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Privacy Rights: The Virtue of Protecting a False Reputation

John A. Humbach
Elisabeth Haub School of Law at Pace University

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by John A. Humbach, Pace Law School
White Plains, New York
jhumbach@law.pace.edu
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ABSTRACT

What is the virtue of protecting a false reputation? The thesis of this paper is that there is none. There is none, at least, that justifies the suppression of free speech. Yet, there is a growing trend to see the protection of reputation from truth as a key function of the so-called "right of privacy."

Unfortunately, people often do things that they are not proud of or do not want others to know about. Often, however, these are precisely the things that others want or need to know. For our own protection, each of us is better off being aware of the negative or less-than-flattering qualities of others with whom we deal.

The things that people say about each other are protected by the Constitution as much as any other form of expression. The Supreme Court has recognized repeatedly that the judgment embodied in the First Amendment is that the benefits of a free flow of information outweigh the costs and that those who speak truthfully cannot be made to do so at their peril. Therefore, disclosures of truthful information cannot, in the name of "privacy," be constitutionally subjected to after-the-fact governmental determinations that they were not justified, unnecessary or even a crime.

Perhaps there are things that it is better for us not to see or hear. But the assumption of the First Amendment is that government should not be deciding these limitations on the free flow of information or what speech is important enough to be "worth it." If, in the name of protecting privacy or reputations, government agencies can decide after the fact what is and is not legitimate negative information, self-censorship will abound and valuable information will suffer.

For a much more complete (and perhaps less contentious) treatment of privacy rights and the First Amendment, see my "Privacy and the Right of Free Expression," available at SSRN: http://ssrn.com/abstract= 1996581

Note: This paper is based on presentations at the annual conference of the Law and Society Association, held in Honolulu, HI on June 5-8 2012 and, at a conference, "Perspectives on Privacy," held at Johannes-Gutenberg University, Mainz, Germany, on June 23-24, 2011.

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by John A. Humbach, Pace Law School
White Plains, New York
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What is the virtue of protecting a false reputation? The thesis of this article is that there is none. There is none, at least, that justifies the suppression of free speech. Yet, there is a growing trend to see protection for false reputations as a key function of the so-called "right of privacy," especially outside the United States.[1] Meanwhile, the Second Restatement of Torts § 652D seems to authorize such protection[2] and, in any case, by imitation or the internationalization of forum shopping,[3] the trend could affect the degree to which free speech is protected under the United States Constitution. It is a therefore trend that deserves examination.

The interests in privacy and in free expression are both important,[4] but they are in fundamental tension with one another. Nobody likes to be talked about but everyone likes to talk, and the lives and doings of our fellow human beings are a primary topic of expressive discourse. When the talk turns into defamatory falsehood, the First Amendment allows a remedy.[5] "[T]here is no constitutional value in false statements of fact."[6] Unflattering statements of *truth*, however, are another matter.

Suppressing the expression of truth always has a cost. When human actions are premised on falsehood, they are less likely to produce the intended results. As a consequence, there is a predictable social cost in forcing individuals and institutions to make choices based on false information. There is, in addition, the personal cost to those who are denied the liberty to speak the truth. When government can deny a person the right to tell his or her own life's story,[7] it is an affront to the dignity and the personality of those whose words are suppressed, a subordination of

[1]* This paper is based on a presentation at the Privacy Discussion Forum, Johannes-Gutenberg University, Mainz, Germany, June 23-24, 2011. For a fuller discussion of the constitutional considerations raised my companion paper *Privacy, Property And The Right Of Free Expression: Private Information and the Right to Know*, *available at* SSRN.

[1] *See infra* text accompanying notes 42-52.

[2] *See infra* text accompanying notes 53-55.

