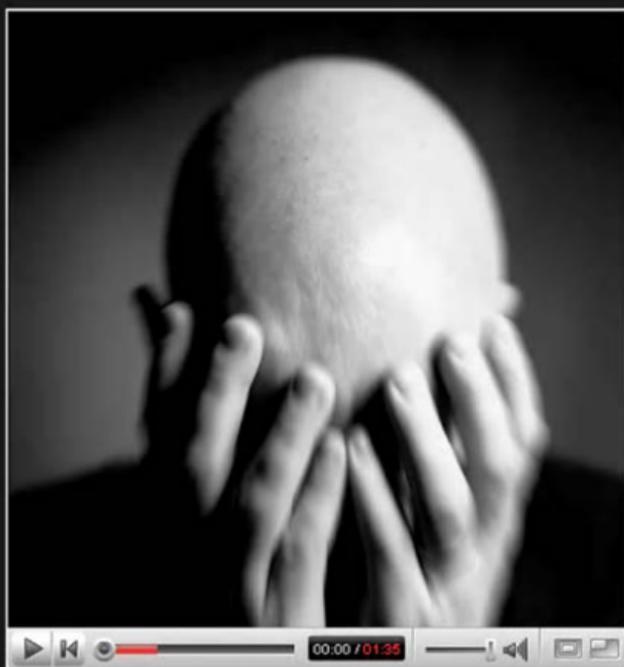


the future of **reputation**

gossip, rumor, and
privacy on the internet



Daniel J. Solove

The Future of Reputation

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The Future of Reputation

Gossip, Rumor, and
Privacy on the Internet

Daniel J. Solove

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To Papa Nat

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Preface

The idea for this book came to me soon after I began blogging in May 2005. I found blogging to be enthralling and invigorating. I was fascinated by the thrill of expressing my thoughts to a broad audience yet acutely aware of how people could be hurt by gossip and rumors spreading over the Internet.

In an earlier book, *The Digital Person: Technology and Privacy in the Information Age*, I explored how businesses and the government were threatening privacy by collecting massive digital dossiers of information about people. In that book, it was easy to take sides. I argued that information collection and use were threatening people's freedom and well-being, and that greater protection of privacy was necessary. When it comes to gossip and rumor on the Internet, however, the culprit is ourselves. We're invading each other's privacy, and we're also even invading our own privacy by exposures of information we later come to regret. Individual rights are implicated on both sides of the equation. Protecting privacy can come into tension with safeguarding free speech, and I cherish both values. It is this conflict that animates this book.

Although I advance my own positions, my aim isn't to hold them out as end-all solutions. The purpose of the book is to explore in depth a set of fascinating yet very difficult questions and to propose some moderate compromises in the clash between privacy and free speech. There are no easy answers, but the issues are important, and I believe that it is essential that we wrestle with them.

Many people helped shape the ideas in this book through conversations and helpful comments on the manuscript: danah boyd, Bruce Boyden, Deven Desai, Tom Dienes, Howard Erichson, Henry Farrell, Bill Frucht, Eric Goldman, Marcia Hofmann, Chris Hoofnagle, Orin Kerr, Ray Ku, David Lat, Jennie Meade, Frank Pasquale, Neil Richards, Paul Schwartz, Michael Sullivan, Bob Tuttle, Christopher Wolf, and David Wolitz. My research assistants, James Murphy and Erica Ruddy, provided helpful research and proofreading. A few passages in this book were adapted from my article "The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure," 53 *Duke Law Journal* 967 (2003). My agent, Susan Schulman, believed in this book from the start and helped tremendously in bringing it to fruition. I would also like to thank Michael O'Malley at Yale University Press, who also believed in this project and gave me the opportunity to bring it to life, and Dan Heaton, for his thoughtful editing of the manuscript.

When quoting from blog posts, I have occasionally corrected obvious typos and spelling errors.

Chapter 6 Free Speech, Anonymity, and Accountability

Gossiping. Shaming. Rumor-mongering. All have pernicious effects on people's lives, yet they all involve acts of expression. When the law restricts the circulation of information, it creates potential threats to free speech. This is one of the main reasons that the law of defamation and privacy are limited in scope. If the law's goal is to restrict the spread of information when it causes harm, how can the law do so without unduly infringing upon freedom of speech?

GOOD SPEECH, BAD SPEECH

Freedom of speech is an essential right in a democratic society. As the poet and essayist John Milton put it eloquently in 1644, "The liberty to know, to utter, and to argue freely according to conscience [is] above all liberties."¹ Reflecting this wisdom, the First Amendment to the U.S. Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."² Freedom of speech gives us the right to express ourselves even if our speech is trivial, despicable, crass, and repulsive. We don't allow the govern-

ment to regulate “matters of taste and style” in speech, the Supreme Court has ruled, since “one man’s vulgarity is another’s lyric.”³ As the Court also declared, we have a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”⁴

The Supreme Court has held that the First Amendment right to freedom of speech places some limits on defamation law. The Court had originally viewed defamation as not being protected by the First Amendment because it has “no essential part in the exposition of ideas.”⁵ Speech that defamed a person was not a key part of public debate, so it didn’t warrant constitutional protection. However, the Court changed its position in the famous case of *New York Times v. Sullivan* in 1964, when it concluded: “Erroneous statement is inevitable in free debate, and . . . it must be protected if freedoms of expression are to have the ‘breathing space’ they need to survive.”⁶ Instead of wiping out defamation law, the Court crafted a compromise to balance the protection of free speech with the ability to seek redress for defamatory statements. In later cases, the Supreme Court left the defamation tort largely intact for “private figures” but limited it significantly for “public figures.”⁷ A “public figure,” one who has achieved a general level of “notoriety” or who has come to the “forefront of particular public controversies,” must prove that the speaker acted with “actual malice.”⁸ “Actual malice” requires that the person who made the statement knew that it was untrue or acted “with reckless disregard of whether it was false or not.”⁹ Basically, famous people have to prove that the defendant intentionally told lies about them or simply didn’t care whether rumors were true or not. Actual malice is hard to establish, and most plaintiffs who have to prove it lose their cases.¹⁰ Private citizens need only show the defendant to have been negligent when he told lies, a much easier standard to establish.

The Supreme Court could have simply abolished the defamation torts of libel and slander in the name of free speech, but it compromised and preserved much of defamation law. One reason, the Court noted, was that falsehoods are “not worthy of constitutional protection” and that the “First Amendment requires that we protect some falsehood in order to protect speech that matters.”¹¹ In other words, the First Amendment protects false speech not for its own sake but as a means of protecting true speech. Moreover, the Court observed, it is important also to preserve the “individual’s right to the protection of his own good name,” which “reflects no more than our basic concept of the essential dignity and worth of every human being.”¹²

The law of privacy clashes more directly with free speech. As we have seen, unlike defamation law, which applies only to falsehoods, privacy law allows

people to redress harms caused by the spread of true information about themselves. Truth is one of the primary defenses to a defamation case, but the fact that information is true will do nothing to halt a privacy case. The famous tort law scholar William Prosser viewed the privacy torts as creating “a power of censorship over what the public may be permitted to read, extending very much beyond . . . the law of defamation.”¹³ Many scholars have argued that it is difficult or even impossible to square the privacy torts with freedom of speech. As the First Amendment scholar Thomas Emerson argues: “Any individual living among others is, by the very nature of society, subject to an enormous amount of comment, gossip, criticism and the like. His right to be left alone does not include any general right not to be talked about.”¹⁴ Similarly, another First Amendment scholar, Eugene Volokh, contends: “The difficulty is that the right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me.” Volokh concludes that the First Amendment “generally bars the government from controlling the communication of information.”¹⁵

If Emerson and Volokh are right, then there’s little the law can do. The First Amendment gives people the right to say whatever they want so long as it is true. It gives you and me the right to blog our thoughts without fear of reprisal. How can the public-disclosure tort—which would make someone liable for saying true things about someone else—be constitutional under the First Amendment? Although the privacy torts can be squared with the First Amendment, the issue is a difficult one, and it requires a bit of explanation.

Absolutism

A popular view of the First Amendment is that its protection of free speech is absolute. This means that if somebody is engaging in speech, then the First Amendment bars any attempt to regulate or prohibit that speech—no matter how odious or harmful the message might be.

