The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy

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ABSTRACT

Increasingly more “ordinary” Americans are choosing to share their life experiences with a public audience. In doing so, however, they are revealing more than their own personal stories, they are exposing private information about others as well. The face-off between autobiographical speech and information privacy is coming to a head, and our legal system is not prepared to handle it.

In a prior article, I established that autobiographical speech is a unique and important category of speech that is at risk of being undervalued under current law. This article builds on my earlier work by addressing the conflict between autobiographical speech and the similarly valuable interest in information privacy. Both interests foster personal autonomy and encourage participation in public debate, and both interests seek to give individuals the power to control if, when and how their personal information is shared with the world. The conflict between speech and privacy has proven to be a pervasive and especially difficult problem, and prior attempts to balance the two interests—through the lens of property or contract law—have failed.

In this article, I propose a new, workable framework to resolve the conflict by reexamining the tort of public disclosure of private facts. This analysis reveals that the current over-emphasis on whether the information disclosed was “newsworthy” is misplaced and likely unconstitutional. The tort’s protection of individual privacy, however, can be reconciled with the First Amendment by interpreting the “offensiveness” element to include an examination of the purpose of the disclosure. A number of courts have implicitly adopted this view and, in doing so, are reflecting community norms that disclosures made for sufficient justifications—such as sharing newsworthy information or, I submit, engaging in autobiographical speech—are not highly offensive. Disclosures made for purely voyeuristic reasons, however, are highly offensive.

This “justified disclosure” approach encompasses community norms and expectations in a way that is more predictable and fair than other proposed frameworks. It further promises to be applicable not just to the conflict between autobiographical speech and information privacy but to broader disputes involving privacy and speech.

1 Assistant Professor of Law, the University of Georgia School of Law. I would like to thank Dan Coenen, Paul Heald, Lori Ringhand and Daniel Bodansky for their helpful comments. I am also indebted to my research assistants Puja Patel, Erica Moreira, Jessica Cox, Mareasa Fortunato, and Molly Levinson.
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As she continued to read, Theresa says, she . . . could not believe that Burroughs had revealed details about events in her life that had occurred 20 years earlier and had been horribly painful for her—so painful that she had spent years in therapy trying to overcome them and had never told her own daughter about them.

She continued to read that night, occasionally stopping because she simply could not bear to read anymore…. Sometimes she had to stop to run to the bathroom and vomit. “I have never vomited so much in my life,” she says.

—Account of Theresa Turcotte discussing her reaction to reading the memoir *Running with Scissors* by Augusten Burroughs about the time when Burroughs, as a teenager, lived with Turcotte’s family.²

“This is my story[.] It’s not my mother’s story and it’s not the family’s story, and they may remember things differently and they may choose to not remember certain things, but I will never forget what happened to me, ever, and I have the scars from it and I wanted to rip those scars off of me.”

—Augusten Burroughs, describing why he wrote *Running with Scissors*³

**INTRODUCTION**

Emily Gould spent years chronicling her daily life and the people in it. Her personal journals, however, were not diaries that she kept locked and hidden under her mattress. Rather, Emily was a modern kind of diarist; she was a blogger. She shared her personal life in one of the most public ways possible—by posting it on the Internet.

Writing about her blogging experiences for the *New York Times*, Emily explained how she and her then-boyfriend, Henry, would argue relentlessly about her hobby of revealing details about their lives for all to see—details that he wished to remain private. “I told

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³ *Id.*
him that writing, especially writing about myself and my surroundings, was a
fundamental part of my personality, and that if he wanted to remain in my life, he would
need to reconcile himself to being part of the world I described.”

Henry, however, saw things quite differently: “His point of view was just as extreme: I wasn’t generously
sharing my thoughts; I was compulsively seeking gratification from strangers at the
expense of the feelings of someone I actually knew and loved.”

The feelings described by Emily and Henry illustrate the potential problem that arises when one person desires to tell her personal story yet, in doing so, publicly reveals private information about another person. The tension here is obvious. While Henry was a major character in Emily’s life story, the story clearly was not hers alone—it was theirs. From Emily’s point of view she was telling “The Story of Me,” but from Henry’s she was telling “The Story of Us.”

Technological changes have radically shaped the environment in which this conflict plays out, because the Internet now supplies an accessible and affordable means for almost any speaker to broadcast her story to the world. This modern ability to reach a broad audience is liberating for the speaker. But it also means, as Daniel Solove has observed, that “[w]ithout warning, anyone can broadcast another’s unguarded moments or times of youthful awkwardness to an audience of millions.”

Emily explained how blogging was the natural extension of her innate desire to share,

Of course, some people have always been more naturally inclined toward oversharing than others. Technology just enables us to overshare on a different scale. Long before I had a blog, I found ways to broadcast my thoughts—to

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5 Id.
gossip about myself, tell my own secrets, tell myself and others the ongoing story of my life.\(^7\)

The appeal of broadcasting personal information on the Internet might be baffling to many, but to others the lure of public self-exposure is irresistible. Emily explained her desire to blog by stating:

I think most people who maintain blogs are doing it for some of the same reasons I do: they like the idea that there’s a place where a record of their existence is kept—a house with an always-open door where people who are looking for you can check on you, compare notes with you and tell you what they think of you.\(^8\)

In a prior article,\(^9\) I made the case that truthful autobiographical speech like Emily’s plays a valuable role in our public discourse that is at risk of legal underprotection. By truthfully speaking about their life experiences, I argued, autobiographical speakers add crucial information to the public debate that enhances our democracy. At the same time, strong protections for the individual right of autobiographical speech facilitates the autonomy and self-fulfillment of the speaker. These important values of autobiographical speech, however, are not currently protected by courts and, prior to my article, were not recognized by legal scholars. These oversights have produced a system in which the life stories of average citizens are at risk of being silenced. For these reasons, I concluded that the free speech values of autobiographical speech need to be recognized and given strong constitutional protection.

Consider Emily. When she shares her life experiences, openly and truthfully, she is adding something special to the public discourse. What she shares differs greatly from

\(^7\) Gould, supra note 4.
\(^8\) Id.
reports of the professional journalist or the seasoned nonfiction writer. Yet the different, and highly personal, perspective that Emily offers is precisely what makes her speech distinctly valuable. In addition to her individual interest in speaking openly about her life, Emily provides a front-line account of the human condition. Our society and our democracy benefit from learning about the personal experiences of people like Emily and from the calls to action that information provokes. As Eugene Volokh has observed, speech about everyday experiences “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.”

Thus if Emily wishes to tell “the ongoing story of my life” by announcing to the world that “this is what I did,” or “this is what happened to me,” it should be her right to do so. It is disturbing and constitutionally suspect to give anyone, including the government or her ex-boyfriend acting through the government, censorship power over her desire to proclaim, “I was here.”

But there are always two sides to every story. In this case, that other side is Henry’s. He is not disputing the truth of what Emily is saying about the lives they share; indeed, his objections to her speech arise precisely because what she seeks to reveal is true. Henry does not want his private personal information broadcast to the world. His desire for privacy is understandable and shared by many. Judge Richard Posner has stated that the desire for privacy “is a mysterious but deep fact about human personality” and “[e]ven people who have nothing rationally to be ashamed of can be mortified by the

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publication of intimate details of their life."\textsuperscript{12} Thus while it is troubling to give Henry the ability to silence Emily, it is a matter of no small concern that Emily is in a position to destroy Henry’s personal zone of privacy. Henry’s right to privacy is real and important, and it stands in direct conflict with Emily’s right to tell her story.

The general conflict between freedom of speech and the value of privacy is a familiar one as courts and commentators have struggled with it for more than a century. The Supreme Court has rightly observed that “[t]he face-off is apparent”\textsuperscript{13} whenever privacy and speech come into conflict. The problem deepens when the face-off concerns truthful autobiographical speech and information privacy. Cases that involve such speech, after all, involve competing interests that are closely aligned: the right of both the speaker and the subject to have control over if, when and how personal information about their lives is revealed to the public. What is more, while the personal character of the speech gives it a specialized and intensified communicative value, that same personal character creates a heightened threat to the privacy interest of others. When Warren and Brandeis first envisioned the right of privacy as a shield against personal disclosures, they depicted it as a right to secure “to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”\textsuperscript{14} This portrayal of the right to privacy, however, just as accurately describes the right of the autobiographical speaker. Thus the face-off between autobiographical speech and

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\textsuperscript{12} Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1229 (7th Cir. 1993).
\textsuperscript{13} Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489 (1975).
\textsuperscript{14} Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 198 (1890). See also Comment, An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases, 124 U. PA. L. REV. 1385, 1394 (1976) [hereinafter Accommodation] (“In short, they championed a right which gave the individual dominion over how, to whom, and to what extent his likeness, his words, his description, and his history were to be disclosed.”).
\end{flushleft}
information privacy presents a direct conflict—either the speaker is silenced and thus loses control over sharing her story or the speaker is free and the subject of the speech loses control of the disclosure of private information about him.

My analysis of how to resolve this conflict unfolds in three parts. In Part I, I briefly review the importance of truthful autobiographical speech and the risk it faces of legal underprotection. Then I probe the conflict that emerges when autobiographical speech is pitted against the right of information privacy and reject the argument proposed by some scholars that the First Amendment rights of the speaker must always prevail over the competing privacy interests. In Part II, I consider the most prominent frameworks that have been proposed by others for balancing the competing speech and privacy interests—property law and implied contracts or duty of confidentiality. While these frameworks draw in creative ways from other areas of law, I ultimately conclude that neither effectively deals with the challenges of this conflict. Finally, in Part III, I propose a new approach for resolving the conflict between autobiographical speech and information privacy. Focusing on the tort of public disclosure, I conclude that there has been an over-emphasis on the “newsworthy” exception. This interpretation of the tort is likely unconstitutional because it fails to protect non-newsworthy yet constitutionally valuable speech like autobiographical speech. I argue, however, that both the tort and the privacy interest it seeks to protect can be preserved by re-examining the “offensiveness” element of the tort. This analysis reveals that there are two purposes of the offensiveness inquiry: to assess the nature of the information revealed and to examine the reason for the disclosure. Reflecting community norms as to what is “highly offensive” to a reasonable person, courts adopting this dual view have held that it is not highly offensive to reveal
information if the disclosure is done for a sufficient reason. Sharing information because it is newsworthy or, I submit, because it furthers an autobiographical purpose, is a sufficient justification. Disclosing personal information purely for a voyeuristic thrill, however, is not. Adopting this “justified disclosure” approach rescues the tort from a potentially fatal constitutional flaw while providing a more workable framework for analyzing speech-versus-privacy conflicts. Because truly autobiographical speech, whether or not “newsworthy” under traditional standards, serves important informative functions, I conclude by arguing that this kind of speech should be aggressively protected. Courts should examine speech to determine if it is genuinely autobiographical and if the information it includes is meaningfully linked to the autobiographical nature of the speech. I also propose a limiting definition of autobiographical speech that focuses on the speaker’s intent and that requires autobiographical speakers to shield the identity of others unless disclosure is substantially relevant to the telling of one’s life story. This approach protects the fundamental constitutional right to engage in autobiographical speech while still according due weight to the important and competing privacy interest in a way that is in line with the case law and more predictable and fair than other proposals.

I. EXPLORING THE CONFLICT BETWEEN AUTOBIOGRAPHICAL SPEECH AND INFORMATION PRIVACY

A. Autobiographical Speech is Worthy of Protection

In a prior article, I offered an in-depth argument that truthful autobiographical speech deserves greater protection than courts and commentators now recognize.\textsuperscript{15} For centuries, this form of speech has been valued by historians, scientists, religious leaders

\textsuperscript{15} West, supra note 9, at 905.
and philosophers, while being all but ignored by legal scholars and the courts. Under current law, only the autobiographical speech that a court is likely to deem “newsworthy”\(^{16}\) is protected so that the life stories of the famous and powerful are safe from censorship while disclosure of the life stories of most “ordinary” people\(^{17}\) remain vulnerable to legal challenge. For decades these differing levels of protection for those with “newsworthy” lives and those with “ordinary” lives has raised few concerns. The development of this distinction corresponded with the rise of the mass media, which focused (understandably) on broadly newsworthy stories. The courts were generally content with this arrangement, and in effect deferred to the media to make gatekeeping choices about newsworthiness. But time brings change. New widespread Internet access combined with the proliferation of weblogs and social networking sites have led more people to tell their stories to a broad audience. At the same time, shifting attitudes about privacy have revealed the desire of many to tell their stories openly. Without proper recognition of the value of autobiographical speech, there is a risk that willing and truthful speakers will be silenced and their stories will be lost.