[3] *See, e.g.,* Dirk Voorhoof, *Abuse of 'forum shopping' in defamation case and freedom of academic criticism*, STRASBOURG OBSERVERS (Mar. 8 2011), *available at* http://strasbourgobservers.com/2011/03/08/abuse-of-%E2%80%98forum-shopping%E2%80%99-in-defamation-case-and-freedom-of-academic-criticism/, describing *Weiler,* No. d'affaire 0718523043 (2011), *available at* http://www.ejiltalk.org/wp-content/uploads/2011/03/judgement-3-mars-2011.pdf; Doreen Carvajal, *Britain, a destination for "libel tourism"*, N.Y.TIMES (Jan. 20, 2008), *available at* http://www.nytimes.com/2008/01/20/technology/20iht-libel21.1.9346664.html. Even if such forum shopping has not been uniformly successful, just the prospect of being hauled into a distant foreign court can plausibly chill speech even if, after an expensive legal battle, the case may eventually be won. It is, of course, a short step from libel tourism to invasion-of-privacy tourism.

[4] *See, e.g.,* Florida Star v. B.J.F., 491 U.S.524, 533 (1989) ("press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society'

[5] *See, e.g.,* Gertz v. Robert Welch, 418 U.S. 323, 340 (1974). Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the imposition of defamation liability has been constitutionally limited in the case of public officials and figures and, in general, a fault-requirement as well as other limitations apply even in the case of non-public figures. *See* Russell Weaver and Donald Lively, UNDERSTANDING THE FIRST AMENDMENT 39-43 (3d ed. 2009). Nonetheless, defamatory falsehood itself is still considered to constitute a categorical exception to First Amendment protection. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

[6] *Gertz*, 418 U.S. at 340.

natural personal development to the truth-suppressive policies of the state. It treats such persons, in effect, as a means for furthering the government's policy of manipulating belief. Whether these costs and burdens on society and individuals are worth it would depend on how the utilitarian calculus works out in each particular situation. But there is no escaping that those who advocate truth suppression in the name of privacy are, in effect, insisting that a utilitarian calculus (or "balancing" test) be used and that freedom of speech should depend on it.[8]

It is true that disseminating factual information can also have a cost. If the disclosures expose a false reputation, for example, they can prevent a person from reaping the advantages that accrue from hiding the truth. These advantages can be substantial because, in our encounters with one another, we must as a practical matter trust other people, at least to a degree, and this means reliance on reputation.[9] When an undeserved reputation attracts unjustified trust, people can be induced to do things they otherwise would not do. Disclosure of truth takes away this advantage. But the fact that the truth may be a burden for the disingenuous is not a strong argument against it. "The First Amendment itself reflects a judgment by the American people that the benefits of its [speech-protective] restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[10]

The First Amendment states flatly that there shall be "no law… abridging the freedom of speech, or of the press."[11] As has frequently been observed, however, freedom of expression is not absolute and, in particular, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[12]. Notably, although "the libelous" is on the list of items that that are historically excluded from First Amendment protection,[13] the dissemination of truthful private information is not.[14] What is more, the Supreme Court has warned, there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[15] Just last term the Court passed up an opportunity to declare that there might be a First Amendment

[7] As occurred in the recent *Esra* case in Germany, where a partly autobiographical work of fiction was banned because it overly revealed "intimate" details about a person with whom the author had romantically interacted. Roman Esra, BVerfGE 119, 1 (2007). *See* Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CAL. L. REV. 925 (2010).

[8] The English Courts and the European Court of Human Rights both explicitly apply a balancing process to decide, as cases arise, whether free expression it worth it. *See, e.g.,* Re S., [2004] UKHL 47; [2005] 1 A.C. 593; A. v. B., [2002] EWCA Civ 337, [2003] QB 195; Von Hannover v. Germany (2005) 40 EHRR 1 at [58], [76] & [79] . The recent balancing revolution in the English courts is engagingly discussed in Andrew Tettenborn, *"Confidence-Plus" And Human Rights: The Monstrous New Tort Of Breach Of Privacy, And What To Do About It* (2011; forthcoming).

[9] Or, at the very least, on the absence of a *bad* reputation.

[10] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

[11] U.S.CONST. AMEND. I. By its actual terms, the First Amendment applied only to Congress. However, it is now also applied to limit the power of the states to enact laws that restrict speech and the press. *See, e.g.,* Gitlow v. New York, 268 U.S. 652 (1925).

[12] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[13] *Id*. *But see supra* note 5.

[14] Except against government, the interest in privacy is not protected by the Constitution. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("the protection of a person's general right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States").