Justice Hugo Black became famous for adopting this position.¹⁶ Black argued that the First Amendment is an “unequivocal command that there shall be no abridgment of the rights of free speech and assembly.”¹⁷ In one lecture, Black declared: “It is my belief that there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be ‘absolutes.’”¹⁸ An interviewer once asked Justice Black what precisely he meant by these words. Black replied by taking out the copy of the Constitution that he always carried in his pocket. He read

the First Amendment: “Congress shall make no law . . .” And then he said: “That’s the First Amendment—I would think: Amen, Congress should pass no law. Unless they just didn’t know the meaning of words.”¹⁹

If you’re a free-speech absolutist, much of the law protecting privacy becomes difficult to defend. The First Amendment forbids the law from restricting people from saying what they want to say.

Balancing

Justice Black’s absolutist approach didn’t win the day. Instead, the Supreme Court currently resolves free-speech cases by balancing speech against opposing interests.²⁰ Under a balancing approach, the value of free speech is high, but it’s not absolute. If there’s a good enough reason, then free speech can be trumped. So the balancing approach views free speech as important, just not sacrosanct.

Even under a balancing approach, critics of privacy protections argue that free speech has a high value that will trump privacy except under exceptional circumstances. When balancing, courts analyze any law—including a tort law—under a level of constitutional “scrutiny.” The highest form of constitutional scrutiny is strict scrutiny. Under strict scrutiny, to “outweigh” a First Amendment interest, a law must be the “least restrictive means” to achieve a “compelling” government interest.²¹ Laws restricting speech rarely survive strict scrutiny, which has been referred to as “‘strict’ in theory and fatal in fact.”²² Volokh argues that many laws protecting privacy should be subjected to strict scrutiny: “Political speech, scientific speech, art, entertainment, consumer product reviews, and speech on matters of private concern are thus all doctrinally entitled to the same level of high constitutional protection, restrictable only through laws that pass strict scrutiny.”²³ This means that the Warren and Brandeis tort of public disclosure is probably unconstitutional if we apply the strict-scrutiny standard.

Contrary to Volokh’s stance, current case law holds that not all forms of speech are worthy of being protected with strict scrutiny. Some forms of speech are less important than others. If we look at current Supreme Court law, not all forms of speech are protected equally.²⁴ For example, the Supreme Court gives less protection to commercial speech, which occupies a “subordinate position in the scale of First Amendment values.”²⁵ Since commercial speech isn’t protected with strict scrutiny, the law can more readily regulate it.

Speech of private concern should be given less protection than speech of public concern. The Supreme Court has endorsed this view to a limited ex-

tent. In one case, the Supreme Court concluded that “not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”²⁶ In short, the Supreme Court ruled that speech of private concern should be given much less protection than speech of public concern.²⁷ The Court has never held that Warren and Brandeis’s public disclosure of facts tort is unconstitutional. The tort has been around for more than one hundred years, so if the Court were to suddenly strike it down, it would be a bolt out of the blue.

The Supreme Court has thus left open an area for the public-disclosure tort to thrive. Recall the last element of the public-disclosure tort—the “newsworthiness test”—that the speech cannot be of “legitimate concern to the public.” If it is, then the case is dismissed. If the speech involves matters of private concern, then the lawsuit proceeds. The newsworthiness element of the public-disclosure tort is designed to protect free speech. The tort was, after all, designed by Louis Brandeis, who after becoming a Supreme Court justice, was a champion of the First Amendment. He is considered one of the great heroes of free speech. But he also believed in the importance of protecting privacy, and he reconciled free speech and privacy with the newsworthiness test.

BALANCING FREE SPEECH AND PRIVACY

Several scholars think that the Supreme Court should abolish the privacy torts when they conflict with free speech. The law professor Diane Zimmerman, for example, argues that the public-disclosure tort should be “scuttled” because the costs to free speech are too high; potential litigation will have a chilling effect on speech and the tort inhibits the “free exchange of personal information.”²⁸ Zimmerman raises a valid point—the privacy torts definitely have the potential to chill speech.

There are compelling reasons, however, why the Supreme Court is right not to eliminate the privacy torts, especially the public-disclosure tort. In fact, protecting privacy—and restricting free speech in some cases—can actually advance the reasons why we protect free speech in the first place. Since this sounds paradoxical, some explanation is in order.

We first need to begin by looking at why free speech is valuable. We’re so used to assuming that free speech is important that we often don’t take the time to think about why. But the why of it really matters. Those pondering

the issue have come up with a number of reasons. I will discuss three of the most popular ones: individual autonomy, democracy, and the marketplace of ideas.

Individual Autonomy

One of the most frequently articulated rationales for why we protect free speech is that it promotes individual autonomy.²⁹ We want people to have the freedom to express themselves in all their uniqueness, eccentricity, and candor. Stopping Jessica Cutler from speaking about Robert in her *Washingtonienne* blog limits her freedom. The autonomy of listeners is also involved. Many people enjoyed Cutler's blog. Stopping Cutler from writing her blog will take away stories that many people might want to read.

But the autonomy justification cuts both ways. As the law professor Sean Scott observes, "The right to privacy and the First Amendment both serve the same interest in individual autonomy."³⁰ The disclosure of personal information can severely inhibit a person's autonomy and self-development.³¹ Julie Cohen notes that lack of privacy can "chill the expression of eccentric individuality."³² The risk of disclosure can inhibit people from engaging in taboo activities.³³ From Cutler's blog, it seemed as though she fully consented to Robert's spanking and kinky sex. She liked being with him. So why shouldn't Robert be able to have sex the way he wants to with another consenting adult? The risk of disclosure, however, might prevent people from doing things they enjoy because of fear of social disapproval. Privacy allows people to be free from worrying about what everybody else will think, and this is liberating and important for free choice.

Privacy protects more than just people's freedom to engage in an unconventional sex life. Privacy permits individuals to express unpopular ideas to people they trust without having to worry how society will judge them or whether they will face retaliation.³⁴ Without privacy, it is hard for many people to sound off about their bosses or express their honest opinions. All of these activities are central to people's autonomy. Protecting privacy can promote people's autonomy as much as free speech can.

Democracy

Free speech is also vital to democracy. The famous First Amendment scholar Alexander Meiklejohn argued that free speech is important not because we should protect the individual's desire to speak but because free speech is necessary for a robust political discourse. According to Meiklejohn, "What is es-

sential is not that everyone shall speak, but that everything worth saying shall be said.”³⁵ As the law professor Owen Fiss observes: “On the whole does [speech] enrich public debate? Speech is protected when (and only when) it does, and precisely because it does.”³⁶ In other words, free speech is most valuable when it contributes to public discussion on issues of policy and politics. Under this view, speech of private concern is relatively unimportant. Reporting people’s secrets rarely contributes much to politics. Was Jessica Cutler’s Washingtonienne blog about her sexual exploits on Capitol Hill really useful for a political debate? It’s a titillating and engrossing read, but our democracy probably isn’t going to suffer without it. As Benjamin Franklin asserted: “If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please. But if it means the Liberty of affronting, calumniating, and defaming one another, I for my part . . . shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus’d myself.”³⁷

In fact, privacy protections can strongly promote democratic discussion and debate.³⁸ Political discussions often take place between two people or in small groups rather than at public rallies or nationwide television broadcasts. More discourse about politics occurs in personal conversations than on soapboxes or street corners. Without privacy, many people might not feel comfortable having these candid conversations. Protecting privacy can actually promote free speech, not just restrict it.

The Marketplace of Ideas

A third justification for free speech is that it contributes to the promotion of truth. This justification was most famously propounded by the philosopher John Stuart Mill, who observed that it is best not to censor speech, because that speech might be true, and censors can’t infallibly distinguish between the true and the false.³⁹ Justice Holmes drew from this theory when he articulated the notion of the marketplace of ideas: “When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”⁴⁰ Under the marketplace theory, free speech enables us to find the truth. The law should butt out and let people decide for themselves what’s true and false.

But truth isn't the only value at stake.⁴¹ Truth must be weighed against other values. As one nineteenth-century English judge put it: "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."⁴² There are many "truths" that are not worth much effort to find out. For example, there is a true answer to the number of paperclips I have in my office, but this information does not have much value. Much true information is trivial and useless. The value of the quest for the truth depends upon what information one is seeking. The truth about a private person's personal life is often worth little or nothing to the general public.

On balance, privacy furthers many of the same interests that free speech does. Free speech is indispensable because it promotes autonomy, democracy, and the quest for the truth. But these interests also depend upon protecting privacy. A balance between free speech and privacy might achieve these interests more effectively than merely protecting speech at all costs.

NEWSWORTHINESS

To reconcile the public disclosure tort with free speech, the tort doesn't apply when the information is of "legitimate concern to the public."⁴³ This is referred to as the "newsworthiness test." If a particular disclosure is newsworthy, then a public-disclosure tort case is dismissed. This newsworthiness limitation is included in the tort to protect free speech.

