for breach of agreements such as Jay and Marion might wish to conclude will be sufficient to frustrate some efforts at contracting, even though both parties would gain from such agreement.

Furthermore, Marion's exclusivity problem with Jay is similar to the holdout problem that justifies public powers of eminent domain.⁴⁴ Just as the property-owning holdout can demand the

43. See *Snepp v. United States*, 444 U.S. 507 (1979) (holding that a CIA agent who had breached his promise not to publish any information relating to the agency without prepublication clearance must remit his profits to the government); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309 (discussing the Supreme Court's treatment of property rights in information).

44. See generally R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF*

entire value of the project for which a group of properties is sought, no matter what else has been paid to other property owners, so the full value of keeping information private can be extracted by each person with access to it. Creating an exclusive right against Marion would be the only way to cure this problem, providing the equivalent of eminent domain. With such a right, if Jay exercises public authority in a form that prevents repeat play (as when formal criminal prosecution is initiated in a way that triggers double jeopardy protections), the "holdout" problem disappears; if Jay attempts to barter disclosure in any other context, Marion's protection is the threat of criminal action against Jay.

C. The Other Side of Nonexcludability: Private Provision of Public Information

The other side of nonexcludability, the costliness of uncovering and disseminating information, also is important. The notion of "chill" in first amendment jurisprudence reflects the free rider problem with publicly valuable information—the inability of any provider of such information to capture its full value makes it less likely to be produced and more readily discouraged by threatened sanctions.⁴⁶ Of course, much publicly valuable information *is* produced and distributed, because the private value derived from such efforts—by political opponents, news media, or others—often greatly outweighs their cost. The costliness point is relative: compared to information of significant value only to private parties who can transact for such information directly or indirectly (as through its close association with saleable, often tangible, private goods), information of substantial public value will be underproduced.

For that reason, there is often juxtaposed to concerns for privacy a sense that some persons legitimately may (and should) be compelled to provide information of significant public value to which they are privy. The disclosure requirements imposed on holders of and candidates for public office regarding who finances

EMINENT DOMAIN (1985) (discussing the proper relationship between the individual and the state in the context of eminent domain).

45. See Cass, *supra* note 40, at 1459. See generally F. SCHAUER, *supra* note 26 (discussing the history of the chilling effect standard in first amendment law and analyzing its effect); Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1 (1986) (proposing and applying an economic model of the costs and benefits of regulating free speech).

their campaigns are justified on these grounds.⁴⁶ Such requirements may be aesthetically objectionable to some, but they do not present the sort of "market failure" problems present in activities defined as extortion. Thus, even if Jay is precluded from demanding concessions from Marion as a quid pro quo for withholding information about Marion, the public can demand that Marion reveal the same information. Lodging enforcement of that obligation in a unified public enforcement agency prevents replication of extortion-like contract failure problems.

This second side of the public good argument differs from the first in one important aspect. While the concern about the difficulties of confining information is sufficiently generic to support a ban on private bartering over the release of information regardless of the content of the information at issue, the concern over adequate production of publicly valuable information depends critically on content. Not all information has a significant expected public value beyond what is readily captured in private transactions. Disclosure requirements, as well as privacy torts, are sensitive to that distinction. Thus, compensation is not required when *Time* magazine puts President Bush's picture on its cover, indicating that a news story about him is inside. Conversely, appropriation for commercial gain will be found where a photograph is used without conveying information of public value, such as putting President Bush's likeness on packages of frozen broccoli.⁴⁷

D. Idiosyncratic Value: The Dark Side of Shadow Prices

The second important characteristic of information is its frequent association with substantial idiosyncratic value. In particular, any individual might be expected to attach extraordinary value to control of personal information about him or her. Both gaining access to that information and precluding access by others routinely has value to the subject of that information far in excess of its value to others.

This point may be explained by reference to particular onto-

46. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding the disclosure requirements of the Federal Election Campaign Act, even though they affect privacy interests, because of the compelling governmental interest in controlling corruption); 2 U.S.C. § 434 (1988) (imposing disclosure requirements on treasurers of political committees regarding receipts and disbursements).

47. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 117, at 851-54 (5th ed. 1984).

logical precepts,⁴⁸ but no particular precept is necessary to understand the distinction between "public" and "private" value in personal information. Certainly, there may be considerable public value—even if only entertainment value—in information about personal foibles or peccadilloes. Film of someone giving a speech with his pants unzipped or slipping on a banana peel, for instance, might amuse a large audience. Few viewers, however, would care that the object of their amusement was any given individual. That is the reason Warren and Brandeis objected to the news reportage of their day⁴⁹ and the reason that news organizations are unlikely to pay substantial amounts for the rights to expose more publicly the unzipped or the clumsy.⁵⁰

Even for "hard news" stories, the public value of the information about particular, identified individuals' misfortunes (or good fortunes) often is contained almost entirely in facts separable from the identity of that individual. The point is harder to see today, accustomed as we are to specific identification, than when Warren and Brandeis wrote a century ago. Even anecdotal evidence is limited, but the fact that stories about unidentified juvenile offenders have not disappeared from newspapers suggests some level of consumer value on the core story, specific identification aside.

Two caveats are appropriate here. First, embarrassing private information is not always distinguishable from information that merely *appears* to be embarrassing. There are some people who are willing to be ridiculed for a price, and not always a high price. *America's Funniest Home Videos*⁵¹ is the most recent example. Put differently, the value of control over personal information is idiosyncratic, but it is not necessarily great. At the same time, voluntarily contracting "ridicule-ees" are rarely found outside settings that convey the implicit understanding that peculiar behavior was staged or that it was not so peculiar and certainly was not reprehensible.

Second, while the private value in preventing the disclosure of much personal information often is high, public value should not be assumed uniformly to be less. There are usually legitimate rea-

48. See Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Post, *supra* note 23.

49. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

50. There also may be substantial costs to the contracting process, valuation aside; this is apt to be true mostly where photographic images of unidentified individuals are in issue.

51. ABC television broadcast.

sons for publicizing the identities of the unwitting object of ridicule or pity. The hypotheticals are not difficult to construct: the person who appears unzipped one day may champion a public ordinance against indecent exposure that would have been violated by his own mishap; the slip-and-fall victim may campaign against an anti-litter initiative, disclaiming knowledge of any harm done by litter. And, of course, real identities add a verisimilitude that is hard to duplicate, making whatever public lessons are drawn from these mishaps more trenchant.⁵² Even if private value in such information is expected generally to be greater than public value, we cannot know just what value is lost when the names of the alleged offenders are omitted from stories on juvenile crime or when the names of other actors are omitted from lighter stories.

This last point is critical to understanding the imprecision of privacy torts: combining the absence of ordinary markets for the "public" value of information and the idiosyncratically high value attached to "private" information means that we cannot know what the public value of this information is or what harm is done by making the information public. Yet these are the values that, as a practical matter, must be balanced when addressing privacy claims. Of course, a rough judgment can be made by balancing the expected public value of publicity with the expected individual harm. This balancing has been used to frame at least three of the four standard privacy torts—disclosure, appropriation, and false light—and is repeated in a more concrete form in their application to particular cases.⁵³ However, weights are assigned with a degree of imprecision on both sides of the balance that cannot be easily overstated.

Nor is the task eased by the fact that the assignment of weights necessarily returns in some form to the ontological issues mentioned above.⁵⁴ Tort law is not constructed according to empirical evidence of privacy values but instead reflects principled norms and intuitive assessments of utility. Indeed, in the absence of empirical measures, it is inevitable that estimates of value will reflect the estimators' principles, either those principles held di-

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

53. The fourth right, the right to be free from unreasonable intrusion, rests on a similar balancing but has less clearly offset public value against private harm. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 47, § 117, at 851-66 (discussing the torts of disclosure, appropriation, and false light).

54. See *supra* text accompanying notes 49-53.

rectly by the decision maker or those the decision maker ascribes to someone whose views are deemed controlling.⁵⁵ This need not bring us full circle to the question of normative first principles; after all, information about ontological principles needed to aid the balancing effort constructed here could be very different from information needed to construct a deontological system for resolving privacy claims. But if the predicate ontological question differs, it does so as a consequence of choices already made about whose values count.

V. CONCLUSION

Perhaps it would not be too churlish to conclude by suggesting that the state of the privacy art is sufficiently rudimentary that a useful place for academicians to focus is the "front end" of privacy analysis. After we have more fully explored the dimensions of privacy interests and privacy protections, we may more easily digest the calls of privacy advocates for more, and more general, safeguards.

55. Greenawalt, *Utilitarian Justifications for Observance of Legal Rights*, in *ETHICS, ECONOMICS, AND THE LAW, NOMOS XXIV* 139 (J. Pennock & J. Chapman eds. 1982); see, e.g., Laycock, *The Ultimate Unity of Rights and Utilities*, 64 *TEX. L. REV.* 407 (1985).