[15] United States v. Stevens, 130 S. Ct. 1577, 1586 (2010), *accord,* Brown v. Entm't Merchs. Ass'n, 2011 U.S. LEXIS 4802 (2011).

exclusion for truthful disclosures of private information, and it did not even hint that there was such a thing.[16] In short, although the First Amendment leaves room for laws that exact liability for false statements that cause reputational harm, the Court has never recognized that persons can held liable for causing such harm with *true* statements.

Neither, however, has the Supreme Court *foreclosed* the possibility of recovery for injurious truthful statements, at least not for cases where the speech does not involve a matter of public concern.[17] Moreover, the right of privacy defined in the Second Restatement of Torts seems, in some of its particulars, aimed precisely at imposing such liability. Specifically, Restatement § 652D authorizes damages for any person who suffers an injury because somebody "gives publicity to a matter concerning the [person's] private life" if "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[18] The open question is the extent to which the application of § 652D of the Restatement is constitutional.[19]

One thing is clear, namely, that the last qualification of § 652D ("not of legitimate concern to the public") is not just an option. It expresses, rather, a constitutionally mandated limitation on government's power to impose liability for disseminating truthful information about people and their lives. Where truthful disclosures deal with matters of public concern, liability for the expression is not constitutionally permissible.[20]

The key precedent is *Bartnicki v. Vopper*.[21] In *Bartnicki*, an unknown person intercepted and illegally recorded a telephone conversation during which intemperate comments were made in connection with tense labor negotiations between a teachers' union and board of education.[22] The recording was anonymously provided to the head of a local citizens organization, who then forwarded it to a radio station. The radio station played the recording on the air. The individuals whose private conversation was thus publicly revealed sued for damages under state and federal wiretap laws[23] which prohibited, among other things, the interception of "any wire, oral, or electronic communication"[24] and the disclosure of the contents of any such interception.[25] The Supreme Court held that it was unconstitutional to apply the wiretap laws to prevent disclosures of intercepted private conversation by people not complicit in the illegal interception.

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[16] Sorrell v. IMS Health Inc., 2011 U.S. LEXIS 4794 (2011) (striking down a Vermont that prohibited the sale, disclosure or use of data identifying pharmaceutical prescribers for marketing purposes).
[17] *See* Barnicki v. Vopper, 532 U.S. 514, 533 (2001) (specifically leaving the question open).
[18] RESTATEMENT (SECOND) OF TORTS, § 652D (1977).
[19] The Restatement acknowledges that it is an open question at "Special Note on Relation of § 652D to the First Amendment to the Constitution." *Id.*
[20] *Bartnicki*, 532 U.S. at 534-35.
[21] *Bartnicki*, 532 U.S. 514 (2001).
[22] Apparently, the key statement, made by the union president to the union's chief negotiator, was "we're gonna have to go to their, their homes . . . [t]o blow off their front porches . . ." (referring to the board of education). *Id.* at 518-19.
[23] 18 U.S.C. 2511.
[24] 18 U.S.C. § 2511(1)(a).
[25] 18 U.S.C. § 2511(1)(c).

The Court in *Barnicki* laid considerable stress on the fact that the disclosures in question were about a "matter of public concern."[26] In drawing this distinction between public and non-public concerns, the Court somewhat echoed a line of late twentieth-century defamation cases in which it had cut back on the "breathing space"[27] that is provided for non-malicious defamatory utterances.[28] Under these cases, the protection of defamatory falsehood is greatest in the case of statements about public officials and figures and the protection is least when the defamatory speech relates only to private persons and matters of private concern.[29]

The unsettled question is whether an absence of public concern is a reason for according a lesser measure of constitutional protection to *truthful* speech. On one hand, as recently as last term the Court in *Snyder v. Phelps* offered the obiter dictum that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[30] On the other hand, despite the Court's continued lip service to the public concern/private concern distinction, it has also roundly disparaged the workability of the distinction as a constitutional test[31]—a position that still apparently holds. And, in *Bartnicki*, the Court pointedly left open the question of whether there ever can be a privacy interest[32] "strong enough to justify [restrictions on] disclosures of … domestic gossip or other information of purely private concern."[33] In spite of the dictum of *Snyder v. Phelps*, therefore, it seems a fair conclusion that the question remains open as of now as to whether truthful disclosures on private matters can constitutionally be suppressed.[34]

There are, however, at least two reasons why the Court should not withhold First Amendment protection from truthful statements that people make about one another, even if the information conveyed arguably intrudes upon interest in "privacy." One is that we all necessarily rely on our knowledge of the qualities, character, conduct and propensities of the people around us and, to put it bluntly, on our awareness of the adverse ways in which they might affect us.