Information is of public concern when "the public has a proper interest in learning about [it]."⁴⁴ For example, the Restatement of Torts distinguishes between "information to which the public is entitled" and "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."⁴⁵ What is of interest to most of society is not the same question as what is of legitimate public concern. It is possible that people will want to hear a story even when they do not consider it of legitimate public concern. For example, a video of Pamela Anderson having sex with Bret Michaels was sold over the Internet, generating hundreds of thousands of dollars in revenue.⁴⁶ A video of the president giving a speech would be much less lucrative. Does this make the sex tape more newsworthy? Ample public curiosity doesn't make a piece of gossip newsworthy, as such interest can stem from a hunger for prurient entertainment instead of from a desire to learn about the news and current events. Therefore information that involves matters of public concern is protected; information that merely provokes our prurient curiosity is not.

Identifying Information

In many instances, there is little need for a story about a person's private life to identify the person. The facts of the story may be of legitimate concern to the public, but the identification of the people involved might not further the story's purpose. In one case, for example, a woman suffered from a rare disease that caused her to continue to lose weight no matter how much she ate. A reporter wrote an article about her called "Starving Glutton," and it contained a photograph of her in a hospital bed. The court found the facts of the woman's disease to be newsworthy, yet the court still let the case proceed because the story could have been told effectively without identifying the woman: "While plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not."⁴⁷

Contrast the "Starving Glutton" case with that of Ruth, who was involved in a horrible car accident. The car was so badly mangled that she had to be cut from the car with the "jaws of life" device. Ruth was rushed away in a helicopter. A while later, lying in her hospital bed as a paraplegic, Ruth was watching *On Scene: Emergency Response*, a reality television show featuring real medical rescues. She was shocked when she saw that this episode was about her. Scenes from her rescue were vividly featured, including images of her mangled body in the car. Ruth was appalled. She said: "It's not for the public to see this trauma that I was going through."

Ruth sued for public disclosure of private facts. The court, however, dismissed her case because Ruth's rescue and treatment were of legitimate concern to the public. Ruth argued that the show's producers should have edited the episode to obscure her identity. The court, however, rejected her argument: "That the broadcast could have been edited to exclude some of Ruth's words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press."⁴⁸ Here, the court simply deferred to the media, an approach that I believe is dodging the issue. The show could have readily been edited to protect Ruth's privacy by blocking her face and not revealing exact details about Ruth's identity. Why not require a few small steps to protect people like Ruth?

One common argument against shielding people's identities is that doing

so erodes the credibility of an article.⁴⁹ Identifying people in news stories certainly allows people to verify the stories independently. But many stories of paramount importance have employed anonymous sources. In exposing the Watergate break-in and cover-up, for example, Bob Woodward and Carl Bernstein relied on the well-known pseudonymous source “Deep Throat.” When journalists protect confidential sources, they engage in a balancing determination, sacrificing the public’s ability to verify for the importance of protecting confidentiality. Public verifiability is not sacrosanct; it can be outweighed by privacy interests. Of course, concealing identities cannot work for all stories, especially those about public figures, since it is the identity of the person that gives the story its relevance. But in many cases, there is no need to identify.

Speaking About One’s Life

Bloggers like Jessica Cutler do not have an unfettered free-speech right to talk about other people’s private lives. People like Robert should be able to sue bloggers like Cutler when they reveal private details that are not of legitimate concern to the public.

However, there is one other important issue involved in the case that must be addressed—Cutler’s right to speak about her own life. Our lives are intertwined with those of others. If you want to write an autobiography, you’re probably going to have to talk about other people, unless you spent your life living in a shack in the woods on a mountainside. Telling Cutler not to speak about her relationship with Robert—even though it may be of private concern—seems rather stifling to her freedom to express herself. It would be one thing for a stranger to talk about Cutler and Robert’s sex life, but it’s another if either Cutler or Robert wants to talk about it. Shouldn’t we be extra careful to preserve people’s ability to tell their own life stories?

Oddly, few cases address the issue of who is doing the talking. The focus is on whether the information is of legitimate concern to the public regardless of whether Cutler is speaking about her own life or whether some reporter is talking about it. A better approach would be for the law to pay attention to who is divulging the secret. It is essential for autonomy that a person be able to talk about her own life—even when what she’s describing isn’t newsworthy. It’s one thing to silence a person from speaking about a piece of juicy gossip about someone else, but it is quite an extreme step to stop a person from talking about her own life.

But even if Cutler has a special right to speak about her own life—whether

newsworthy or not—that doesn't mean that she can do so irresponsibly. The law should still require her to be careful not to damage the lives of others like Robert. To better think about these issues, let's look at a similar case. Susanna Kaysen was a well-known author, having written the book *Girl, Interrupted*, which was made into a movie costarring Angelina Jolie, who won an Oscar for her role.⁵⁰ Kaysen started having an affair with Joseph, a married man. She ultimately persuaded him to leave his wife, and he divorced in 1996 and moved in with Kaysen. At some point afterward, Kaysen started to experience severe vaginal pain. She went to doctor after doctor, but none was able to help her. Kaysen began to write a book about her experiences. She didn't tell Joseph about the subject of her book. In 1998 Kaysen broke it off with Joseph. Three years later, in 2001, she published her book, *The Camera My Mother Gave Me*, an autobiographical account of her terrible vaginal pain and how it affected her relationship with Joseph. She referred to Joseph at all times only as her "boyfriend" and altered some details about his life, such as where he was born and his occupation.

The book contained some graphic descriptions of their sex. In the book Joseph becomes impatient with Kaysen's condition and continually pesters her for sex, even resorting to "whining and pleading." Kaysen depicts Joseph in an unflattering light, as insensitive to her plight. In one scene where Joseph tries to have sex with Kaysen, she writes: "I felt he was trying to rape me. Because he hadn't seen how willing I was. All he could see was what he wanted."

When the book came out, many of Joseph's friends, family, and business clientele read the book and knew that Joseph was the "boyfriend." Joseph sued under the tort of public disclosure of private facts, claiming that his reputation was severely harmed. The court dismissed Joseph's case, concluding that the book was newsworthy. The topic of the effects of Kaysen's vaginal pain on her relationships was a matter "of legitimate public concern, and it is within this specific context that the explicit and highly personal details of the relationship are discussed." The court also noted that Kaysen had a "right to disclose her own intimate affairs." She was "telling her own personal story—which inextricably involves [Joseph] in an intimate way."⁵¹

The court was right that Kaysen's and Joseph's lives were intertwined and that Kaysen has a right to talk and write about her own life. The most important consideration, however, should have been whether it was possible for Kaysen to avoid identifying Joseph. She did indeed take as many steps as possible to conceal the identity of Joseph, not only omitting his name but even altering details about his life to further prevent his identification. It wasn't pos-

sible to do much more. Therefore Kaysen appears to have exercised the appropriate level of care in the steps she took to protect Joseph from being identified. She should win for this reason.

Turning back to the *Washingtonienne* case, there's no need to stop Cutler from talking about her sex life. She just needs to do it a bit more thoughtfully, with more attention to the rights of the other person involved. All Cutler had to do was avoid using Robert's initials and avoid mentioning where he lived, as these were key clues that would make it possible to identify him.

But she's just a twenty-something amateur, one might say, so why should we expect her to exercise the care of a professional journalist? The answer is that the line between amateur and professional journalists is dissolving. The Internet gives amateurs a power similar to what professionals have—to reach thousands, perhaps millions, of people. And with power should come some responsibility. While we can't expect bloggers to be perfect in all the steps they take to shield others' identities, we should hold them to a reasonable standard of care. Cutler was sloppy in handling Robert's identity when she blogged. As a result, she upended his life. This didn't have to happen. Cutler could still have written her story. And Robert's sex life could still have remained private. In many cases—as in this one—with a little bit of care, free speech and privacy can peacefully coexist.

ANONYMITY

Article III Groupie wasn't the typical groupie, obsessed with rock stars. Instead, her fixation was on federal judges. Named after Article III of the U.S. Constitution, which establishes the powers of the federal judiciary, Article III Groupie was a young law school graduate who created the blog *Underneath Their Robes*. Article III Groupie blogged about “scrumptious tidbits of news and gossip about federal judges.”⁵² She also dished out gossip about law clerks, recent law school graduates who assisted judges for yearlong stints. As Article III Groupie described her blog:

This weblog, “Underneath Their Robes” (“UTR”), reflects Article III Groupie's interest in, and obsession with, the federal judiciary. UTR is a combination of *People*, *US Weekly*, *Page Six*, *The National Enquirer*, and *Tigerbeat*, focused not on vacuous movie stars or fatuous teen idols, but on federal judges. Article III judges are legal celebrities, the “rock stars” of the legal profession's upper echelons.