To illustrate how one person’s autobiographical speech might be censored while another’s is protected under the current law, it is helpful to compare the stories of two women—Susanna Kaysen and Jessica Cutler. Susanna Kaysen is a well-known memoirist, who has won numerous awards for her writing. One of her books, *Girl Interrupted*, concerning the time she spent in a mental institution as a teenager, was a

\(^{16}\) Throughout this article, I use the term “newsworthy” to describe any speech that a court has concluded is newsworthy, a matter of public concern, or a matter in the public interest.

\(^{17}\) This article places the term “ordinary” in quotations, because the term is used only to suggest the extent that society or the courts might view the speakers’ lives as not newsworthy.
best-seller and gave rise to a major motion picture. In 2001, Kaysen published another memoir titled *The Camera My Mother Gave Me* in which she discussed her multi-year battle with severe vaginal pain. Among other things, she chronicled the impact that condition had on her intimate relationship with her then live-in boyfriend. Kaysen portrayed her boyfriend as insensitive to her ordeal and impatient about her refusals to have sex. The storyline culminates in a scene in which Kaysen questions whether he might have tried to rape her, although she ultimately concludes that she consented to the intercourse.

Following publication of the book, Kaysen’s now-former boyfriend sued her for violating his privacy. There was no dispute about the truth of Kaysen’s speech; rather the question before the court was whether Kaysen had violated her ex-boyfriend’s rights by revealing intimate details about their relationship. The court ruled in favor of Kaysen, deeming her discussion of how her medical condition affected their relationship a matter of “legitimate public concern” and therefore constitutionally protected.

Kaysen’s case can be compared to that of another woman—Jessica Cutler. Cutler was a 24-year-old Capitol Hill staffer when she decided to start a weblog about her life. In that blog, she wrote about the daily events of her life, her friends, and her job. But

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20 *Id.* at *1.
21 While Kaysen refers to him as only “my boyfriend,” and his occupation and hometown were changed, he argued that he was easily identified by anyone who knew of his relationship with Kaysen.
22 *Id.* at *6.
23 Poor Mojo’s Almanac(K) presents; The Story of the Washingtonienne, http://poormojo.org/pmjdaily/washingtonienne.htm (republishing the Washingtonienne blog which was removed) (last visited Sept. 7, 2009).
she also wrote about her ongoing sexual exploits with up to six different men. One man was married, one had a high-ranking government job, another was her superior at work, and at least one, she alleged, paid her for sex. Like Kaysen, Cutler was sued by a former sexual partner for invasion of privacy. Again there was no dispute about the truth of her speech; instead, the question was whether she had the right to publicly reveal intimate information about her relationship with the plaintiff. The case against Cutler survived a series of preliminary motions and proceeded to discovery before the parties settled the case. Yet Cutler, far more so than Kaysen, faced the risk that she could be legally penalized for truthfully speaking about her life.

The comparison between the cases against Kaysen and Cutler is striking. Both women wrote about their sexual relationships and about dimensions of those relationships that concerned power, tradeoffs, and intimate choices. Both women spoke willingly and truthfully. The difference between the two, of course, was that Kaysen was an award-winning author and her speech was published in a book by Random House. Cutler, on the other hand, was a young and unknown woman who published her speech through a personal weblog. Kaysen’s life experiences were deemed to be newsworthy and thus protected. Cutler’s story, however, was not likely to be found to be newsworthy and she thus faced punishment for telling it.

Each woman’s wish to speak truthfully about her life deserves constitutional protection. Autobiographical speech occupies an exceptional place in the public discourse—a space rivaled perhaps only by political and religious speech—in its ability

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24 Cutler wrote under a pseudonym and identified the men by their initials only. After only a matter of weeks, however, she and the men were identified by another blogger.
25 Id. (May 11, 2004, 2:21 p.m.).
to foster both the autonomy-based and society-advancing values that justify strong constitutional protection of free speech. As to personal autonomy, the value of autobiographical speech is unmistakable. The basic point is hard to miss: by openly and truthfully discussing our life experiences, we are free to reexamine our pasts and develop our minds. Indeed, the work of psychologists and therapists is rooted in the benefits of autobiographical speech. And religious customs have reflected the importance of such speech for centuries.  

Autobiographical speech also fulfills the society-based theories of free speech by promoting a national dialogue in which a rich array of voices share personal stories to which others can react in ways that reshape their own attitudes and actions. Protecting the free flow of first-person accounts thus informs our citizenry, promotes effective democracy, and leads to greater tolerance.

Under current law, truthful autobiographical speech is at risk of being undervalued and underprotected. Preoccupation with the value of political speech and exemptions from tort liability only if privacy-threatening speech is deemed to be newsworthy too greatly restricts the range of permissible autobiographical speech. Of particular concern, failure to protect such speech risks allowing the voices of the poor, the powerless and the oppressed to be erased from our public debate. It is, therefore, imperative to give robust First Amendment protection to truthful autobiographical speech.

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27 For a more in-depth discussion of the individual-based values of autobiographical speech, see West, supra note 9, at Part III.B.
28 For a more in-depth discussion of the society-based values of autobiographical speech, see West, supra note 9, at Part III.C.
B. Information Privacy is Worthy of Protection

On the other side of this conflict lies information privacy, a right of such popular appeal that even its critics admit it is “easy to endorse.” 29 Dean Prosser observed of the tort of public disclosure of private facts that “no other tort has received such an outpouring of comment in advocacy of its existence” 30 and Harry Kalven warned that “[i]t takes a special form of foolhardiness to raise one’s voice against the right of privacy at this particular moment in its history.” 31 To be sure, the rights of tell-all bloggers like Jessica Cutler have few apologists, 32 and the idea of regulating their speech is attractive to many. Even Eugene Volokh, who has written critically of information privacy rights, confessed:

Speech restrictions aimed at protecting individual 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 like their stopping me from talking about them, the trade-off might be worth it. 33

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29 Volokh, supra note 10, at 1050.
30 PROSSER, TORTS 1051 (1st ed. 1941).
32 “Bloggers like Jessica should not have an unfettered free speech right to disclose intimate details about people’s private lives that are not of legitimate concern to the public.” Solove, supra note 6, at 1198; see also Andrew J. McClurg, Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality, 74 U. CIN. L. REV. 887, 938 (2006) (“There is a world (literally) of difference between oral gossip and Internet gossip. Mass dissemination of private information acquired during an intimate relationship is an indecent and irresponsible breach of trust—and contract.”).
33 Volokh, supra note 10, at 1051. So sympathetic was Volokh’s personal view toward privacy regulations, despite his constitutional critique of them, that he issued an invitation to information privacy supporter to use his critiques to refine and further their efforts.
The legal debate supporting the right to protect our privacy from the “selfish, exploitative, or malicious” people in our lives who might share our secrets is relatively young, but the passion and persistence of the scholarly arguments signal that there is an important interest at stake—one that deserves consideration. Warren and Brandeis articulated the value of privacy of personal information in the “most influential law review article of all,” writing: “Of the desirability—indeed of the necessity—of some protection [of the right of privacy], there can, it is believed, be no doubt.” Justice White, writing for the Court in *Cox Broadcasting Corp. v. Cohn*, an information privacy case, declared that “powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual.” He added that “the century has experienced a strong tide running in favor of the so-called right of privacy.”

Privacy advocates have made a convincing case that protecting a right of information privacy serves many of the same goals as free speech such as furthering individual autonomy and public debate. It has been argued frequently, for example, that privacy—like free speech and often in connection with free speech—furthers the

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34 McClurg, *supra* note 32, at 887.
35 *See* Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INT’L. PROP. MEDIA & ENT. L. J. 97, 98 (2000) (explaining “[p]rivacy as conceived in twentieth century case law is a young legal concept, less developed than the law of free speech”); Solove, *supra* note 6, at 1030 (admitting that information privacy “has not simmered for centuries like much of tort law or criminal law”).
38 *Cohn*, 420 U.S. at 487.
39 *Id.* at 488.
40 Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 723 (1996) (contending that privacy and free speech “both serve the same interest in individual autonomy.”).
individual interest in autonomy and self-realization.\textsuperscript{41} Privacy advocates do not dispute the important role freedom of speech plays in the development of individual autonomy, but they argue that providing a zone of personal privacy is equally important.\textsuperscript{42} Accepting that privacy, in addition to speech, promotes individual autonomy, Daniel Solove contends that “[t]here is no clear reason why the autonomy of speakers or listeners should prevail over that of the harmed individuals.”\textsuperscript{43}

Scholars have also argued that privacy protection, much like free speech, furthers the goal of effective democratic self-governance by facilitating uninhibited public debate.\textsuperscript{44} Edward Bloustein, for example, argues that a lack of privacy of thought leads to conformity of ideas. He explains that without personal privacy, an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man.\textsuperscript{45}

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\item \textsuperscript{41} See Bezanson, supra note 91, at 1134-35 (contending that the right to privacy “at its core” is about giving individuals “a space free from the demands of the larger social order in which to develop beliefs, attitudes, and behavioral norms”); Gerwitz, supra note 59, at 165 (arguing that “people are more likely to express themselves fully, openly, and robustly when they have confidence that what they say will be heard only by a known group of listeners”).
\item \textsuperscript{42} See Scott, supra note 40, at 723 (arguing that “both [speech and privacy] are critical to autonomy, it is desirable to give proper weight to both”); Solove, supra note 6, at 992 (stating that “it is difficult to say whether free speech or privacy promotes more autonomy; both further autonomy, just in different ways and in different aspects of life”).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. at 993-94 (noting that “[p]rivacy encourages uninhibited speech [and] [i]mportant discourse, especially communication essential for democratic participation, often takes place in microlevel contexts (between two people or in small groups) rather than in macrolevel contexts (public rallies or nationwide television broadcasts)”; see also James Nehf, Recognizing the Societal Value in Information Privacy, 78 WASH. L. REV. 1, 69 (2003) (Privacy “is a public value because it is necessary to the proper functioning of our political system.”)
\item \textsuperscript{45} Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962, 1003 (1964); see also Scott, supra note 40, at 717 citing
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Building on this thought, Sean Scott surmises that “[i]f granting people privacy . . . encourages this participation in public debate, then privacy promotes the First Amendment value of truth.”\(^46\)

There are other reasons why dispensing with privacy protection might hurt, not help, the political process. Several scholars point to the deterrent effect on those considering a run for political office.\(^47\) Robert Bellah has argued that “the treatment of public figures by the media [might] have a ‘chilling effect’ on the decision of individuals to enter the public sphere because they fear what the relentless scrutiny may do to them.”\(^48\)

For all of these reasons, I agree with Richard Murphy that “the benefits to privacy should not be lightly dismissed,” but rather “need to be taken into account when trumpeting unrestricted disclosure of personal information.”\(^49\) And I join Harry Kalven,
Jr. in embracing the premise that “privacy is surely deeply linked to individual dignity
and the needs of human existence.”

C. **Is There Room for Both Interests?**

1. **Polar Opposites or Mirror Images?**

Once we establish that both autobiographical speech and information privacy are
significantly valuable interests that cannot be easily dismissed, the conflict between the
two becomes obvious. Both rights are valuable and function to further many of the
same goals of individual autonomy and public debate. They are also, however, difficult
to reconcile in large part because they are in essence the same interest. Both the
autobiographical speaker and the privacy plaintiff wish to control whether, when and
how personal information about them is revealed publicly. The Georgia Supreme Court
was early to recognize this symbiotic relationship between the two, observing that “the
right to withdraw from the public gaze at such times as a person may see fit,” and “the
right of one to exhibit oneself to the public” are in actuality flip sides of the same
personal liberty coin.