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[26] *Id.* at 533-35.

[27] New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

[28] Time, Inc. v. Firestone, 424 U.S. 448 (1976) (no showing of actual malice required); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)(presumptive as well as punitive damages allowed without proof of actual malice). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979). As *defamation* cases, these cases are not strictly speaking direct precedents for cases that do not involve any categorical exclusion from First Amendment protection. They are not, that is to say, direct precedents for cases in which the opposing interest to be served is privacy. *See supra* text accompanying notes 11-16.

[29] *Id.* In the case of public officials and figures, for example, liability is constitutionally permissible only if the statements were made with "actual malice." New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[30] Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

[31] Gertz v. Robert Welch, 418 U.S. 323, 345-46 (1974).

[32] The particular privacy interest the Court appeared to have in mind here was the interest in "privacy of communication." 532 U.S. at 532-33. This was, however, the only privacy interest that *Bartnicki* indicated might conceivably be strong enough to outweigh free-expression interests at all.

[33] 532 U.S. at 533, *citing* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967), which likewise left open the question of whether "truthful publication of private matters unrelated to public affairs can be constitutionally proscribed." *Id.*

[34] Even though the Court in *Snyder* said at one point that "this case *turns largely on* whether that speech is of public or private concern," 131 S. Ct. at 1215, the Court cautioned later that "the reach of our opinion here is limited by the particular facts before us," *id.* at 1230. Thus, while the Court clearly said that public-concern nature of the speech in *Snyder* meant that First Amendment was required, it did not ever say (and it seemed to expressly exclude) any holding that private-concern speech was not protected. And, indeed, on a fair reading of the case, the arguments for and against protecting purely private interest speech were not even considered by the Court—quite properly, moreover, because the record did not raise the question. *Id.*

That is to say, people want and need to know about the *negative features* of others with whom they deal and upon whom, out of necessity or convenience, they must confer at least some degree of trust. The other reason for broadly protecting such truthful statements is that the First Amendment should be deemed to apply from the ground up, to protect *all* of the people, not just the ones who engage in "serious" political debate or other high-minded "serious" discourse. These two reasons will be considered in turn.

Protecting False Reputations and the Need to Know. As noted in the previous section, the right of privacy defined in the Second Restatement of Torts imposes liability on any person who causes injury by giving "publicity to a matter concerning the private life of another" if the matter is reasonably "offensive"[35] and "is not of legitimate concern to the public."[36] A statement is "publicity" if it is communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[37] In a pre-Internet document (as the Restatement was), this narrowing definition of "publicity" may have succeeded in significantly limiting potential liability for ordinary gossip.[38] Most people did not, until recently, have much personal ability to communicate with "many persons" and, as a practical matter, "publicity" was primarily the preserve of the press. Things have, however, changed. To provide some context, it might be useful to consider some kinds of modern Internet-age factual situations in which speech would be suppressed under the Restatement's rule.

Last year someone in suburban New York circulated a "Smut List" containing the names of nearly 100 purportedly sexually-active high school girls.[39] The list, which appeared on Facebook and quickly attracted thousands of "likes," caused outrage among school officials, who denounced it as a "reprehensible act of cyberbullying."[40] The local police chief promised "to prosecute to the fullest extent of the law."[41]

Then there is the free-speech adventure of plumber Ian Puddick.[42] Distraught to discover that his wife was having sex with a superior at the office, Puddick "set up a series of websites, a Twitter account and a blog to draw attention to the affair."[43] This led to police raids by an elite

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[35] It is well established that offensiveness alone is not a sufficient ground for removing First Amendment protection. *See, e.g.,* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011)*;* Boos v. Barry, 485 U.S. 312, 322 (1988); Texas v. Johnson, 491 U.S. 397, 406-07 (1989). Therefore, this prong of the Restatement rule does not insulate the it from constitutional invalidity, and the element of "offensiveness" will not be discussed further here.