Article III Groupie's electronic face

This weblog is a source of news, gossip, and colorful commentary about these judicial superstars!

According to her self-description, Article III groupie graduated from a top law school and worked for “a large law firm in a major city, where she now toils in obscurity.” She described herself as a “diva” and as a “federal judicial starf**ker.”

Little more was revealed about the elusive Article III Groupie. She said that in “her free time, she consoles herself through the overconsumption of luxury goods” and that her “goal in life is to become a federal judicial diva.” Article III Groupie’s identity was shrouded in secrecy. The only picture of the mysterious Article III Groupie was a small hand-drawn sketch.

Who was this Sex-in-the-City-type diva? How bizarre that she would be starstruck by the nerdy world of the federal judiciary! How exciting that someone—anyone—was even interested in this lonely corner of the world in the same way that groupies were into rock stars! Suffice it to say that Article III Groupie’s blog was quite quirky and entertaining. She seduced the online legal world with her exuberance and audacity. Who else but Article III Groupie would dare to hold “hottie” contests for male and female judges?⁵³ Who else had the moxie to use such catty phrases as “judicial divas,” “bench-slappery,” “litigatrix,” “bodacious babes of the bench,” “judicial hotties” and “judicial prima donnas”?

Article III Groupie’s gossipy blog was a big hit. It attracted an impressive array of readers, including federal judges themselves. It was U.S. Appeals Court Judge Alex Kozinski who anointed Article III Groupie with the nick-

name A3G. And U.S. Court of Appeals Judge Richard Posner admitted that he enjoyed the site: “It’s occasionally a little vulgar, but this is America in 2005.”⁵⁴

One day, rather abruptly, A3G decided to unmask herself. The opportunity came when Jeff Toobin of the *New Yorker* wanted to interview A3G in person. A3G agreed to meet him for lunch. When Toobin saw A3G, his jaw dropped. “So you’re a guy?” Toobin gasped.

Yes, A3G was a man. His name was David Lat. Lat was a graduate of Yale Law School who had clerked for a conservative federal judge on the U.S. Court of Appeals for the 9th Circuit. I knew Lat personally; he was a classmate of mine at Yale Law School. But I had no idea Lat was A3G until I read it in Toobin’s *New Yorker* article. To make matters more interesting, Lat worked as a federal prosecutor in Newark, New Jersey.⁵⁵ He regularly appeared in court before federal judges.

When Toobin’s article revealed to the world A3G’s true identity, it sent shockwaves throughout the legal community. This amazing disrobing quickly drew the attention of the mainstream media, and Lat’s story was featured in scores of newspaper articles.

Lat had decided to be anonymous as a way of protecting his job while maintaining such a salacious blog. In an interview, Lat explained: “The law is a fairly conservative profession, and being known as a legal gossip-monger would not be good for my professional advancement. It also wouldn’t help me in my lifelong ambition to become an Article III judge. Issuing snarky commentary about sitting federal judges won’t put me on a fast track to the federal bench.”⁵⁶ Beyond the inherent difficulties of juggling the blog with his law career, Lat regularly appeared in federal court representing the United States government. Without anonymity, the very judges he was calling “your honor” in the courtroom would know he was referring to them as “hotties” in the blogosphere. It was difficult to imagine how he could continue to represent the federal government in court.

Moreover, Lat’s anonymity provided a sense of mystery to the blog. Now that mystery had vanished. The blog just wouldn’t be the same without Lat’s unique alter ego, A3G. One commentator wrote in a post about A3G at another legal blog: “This is terrible. I can’t read that site knowing the author is a man.”⁵⁷ Anonymity had allowed Lat to assume a new identity, a persona he carefully designed to be as distinct from himself as possible. One reader of his blog who knew him stated in an interview in the *New York Times*: “David was on this one side a hard-core Federalist Society type, who clerked for an ex-

tremely hard-right judge, and was way to the right of most of his associates. And he had this whole other side of flamboyant, theater-watching, Oscar-watching, shoe-loving, litigatrix. How do these two sides get reconciled?”⁵⁸

Anonymity allows people to escape accountability for their words, but this comes at a cost—the loss of authorship credit under one’s real name. Lat wanted to have the praise and attention his female alter ego A3G was getting. He increasingly grew frustrated that he was toiling over the blog but getting little recognition for it. He wanted the attention the blog was attracting to be associated with his name. But the irony was that in his quest to get credit for the blog, he risked destroying the blog and even his career.

After revealing his identity, Lat braced himself for the firestorm that would ensue. After his identity was announced, his supervisors in the United States Attorney’s office asked him to stop blogging immediately. Lat quickly locked his blog down, making it inaccessible to the public without a special password. Near the end of a stressful week, in which he wondered whether he would be fired, Lat met with his boss. He would be able to keep his job—on the assumption that *Underneath Their Robes* would be kept underneath its password.

But Lat’s story has a happy ending. A few weeks later, he left the U.S. Attorney’s office to accept a job blogging full-time at *Wonkette*, the political gossip blog that had publicized Jessica Cutler’s *Washingtonienne* blog. He later went on to launch a new legal gossip blog, *Above the Law*. Lat now blogs under his real name.

The Virtues of Anonymity

The saga of Article III Groupie demonstrates how easy it seems to be anonymous on the Internet. A person can readily create a blog under a pseudonym or can post anonymous comments to blogs or online discussion groups. According to a survey, 55 percent of bloggers use pseudonyms rather than their real identities.⁵⁹

Anonymity can be essential to free speech. As the Supreme Court has noted: “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”⁶⁰

Anonymous speech has a long history as an important mode of expression. Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings or

used pen names. It was common for letters to the editor in local newspapers to be anonymous. Ben Franklin used more than forty pen names during his life.⁶¹ Mark Twain, O. Henry, Voltaire, George Sand, and George Eliot were all pseudonymous authors. Indeed, James Madison, Alexander Hamilton, and John Jay published the Federal Papers under the pseudonym Publius. Their opponents, the Anti-Federalists, also used pseudonyms.⁶²

Anonymity allows people to be more experimental and eccentric without risking damage to their reputations.⁶³ Anonymity can be essential to the presentation of ideas, for it can strip away reader biases and prejudices and add mystique to a text. People might desire to be anonymous because they fear social ostracism or being fired from their jobs. Without anonymity, some people might not be willing to express controversial ideas.⁶⁴ Anonymity thus can be critical to preserving people's right to speak freely.

Accountability

Anonymity also has a dark side. As Adam Smith observed in *The Wealth of Nations*: "While [a 'man of low condition,' as opposed to a 'man of rank and fortune'] remains in a country village his conduct may be attended to, and he may be obliged to attend to it himself. In this situation, and in this situation only, he may have what is called a character to lose. But as soon as he comes to a great city, he is sunk in obscurity and darkness. His conduct is observed and attended to by nobody, and he is therefore likely to neglect it himself, and to abandon himself to every low profligacy and vice."⁶⁵ According to Smith, people behave differently when they can do so anonymously. People "of rank and fortune" are generally going to be noticed no matter where they are; but ordinary people will be noticed only in the small village. In the large city, a person becomes a face in the crowd and has achieved an anonymity of sorts in daily life. This anonymity, Smith observes, will tempt people to behave badly. When people are less accountable for their conduct, they are more likely to engage in unsavory acts.

When anonymous, people are often much nastier and more uncivil in their speech. It is easier to say harmful things about others when we don't have to take responsibility. When we talk about others, we affect not only their reputation but ours as well. If a person gossips about inappropriate things, betrays confidences, spreads false rumors and lies, then her own reputation is likely to suffer. People will view the person as untrustworthy and malicious. They might no longer share secrets with the person. They might stop believing what the person says. As U.S. Supreme Court Justice Antonin Scalia observed,

anonymity can make lying easier; and the identification of speakers can help significantly in deterring them from spreading false rumors and can allow us to locate and punish the source of such rumors.⁶⁶

Anonymity also facilitates deception. People can readily masquerade as other people in creating blogs and profiles. Harriet Miers was the first Supreme Court Justice nominee to have her own blog—Harriet Miers’s Blog!!!⁶⁷ Her first entry:

OMG I CAN’T BELIEVE I’M THE NOMINEE !!! This is BIGGEST DAY OF MY LIFE !!! EVER
!!!!