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51 There is some debate over whether the right of information privacy should be treated as a
(discussing the case of *Bartnicki v. Vopper*, 532 U.S. 514 (2001) and arguing that in “the
premise that the conflict posed between speech and privacy is a conflict between two
rights of constitutional stature. By this important measure, all nine Justices in *Bartnicki*
were in agreement”) and Volokh, *supra* note 10, at 1071 (arguing that “[t]he fact that the
proposed statutory or common-law right [in information privacy] is in one way analogous
to a constitutional right does not give it constitutional stature”).
52 Throughout this article, I use the term “privacy plaintiff” to refer to any individual who
might have a claim that personal information about him was unlawfully disclosed.
embraces the right of publicity, it no less embraces the correlative right of privacy.”).
From the beginning, the “right of privacy” as envisioned by Warren and Brandeis did not simply entail the “right to be let alone,” or, for that matter, the right of an individual to keep personal facts from public view. Rather, Warren and Brandeis spoke of securing “to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.” An early, well-known privacy case reflected the same approach, stating that “[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze.”

The modern right of information privacy has maintained this focus on the individual’s ability to control if, when and how personal facts are revealed. The United States Supreme Court, for example, has stated that “both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.” Paul Gerwitz has noted that “[p]rivacy is ultimately about our power to choose our audience.” Sean Scott has observed that the disclosure of private information “violates the individual’s right to choose who shall be privy to such information.” And others have described information privacy as “the right of decision

54 Warren & Brandeis, supra note 14, at 195. While Warren and Brandeis are frequently credited for coining this famous phrase, they borrowed it from Judge Thomas M. Cooley. Christina E. Wells, Privacy and Funeral Protests, 87 N.C. L. Rev. 151, n. 145 (citing THOMAS M. COOLEY, LAW OF TORTS 29 (2d ed. 1888)).
55 Warren & Brandeis, supra note 14, at 198.
57 Throughout this article, I adopt the term “information privacy” as shorthand to refer to an individual’s interest in not having facts that he considers to be private revealed to anyone without his consent.
60 Scott, supra note 40, at 722.
over one’s private personality,”'^61 individuals’ “general right to control the use of information about themselves,”'^62 the “legal power to control the flow of information about one’s self to other people,”'^63 and “our ability to control who has access to us, and who knows what about us.”'^64

All of these formulations suggest that it is the control over the disclosure of information, and not only the maintenance of its secrecy, that lies at the heart of the legal protection for information privacy. '^65 Clearly if the information were totally secret, there would be no potential privacy invasion because no one else would have access to it. '^66 Thus the question is not simply who should have access to personal information, but, more precisely, who else. And who gets to decide if, when and with whom it is shared.

This inescapable bond between the right to choose privacy and the right to choose publicity of one’s personal life is of key importance to the complexity of the autobiographical speech versus information privacy debate. Both the privacy plaintiff

[^61]: ALAN F. WESTIN, PRIVACY AND FREEDOM 324 (1967).
[^64]: James Rachels, Why Privacy is Important, 4 PHIL. & PUB. AFF., 323, 329 (1975).
[^65]: See RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 271 (1983) (As Judge Posner argued, “[W]hen people today decry lack of privacy, what they want, I think, is mainly something quite different from seclusion: they want more power to conceal information about themselves that others might use to their disadvantage.”).
[^66]: See U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 763 (1989) (stating that “[i]n an organized society, there are few facts that are not at one time or another divulged to another.”); Kenneth L. Karst, “The Files”: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 LAW & CONTEMP. PROB. 342, 343-44 (1966) (“Hardly anyone in our society can keep altogether secret very many facts about himself. Almost every such fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure”); Warren & Brandeis, supra note 14, at 198 (acknowledging that a man may choose to share his personal thoughts with select others, yet “he generally retains the power to fix the limits of the publicity which shall be given them”).
and the autobiographical speaker seek the right to control the release of information about themselves. The autobiographical speaker desires to share his story and has chosen his time, method and audience. The privacy plaintiff, meanwhile, wishes to wait until a different time, or to select another venue, or to limit the number or type of listeners, or to remain quiet altogether. From each parties’ perspective, the question focuses on control over personal information. Accepting that autonomy and control over one’s personal information is a valuable right, therefore, does not resolve the conflict when, due to shared lives and experiences, both wish to control the same piece of information. Is the conflict between autobiographical speech and information privacy, therefore, a zero-sum game—must one person always lose and another always win?

2. Must Speech Always Win?

One possible solution to the clash between autobiographical speech and information privacy is to award the privacy plaintiff total control over his personal information. This approach, however, entails denying the autobiographical speaker the anonymity to share her story. Eugene Volokh has “reluctantly” concluded that such an approach has “troubling implications” by giving the privacy plaintiff too much power—a power he defined as the “right to have the government stop you from speaking about me.” And Tom Gerety has cautioned against an overly broad right of information privacy, observing privacy for some theorists “includes all control over all information

67 Volokh, supra note 10, at 1053.
68 Id. at 1050-51; see also Zimmerman, supra note 63, at 293 (noting the problems with awarding anyone “the right to govern authoritatively both the nature of personal information exposed to public view and the conditions under which others may discuss those personal facts”); Singleton, supra note 62, at 124-25 (describing it as allowing the plaintiff “a right to control a thought in someone else’s mind, even when that thought may later become an observation in a notebook, a comment to a coworker, or an email to a company”).
about oneself, one’s group, one’s institutions” and that “[s]urely privacy should come, in
law as in life, to much less than this.”

While there is no support even among privacy advocates for an absolute right of
information privacy, some scholars have embraced the opposite conclusion—when
speech clashes with information privacy, the speech always wins. At its core, these
commentators argue, this question pits a vague, undefined and untested interest in privacy
against the venerable constitutional right to speak. For them, to state the issue this way is
in effect to resolve it: the revered speech interest necessarily must trump the nebulous
privacy claim.

Critics of privacy regulations argue that allowing such an ill-defined interest to
interfere with the long-recognized and celebrated First Amendment right to speak is
constitutionally unacceptable. The most common criticisms of information privacy
regulations are that the interest they seek to safeguard is too new and undefined to
deserve such strong protection. Particularly troublesome to critics is the lack of
consensus on a definition of “privacy,” a difficulty that increases the risk of self-
censorship. Diane Zimmerman, a prominent information privacy skeptic, has argued that
the right of privacy is “rich in symbolic value but has little particularized meaning.”

Even defenders of privacy law admit that there is no real agreement about what core
values are at stake and their “[a]ttempts to define the concept of ‘privacy’ have generally

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70 See note 35.
not met with any success.” William Beaney has commented that “even the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right.” Spiros Simitis has noted that “the more the need for a convincing definition of privacy based on criteria free of inconsistencies has been stressed, the more abstract the language as grown.” And Daniel Solove has acknowledged that it is “a concept in disarray” because “[n]obody can articulate what it means.”

Thus the right of privacy has been described as “exasperatingly vague and evanescent,” “highly malleable,” and “infected with pernicious ambiguities.” Robert Post, a prominent privacy advocate, confessed that “[p]rivacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.” Judith Jarvis Thomson summed up the problem with defining privacy by declaring that “nobody seems to have any very clear idea what it is.”

The lack of consensus on what, exactly, privacy law seeks to protect raises alarms for free speech scholars. Uncertainty about what is and is not allowed inevitably leads to

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a chilling effect.\textsuperscript{81} Volokh has argued that relevant standards are “so vague … that accepting them may jeopardize a good deal of speech that ought to be protected,”\textsuperscript{82} and Zimmerman has warned that a constitutional privacy regulation “would have to be defined precisely and clearly enough that a publisher would have fair warning of the approximate location of the line between protected and unprotected revelations.”\textsuperscript{83}

These commentators argue that the constitutional interest at stake with truthful speech is simply too strong to allow these types of restrictions. Diane Zimmerman, for example, has contended that the tort of public disclosure of private facts is unconstitutional and incompatible with our free speech jurisprudence. According to Zimmerman, the right of privacy as developed by Warren and Brandeis “has actually had a pernicious influence on modern tort law because it created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press.”\textsuperscript{84}

The “speech always wins” approach is further supported by the argument that there are certain types of intimate human relationships that are simply ill-suited for legal rules. As Zimmerman has explained “we refuse to resolve some human problems by law because we are unwilling to bear the cost that legal solutions would impose.”\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{81} See, e.g., ROBERT M. O’NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 167 (2001); BRUCE W. SANFORD, DON’T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 1-10 (1999). [Check!]
\item \textsuperscript{82} Volokh, supra note 10, at 1116.
\item \textsuperscript{83} Zimmerman, supra note 63, at 342.
\item \textsuperscript{84} Zimmerman, supra note 63, at 292.
\item \textsuperscript{85} Zimmerman, supra note 63, at 364-65.
\end{itemize}
of the complexities of human interaction, Zimmerman concluded that the answer lies with “social evolution” rather than “an enunciation of new legal restraints.” 86

This argument contends that the law should not silence a truthful speaker, but instead it should place the burden on the privacy plaintiff to exercise care when deciding to whom he reveals personal information. The Supreme Court has, to some degree, adopted this approach to privacy by stating that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.” 87 Zimmerman agrees, noting that “[p]erhaps the best defense against the effects of public gossip is a willingness to be more discreet in revealing personal information about ourselves and in exposing our intimate behavior to public view.” 88

There is an appealing simplicity to this “caveat emptor” style approach to privacy and speech. If a person does not want his personal information revealed publicly, then he should take greater care in choosing the people to whom he reveals that information. Susanna Kaysen’s boyfriend, for example, knew that his girlfriend wrote memoirs for a living. Is it not proper to consider him on notice that some personal aspects of their lives might end up in the public domain? In similar fashion, why should Jessica Cutler’s paramours, specifically if they had only episodic contact with her, rest in her a faith to keep quiet about sexual and other aspects of their relationships? And the “assumption of risk” argument becomes even stronger if we view the acts the plaintiffs wish to conceal as involving possible wrongdoing such as violent behavior, illegal activity or immoral acts like infidelity.

86 Id.
88 Zimmerman, supra note 63, at 364.
It is not uncommon in tort law to examine the plaintiff’s behavior before determining whether or not he is eligible for recovery from the defendant. In defamation law, for example, the courts consider the public or private status of the plaintiff before determining whether a claim can proceed. If the plaintiff is found to be a public figure, the burden for recovery is higher. According to the Supreme Court, the public figure plaintiff is less deserving of recovery because she has assumed the risk by thrusting herself into the public arena. Warren and Brandeis took a similar approach in their initial view of the privacy right. They stated that a person who was active in “public life” would have less of a privacy right about the disclosure of information that had bearing on their fitness for a public role, even if the information in question was about their private life.

The difficulty with this approach is that it goes too far. By suggesting that every person bears the responsibility of not revealing to anyone information that they do not wish revealed to everyone is unrealistic. The interest in information privacy is not necessarily about protecting complete solitude but rather, as Randall Bezanson explained, it is about a “space of intimate associations.” Privacy, Bezanson argued, is “a space occupied by others, but only by some others.”

Zimmerman’s approach is not only unduly dismissive of the intimacy that does and should exist in human relationships, it also fails to deal with many potential scenarios that give rise to information-privacy problems. Of particular importance, many privacy

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89 See Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1767 (2007) (“In the common –law privacy tort of public disclosure of private facts, a plaintiff’s efforts to keep certain facts private are assessed in determining liability.”).


plaintiffs will have had little or no choice in their shared experiences with a future speaker. They might have crossed paths because of the accident of birth, the necessity of work, or random acts of fate. For these privacy plaintiffs, it is not helpful to speak about exercising care in choosing with whom one enters into intimate relationships. As Judge Posner explained when discussing the Supreme Court’s Florida Star case, “[t]o be identified in the newspaper as a rape victim is intensely embarrassing. And it is not invited embarrassment. No one asks to be raped.”

A final point going against the “speech always wins” approach is that the United States Supreme Court has never, despite repeated opportunities, ruled out the possibility that a privacy interest could prevail over a speech right. In Florida Star v. B.J.F., for example, the Court emphasized that it was not holding “that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press.” Similarly, the Court in Cox Broadcasting Corp. refused to answer “the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments.”

Although any bright-line approach has its appeal, the conflict between speech and information privacy cannot be convincingly resolved through a rule that always favors speech. The privacy interest at stake is too valuable to dismiss quite so easily.