[36] RESTATEMENT (SECOND) OF TORTS, § 652D (1977).

[37] *Id.* at cmt. a.

[38] Specifically, the Restatement distinguished "publicity," as it uses the term, from the much broader defamation concept of publication. "Publication," it is explained in the comments, "includes any communication by the defendant to a third person." *Id.*

[39] Randi Weiner, *Harrison cops investigate source of 'Smut List'*, THE JOURNAL NEWS, Mar. 19, 2011, at 3A; *see also* Andrew Klappholz, *'Smut List'*, THE JOURNAL NEWS, Mar. 23, 2011, at 1A.

[40] Weiner, *supra* note 39.

[41] Klappholz, *supra* note 39, at 8A.

[42] *See* Caroline Davies, "Plumber Ian Puddick Cleared of Harassing Wife's Lover on Internet, " guardian.co.uk (June 17, 2011), *available at* http://www.guardian.co.uk/uk/2011/jun/17/ian-puddick-internet-cleared-twitter; Jamie Doward, *'Cuckold' case will test the limits of the internet*, *available at* http://www.guardian.co.uk/technology/2011/jun/12/puddick-harassment-internet-law. While the case arose under English law, the facts are presented here as the kind that might arise under the Restatement § 652D.

[43] Doward, *supra* note 42.

"serious crimes unit" and a criminal prosecution for "harassment."[44] Although the case was ultimately dismissed after an extended period of uncertainty for Puddick, it was not exactly, to quote Puddick, a "victory for free speech."[45] For though Puddick's lawyer said the case was about his "right to express his feelings about another person's immorality,"[46] the free expression issue was apparently resolved on different grounds, namely, that the "three websites with the graphic details about the affair … could not be proved [to have been issued by] Mr Puddick."[47]

As a third example, consider the facts of *Mosley v. News Group Newpapers Limited*,[48] in which a prominent figure in professional auto racing complained of a published story and images (Internet and print) that showed him engaged in sado-masochistic sex play with a number of alleged prostitutes, a disclosure that was damaging to his reputation. Although there was apparently nothing untrue about the information disseminated (and to that extent, the damaged reputation was apparently a false one), court stressed that the case was about privacy, not defamation,[49] and awarded the plaintiff a judgment for £60,000.[50]

Finally, there is the *Esra* case recently decided by Germany's Constitutional Court, where a partly autobiographical work of fiction was banned because it revealed overly "intimate" details about a person with whom the author had been romantically involved.[51] Even accepting that the book in question went way over the line in its personal revelations, it can be reasonably expected that future authors, worried about how intimate is "too intimate," will take the safer course and be continuingly chilled in their exercise of free expression.[52]

While three of these four factual situations were litigated outside the United States, all of them are examples of situations in which it seems entirely reasonable to expect that Restatement § 652D would support suppression of the truth in order to protect a false reputation.[53] What is more, none of the situations seems to involve a "matter of public concern" within the meaning of

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[44] *Id.*

[45] Rebecca Camber, "*Victory for free speech as cuckolded husband is cleared of using internet to harass wife's millionaire lover*," Mail Online (Jun. 17 2011), *available at* http://www.dailymail.co.uk/news/article-2004804/Ian-Puddick-cleared-using-internet-harass-wifes-millionaire-lover.html.

[46] Doward, *supra* note 42.

[47] Camber, *supra* note 45.

[48] [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20, *available at* http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html.

[49] *Id.* at ¶ 214.

[50] *Id.* I am grateful to Andrew Tettenborn for bringing this case to my attention in his excellent summary of the current English law in Andrew Tettenborn, *"Confidence-Plus" And Human Rights: The Monstrous New Tort Of Breach Of Privacy, And What To Do About It* (2012; forthcoming).