OMG OMG OMG

Needless to say, it was fake. Miers is not alone. There was a blog called Luttig’s Lair impersonating Judge J. Michael Luttig.⁶⁸ In one high school, some students created fake blog entries in another student’s name, boasting about sexual adventures that never happened.⁶⁹ In another incident, an anonymous person created a fake Myspace profile for a twelve-year-old girl, using her real phone number and saying she was a stripper.⁷⁰ Anyone can sign up on a free blogging service and create a blog. In anybody’s name. In your name. You might have a blog and not even know about it.

When people can avoid being identified, they can slip away from their bad reputations. In one instance, a woman joined an online chat group for eating disorders. She said she, too, suffered from an eating disorder, but she was eventually revealed to the group to be a fraud. After being booted from the group, she moved over to a group of sexual abuse victims. When revealed as a phony in that group, she reappeared in a group of people suffering from AIDS.⁷¹ As sociologist Robert Putnam observes: “Anonymity and fluidity in the virtual world encourage ‘easy in, easy out,’ ‘drive-by’ relationships. The very casualness is the appeal of computer-mediated communication for some denizens of cyberspace, but it discourages the creation of social capital. If entry and exit are too easy, commitment, trustworthiness, and reciprocity will not develop.”⁷² In other words, anonymity inhibits the process by which reputations are formed, which can have both good and bad consequences. Not having accountability for our speech can be liberating and allow us to speak more candidly; but it can also allow us to harm other people without being accountable for it.

Thus anonymity is a form of privacy protection, yet it can also facilitate privacy violations. Anonymity can preserve privacy by allowing people to speak freely without being publicly identified, yet it can undermine privacy by allowing people to more easily invade the privacy of others. As the tension be-

tween anonymity and accountability demonstrates, along with the tension between privacy and free speech, the choice isn't as simple as one between freedom and constraint. Rather, it is a choice that involves freedom on both sides.

Wikipedia: The Power and Peril of Openness

The virtues and vices of anonymity are starkly implicated in Wikipedia, one of the most fascinating creations on the Internet. Created by Jimmy Wales in 2001, Wikipedia is an experiment in the power of collective knowledge.⁷³ Wikipedia is an online encyclopedia, whose authors collaborate with readers, who can volunteer information and edit entries. This exchange is made possible by “wiki,” a Web-based application by which people can add and edit text collaboratively. It is named for the Hawaiian term *wiki wiki*, which means “quick.”

By 2004, just a few years after its inception, Wikipedia had surpassed 1 million entries. By 2006 it had grown to 3.5 million entries.⁷⁴ Wikipedia is now the largest encyclopedia ever written, and it is available for free. As of late 2006 Wikipedia has become one of the most visited websites in the world.⁷⁵

Unlike a regular encyclopedia, which quickly ages in its leather-bound covers, Wikipedia is dynamic, growing and changing each day. It is constantly updated. Anybody can edit and change a Wikipedia article. It relies on the collective wisdom of the Internet.

Most of us would be quite flattered to find an entry about ourselves on Wikipedia. Not so for John Seigenthaler. Seigenthaler was a lifelong journalist who fought for free speech and civil rights. He was an assistant to Bobby Kennedy when he was serving as attorney general during his brother John Kennedy's presidential administration. In 2005 Seigenthaler was in his late seventies and could look back on a long distinguished career. However, he was shocked to find a very different take on his life in his Wikipedia bio: “John Seigenthaler Sr. was the assistant to Attorney General Robert Kennedy in the early 1960's. For a brief time, he was thought to have been directly involved in the Kennedy assassinations of both John, and his brother, Bobby. Nothing was ever proven.”⁷⁶

Seigenthaler was furious. In a *USA Today* editorial, Seigenthaler wrote:

I have no idea whose sick mind conceived the false, malicious “biography” that appeared under my name for 132 days on Wikipedia, the popular, online, free encyclopedia whose authors are unknown and virtually untraceable. . . .

At age 78, I thought I was beyond surprise or hurt at anything negative said about me. I was wrong. One sentence in the biography was true. I was Robert Kennedy's administrative assistant in the early 1960s. I also was his pallbearer. It



WIKIPEDIA

The Free Encyclopedia

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was mind-boggling when my son, John Seigenthaler, journalist with NBC News, phoned later to say he found the same scurrilous text on Reference.com and Answers.com.⁷⁷

Ironically, Seigenthaler had previously founded a center to protect the First Amendment right to free speech. Now he was being burned by it. Seigenthaler said that he still believed in free speech, but “what I want is accountability.”⁷⁸

Seigenthaler tried to track down the person who had posted the information, but to no avail. He located the Internet protocol (IP) address of the author and from that determined that the author’s Internet service provider (ISP) was BellSouth Internet. An IP address is a unique number that is assigned to every computer connected to the Web. An example might look like this: 210.28.111.120. BellSouth Internet knew the name of the customer with the IP address but would not reveal it unless ordered by a court. Seigenthaler

would have to file a defamation lawsuit against the person, but he wasn't interested in suing.

Eventually the misinformation was removed from Wikipedia, more than four months after it had been posted. Seigenthaler described the difficulty of cleaning up the stain of the rumor: "When I was a child, my mother lectured me on the evils of 'gossip.' She held a feather pillow and said, 'If I tear this open, the feathers will fly to the four winds, and I could never get them back in the pillow. That's how it is when you spread mean things about people.' For me, that pillow is a metaphor for Wikipedia."⁷⁹

Enter Daniel Brandt, an outspoken critic of Wikipedia who had read about the case and was able to trace the IP address to a Nashville company. He then emailed the company asking for information about its services and got a response with the same IP address. Tipped off that the culprit was nearly in sight, a *New York Times* reporter called the company. This prompted the person to come forward, confess, and apologize to Seigenthaler. He explained that it was just a silly prank to rile a coworker. Because of the publicity, the person resigned from his job.⁸⁰

In response to the Seigenthaler debacle, Wikipedia changed its open policy and required users to register before creating new articles. All users, whether registered or not, could still edit articles except certain ones that were frequently abused. For example, at the top of the Seigenthaler article is the following statement: "Because of recent vandalism, editing of this article by anonymous or newly registered users is currently disabled. Such users may discuss changes, request unprotection, or create an account." The Seigenthaler entry is now corrected, and the offensive information has long been removed.⁸¹ But the cost of protecting the entry from abuse was to sacrifice some anonymity and openness.

One of the problems with anonymity is that it makes it harder to assess an author's reputation. An open system that allows people to edit anonymously is more easily abused because bad-faith authors are not held accountable. For some time, vandals have been attacking Wikipedia, deliberately adding falsehoods to articles.⁸² The legal scholar Bruce Boyden observes: "All it takes is one dedicated person with low scruples, a grudge, and a little extra time on their hands, and the harms skyrocket."⁸³ And it's not just random miscreants who try to manipulate Wikipedia entries anonymously. Several employees of politicians were caught trying to doctor Wikipedia entries anonymously. One intern for U.S. Representative Martin Meehan deleted part of a Wikipedia entry about Meehan's early promises to serve only four terms (he was cur-

rently on his seventh term). At one point, the spate of abuses inspired Wikipedia to block federal congressional IP addresses from editing entries.⁸⁴ Even Jimmy Wales, the founder of Wikipedia, was caught anonymously editing his own Wikipedia entry. He deleted references to Larry Sanger as a co-founder of the encyclopedia. “I wish I hadn’t done it. It’s in poor taste,” Wales confessed. “People have a lot of information about themselves but staying objective is difficult.”⁸⁵

The Seigenthaler case exposed some of the tensions at the heart of Wikipedia. When anybody can spread information online, it becomes harder to know what information to trust and what information not to trust. When we read entries in the *Encyclopaedia Britannica*, we know that they are written by experts and carefully vetted. Wikipedia entries are a collaborative exercise, and they can be written by those in the know as well as any fool stumbling along the information superhighway. People can just as easily introduce false information as true information.

The results can be extremely useful, yet sometimes unreliable. As the law professor Orin Kerr puts it, Wikipedia entries “seem to be a strange mix of accurate statements and egregious errors.”⁸⁶ Wikipedia is more optimistic: “We assume that the world is full of reasonable people and that collectively they can arrive eventually at a reasonable conclusion, despite the worst efforts of a very few wreckers. It’s something akin to optimism.”⁸⁷ Pimples and all, Wikipedia is an example of the benefits of collective action. What is remarkable about Wikipedia is how often it works. In many cases, it serves as a terrific resource, but it also has a fair amount of dubious data.