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92 Haynes v. Knopf, 8 F.3d 1222, 1232 (7th Cir. 1993).
94 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).
II. PRIVACY V. SPEECH: THE SEARCH FOR A WORKABLE FRAMEWORK

In Part I, I suggest that it is overly simplistic to take an absolutist approach to the problem posed by autobiographical speech by concluding that either the speech right or the privacy right must always prevail. The question then becomes how to balance the two diametrically opposed interests. Is there a framework that protects the important speech right of the autobiographical speaker while still giving appropriate deference to an individual’s interest in privacy of personal information? There is no doubt that the answer, if one exists, will not be easy. The rejection of an absolutist viewpoint necessarily means adopting a more complicated approach.95

A number of commentators have attempted to push the speech-versus-privacy conflict into pre-existing legal frameworks—most commonly either property or contract law. These approaches, however, suffer from many flaws. They do not adequately take into account the dual interests at stake and raise the risks of underprotection. And, even if workable in other contexts, these frameworks are ill-suited for dealing with the special problem posed by autobiographical speech.

95 See Peter B. Edelman, Free Press v. Privacy: Haunted by the Ghost of Justice Black, 68 Tex. L. Rev. 1195, 1229 (1990) (noting that “[w]hen speech is truthful, balancing its value against the privacy rights of an individual is assuredly a complex task”). It also means that courts must engage in some kind of balancing of the two interests. See Solove, supra note 6, at 1031 (As Solove wrote, “not all speech is of equal value, nor is speech a value superior to all others. It is imperative to balance. Balancing means assessing the value of particular forms of speech against their costs.”). But see Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 Stan. L. Rev. 1373, 1412 (2000) (stating “The U.S. West [v. FCC] decision nicely illustrates Peter Edelman’s observation that judges balancing speech and privacy claims reveal themselves to be ‘absolutists in balancers’ clothing’” quoting Edelman, supra note 107, at 1223.)
A. Property

One of the most popular approaches among commentators is to argue that individuals maintain a property interest in their own life story or personal information. Warren and Brandeis began by framing their concept of information privacy as one that arises out of “[t]he right of property in its widest sense” although they ultimately abandoned the property analogy and declared privacy to be a distinct right. Other privacy scholars, however, have not given up so easily. Alan Westin stated that personal information “should be defined as a property right, with all the restraints on interference by public or private authorities and due-process guarantees that our law of property has been so skillful in devising.”

Looking at information privacy as a type of property right suggests that each individual has an ownership interest in his or her life stories and personal facts. Viewing personal information this way is attractive to privacy advocates because it opens up a constitutional end-run around the First Amendment. The recognition of intellectual property rights, whether in copyright or trademark, have given rise to broad exceptions to the free speech rights of individuals. Thus, once private information is defined as a property right, the “circulation of personal information by someone other than the owner is handling a dangerous commodity in interstate commerce.” As Julie Cohen has argued, once we accept that personal information “is the property or quasi-property of the

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96 Murphy, supra note 49, at 2383-84 (arguing that personal information “like all information, is property.”); Lawrence Lessig, The Architecture of Privacy, 1 VAND. J. ENT. L. & PRAC., 56, 63 (1999) (arguing in favor of giving “individuals the [property] rights to control their data”).

97 Warren & Brandeis, supra note 14, at 211.

98 WESTIN, supra note 61, at 324-25.

99 Id. at 325.
individual to whom it refers then … speech rights cannot be absolute, and may not
prevail at all. 100

The problem with applying the property rubric to information privacy is that it is
not a good fit with current law. Viewing the right of information privacy through the lens
of copyright, trademark, or patent, 101 for example, is not helpful because both are far
narrower rights than a right to own your life experiences. Mere facts, for example, are
not copyrightable as a form of original expression, 102 trademarks only guard against
consumer confusion, and patent protects inventions implementing new technical ideas. 103

While some scholars support applying the property framework to information
privacy, the courts for the most part have rejected this approach. 104 In Melvin v. Reid, for
example, one of the first and most famous information privacy cases, the Supreme Court
of California rejected the idea that a former prostitute had a property right in her personal
life story. The court said it could find “no authorities sustaining such a property right in
the story of one’s life” 105 and that right of privacy “is an incident of the person and not of
property.” 106

The courts are reluctant to embrace a property view of information privacy,
according to Singleton, because the concept of privacy is so complex and property

100 Cohen, supra note 95, at 1420.
101 The law of trade secrets is more likely to have some relevancy to the speech versus
privacy debate. This area, however, is discussed below because of its similarities to
contract law. See, infra, Part IIIB.
103 Singleton, supra note 62, at 125-126.
104 Singleton, supra note 62, at 112 (“The tort of public disclosure of embarrassing public
facts comes closest, in theory, to embracing a broad view of property rights in personal
privacy. But in practice, skeptical courts have curtailed it.”).
106 Id. at 92-93.
interests seldom give rise to damages “for purely emotional injuries” such as those at issue in public disclosure cases.\footnote{Singleton, \textit{supra} note 62, at 114.} Intellectual property rights, moreover, have been given explicit constitutional approval, found in Congress’s express powers of Article I, Section VIII, but “property rights in privacy do not have constitutional sanction.”\footnote{\textit{Id.} at 133.} Margaret Radin has explained that “in the language of the First Amendment, ‘expression’ is something that is not propertized and indeed is something whose value requires it not to be propertized.”\footnote{Margaret Jane Radin, \textit{Regime Change in Intellectual Property: Superseding the Law of the State with the “Law” of the Firm}, 1 U. OTTAWA L. & TECH. J. 173, 176 (2003).}

The property framework, moreover, is not helpful in resolving the conflict between information privacy and autobiographical speech. Even if we accept that individuals have an intellectual “property” ownership interest in their life stories, it does not follow that there is an easy answer to problems presented when one person exercises a right to disclose or not disclose a shared life experience. The property framework does not suggest how to resolve the “tie” between shared owners of the same personal information. Treating the privacy plaintiff and the autobiographical speaker as “co-owners” of the property might strongly favor the speaker, for example, because copyright law allows one co-owner to use the copyrighted material however she wishes without the permission of the other.\footnote{Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1067-68 (7th Cir. 1994). She must only account to the other for any profits. \textit{Id.;} J. David Yarbrough, Jr., \textit{What’s Mine Might Be Yours: Why We Should Rethink The Default Rule For Copyright Co-Ownership In Joint Works}, 76 TUL. L. REV. 493, 496 (2001).} Intellectual property law also recognizes a public need for access to certain expression and all facts and ideas, which is evident in the doctrine of fair
use, the idea/expression dichotomy, the merger doctrine and the time limitations on ownership.

Publicity law is another area which, in theory, might fit with information privacy and autobiographical speech because, as discussed above, they all involve control over if, when and how personal information is made public. Yet again, however, the law in this area is a poor match with the privacy and speech interests at stake.

Publicity law focuses on the commercial exploitation of a person’s name, likeness, and persona that most commonly arises in cases involving celebrities. The issue is the right to control the pecuniary interest in one’s identity. Thus while the right of publicity (or appropriation) is one of Prosser’s four privacy rights, it is generally treated like a property right in one’s personality. Because the right of publicity is about protecting the commercial value of one’s identity, courts have concluded that it “does not include a person’s life story” or “general incidents from a person’s life.” The Fifth Circuit Court of Appeals further explained:

The narrative of an individual’s life, standing alone, lacks the value of a name or likeness that the misappropriation tort protects. Unlike the goodwill associated with one’s name or likeness, the facts of an individual’s life possess no intrinsic value that will deteriorate with repeated use.

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111 See discussion infra Part IC.
112 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.3, at 43 (4th ed. 1992) (explaining that the publicity right is protected because “whatever information value a celebrity’s endorsement has to consumers will be lost if every advertiser can use the celebrity’s name and picture”).
113 Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994).
114 Id. at 438; see also Groden v. Random House, Inc., 61 F.3d 1045 (2nd Cir. 1995) (explaining that that speakers are free to use another person’s identity as long as the use was only “incidental” to a matter of public interest).
In an autobiographical speech context, it is the individual life experiences that are of value, not the commercial value of the plaintiff’s identity. The autobiographical speaker is trying to share his life story and not seeking to profit from the plaintiff’s celebrity.\footnote{If the speaker’s goal were to profit financially, the speech would likely not be purely autobiographical as defined below in Part IV.B.1. If, however, a case arose where a true autobiographical speaker was still, nonetheless profiting off of the identity of the plaintiff, then some compensatory damages for right of publicity might be appropriate.}

Viewing an individual’s privacy interest in personal information as a property right is appealing because our life experiences are inherently personal and we share a sense that they should be something we “own.” In practice, however, privacy and property are a poor fit. Intellectual property law has developed around a concept of personal ownership in expression, not facts, and is designed primarily to compensate the plaintiff for revenues that were lost due to the unauthorized acts of others. Both autobiographical speech and information privacy, on the other hand, involve intensely personal interests that, if violated, yield emotional harms. Thus property does not appear to be the appropriate framework for this conflict.

\textbf{B. Implied Contract or Duty of Confidentiality}

A much more promising avenue for balancing the interests of information privacy versus the freedom of speech is to analyze the situation as an implied contract or a duty of confidentiality. The theory here is that individuals in certain relationships could be seen as having an implied contract with each other that neither will reveal publicly certain private information.\footnote{McClurg, \textit{supra} note 32, at 887.} Closely related to the implied contract approach is the theory that
some people who possess personal information about others have an enforceable duty of confidentiality preventing them from disclosing it.\textsuperscript{117}

Securing an express promise not to disclose private information is clearly one way for a privacy plaintiff to get around the free speech protections of the First Amendment, because the Supreme Court has stated that a person may bargain away their constitutional rights to speak.\textsuperscript{118} It is also generally accepted that certain relationships embody an implied promise of confidentiality. These relationships include an individual’s dealings with her doctor, her banker, her clergy member or her lawyer. As Volokh has explained, “[w]hen 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.”\textsuperscript{119}

To say that one set of relationships gives rise to a duty of confidentiality, however, is a far cry from saying that other very different relationships entail the same obligation. What is more, even if a duty of confidentiality arises, the question arises about how far it extends. Nonetheless, Andrew McClurg has argued the law should presume that “an implied contract of confidentiality arises in intimate relationships that the parties will not disseminate through an instrument of mass communication private, embarrassing information (including photos or videotapes) about the other acquired during the relationship.”\textsuperscript{120}

\textsuperscript{117} Bezanson, supra note 91, at 1135. See also Jessica Litman, Information Privacy/Information Property, 52 STAN. L. REV. 1283, 1308 (2000) (suggesting disclosure of personal information should be actionable as a “breach of trust.”).


\textsuperscript{119} Volokh, supra note 10, at 1058.

\textsuperscript{120} McClurg, supra note 32, at 888.
Similarly, Neil Richards and Daniel Solove have argued that the courts should read a duty of confidentiality into intimate relationships to resolve these disputes.\textsuperscript{121} They point to the British breach of confidentiality tort, which they argue has the same common law origins as American privacy law. Under English law, a duty of confidentiality attaches “whenever information is imparted, either explicitly or implicitly, for a limited purpose.”\textsuperscript{122} This system allows recovery by a plaintiff against a number of people if they reveal information of a personal nature because, “[t]he information about the relationship is for the relationship and not for a wider purpose.”\textsuperscript{123} English law, Richards and Solove argue, “serves as a useful example of an alternative way that the common law can conceptualize and regulate unwarranted disclosures of personal information.”\textsuperscript{124} Thus this view suggests that, based on societal norms, most individuals have an implied duty not to reveal certain private information about others with whom they have a personal relationship.

Even critics of the public disclosure tort or other information privacy protections, such as Zimmerman and Volokh, have suggested that expanded contract liability might be an appropriate method for addressing problems posed by the unauthorized disclosure of private information. Volokh has conceded that at least to

\textsuperscript{121} Neil M. Richards and Daniel J. Solove, Privacy’s Other Path: Recovering the Law of Confidentiality, 96 GEO. L. J. 123 (2007); see also G. Michael Harvey, Comment, Confidentiality: A Measure Response to the Failure of Privacy, 140 U. PA. L. REV. 2385, 2392 (1992) (arguing for a “a legally enforceable duty of confidentiality that attaches whenever a person or institution intentionally or negligently engages in an unauthorized disclosure of inaccessible, personal information that she/it has explicitly and voluntarily agreed to hold in confidence, and this disclosure results in the publicity of that information.”).