[51] Roman Esra, BVerfGE 119, 1 (2007). *See* Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CAL. L. REV. 925 (2010).

[52] It is not far-fetched to assume that virtually all sex scenes in novels (at least, all that are believable) are at least partly "autobiographical." Of course, this may not cause serious legal jeopardy for authors who have had many lovers (so that individual identification is difficult), but for those who are relatively chaste, one wonders.

[53] RESTATEMENT (SECOND) OF TORTS, § 652D (1977). Even though the plaintiff in the *Mosley* case was no doubt a somewhat less protected "voluntary public figure," *see* RESTATEMENT (SECOND) OF TORTS, § 652D cmt. e (1977), the Restatement's right of privacy would apparently nonetheless impose liability (suppress the disclosure) because "[t]here may be some intimate details of her life, such as sexual relations, which even [a voluntary public figure] is entitled to keep to herself." *Id.* at cmt. h.

Bartnicki[54] or any of the Supreme Court's other cases. They all involve, rather, "disclosures of … domestic gossip or other information of purely private concern."[55]

The question is, accordingly, whether the principle of *Bartnicki*, applicable to matters of pubic concern, ought to be extended to provide First Amendment protection to mere "domestic gossip or other information of purely private concern." In deciding that question, a consideration that naturally comes to mind is the extent to which such speech has any value. This may or may not be an obsolete way of thinking about free speech in view of the Court's recent reasoning in *United States v. Steven*s, where it said that even "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."[56] The fact remains, however, that even content-based restrictions on speech[57] are constitutionally permissible if the laws that in question pass strict scrutiny.[58] And in deciding whether an application of law to protect a false reputation serves a "compelling interest," as strict scrutiny requires,[59] it is inevitable that the value of protecting the false reputation will be pitted against the value of factual disclosures that could puncture it.

As an initial reaction, most of us would have no trouble condemning the disseminators of a 'Smut List' of local teenage girls willing to have sex. It is not, however, hard to imagine that at least some people might legitimately value the kind of information that such a list can convey.[60] For example, would the mother of a teenage girl have a legitimate interest in learning similar facts about the boy who is taking her daughter to a "party" this Friday night? It is far from self-evident that she would not. Is it not legitimate for someone, such another mother, to tell her if the boy is known to be a sexually active lothario with many "conquests" to his name? Is this a kind of disclosure that the Constitution should protect only if it is delivered one-to-one? Similarly, in this era of burgeoning STDs,[61] it is far from self-evident that the mothers of teenage boys might not have a legitimate interest in knowing whether the girls their sons go out with are sexually active. Even when information relates to plausibly legitimate concerns, however, the problem is that its dissemination, particularly if it is truthful, can damage false reputations. That is to say, it invades the right to privacy.

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[54] *See Bartnicki*, 532 U.S. at 525 & 534-35.

[55] *Bartnicki*, 532 U.S. at 533, *citing* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967), which likewise left open the question of whether "truthful publication of private matters unrelated to public affairs can be constitutionally proscribed." *Id.*

[56] United States v. Stevens, 130 S. Ct. 1577, 1591 (2010), *quoting* Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting).

[57] A restriction that singles out speech disclosing information about persons' private lives is, rather plainly, "content-based. *See* Boos v. Barry, 485 U.S. 312, 321 (1988)(striking down a speech restriction adopted "to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments"). That is to say, the restriction's "justification focuses only on the content of the speech." *Id.*

[58] *See* Brown v. Entm't Merchs. Ass'n, 2011 U.S. LEXIS 4802 (2011); United States v. Playboy Entertainment Group, 529 U.S. 803, 813 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[59] *Id.*

[60] Assuming, of course, that the list was accurate. It should be stressed that the discussion in this paper is focused on the tension between the *right of privacy* and First Amendment interests. Obviously, very different concerns are raised by disseminations of defamatory *false* information.