Wikipedia entries matter so much because they often appear near the top of Google searches. And Wikipedia has enough good information to make the articles worth looking at. Ironically, it is because the articles have a lot of valid and useful information that their errors become so problematic. Nobody would even pay attention to Wikipedia if it contained mostly false data. Since it contains so much accurate information, Wikipedia encourages users to rely upon its articles and leaves them more readily deceived by the false information.

Wikipedia dispenses with one of the primary features of ordinary encyclopedias. No longer must authors of entries have credentials. On the one hand, we trust a traditional encyclopedia entry because we trust the author. Authors have staked their reputations on their work. In contrast, Wikipedia entries can have dozens of authors, and we know little about them. Wikipedia lists a history of the edits by each author, but authors use pseudonyms like “Gopple” or

“Taco,” so we don’t know who they are or what their expertise is. How much are we to trust a fact added by someone named “Gopple,” about whom we know little else?

The irony, in the end, is that Wikipedia must defend its own reputation. It must ensure that its articles are dependable, for if they contain too much junk information, people might no longer find the site trustworthy. Wikipedia’s reputation thus depends upon balancing openness and anonymity against accountability. The Seigenthaler case pushed Wikipedia toward a less anonymous system. But the more Wikipedia limits anonymity, the less free and open the project becomes. It’s a difficult trade-off, one that lies at the core of so many of the thorny problems with online speech.

THE LAW OF ANONYMITY

Anonymity also implicates reputation in another way. The more people can spread falsehoods or invade privacy without accountability or fear of repercussions, the more likely they are to do so. Anonymous speech can cause reputational harm to others, and it can undermine the ability of those harmed to seek redress. Anonymity hobbles the pursuit of legal remedies for privacy violations and defamation. How, then, should we balance anonymity with accountability?

One way to strike a balance is to enforce traceable anonymity.⁸⁸ In other words, we preserve the right for people to speak anonymously, but in the event that one causes harm to another, we’ve preserved a way to trace who the culprit is. A harmed individual can get a court order to obtain the identity of an anonymous speaker only after demonstrating genuine harm and the need to know who caused that harm.

Traceable Anonymity

Traceable anonymity is for the most part what currently exists on the Internet. Many people use the term *anonymity* rather imprecisely—to refer to both anonymous speech (no name or identifier attached) and pseudonymous speech (using a pen name). In most cases such conflation is not problematic, and for convenience and readability, I use the term in the same way here.

But there’s another dimension to anonymity that is not captured by the language we use—traceability. Traceability involves the extent to which anonymous or pseudonymous postings can be traced to the author’s true identity.

Many people assume that when they are anonymous, they are untraceable, but this is often a myth. It is relatively easy to blog anonymously, but it is hard to be nontraceable. The reason has to do with the Internet Protocol, mentioned above. Whenever a user communicates over the Internet, her IP address is logged. For any session of Internet use, the ISP typically has information that links a particular customer with her IP address.

Suppose you write an anonymous comment on my blog saying something bad about me. At a minimum, I will know the IP address of the computer you posted from. I might even have information about the organization that assigned you your IP address. Thus I will know your ISP or the company where you work from and the city you were in when you posted. This is how Brandt traced the Seigenthaler defamer. If you post from work, your employer has information about which specific computer your post came from, and the comment may be traced back to your office computer. If you post from home, your ISP can connect your IP address to your account information. Thus even when you're anonymous, you can be tracked down.

Many people don't realize that their anonymous blogging or comments can be traced back to them. It is indeed possible to make yourself untraceable, but it involves significant care and know-how.⁸⁹ For example, anonymizing services are available to cloak your IP address.

But one mistake can leave your identity exposed. Even if you conceal your IP address, it is still possible to be traced. People often leave behind various snippets of personal information that when assembled can identify them. According to one study, "a large portion of the US population can be re-identified using a combination of 5-digit zip code, gender, and date of birth."⁹⁰ In 2006 AOL turned over twenty million search queries to researchers. AOL did not perceive a privacy problem because it did not include subscribers' names along with the queries. The *New York Times*, however, demonstrated that some subscribers could still be identified. A reporter analyzed the searches for one anonymous user and was able to zero in on the person.⁹¹

Most people don't do even a minimal job of avoiding traceability. And perhaps that's not so bad so long as the law provides adequate protection against others finding out their IP addresses or account information. In other words, the key is for the law to allow the unmasking of anonymous people when they engage in harmful speech about others. But people shouldn't be unmasked too readily. The law thus must draw a careful line between when it is appropriate to unmask an anonymous speaker and when it isn't.

Balancing Anonymity and Accountability

The First Amendment to the U.S. Constitution limits restrictions on anonymous speech.⁹² According to the Supreme Court: “Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity.”⁹³ When a person tries to identify anonymous speakers by requesting their records from their ISP, several courts have required heightened standards before ordering the unveiling.⁹⁴

Suppose you invade my privacy or defame me by something you write anonymously on your blog. I can sue you in what has become known as a “John Doe” lawsuit. Since I don’t yet know who you are, I sue you under the pseudonym you use or under “John Doe.” I then must convince the judge that my case is strong enough to go forward.⁹⁵

“John Doe” lawsuits provide a good compromise between anonymity and accountability, but the solution isn’t perfect. Consider the case of Allegheny Energy Service. Yahoo! hosts message boards for all publicly traded companies. One of these companies was Allegheny Energy Service.⁹⁶ In 2003 Allegheny company officials discovered a rather unsettling posting on the Yahoo! board:

I work for this company (non-exempt) and have a lot of years under my belt. Yes, A.N. and his cronies turned his respectable Blue Chip into a POS [Piece of Shit]. He and they ruined a good chunk of my 401K. Now I have to delay retiring. They offered up all sorts of crap on a silver plated tray for us to swallow. . . .

Just like Allegheny Energy’s Work Management horse manure which has done nothing more than take the tools out of workers’ hands and created a non productive pile of dung. Another STUPID program that Allegheny Energy probably spent millions on for nothing, absolutely nothing. Then we were force fed “love thy n*gger” with Allegheny Energy’s DIVERSITY program.

Allegheny’s lawyers wanted to find out what employee had posted the racial slur. To find out, they filed a “John Doe” lawsuit against the anonymous poster, claiming a “breach of a duty of loyalty” to the company. The anonymous poster was not aware a lawsuit had been filed. Allegheny’s attorneys then filed an “emergency motion” to prevent the poster from posting more messages. They claimed that Doe’s posting violated the company’s antiharassment policy. They subpoenaed Yahoo! to obtain its records about the poster’s account. Yahoo! released the identity of the poster—Clifton, an engineering

technician who had been working for Allegheny Energy Service for sixteen years. Clifton had posted to the Yahoo! message board from home, using his wife's Yahoo! account. After establishing Clifton's identity, Allegheny dropped the "John Doe" lawsuit.

Company officials later called Clifton into a conference room and handed him a copy of his Yahoo! message board posting. The director of employee relations told Clifton that his racial slur violated Allegheny's diversity policy. Clifton was later fired for "placing a racially derogatory posting on the Yahoo message board in violation of Allegheny Energy's Positive Work Environment expectations."

This case raises several difficult issues about free speech, anonymity, and accountability. Allegheny Energy used a rather dubious technique to obtain Clifton's identity. Ordinarily, Allegheny Energy has no right to find out the identity of an anonymous speaker. But it obtained a subpoena for the speaker's identity with a legal action that appears to have been brought solely to unmask the speaker. Clifton was speaking outside of work, using his home computer, and trying to be anonymous. Does an employer have any justification for uncovering the identity of an employee who posts anonymously from home? On the other hand, Clifton's racial slur was quite offensive. If one of Allegheny Energy's employees is publicly making such comments, shouldn't an employer have the right to know? Should Clifton be able to make such remarks without being accountable for them?

As odious as Clifton's statements were, it wasn't invading anybody's privacy or defaming anyone. These were his personal views expressed on his own time. Moreover, Allegheny Energy appears to have filed a sham case just to find out Clifton's identity. Thus it is extremely important to establish high thresholds for making anonymity traceable. Otherwise, the promise of anonymity will begin to ring hollow. The law must restrict bad-faith lawsuits designed solely to unmask anonymous speakers.

WHO SHOULD BE RESPONSIBLE FOR HARMFUL SPEECH?

One of the most wonderful features of the Internet is its interactivity. On my blog, for example, anybody can post a comment. People can even do so anonymously if they want. Comments appear below my posts, and sometimes the discussion in the comments is much more interesting than the initial post. I have some power over the commentators. I can edit or delete comments I

find irrelevant, uncivil, or offensive. I can require people to identify themselves rather than grant them anonymity. But I prefer to permit anonymous comments, as this encourages greater candor and more comments.