\textsuperscript{122} Richards & Solove, supra note 121, at 159.


\textsuperscript{124} Id. at 181.
some limited degree, applying contract law to promises not to reveal personal
information “is eminently defensible under existing free speech doctrine.”¹²⁵

While the implied-contract framework is a promising approach to some speech-
versus-privacy problems, it is insufficient to resolve the conflict with autobiographical
speech. For this approach to work it would need to hinge significantly on the contextual
intricacies of the relationship, making it difficult to predict whether a duty exists and
leading to a highly subjective analysis. This subjectivity is inherently threatening to the
constitutional rights of the autobiographical speaker.

As an initial matter, the origin of this duty of confidentiality is questionable. Do
we really have such societal customs again disclosure? Does a reasonable person assume
a sibling or child will not someday, through the telling of her life story, reveal private
information about the family? Is it reasonable for someone entering into a relationship,
even an intimate relationship, to presume the other person will not reveal to anyone else
anything about private matters that occurred? The concept of “kissing and telling” is
nothing new¹²⁶ nor is autobiography. And while the concept that a person has a right to
control what information about himself or herself is released publicly is found in areas
such as the doctor-patient relationship or attorney-client privilege, “[t]he individual’s

¹²⁵ Volokh, supra note 10, at 1057; see also Zimmerman, supra note 63, at 363
(observing that more attention should be given “to increasing the use of legal sanctions
for the violation of special confidential relationships, in order to give individuals greater
control over the dissemination of personal information”)
¹²⁶ According to William Safire, “[t]he original meaning of the infinitive phrase to kiss
and tell was ‘to boast of one’s sexual exploits.’ It was coined, or first used in print, by the
playwright William Congreve in his 1695 comedy, ‘Love for Love’: ‘O fie, Miss,’ said a
swain worried about his love’s indiscretion (she was in the process of blabbing all to her
stepmother), ‘you must not kiss and tell.’” William Safire, On Language: Kissing and
Telling about Kiss-and-Tell, N.Y. TIMES, June 5, 1988, Sunday, Late City Final Edition,
at 16. (section 6, page 16, column 3, magazine desk)
right to control information is far from implicit in other human relationships.\textsuperscript{127} As Singleton has observed, “[g]enerally, people do not feel obligated to ask for anyone’s permission before relaying the information they have collected to a third party, however embarrassing the subject of the information might be.”\textsuperscript{128} The Ninth Circuit Court of Appeals suggested that society accepts that when we allow another into our home that person “may repeat all he hears and observes when he leaves.”\textsuperscript{129} Singleton also has suggested that it is “a default rule of human interactions, and not something to which we consent” that all individuals may share opinions and observations about others.\textsuperscript{130} In keeping with this thinking, most states and the federal government have enacted “one-person consent” laws that allow a conversation to be recorded as long as one person in the conversation is aware of the recording.\textsuperscript{131} Thus rather than accepting a web of implied contracts or duties not to disclose, both legal and societal customs suggest we understand that we might talk about others and others might talk about us. As one court has noted, “[a] cause of action can not lie each time someone succumbs to the temptation to break a confidence and whisper a juicy rumor.”\textsuperscript{132}

Discerning the parameters of a duty of confidentiality in personal relationships is also problematic. How many dates are required before the duty kicks in? Does a one-night stand qualify? Assuming a marriage creates the duty, does a divorce nullify it? How can a person desiring to share his or her story (and therefore reveal parts of others’

\textsuperscript{127} Singleton, supra note 62, at 123.

\textsuperscript{128} Id.

\textsuperscript{129} Dietemann v. Time, Inc., 449 F.2d 245, 249 (1971).

\textsuperscript{130} Singleton, supra note 62, at 124-125.

\textsuperscript{131} See A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C., available at http://www.rcfp.org/taping/quick.html

lives) cancel an implied promise not to tell or refuse to make it? Must a potential future speaker declare her intentions at the outset of the relationship? Must the other person consent? Clearly an adult member of a family who wishes to speak about his childhood, including revealing personal information about other family members, cannot be forced into silence because he did not negate the implied duty at birth or as a young child.

A realistic and workable contract or confidentiality framework, therefore, would need to embrace a highly contextual approach to these relationships and employ a fact-based inquiry into the particular relationship at issue. Thus in some intimate relationships there might be facts suggesting an implied promise existed while in others there are not. Each relationship is different and therefore broad norms are insufficient to set the rule. Sometimes ten dates would be enough to invoke the duty, but sometimes less and sometimes more. What we are looking for, in other words, would be an implied-in-fact contract not one that was implied-in-law.

This implied-in-fact contract analysis is similar in many ways to trade secret law, which requires a case-by-case factual inquiry into issues such as whether the information at issue was actually secret, whether the owner of the secret took adequate protective measures and whether the defendant knew that the information was a trade secret. Only in “extreme cases,” according to Judge Posner, can a trade secret dispute be settled on summary judgment because there are so many factual considerations that must be

133 See, e.g., Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 179 (7th Cir. 1991) (observing that determining whether reasonable precautions were taken “depends on a balancing of costs and benefits that will vary from case to case and so require estimation and measurement by persons knowledgeable in the particular field of endeavor involve”).
examine by a trial court judge or a jury. Ultimately the question in trade secrets cases is whether the defendant disclosed information that he knew or had reason to know was a trade secret. In other words, was there an implied understanding between the two parties that the defendant would not disclose the information? 

The difficulty with applying such a highly contextual approach to the speech-versus-privacy conflict is the lack of predictability and fairness and, most significantly, the highly subjective nature of such an inquiry. Clearly replacing broad rules with case-by-case inquiries comes at the cost of predictability for the parties. An autobiographical speaker would have a difficult time discerning in advance whether the particular relationship she wishes to discuss involved an implied-in-fact contract or duty of confidentiality. The elements of human relationships that could be relevant are overwhelming, and it is unclear what factors would be important to this inquiry. As is always the case whenever there is uncertainty with speech regulations, this would raise concerns of a chilling effect where valuable speech is wrongly silenced. That concern of self-censorship is especially high here. The implied-in-fact contract approach, moreover, is also highly subjective for many of the same reasons it is unpredictable. With so many factors to consider and so little guidance on how to evaluate them, the judge or jury would have too much power to protect the speech of some based on subjective opinions about the speaker and not based on the law.

Applying this framework to human relationships, furthermore, is less fair than in the trade secret context. With trade secrets, the inquiry is into whether the defendant genuinely knew or had reason to know that the information at issue was a secret that he

134 Id.
135 RESTATEMENT (THIRD) OF UNFAIR COMPETITION §40.
was obligated not to reveal. It is more appropriate to apply this standard to the arms-length relationships between employers and employees or among business competitors. Participants in these relationships are more likely to be on notice that their interactions are triggering legal duties and that those duties might include obligations not to disclose. In the context of personal relationships, however, it is far less likely that the parties knew they were invoking a legal obligation to keep a secret. Applying such a duty to them would require embracing a legal fiction that goes against our societal norms and fails to give the parties adequate notice of their potential liability.

Ultimately, autobiographical speech made by the “ordinary” person would be particularly vulnerable under the contract or confidentiality approach. Individuals who desire to speak publicly about their life experiences will most assuredly be speaking about others as well. If they are bound by an implicit promise not to disclose information about the people with whom they have developed a relationship, their stories simply cannot and will not be told. One might respond that this limiting duty will extend only to other persons with whom the would-be speaker has developed an intimate relationship. Yet the closer a relationship is, the more central it becomes to the speaker’s story. The consequences of muzzling autobiographical speakers are grave because silencing autobiographical speech prevents people from giving witness to their life experiences. The result is that their stories are erased from the public dialogue.

III. PROPOSING A NEW APPROACH TO THE FACE-OFF

The foregoing analysis suggests that previous efforts to deal with speech-versus-privacy conflicts involved trying to shove a square peg into a round hole. The power to disclose, or not disclose, personal information should not be transmuted into something it
is not—whether that something is a property entitlement, an implied contract or a duty of confidentiality. In this Part, I return to the world of tort law in search of a resolution and re-examine the tort of public disclosure of private facts. I conclude that an overemphasis on the “newsworthiness” of the disclosure is constitutionally fatal for the tort because it leaves valuable speech unprotected. But by taking a new look at the tort and the requirement that the disclosure be “highly offensive to a reasonable person,” I argue that both the tort and the privacy interest it seeks to protect can be saved. I propose a new “justified disclosure” approach that directs the focus away from the problematic newsworthiness inquiry. This approach accepts that the core purpose of the tort is not to separate information based on newsworthiness but rather to prevent unjustified disclosures. It is unjustified disclosures, not non-newsworthy ones, that are “highly offensive to a reasonable person.”

Analyzing the tort through the lens of whether the disclosure was justified or unjustified (as opposed to newsworthy or not newsworthy) is consistent with one view of the case law, adequately balances the competing interests of speech and privacy, fits within our cultural norms, and is constitutionally sound. It protects autobiographical speech while providing some security for information privacy. It is also arguably more predictable and fair than other suggested frameworks. And while my analysis focuses on autobiographical speech, its sliding scale approach promises to be applicable in other broader conflicts between free speech and privacy.

136 I note again that I use the term “newsworthiness” to refer to a court’s inquiry into whether speech is newsworthy, a matter of public concern, or a matter in the public interest
The justified disclosure approach does, admittedly, mean that the privacy interest will outweigh the speech right only in a small number of cases where the autobiographical speech interest is minimal and the privacy interest is exceedingly high. Most supporters of the privacy right concede that the strong free speech interests leave only a narrow path to victory. The Supreme Court’s approach to any regulation on the content of the speech, requiring that the government establish that the regulation was necessary to further a compelling government interest, is purposely difficult to overcome. The result is a system in which “occasions when competing social values are found to outweigh the interest in unrestricted freedom of speech are highly exceptional.”

General constitutional protections for speech combined with the unique value of autobiographical speech suggest that establishing liability should be difficult, yet the special importance of information privacy argues that recovery not be entirely foreclosed. The Court struck a similar speech-favoring balance in the conflict with defamation and reputational harm by allowing a limited path for recovery in an attempt to safeguard the community’s interest in protecting reputation “while diminishing as little as possible the constitutionally guaranteed right of free speech.”

A. Reexamining the Tort of Public Disclosure of Private Facts

1. An Overemphasis on Newsworthiness

The central role of the newsworthiness defense in cases involving speech and privacy cannot be overstated. It began with Warren and Brandeis who exempted “matter

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138 *Id.* at 367.
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which is of public or general interest”¹³⁹ from their fledgling privacy right.¹⁴⁰ Dean Prosser built on this idea by defining the tort as including only “not newsworthy” disclosures. Today consent and newsworthiness are repeatedly listed as the primary two defenses to a disclosure charge. In fact, much of the scholarship on the privacy-versus-speech debate presupposes that the conflict is between private plaintiffs and the media so that the ultimate question is whether the speech is or is not newsworthy.¹⁴¹

This focus on newsworthiness by courts and scholars has led to an incorrect assumption by many that a disclosure of a private fact is either “newsworthy” and therefore constitutionally protected or not newsworthy and therefore of lesser or no First Amendment value.¹⁴² The Ninth Circuit has declared as much, stating that “unless it be privileged as newsworthy … the publicizing of private facts is not protected by the First

¹³⁹ Warren & Brandeis, supra note 14, at 214.
¹⁴⁰ There is an irony in the over-emphasis on newsworthiness today, however, which is that Warren and Brandeis were concerned with revelations by the press. Kalven, supra note 31, at 330 (“Warren and Brandeis were concerned only with public disclosure in the press of truthful but private details about the individual which caused emotional upset to him.”) Indeed, it is now well known that it was the press’s coverage of his daughter’s wedding which first led Warren to write the article. Id. at 329, n. 22.
¹⁴¹ See, e.g., Solove, supra note 6, at 1029 (“It is the media’s dark underbelly—reporting on the latest celebrity scandal—that will be in the gray zone and might be chilled. And this consequence is not as terrible as the free speech critique proponents make it out to be. Why should the media be allowed to do whatever it wants, no matter how socially detrimental or harmful to individuals, no matter how great the costs to others in society, no matter how few the benefits produced?”).
¹⁴² See also Diane Leenheer Zimmerman, Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!, 10 DePaul-LCA J. ART & ENT. L. 283 (2000), noting this dichotomy in the fair use exception to right of publicity cases. “As I mentioned previously, both its advocates and opponents have always agreed that the scope of any possible property interest in publicity is limited by the free speech clause of the Constitution. If a use of a celebrity’s identity occurs in a “newsworthy” setting, the use does not, all concede, violate any property right. [internal citation omitted]. But matters quickly go awry because the flip-side assumption seems to be that if a use is not newsworthy, it must perforce be commercial. And if it is commercial, then it does not have a First Amendment dimension and is fair game for regulation. [internal citation omitted].”
Amendment.”¹⁴³ The Tenth Circuit has agreed that “dissemination of non-newsworthy private facts is not protected by the first amendment.”¹⁴⁴ Rodney Smolla has interpreted the Court’s decision in Bartnicki v. Vopper as holding that the newsworthiness defense “separate[s] that which deserves protection from that which does not.”¹⁴⁵

I propose that this is a false dichotomy and an unconstitutional approach. While newsworthy speech is certainly deserving of constitutional security, a finding that speech is not newsworthy should not strip it of all First Amendment protection. There are important constitutional values in non-newsworthy speech that deserve attention even when facing off against information privacy. Nothing in First Amendment law even remotely suggests that only speech on “newsworthy” subjects merits judicial protection.¹⁴⁶ All sorts of communicative activity—ranging from expression of group pride to musical performance to nude dance—has been wrapped in the mantel of the First Amendment. My work suggests one additional category has constitutional value—autobiographical speech—and there certainly may be more. The key point is that autobiographical speech, even with respect to non-newsworthy subjects, advances the individual and societal goals of the freedom of speech. It, therefore, deserves constitutional protection.