[61] Sexually transmitted diseases. In a study reported in 2008, the U.S. Centers for Disease Control and Prevention found that "at least one in 4 American girls has a sexually transmitted disease." Associated Press, "*1 in 4 teen girls has sexually transmitted disease*" (Mar. 11.2008), *available at http://www.msnbc.msn.com/id/23574940/ns/health-kids_and_parenting/t/teen-girls-has-sexually-transmitted-disease/*

Everyone would like to control his or her own public image.[62] People sometimes do things in private that they are not proud of and do not want others to know about. Often, however, these are precisely the things that others want or need to know. We are better off knowing about others' activities that may evidence their character, qualities, and propensities. Parents want to know about the people who interact with their children, businesspeople want to know about their business counterparts, people in dating relationships want to know about their romantic partners, and so on.[63] Our natural curiosity about other people's negatives may, indeed, be nature's way of keeping us alert to potentially valuable data.

What is more, it is impossible to say *ex ante* which particular bits of information may later be relevant or useful. It is therefore hard to imagine how government[64] could reliably specify what kinds of private information people have a legitimate reason to know and which ones can be communicated only at one's own legal peril. Every bit of information about the others with whom we deal, especially the negative information, is potentially relevant and useful. Thus, the question arises whether it can be consistent with good legal policy, not to mention the constitutional protection of speech, to make the dissemination of truthful information about other people selectively punishable—a risky activity that one does at one's own peril: Should the disclosures that people make about other people without the latters' consent be subject to after-the-fact governmental determinations that the disclosure was not justified, unnecessary or even a crime?

The judgment embodied in the First Amendment is that the benefits of a free flow of information outweigh the costs.[65] And the Supreme Court has recognized repeatedly that assuring the free flow of information requires that "breathing space" be allowed so that those who speak do not do so at their peril.[66] If, in the name of protecting privacy or reputations, we let government personnel decide after the fact which communications of negative information were and were not legitimate, with the latter being punished by liability or as a crime, self-censorship will abound and information will suffer.

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[62] And, it should be stressed, there is nothing *per se* reprehensible in wanting to do so. Indeed, I tend to agree with Judge Alex Kosinski and Professor David Han that First Amendment also includes a right to try, by means of free expression, to define and shape the contours of one's own public persona. *See* David S. Han, *Autobiographical Lies And The First Amendment's Protection Of Self-Defining Speech*, 87 N.Y.U. L. Rev. ___ (forthcoming), *available at* SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945248 & United States v. Alvarez, 617 F.2d 673-74 (9th Cir. 2010)(Kosinski, J. concurring in denial of rehearing en banc). We all have complex personalities, a mix of aspects that are lovable and of others that are not, and it would strike to the core of liberty and autonomy for the law to regulate which aspects of ourselves we are allowed to stress, to downplay, to distort or even to fabricate. To recognize and support this form of self-defining expression decidedly does not, however, justify suppressing the expression of other persons who might want to present additional or alternative interpretations of an individual's personality.

[63] Even though there may be no particular "public interest" in these kinds of topics of communication, such "daily life matters" (as Professor Volokh dubbed them in his excellent analysis) may, for most people most of the time, be the ones that really count and at to which they most need information. *See* Eugene Volokh, *Freedom of Speech, Information Privacy and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 Stan. L. Rev. 1, 32-39 (2000).

[64] *I.e.,* the law.

[65] *Cf. supra* text accompanying note 10.

[66] *See, e.g.,* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011), *quoting* Boos v. Barry, 485 U.S. 312, 322 (1988); New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

The First Amendment Protects Everybody, not Just Elite "Public Interest" Discourse. Even if it is so that only "the publication of truthful information of public concern" "implicates the core purposes of the First Amendment,"[67] and "most of what we say to one another" lacks "serious value,"[68] it is all "still sheltered from government regulation."[69] That is to say, the protection of the First Amendment applies not only to high-minded elites engaged in "a meaningful dialogue of ideas" or a "robust debate of public issues" having "serious" political value[70] but to everyone, from the ground up. Just as a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,"[71] so also an ordinary person's concern for the free flow of information about "daily life matters"[72] may be what is of keenest interest, not to mention of greatest personal value. Ordinary people do not always talk about matters of public concern, but that does not mean that what they say is not important to *themselves*.