But anonymity can make it difficult to track down a commentator. If a person suffers a privacy violation or defamation as a result of a comment, can he hold me as well as the commentator responsible? This is a very important issue, one with dramatic repercussions for both free speech and the protection of reputation online.

The Plight of Kenneth Zeran

About a week after the Oklahoma City bombing in 1995, a person with the username “KenZZO3” posted an advertisement on an AOL bulletin board.⁹⁷ The advertisement was entitled “Naughty Oklahoma T-shirts.” People could order shirts with slogans such as:

Visit Oklahoma . . . It's a BLAST!!!
 Putting the kids to bed . . . Oklahoma 1995
 McVeigh for President 1996

The message said interested people should call “Ken” at Kenneth Zeran’s home phone number.

Zeran, however, hadn’t posted the advertisement. He learned about the posting when he began receiving phone calls from irate people. Zeran called AOL and demanded that the posting be removed and that a retraction be posted. AOL removed the posting the following day but refused to post a retraction. The phone calls continued, and they were nasty and threatening. Zeran’s business consisted of listing apartments on a monthly basis, and he had given out his phone number on the listings. He felt helpless, since changing his phone number would hurt his business.

Zeran discovered that a second posting had been made using a similar username to the previous one. The posting stated that some of the T-shirts had sold out, but that new T-shirts were available with additional offensive slogans. The new posting said that callers should ask for “Ken” and to “please call back if [the phone line was] busy.” Zeran kept receiving threatening calls. He called AOL again to take down the new posting and to block future ones. The AOL operator told him that AOL was working on terminating the abuser’s account. But the postings kept on coming. New advertisements touted odious Oklahoma City bombing bumper stickers and key chains. And

the phone calls kept increasing. Within a few days, Zeran was receiving a call about every two minutes. When a copy of the advertisement was discovered by a local radio station, the broadcaster Mark Shannon read some of the T-shirt slogans over the air and urged listeners to call Zeran to express their outrage. A barrage of calls ensued, including death threats. Some of the calls were so menacing that the local police began to monitor Zeran's house.

Finally, the media began to report that the advertisement was a hoax, and the radio station issued an apology. The phone calls slowly began to abate, and about three weeks after the initial advertisement, Zeran was receiving only about fifteen calls per day—a marked improvement. But the ordeal had taken its toll on Zeran, who was so shaken up that his doctor prescribed an anti-anxiety drug.

Nobody knows who posted the advertisements, but Zeran was determined to get some justice for his plight. He sued AOL for negligently failing to remove the defamatory postings. Zeran was suing AOL not directly for defamation but for taking an unreasonable delay in removing the defamatory postings.

Zeran's case ended when the U.S. Court of Appeals for the Fourth Circuit declared that AOL was immune from suit.⁹⁸ AOL could not be sued because Congress, concerned that ISPs and others might be responsible if one of their users made a defamatory statement, had passed a law immunizing the hosts of Internet communication forums from liability for things said by others using these forums.

Suppose a person makes a defamatory comment about you on my blog. You sue me because the statement appears on my blog. But I didn't make the statement—all I did was provide the forum in which another person said it. Why would you want to sue me rather than the person who made the statement? Because I might have a very popular blog with tens of thousands of readers. I might be wealthy and the person making the statement might not be. Or the person might have posted anonymously, and I'm the only one who can be tracked down to sue. This is what happened in Zeran's case. AOL maintained the bulletin board. It had a lot of money, and the person who posted the bogus T-shirt ads was anonymous. So AOL was the natural target.

But ISPs such as AOL have millions of users. Should AOL be responsible if some of its users defame others or invade their privacy? Certainly not initially. After all, AOL is providing a rather open forum on its bulletin boards. All sorts of people can post messages, and AOL cannot possibly monitor every

one. AOL is simply providing a place for people to talk—a microphone and soapbox in cyberspace—that’s all. It shouldn’t be responsible for what they say.

That was the logic Congress followed in 1996, when it passed Section 230 of the Communications Decency Act (CDA), immunizing ISPs and the hosts of online forums from liability for the speech of their users. The statute reads: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹⁹ According to the court that heard Zeran’s suit: “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”¹⁰⁰

Section 230 was the law when Zeran sued AOL, so how could he possibly have a case? In defamation law, if I help you spread a defamatory statement, I can be liable under defamation law as a “distributor” if I know or have reason to know that the statement is defamatory. When the statement was first posted, AOL would clearly not be liable. But after Zeran told AOL that it was false and begged them to take it down, then AOL had reason to know it was defamatory. Since AOL didn’t take it down until much later, Zeran argued that AOL should be liable for the time during which it knew about the bogus ad yet did nothing.

Does Section 230 immunize AOL even after it knows that somebody has posted a defamatory statement? Based on the way the statute is worded, this is a complicated question. Courts have wrangled over this issue, with most courts holding that Section 230 provides a broad immunity, waiving liability even after an ISP knows that a posting is defamatory. Unfortunately for Zeran, the court concluded that AOL was still immune.¹⁰¹ Zeran was out of luck. He couldn’t track down the anonymous person who posted the T-shirt ads. He couldn’t sue AOL. He had no way to fight back.

AOL certainly doesn’t have time to monitor every comment posted on its network. There are millions of communications by AOL users, and AOL cannot possibly police them all. But in this case, Zeran had informed AOL about the message. Should that affect the ISP’s responsibilities? Despite Zeran’s pleas, AOL acted slowly, and Zeran continued to suffer harm. Shouldn’t the

law provide some incentive to AOL to respond promptly to such a complaint? Under the court's interpretation of Section 230, AOL could ignore Zeran with impunity.

Immunity for Bloggers

Section 230 doesn't immunize bloggers for what they themselves say. At most, it may immunize them for comments to their posts written by others. To what extent should bloggers or websites that allow others to post comments be immune when one of the comments defames or invades a person's privacy?

On my blog, my coauthors and I allow anonymous comments. I had a first-hand experience with a defamatory comment to one of my blog posts. I wrote a post criticizing the bar exam, which all lawyers must pass in order to be licensed. An anonymous person wrote a nasty comment outing the identity of a pseudonymous blogger and stating several falsehoods about her. Here's the relevant part of the comment, in which I have changed her name and the name of her blog to protect her anonymity:

Does the [bar exam] test legal ability? Debatable. Jane Doe, aka Legal Blogger Girl, aka host of legalbloggirl.com, would say no because she failed the NY bar 6 times in a row, mainly due to absurdly low [bar exam] scores.

Although Jane Doe is a proven liar and horrid test taker, I agree the [bar exam] should go.

Jane Doe blogged under the pseudonym Legal Blogger Girl. The anonymous commenter to my blog had revealed Jane Doe's actual identity, ruining her ability to be anonymous. And the statement about failing the bar seemed very likely to have been false.

Jane Doe emailed me requesting that I delete the comment. Although I couldn't be certain, I was fairly confident that it was false. It had little relevance to my post and seemed to be merely a nasty potshot. I had no trouble promptly deleting it. A few weeks later, I was surprised when Jane emailed me again to say that the comment was still there. Apparently, the anonymous commentator had reposted the comment. I deleted it again. This time, the commentator finally stopped.

Deleting the comment only took a few seconds, and I could readily see why Jane Doe wanted the comment gone. But what if I weren't sympathetic to her plight? If Section 230 gives me complete immunity, then it says that I could simply ignore her and be completely immune. After all, I didn't post the com-

ment—somebody else did. Why should I be responsible for what some anonymous person said?

Although somebody else made the comment, I provided him with the forum in which to do it. I allowed him to post his comment, and I allowed him to do it anonymously. I can easily shut off comments to my blog, but I like having comments because it creates a dialogue in which people can read and discuss my ideas. My blog has a fairly sizable readership, so it is a forum where people will be heard. I believe, therefore, that I have some responsibility to ensure that the website I control is not causing harm to others. The law should encourage me to take Jane Doe's complaint seriously and do what I can to prevent my website from causing her harm.

Many courts, however, interpret Section 230 as providing bloggers like me with blanket immunity for comments posted by others. That means that I could simply thumb my nose at Jane Doe. But there is an alternative way to interpret Section 230, a way I believe is preferable to blanket immunity. Section 230 might be read to grant immunity only before the operator of a website is alerted that something posted there by another violates somebody's privacy or defames her. If the operator of a website becomes aware of the problematic material on the site, yet doesn't remove it, then the operator could be liable. In other words, I certainly shouldn't be liable to Jane Doe for the comment, but if I refuse to take it down after she asks, then perhaps I should be liable. At that point, I know about the comment, I am on notice that it is causing harm to another, and instead of doing something about it, I'm embracing the comment by leaving it up on the website. As I stated in the previous chapter, however, legal liability must be modified to limit damages and encourage informal ways of resolving disputes.