¹⁴³ Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975).
¹⁴⁴ Gilbert v. Med. Econcs. Co., 665 F.2d 305, 308 (10th Cir. 1981); see also Shulman v. Group W Prods., Inc., 955 P.2d 469, 484 (Cal. 1998) (“The contents of the publication or broadcast are protected only if they have ‘some substantial revelant [sic] to a matter of legitimate public interest’” (quoting Gilbert, 665 F.2d at 308)).
¹⁴⁵ Smolla, supra note 51, at 1152.
¹⁴⁶ See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995) (“The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.”).
Not only is the law’s existing emphasis on newsworthiness constitutionally unsound, it generates confusion because it shifts attention away from the actual type of disclosures of private information that society finds highly offensive and with which the public disclosure tort is concerned. The tort is not about the protection of newsworthy speech, but about protecting individuals from unwarranted and emotionally harmful disclosures of private information. In other words, as courts balance autobiographical speech and information privacy, it is critical that they keep in mind what the tort is trying to prevent—harmful disclosures made without an adequate justification. Newsworthiness is one such adequate justification, but it is not the only one. Disclosures done for a reason that is purely voyeuristic, however, are not sufficiently justified. The appropriate question in a speech-versus-privacy conflict is thus not whether the speech is newsworthy, and therefore protected, but rather whether the defendant’s reason for disclosing the information was strong enough to outweigh the emotional harm to the plaintiff.

2. The Dual Purposes of the “Offensiveness” Inquiry

While supporters of the tort argue that individuals should have a right to control if, when and how private information is revealed, the tort does not allow individuals to keep any fact in their lives private at any time. As Dean Prosser explained, “[t]he law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity.”

Rather, the tort places several limitations on what kind of personal information can be protected from disclosure and under what circumstances. For example, there is no privacy violation if the information revealed was already known.

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by many people, even if someone has gone to great lengths to keep it secret from a
certain segment of society or acquaintances, because “there is no liability for giving
further publicity to what the plaintiff himself leaves open to the public eye.” Likewise
there is no recovery if the disclosure was not “public” in the sense that it was revealed to
a large audience. And, of course, the “newsworthiness” exception means that persons
might find themselves at the center of a public controversy concerning even the most
private matter, with no recourse whatsoever. As Judge Posner has explained:

People who do not desire the limelight and do not deliberately choose a
way of life or course of conduct calculated to thrust them into it
nevertheless have no legal right to extinguish it if the experiences that
have befallen them are newsworthy, even if they would prefer that those
experiences be kept private.

All of these limitations on recovery embrace an understanding that all individuals must
live with the risk that, at times, they might involuntarily lose control over personal
information.

The most significant limitation on recovery is the requirement that the disclosure
must be “highly offensive to a reasonable person.” Dean Prosser explained that “[a]ny
one who is not a hermit must expect the more or less casual observation of his neighbors
and the passing public as to what he is and does, and some reporting of his daily
activities.” A privacy violation thus must involve a revelation of a greater magnitude
than this and be something that a reasonable person would conclude has crossed the line.

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151 RESTATEMENT (SECOND) OF TORTS, § 652D.
152 Prosser, supra note 147, at 396-97.
The offensiveness element plays a key role in defining the private-facts tort, and close inspection reveals that courts view it as serving two different purposes. The first purpose is to ensure that the sensitive and personal content of the information revealed is of a nature that a reasonable person would find it highly offensive. The second function of the offensiveness element is to examine the purpose of the disclosure and discern whether the reason for the disclosure was of such minimal social or personal value that it does not justify the harm it has caused.

a. The Nature of the Information

The first type of “offensiveness” is fairly straightforward. In order to prevail on a public disclosure claim the plaintiff must show that a reasonable person would conclude that the content of the information is of a kind that its disclosure qualifies as highly offensive. Mere embarrassment or humiliation alone is not considered sufficient to meet this standard. Rather, the publicized information must be “deeply shocking to the average person subjected to such exposure.”\(^\text{153}\) As a general matter, a reasonable person would be offended to have nude photos revealed publicly, but not offended to have a photo of her walking down the public sidewalk. Dean Prosser pointed out that “[t]he ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit or gone camping in the woods, or that he has given a party at his house for his friends.”\(^\text{154}\)

Certain categories of information are frequently found to be highly offensive under this standard—such as sexual matters and medical information. Judge Posner declared in one case that protecting “intimate physical details” is “at the core” of the

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\(^{153}\) *Haynes*, 8 F.3d at 1234-35.

\(^{154}\) Prosser, *supra* note 147, at 396-97.
public disclosure tort.^{155} Yet even in cases that involve disclosure of this type of intimate information, the identity of the plaintiff and the context of the information could affect the analysis. For example, it might not be offensive for nude photos to be released of a celebrity who has made a name for herself as a sex symbol even if it would be highly offensive for most individuals.^{156} Conversely, the release of generally banal information like addresses and telephone numbers is unlikely to be offensive for most people but could be highly offensive if it were the personal information of abortion providers who have been the target of death threats.^{157}

b. The Reason for the Disclosure

The second function of the “offensiveness” element examines the reason for the disclosure and then determines whether that reason provides a sufficient justification for disclosure in the eyes of a reasonable person. Several courts, for example, have suggested that a reasonable person should not find it highly offensive for personal information to be publicly disclosed if it is newsworthy,^{158} surmising that “the public’s interest in the news and the absence of less invasive methods of reporting the story may mitigate the offensiveness of the intrusion.”^{159} Similarly, the California Supreme Court has held that an intrusion into a person’s privacy might not be highly offensive, or might be less offensive, “when employed by journalists in pursuit of a socially or politically

^{155} Haynes, 8 F.3d at 1234-35.
^{158} Haynes, 8 F.3d at 1232. In Bonome v. Kaysen, 2004 WL 1194731, at *7, the court found that it was not “offensive” to have personal information revealed only to the extent it shared a logical nexus with a matter of legitimate public concern.
important story”¹⁶⁰ than if done purely for the purpose “of harassment, blackmail or prurient curiosity.”¹⁶¹ The point is that the purpose of the invasion of privacy is vital to determining whether the act was sufficiently offensive to trigger liability.

By examining the justifications for disclosure of personal information, the courts reveal that a disclosure is deemed to be most offensive—meaning the most unwarranted—when it arises out of simple nosiness about other people’s lives. Warren and Brandeis wrote in favor of a right of privacy to prevent the publication of “unseemly gossip,” arguing that “[w]hen personal gossip attains the dignity of print, [it] crowds the space available for matters of real interest to the community.”¹⁶² Judge Posner described the offense as being about preventing “gratuitous” disclosures,¹⁶³ explaining that the goal is to prevent “the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.”¹⁶⁴ The Restatement explains that we are most offended by the “morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”¹⁶⁵ The Ninth Circuit observed that disclosures that satisfy nothing more than

¹⁶¹ Id.
¹⁶² Warren & Brandeis, supra note 14, at 196.
¹⁶³ Haynes, 8 F.3d at 1229.
¹⁶⁴ Id. at 1232.
¹⁶⁵ “However, the newsworthy privilege is not without limitation. Where the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection.” Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983) (internal quotations omitted); see also Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998).
our “prurient curiosity”\textsuperscript{166} are not protected while the Sixth Circuit has decried invasions of privacy that are nothing more than “obvious exploitation of public curiosity.”\textsuperscript{167}

It is when an individual suffers substantial harm because his private information was exposed for the purpose of gawking, prying or gossiping that the courts are concluding the privacy interest can prevail. Some passages in the commentaries suggest that gossip (at least in certain forms) is both socially valuable and constitutionally protected.\textsuperscript{168} At its core, however, the public disclosure tort is aimed at protecting us from extreme cases of just this sort of “gratuitous” speech. Some gossip is protected because the information revealed is not highly offensive. Some gossip is protected because it is found to be newsworthy. But some gossip is highly offensive and unwarranted, and this is where the public disclosure tort comes to life.\textsuperscript{169}

3. Focusing on the Purpose of the Disclosure Tort

From what has been said so far it appears that the law, as reflected in the courts’ views of “offensiveness,” is concerned with protecting disclosures that are done for the “right” reasons as well as with stopping disclosures that are done for the “wrong” ones. There are a number of “wrong” reasons. Blackmail and harassment, for example, have

\textsuperscript{166} Shulman, 955 P.2d at 493.
\textsuperscript{168} Posner, The Right of Privacy, 12 GA. L. REV. 393, 397 (1978) (“Gossip columns open people’s eyes to opportunities and dangers; they are genuinely informational.”). See also Zimmerman, supra note 63, at 334.
\textsuperscript{169} See Solove, supra note 6, at 1064 (“As for gossip, although some of the time it can educate people about human nature, often it functions only to entertain. . . . If the purpose of gossip is to teach us lessons about human nature in general, there is often no need to identify individuals who desire privacy.”)
been mentioned. The remaining “wrong” reasons are described in various terms but tend to converge on the same idea—private individuals should not have to suffer the severe emotional harm of having a deeply personal fact about them revealed publicly if the purpose of the disclosure is not sufficient. The simple desire of some to pry into the private lives of others, these cases reveal, is not a sufficient justification. It is this type of unwarranted disclosure that the community finds “highly offensive” and for which constitutional protections are at their weakest or perhaps non-existent. And despite repeated predictions of its demise, the public disclosure tort perseveres in order to prevent and punish this type of harmful disclosure.

This analysis suggests that the common approach to the disclosure tort as requiring a simple separation of the newsworthy from the non-newsworthy disclosure is incorrect. Instead, the focus should be on the justification for the disclosure and whether it is sufficient to overcome the harm to the plaintiff. As Daniel Solove recently suggested, it is the “context in which it is gathered and disseminated, and … the purpose or the use of the data” that should decide whether the disclosure is protected or not. Solove explained that “[a] focus on uses means that the law must examine the purpose of the disclosure, not just the nature of the information disclosed.” Yet Solove’s emphasis, like most others, is on trying to separate out the speech that involves a matter of public concern, which he calls “high value” speech, from that of purely private concern, which he considers “low value” speech. This analysis is in essence the same as the newsworthiness inquiry. He concludes that “[o]ften, the same piece of information is

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170 Shulman, 955 P.2d at 493.
171 Solove, supra note 6, at 1019.
of both private concern and public concern—it just depends on the context."  
Under this approach, personal information that is revealed for a newspaper article is more likely to be considered high value speech than is personal information used for commercial marketing.  