What is more, as members of a social species, the character, qualities, conduct and propensities of other people are almost inevitably matters of primary interest. Some people talk about atoms the stars or the Federal Reserve policy but for most of us the number-one topic of conversation is other people. Our fellow human beings are *the* topic of primary concern. In addition to the self-protective role that such discourse can have,[73] "domestic gossip or other information of purely private concern" play an undoubtedly important role in social control. When people do things they are not proud of and do not want others to know about, there is a reason: The knowledge and chatter of others is a sanction in itself. Talking about one another is the way we establish shared values, strengthen feelings of community and reinforce the expectations and norms that are the core of social cohesion. Even when people are not discussing the next election or national health policy, their talk about other people is socially indispensable.

There are, in short, good policy reasons why communications about matters of non-public concern—even "domestic gossip or other information of purely private concern"—should receive First Amendment protection. Most of the information that is highly important to most people does *not* relate to matters of "public" concern—at least not in any narrow sense. Even though people's lives are affected by what is done by government, most are vastly more affected by the acts of the ordinary people who live around them and with whom they directly interact. The average person's interest in information about the qualities, character, conduct and propensities of the people who surround her is not only legitimate; it most often the most relevant interest of all. That is why "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace *all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[74]

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[67] *Bartnicki*, 532 U.S. at 533-34.
[68] United States v. Stevens, 130 S. Ct. 1577, 1591 (2010).
[69] *Id.*
[70] Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).
[71] Sorrell v. IMS Health Inc., 2011 U.S. LEXIS 4794 (2011), *quoting* Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977). *See also* United States v. United Foods, Inc., 533 U.S. 405, 410-411(2001) ("those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups").
[72] *See supra* note 62.
[73] *See supra* text accompanying notes 60-65.

We may sometimes bemoan the fact that people find juicy gossip of such compelling interest. Arguments can be constructed why our neighbors' private lives should be none of our business. And indeed, there are no doubt many things *are* none of our business. A right of free expression does however not mean a right to pry or hack into others' private affairs or records.[75] Nor does it mean that people should be *compelled* to reveal their secrets.[76] What means is that, once information is out, the situation is different.[77] Free speech is a constitutional right, not just of the politically active and elites, but of ordinary people as well. Topics of widely shared private concern *are* matters of public concern.[78] For ordinary people in their ordinary daily lives, knowing about the activities, choices and, ultimately, character of those who live around them can have enormous personal consequences for both their private and "public" decisions and, therefore, be a matter of utmost concern, even if not a government-recognized "public" concern.[79]

Conclusion. It is the thesis of this article that there is no virtue in protecting a false reputation. Despite the possibilities presented in the Second Restatement of Torts and the growing trend of cases from Europe, the Supreme Court should resist the urge to find new reasons in a so-called "right of privacy" to suppress the expression of truth. The world has a long history of governments deciding which facts the people should know and which they should not. And perhaps there are some things that it is better for us not to see or hear. But the assumption of the First Amendment is that government should not be deciding these restrictions on the free flow of information or, indeed, even what speech is important enough to be "worth it."[80].

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[74] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)(emphasis added), q*uoting* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[75] In *Barnicki*, for example, there was no question that the law against interception of communications was constitutional. *Bartnicki*, 532 U.S. at 524-25.

[76] *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (striking down compelled speech); Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974)(striking down compelled publication requirement in newspaper). *But cf.* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004)(upheld compelled speech under the Fourth and Fifth Amendments, but did not discuss the First Amendment).

[77] *Cf. id.* at 526-28.

[78] *Cf.* Justice Holmes' classic put down of the public interest in private home ownership (which he decided was ultimately not worthy of protecting): "This is the case of a single private house. No doubt there is a public interest even in this…." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[79] Because of the invidious discrimination that still is felt by members of sexual minorities, one area of special concern may be the interest that some "LGBT plaintiffs understandably assert in … 'selective disclosure' of their sexual orientations or identities." Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 Ca. L. Rev. 1711, 1716 (2010). An argument can be made for example that, as long as people discriminate invidiously, government has an interest in forbidding the dissemination of information used in doing so. Like most such discrimination, however, this current situation is (one hopes) a transitional problem and, as such, it can be managed transitionally rather than as a pretext for structuring foundational limitations on the basic liberty of free expression.

[80] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).