This view of the “high” versus “low” value of speech is particularly concerning for the autobiographical speaker. Indeed, the value of autobiographical speech emanates largely from its immensely personal nature. Most autobiographical speakers experience the rewards of self-realization and fulfillment by telling their stories to a broad audience. At the same time, they add to the public discourse and debate by commenting on life in our society and on the human condition as lived by the individual in real terms. For this reason, our individual and collective understanding is enhanced by hearing their voices. The autobiographical speech concept is aimed at protecting this type of seemingly non-newsworthy speech by ordinary citizens. Yet there is a great risk that the value of hearing about life experiences of “ordinary” people, particularly members of minority and oppressed groups, will not be recognized by courts or by society. Thus drawing a legal line based on a judge or jury’s view of whether their stories are a matter of “public concern” or of “high value” is exceedingly troubling. The ultimate decision as to what is or is not a significant part of a person’s life story should rest with that person alone. Much like deciding what constitutes great art, autobiographical speech is an area in

\[172 \text{ Id. at 1031.}\]
\[173 \text{ Id. at 1019.}\]
\[174 \text{ See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned} \]
which “no official, high or petty”\textsuperscript{175} should be given the power to decide the worth of any individual’s life story. With Solove, I share the view that looking at the context of the speech and the use of the information is helpful. I disagree, however, that the proper touchstone for analysis concerns whether the speakers’ purpose focuses on sharing newsworthy information versus non-newsworthy information. The proper approach would take account of both aspects of the “offensiveness” inquiry—focusing not only on the nature of the information itself but also the purpose of the disclosure.

\textbf{B. The Autobiographical Speech Justification}

When private information is publicly disclosed, therefore, the proper question is not simply whether the information was newsworthy, which is a constitutionally underinclusive inquiry, but whether was there a sufficient justification for the disclosure such that a reasonable person would not find its revelation highly offensive. Taking into consideration the individual and public value of autobiographical speech, I propose that it is not highly offensive to have personal information revealed when that information is substantially related to the speaker’s autobiographical purpose. In the context of core autobiographical speech, much like in the context of newsworthiness, the privacy interest should yield to the speech interest if the speech is truly autobiographical and if the information is substantially linked to this autobiographical purpose. If, however, the

privacy interest is high yet the autobiographical interest is tangential or minimal, there is room for the privacy interest to prevail.

In determining the autobiographical justification of the speech, two inquiries should be made that are drawn, in part, from the case law discussing “newsworthiness.” First, was the speech as a whole truly autobiographical? And, if so, was the personal information, including the person’s actual name and identifying information, sufficiently related to the autobiographical purpose of the speech to warrant the invasion of privacy?

1. **Does the Speech Have an Autobiographical Purpose?**

To discern whether one person’s speech justifies violating another person’s information privacy because of its autobiographical purpose, the first matter to be resolved is whether the speech at issue is indeed autobiographical. Just as all information is arguably “newsworthy”\(^{176}\) or “political,”\(^ {177}\) virtually all speech can be described in some manner as “autobiographical.” A news reporter who overhears an account of the stranger’s sexual tryst, for example, could logically argue that that account is now part of his life story. Such a broad definition of “autobiographical,” however, trivializes the unique and valuable category of speech that deserves protection.

Any attempt to define a category of speech is difficult and destined to be imprecise. The definition of “political” speech, for example, which is famously declared to be at the core of the First Amendment, is still much-debated and subject to ongoing refinement. This is, as Lawrence Lessig described, “the contingency of present First Amendment doctrine.”\(^ {178}\) The problems with defining autobiographical speech are no

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\(^ {176}\) Zimmerman, *supra* note 63, at 351.

\(^ {177}\) *See* West, *supra* note 9, at 924-26.

different. A definition that is too broad will protect more speech than is necessary to further the goals of autobiographical speech while a definition that is too narrow leaves valuable speech unprotected. A definition that is too complex, meanwhile, risks chilling speech while one that is too simple might be imprecise and vague. These are the unavoidable intricacies of human communication, however, and must be accepted in order to proceed. With these caveats and limitations in mind, I offered in my earlier article this inaugural definition of autobiographical speech: “autobiographical speech is speech that is substantially related to the story of the speaker’s life and that a reasonable person would presume was communicated with the primary intent of sharing information about the speaker.”¹⁷⁹

This definition attempts to capture the speech that should be protected because of the value it contributes to the individual and to society while, at the same time, setting forth limiting principles to exclude speech that does not further these goals. The definition also pulls from existing case law. The “substantially related” element, for example, requires that there be a significant nexus between the information communicated and the speaker’s life.

My proposed definition, however, also includes elements that reflect the unique nature of autobiographical speech. For example, the definition requires the speech to be about “the story of the speaker’s life.” The value of autobiographical speech arises out of individuals choosing to truthfully share their life experiences. The further the speech strays from this core purpose, the less valuable it becomes as far as an instance of autobiographical speech.

¹⁷⁹ West, supra note 9, at 959.
Finally, the definition includes a requirement that “a reasonable person would presume [the speech] was communicated with the primary intent of sharing information about the speaker.”\textsuperscript{180} An inquiry into the intent of the speaker can be a controversial proposition and, in some cases, the Supreme Court has rejected this approach. In a criminal libel case, for example, the Supreme Court rejected a standard found in many state laws, which limited the defense of truth to only those “utterances published ‘with good motives and for justifiable ends.’”\textsuperscript{181} The Court explained that public discourse will be harmed if a speaker “must run the risk that it will be proved in court that he spoke out of hatred.”\textsuperscript{182} The Court further noted that “even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”\textsuperscript{183} Likewise, the Court stated in a campaign finance case that it is inappropriate to have a test based on the speaker’s intent because it “could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.”\textsuperscript{184} The Court further explained that “First Amendment freedoms need breathing space to survive. An intent test provides none.”\textsuperscript{185} Martin Redish agrees, claiming that “under well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.”\textsuperscript{186}

In other areas of speech, however, the Court repeatedly has allowed an inquiry into the intent of the speaker to determine whether certain speech was part of a

\textsuperscript{180} \textit{Id.}
\textsuperscript{181} Garrison v. Louisiana, 379 U.S. 64, 70 (1964).
\textsuperscript{182} \textit{Id.} at 73.
\textsuperscript{183} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 469 (quoting N.A.A.C.P. v. Button, 371 U.S. 415 (1963)).
constitutionally protected category. For example, when faced with speech that is arguably an unlawful incitement of violence, the Court looks to whether the advocacy was “directed to inciting or producing imminent lawless action”. In defamation cases, the Court will decide whether a false statement was made intentionally or not, and a speaker’s “economic motivation” is a factor in determining whether speech can be qualified as “commercial.” In determining whether a public employee’s speech is protected, the Court will look at the purpose of the speech. The Seventh Circuit interpreted the Court’s test in Connick v. Myers as stating that “[t]he test requires us to look at the point of the speech in question: was it the employee’s point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?” The Court has declared that a “true threat,” moreover, “encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” as well as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

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191 Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985); see also Martin v. Parrish, 805 F.2d 583, 585-86 (5th Cir. 1986) (“Appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress -- to ‘motivate’ them” and appellant’s “language is unprotected under the reasoning of these cases because, taken in context, it constituted a deliberate, superfluous attack on a ‘captive audience’ with no academic purpose or justification.”); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1187 (6th Cir. 1995) (“The court must ask to what purpose the employee spoke.”).
The Court also examined the speaker’s motive when determining whether government speech violates the Establishment Clause. The Court explained:

The meaning of a statement to its audience depends both on the intention of the speaker and on the “objective” meaning of the statement in the community. . . . Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.\textsuperscript{193}

As discussed above, when individuals chose to speak truthfully and publicly about their life experiences, their speech contributes significantly to the public discourse and to their own personal growth. It is these unique values of intentional autobiographical speech that my work is attempting to protect. Of course, speech undertaken for non-autobiographical purposes may well be constitutionally protected, as the newsworthiness precedents reveal. In addition, a privacy challenge might fail because it cannot establish all elements of the claim. Those matters are outside the scope of this article. For my purposes, an inquiry into the intent of the speaker is helpful and, indeed, indispensible, in identifying the types of speech that are most deserving of protection.

The intent of the speaker can be analyzed in two ways—subjectively and objectively. A subjective approach would look to the actual intent of the speaker regardless of how the speech was perceived by her audience. Because of the inherent difficulty in discerning someone’s thoughts, a subjective intent test would most likely require courts or juries to defer to the speaker’s representation of whether the intent was

autobiographical or not. When it comes to deciding whether disclosure of a private fact was newsworthy, many courts do simply defer to the media.\textsuperscript{194}

This approach has been both lauded\textsuperscript{195} and criticized.\textsuperscript{196} Deferring to the media to tell us what is and is not newsworthy has its advantages. Most notably, it keeps the courts out of the business of deciding the value of speech and making decisions that could amount to judicial censorship.\textsuperscript{197} The media, it is assumed, has outside pressures from their readers, viewers and listeners to report on only matters that are of public interest, otherwise their business will fail. These checks on the media might be insufficient when, however, “[w]hat is of interest to most of society is not the same question as what is of legitimate public concern.”\textsuperscript{198} Warren and Brandeis most certainly would not have supported a “defer to the media” approach; they had little faith in the press’s ability to know the line. They complained that “[t]he press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the

\begin{footnotesize}
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\item Kalven, \textit{supra} note 31, at 336 (“[S]urely there is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness.”).
\item See Volokh, \textit{supra} note 10, at 1089 (“Under the First Amendment, it’s generally not the government’s job to decide what subjects speakers and listeners should concern themselves with.”).
\item See Solove, \textit{supra} note 6, at 1006 (stating “the media should not have a monopoly on determining what is of public concern.”).
\item See Heath v. Playboy Entertainment, 732 F. Supp. 1145, 1149 (S.D. Fla. 1990) (“[W]hat is newsworthy is primarily a function of the publisher, not the courts.”). The Fifth Circuit has explained that judges “must resist the temptation to edit journalists aggressively. . . . Exuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists.” Ross v. Midwest Commc’ns., 870 F.2d 271, 275 (5th Cir. 1989).
\item Solove, \textit{supra} note 6, at 1001.
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resource of the idle and of the vicious but has become a trade, which is pursued with industry as well as effrontery.”

Deferring to the autobiographical speaker to tell us whether speech is or is not a necessary part of their life story is similarly flawed. Indeed, the potential pitfalls of deferring to the speaker only intensify with autobiographical speakers, who lack profit motives and have no pressure to self-regulate.

For these reasons, an objective intent standard provides the proper approach for dealing with autobiographical speakers. A standard that asks whether a reasonable person would conclude that the speaker’s primary intent was to share information about the speaker effectively captures the speech that furthers the valuable contributions of autobiographical speech while excluding speech that, while arguably autobiographical, was spoken for an ulterior motive. This approach also guards against efforts by speakers to purposely inflict emotional harm on others by revealing personal information while attempting to hide behind the “autobiographical speech” defense.

2. Is the Identifying Information Necessary to Further the Autobiographical Purpose?

Just because the speech is primarily autobiographical does not necessarily suggest that someone should be free to broadcast another person’s personal information with impunity. The second part of the inquiry thus examines whether the information is sufficiently linked to the autobiographical purpose to warrant the invasion of privacy. More specifically, when are the plaintiff’s name and other identifying information necessary to further the autobiographical purpose of the speech?

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199 Warren & Brandeis, supra note 14, at 196.
There is much to be drawn here from the courts’ current approach to the newsworthiness inquiry, because many courts have demanded that there be a link between the privacy plaintiff’s personal information and the overall “newsworthiness” of the speech before allowing the exemption. The Fifth and Tenth Circuits, for example, ask whether “a logical nexus exist[s] between the complaining individual and the matter of legitimate public interest.” Sometimes the inquiry is whether the private fact itself was a necessary part of the overall newsworthy story. But more often the question is whether the plaintiff’s name, photograph, or other identifying information was sufficiently relevant to the newsworthiness of the speech to justify the intrusion on the plaintiff’s privacy. The California Supreme Court asks whether the private facts disclosed by the speaker “were substantially relevant to the segment’s newsworthy subject matter.”

Frequently, courts have concluded that while the information in general was newsworthy, the plaintiff’s personal information or at least information that would identify the plaintiff to others was not. Thus there was no need for the media to reveal the identifying information. In one of the most famous personal information cases, *Melvin v. Reid*, the California Court of Appeal said that it was the use of the plaintiff’s “true name in connection with the true incidents from her life” that crossed the legal line

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200 Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).
201 See, e.g., Nobles v. Cartwright, 659 N.E.2d 1064, 1076 (Ind. Ct. App., 1995) (stating that “when dealing with the disclosure of such allegedly ‘private’ fact about a plaintiff, courts generally require an appropriate nexus or some sufficient degree of relatedness between the fact or information disclosed and a matter which was . . . of legitimate public interest.”).
of privacy.\(^{204}\) Merely using “those incidents from the life of appellant which were spread upon the record of her trial,” however, would not give rise to a cause of action.\(^{205}\) In *Briscoe v. Reader’s Digest Association*, likewise, the California Supreme Court held in similar fashion that “reports of the facts of past crimes are newsworthy,” but “identification of the *actor* in reports of long past crimes usually serves little independent public purpose.”\(^{206}\)

At times, however, courts have concluded that the media need to use actual names and identifying information in order to substantiate their reporting and thus “strengthen the impact and credibility of the article.”\(^{207}\) The Tenth Circuit, for example, said that using a plaintiff’s photograph and actual name was important because “[t]hey obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff’s name and photograph been suppressed.”\(^{208}\) The Fifth Circuit agreed, stating that “[t]he infamous Janet Cooke controversy (about the fabricated, Pulitzer-Prize winning Washington Post series on the child-addict, Jimmy) suggests the legitimate ground for doubts that may arise about the accuracy of a documentary that uses only pseudonyms.”\(^{209}\) Judge Posner came to the same conclusion, noting that forcing an

\(^{204}\) *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931).

\(^{205}\) *Id.*

\(^{206}\) *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 40 (Cal. 1971).

\(^{207}\) *Gilbert v. Med. Econsc. Co.,* 665 F.2d 305, 308 (10th Cir. 1981); *see also* *Howard v. Des Moines Register & Tribune Co.*, [get cite] (holding that the use of actual names of persons who were involuntarily sterilized “strengthen[ed] the accuracy of the public perception of the merits of the controversy”); *Ross v. Midwest Communications, Inc.*, [get cite] (finding that reporting the identity of an alleged rape victim was of “unique importance to the credibility and persuasive force of the story”).

\(^{208}\) *Gilbert*, 665 F.2d at 308.

\(^{209}\) *Ross v. Midwest Commc’nns.,* 870 F.2d 271, 274 (5th Cir. 1989).
historian to change all identifying information about one of his subjects would mean that “he would no longer have been writing history. He would have been writing fiction.”

The analysis of when use of someone’s actual name or other identifying information is sufficiently linked to the autobiographical purpose of the speech is very similar to examination of the issue under newsworthiness. In some cases, the use of this identifying information is only tangentially related to the autobiographical nature of the speech, so that requiring the speaker to omit it would not significantly affect the speaker’s autobiographical goals. Yet, in other cases, asking the speaker to leave out this information would so fundamentally alter the story that the speaker would no longer be truthfully accounting about her life experiences or the omission could give the appearance that her story is fabricated.

In some cases, the use of pseudonyms can be an effective way to protect the privacy interest of others. In many cases, however, this will be ineffective. Consider the subject of Judge Posner’s decision in Haynes v. Knopf—Ruby Lee Daniels. She was the protagonist of author Nicholas Lehman’s historical study of the black migration north in his book, Promised Land. Daniels spoke to the historian about her personal experiences willingly, truthfully, and, presumably, because wanted her story told. She told of the disastrous effects of the government’s policies on her relationship with her then-husband Luther Haynes. Posner discussed the possibility that a pseudonym could have been used instead of Haynes’ real name. The effort, Posner noted, would have been futile. As he explained:

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210 Haynes v. Alfred Knopf, Inc., 8 F.3d 1222, 1233 (7th Cir. 1993).
211 Id.
The details of the Hayneses’ lives recounted in the book would identify them unmistakably to anyone who has known the Hayneses well for a long time (members of their families, for example), or who knew them before they got married; and no more is required for liability in defamation law or in privacy law.\textsuperscript{212}

Indeed, what Posner predicted is precisely what occurred in \textit{Bonome v. Kaysen}. In that case the author Susana Kaysen did not reveal her live-in boyfriend’s name, but rather referred to him throughout the book simply as “my boyfriend.”\textsuperscript{213} She also changed certain potentially identifying information about him such as his occupation and hometown.\textsuperscript{214} Despite these efforts to hide his identity, her boyfriend’s friends, family and business contacts were able to identify him as the person depicted in the book.\textsuperscript{215}

These examples reveal that in some cases the use of pseudonyms will not be effective because too many people will be able to identify the plaintiff. In order to successfully hide the plaintiff’s identity, the speaker would have needed to change numerous details about the person and the incident being discussed. Such significant alteration of identifying information would transform the speaker’s factual story into a semi-fictional one. In Kaysen’s case, moreover, it might have been impossible for her to tell her story at all, because there was no way for her to talk about how her medical condition affected her long-term, intimate relationship without in some way identifying her former boyfriend. She only revealed the smallest amount of identifying information about him that was necessary for her to tell her story. The court in \textit{Bonome v. Kaysen} recognized the importance of Kaysen’s choice not to use his name, noting that even if he

\begin{itemize}
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textit{Bonome v. Kaysen}, No. 032767, 2004 WL 1194731, at *1 (Mass. Super. Mar. 3, 2004). \textit{Id.}, at *1
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.} at *2.
\end{itemize}
was still identifiable to those who “knew of the relationship,” the exposure could have been considerably broader.\(^\text{216}\) Thus, in Kaysen’s case and in other cases like hers where there is a legitimate autobiographical purpose and no effective way to conceal the plaintiff’s identity, the autobiographical speaker’s right to speak truthful must prevail.

But there remain some cases where the use of pseudonyms or altered identifying information would be effective at protecting the plaintiff and the changes would not interfere significantly with the autobiographical nature of the speech. These are the cases where the plaintiff’s privacy interest can and should be recognized and given force. Take, for example, the Capitol Hill staffer Jessica Cutler. While she attempted to hide the identities of the men in her life by not using their names and by writing anonymously, her efforts were exceedingly simple and easily decipherable. She used their real initials and offered bits of information about their current jobs, religion and families.\(^\text{217}\) This proved to be sufficient information for other inquisitive bloggers to uncover the identities of the men she was discussing.\(^\text{218}\) The identifying information was not necessary to Cutler’s autobiographical purpose of sharing her myriad relationship experiences. Indeed, it is possible that she could have hidden their identities even if she had not written anonymously. A standard that would require Cutler, and others like her, to be more diligent about protecting the identities of the men would successfully protect their privacy interests while still allowing her to share her autobiographical speech.\(^\text{219}\)

\(^{216}\) *Id.* at *7.

\(^{217}\) Poor Mojo’s Almanac, *supra* note 23 (May 11, 2004, 2:21 p.m.).


\(^{219}\) Solove, *supra* note 6, at 1199 (“Jessica certainly has a right to speak about her life, but she should do it more carefully by concealing the identities of the people she blogs about.”).
The speaker’s decision to use pseudonyms or to alter identifying information can also provide insight into the speaker’s intent as discussed above. Efforts to hide the plaintiff’s identity, whether successful or not, provide evidence that the speaker intended to share information about herself and not about the plaintiff. Even accepting that that level of exposure was “arguably odious,” the court was persuaded by the fact that Kaysen did not subject her ex-boyfriend to any “unnecessary publicity or attention.” In other words, she revealed what she needed to reveal to effectively tell her story, but no more and this is evidence of her autobiographical intent.

Thus, in addition to establishing whether the speaker was speaking with an autobiographical purpose, courts should inquire whether the use of the plaintiff’s name or other identifying information was necessary to further that purpose. If it is not necessary, the burden can be placed on speaker to take reasonable efforts to conceal the plaintiff’s identity. Using the speaker’s efforts to hide the plaintiff’s identity as evidence of a true autobiographical intent, moreover, will incentivize speakers to only reveal on information that identifies others if it is necessary for them to tell their story.

C. The Benefits of the Justified Disclosure Approach

The justified disclosure approach picks up where the current legal system and other potential frameworks break down. Under current law, there is a risk that many truthful autobiographical stories will be silenced because of an over-emphasis on the “newsworthiness” inquiry. Identifying these speakers, while excluding those with non-autobiographical motives, protects both their constitutional rights and their unique contributions to the public discourse. This approach, however, leaves room to recognize

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220 Bonome, No. 032767, 2004 WL 1194731, at *7
the privacy interests of individuals who could be harmed by unwanted publicity in cases where the speech was not primarily autobiographical or where their identities were not necessary to the autobiographical purpose of the speech.

The traditional focus on “newsworthiness” when dealing with public disclosure cases allows courts to punish truthful, but non-newsworthy, autobiographical speech—an approach that is constitutionally unsound. Because the Constitution does not exclude all non-newsworthy speech from the protections of the First Amendment, adhering to the “newsworthiness” framework could be fatal for the tort. The justified disclosure approach, however, solves this problem by separating the constitutionally valuable speech from the more harmful unjustified disclosures. This analysis is in line with the majority of the case law in which courts have concluded that it is not “highly offensive” under the tort to have personal information disclosed if it is for a sufficient reason.

Through their interpretation of what is “highly offensive” to a reasonable person, courts are reflecting community norms and expectations. The courts have concluded, for example, that it is highly offensive to have personal information revealed for purely voyeuristic reasons. In this way, the justified disclosure approach has many of the same benefits of Richards and Solove’s duty of confidentiality framework. While the justified disclosure approach is not as predictable as a bright-line rule always favoring speech, it is preferable to an overly complex fact-based analysis of a duty of confidentiality framework. It involves only a two-step inquiry into the objectively autobiographical intent of the speaker and the link between the plaintiff’s identity and the autobiographical purpose of the speech. A would-be autobiographical speaker, moreover, can protect himself ex ante by taking every reasonable step to conceal the identities of others and
only reveal as much personal information about other as is necessary to tell his story. This approach is also arguably fairer because no fact-finder will have the power to judge the value of the speech, only whether the identifying information was necessary to further an objectively autobiographical purpose.

And while this approach favors the speaker, it remains respectful of the significant information privacy interest at stake and provides real, if limited, privacy protection. Privacy plaintiffs can prevail under this framework if they can establish that the disclosure of their personal information was unjustified and thus highly offensive or, in the case of autobiographical speech, if they can show that their identifying information was not necessary to further the autobiographical purpose.

This article is focused on resolving the autobiographical speech versus information privacy conflict, yet the justified disclosure approach promises to be useful in a number of speech-versus-privacy disputes. Its focus on the reason for the disclosure and its goal of identifying and punishing emotionally harmful yet unjustified disclosures such as pure voyeurism has a potentially much broader application.

**CONCLUSION**

There are fewer things more valuable to human beings than our own life experiences—they embody our fondest memories, our deepest shames, our greatest fears and our most enduring loves. As free citizens, we all wish to control these stories and decide for ourselves if, when, how, and to whom they will be revealed. Some of us find it cathartic to share them broadly, while others of us wish to hold them close. Sometimes these conflicting desires are irreconcilably at odds.
The best approach to the autobiographical speech versus information privacy dilemma is to recognize the inherent value of speaking about life experiences while, at the same time, remaining aware of the potential harms some public disclosures bring. Both autobiographical speech and information privacy promote individual autonomy and foster our democracy. Yet prior attempts to balance the two significant interests have failed. Privacy and speech are not property rights that we own, sell and trade. And it would be a complicated legal fiction to say that we have undeclared contracts with each other about when to speak and when to stay quiet.

What we do have, however, are shared understandings about when it is acceptable to disclose personal information about others and when it is highly offensive. The courts, through an interpretation of the tort of public disclosure, have begun to recognize this by declaring that it is not highly offensive to a reasonable person to have private information revealed for a sufficient justification. Pure voyeurism, the courts have concluded, is not a sufficient reason to inflict the emotional harm of a public disclosure on an individual. Sharing newsworthy information is a sufficient justification as is, I submit, engaging in truthful autobiographical speech. In addition to resolving the autobiographical speech versus information privacy face-off, this approach promises to be applicable to a broad range of speech versus privacy disputes.