This is an example of the difference between the libertarian and middle-ground approaches. When it is interpreted as granting broad immunity from lawsuits, Section 230 advances the libertarian approach, valuing free speech above all else. The middle-ground approach, in contrast, seeks to encourage people to work out the problem informally first, by spurring bloggers to remove harmful comments. If this informal process fails, a lawsuit can be brought, but otherwise, the law would function to serve as an impetus to get people to work it out among themselves.

Nude on the Net

In one case, a woman's ex-boyfriend impersonated her in a Yahoo! chat room. Anybody can sign up as a Yahoo! user for free and can use any name. The ex-

boyfriend posted naked photos of the woman and included her email address and work phone number. His goal was to get men to start harassing her. When she discovered what happened, the woman was appalled. According to the woman, she wrote to Yahoo!, explaining that she didn't create this profile and wanted the photos removed. A month passed, and Yahoo! did nothing. She wrote to Yahoo! again. No response. Finally, she spoke with a Yahoo! employee, who promised to help her remove the photos. But the woman claims that Yahoo! still didn't get the photos taken down.

The woman sued Yahoo! but the court threw out the case because Yahoo! was immune under Section 230.¹⁰² If Yahoo! or bloggers can be liable if, after being informed, they fail to remove a comment that is defamatory or invasive of privacy, then they might become too cautious and remove comments too quickly. This will have a negative impact on speech, because if a person doesn't like a comment about herself, ISPs or bloggers might be extra careful and remove it in order to avoid a lawsuit. The result would be a kind of heckler's veto, where a person could have a comment removed by complaining about it, whether justifiably or not.

On the other hand, if Yahoo! or bloggers ignore a person's complaints about harmful comments, then that person might be without much recourse. Shouldn't Yahoo! have removed the photos? This seems like an awful situation for the plaintiff—nude photos of herself, as well as her contact information, are placed on the Internet and she is helpless in getting them removed. Is there such a big harm in forcing Yahoo! to remove them? Shouldn't people have some ability to halt the distribution of nude pictures or falsehoods or other personal information about themselves on the Internet? While the plaintiff shouldn't be entitled to obtain large money damages from Yahoo! the law should provide an incentive for Yahoo! to respond to legitimate take-down requests. Copyright law, for example, provides for a such a system when users of Internet service providers like Yahoo! post content that infringes upon copyright. Internet services providers are not liable if they remove copyright-infringing content posted by their users.¹⁰³ Notice and take-down systems can certainly be abused by people requesting removal of content that is not defamatory or invasive of privacy, but the law could address this problem by penalizing abusers.

Chase529

Chase Masterson is a well-known actress, having appeared in several television shows. Her real name is Christianne Carafano. One day, a profile with the

name Chase529 appeared on Matchmaker.com, an Internet dating service.¹⁰⁴ The profile had four pictures of Carafano, along with her home address and phone number. The profile also had the following exchange:

- Q: Have you had, or would you consider having a homosexual experience?
 A: I might be persuaded to have a homosexual experience.
 Q: What is your main source for current events?
 A: Playboy/Playgirl.
 Q: Finally, why did you call [Matchmaker.com]?
 A: Looking for a one-night stand.

The answers to other questions were even more provocative:

- Q: Try to describe the type of person you might be interested in meeting?
 A: Hard and dominant in more ways than one. Must have strong sexual appetite.
 Q: Describe your personality type?
 A: I like sort of being controlled by a man in and out of bed.
 Q: What's the first thing others notice about you?
 A: My beauty.
 Q: What is sexy?
 A: A strong man with a dominating attitude with a yet controlling touch.¹⁰⁵

People who responded to the profile received an automatic reply that gave out Carafano's home address and phone number.

Carafano didn't write the profile. It was written by an anonymous person in Berlin. Carafano wasn't even aware that the profile existed. She soon found out when she began to be contacted by people responding to the profile. Some of the responses were sexually explicit and threatening. Fearing for her safety and that of her son, Carafano moved out of her home and spent several months in hotels. An assistant to Carafano contacted Matchmaker and demanded that the profile be removed. Matchmaker blocked the profile from public view and deleted it soon afterward.

Carafano sued Matchmaker for invasion of privacy and defamation. Matchmaker argued that it was immune under Section 230 because it had not created the profile. The court agreed with Matchmaker. Although noting "the serious and utterly deplorable consequences that occurred in this case," the court noted that "Matchmaker did not play a significant role in creating, developing or 'transforming' the relevant information."¹⁰⁶

The court's decision makes a lot of sense. Internet dating websites host tens of thousands—sometimes millions—of profiles. They are not responsible when a prankster creates a fake profile that invades another's privacy or is

defamatory. So they should be immune when this happens. But unlike the broad interpretations of Section 230, once an Internet dating service is notified about a problem, it should respond or be liable. Matchmaker responded and removed the profile. Thus it should not be liable.

The Nazi Art Thief Who Wasn't

Ellen Batzel, an attorney in North Carolina, hired Bob Smith, a handyman, to do some work on her home.¹⁰⁷ Batzel loved to collect art, and she had many paintings in her collection.

The working relationship turned ugly, and Smith sued Batzel in small-claims court for payment for the repairs. Smith also decided to retaliate against Batzel outside the courts. He sent an email to the Museum Security Network about Batzel's art. The network consisted of a website and an email newsletter about stolen art. It had about one thousand readers, mainly those in the art and museum world, as well as law enforcement officials and journalists. It was run by Tom Cremers, who was the director of security at the Rijksmuseum in Amsterdam. Cremers received the following email:

From: Bob Smith [e-mail address omitted]
 To: securma@museum-security.org
 Subject: Stolen Art

Hi there,

I am a building contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the granddaughter of "one of Adolph Hitler's right-hand men." At the time, I was concentrating on performing my tasks, but upon reflection, I believe she said she was the descendant of Heinrich Himmler.

Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them.

I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. Her address is [omitted].

I also believe that the descendants of criminals should not be persecuted for the crimes of the fathers, nor should they benefit. I do not know who to contact about this, so I start with your organization. Please contact me via email [. . .] if you would like to discuss this matter.

Bob.

As the sole manager of the Museum Security Network, Cremers determined which of the emails he received would be forwarded to the group. He

decided to send the email along to the group, and he added a message along with the email noting that “the FBI has been informed of the contents of [Smith’s] original message.”

Some of Cremers’s readers were upset that he had forwarded Smith’s email. One wrote to him:

Mr. Smith is completely out of line for suggesting that some woman with old paintings in her home has amassed a collection of paintings from Nazi war booty. His claims, evidence and assumptions were ridiculous and he was very disrespectful of this woman’s privacy in offering this woman’s address. . . . I think it was wrong for you to take this man’s story seriously. Please respond.

Cremers replied that he considered Smith’s message dubious, but he defended his decision to forward it. “What is worse,” Cremers asked, “forwarding messages with strange contents or censor[ing] messages?”

A few months later, Batzel discovered the message. She was appalled. She wasn’t descended from Nazis and had acquired her art from legitimate dealers. As a result of Cremers’s posting Smith’s email, Batzel lost some clients and had to defend herself against a campaign to get her disbarred.

Batzel sued Cremers for defamation. The court, however, dismissed the case against Cremers based on Section 230 immunity. Since Cremers did not write the email himself, he was just the conduit for it so long as he “reasonably believed” it was provided to him for posting on the Network.¹⁰⁸

If this case hadn’t involved the Internet, Cremers would have a much tougher defense. He would no longer be immune under Section 230. He could be liable for spreading the defamatory statement to others. But because he forwarded it over the Internet, he was immune.

The court’s interpretation of Section 230 was quite broad. Smith wasn’t merely posting a comment to a website or an online discussion group. Instead, he was emailing a tip to Cremers, who decided what was posted and what wasn’t. By forwarding the email, Cremers became the speaker, much as he would have been had he heard a rumor and written about it to the group himself.

Judge Gould issued a powerful dissent in the case: “The majority rule licenses professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity. So long as the defamatory information was written by a person who wanted the information to be spread on the Internet (in other words, a person with an axe to grind), the rumormonger’s injurious conduct is beyond legal redress.” Judge Gould wrote that Section 230

was not intended to be stretched to immunize people for their “decisions to spread particular communications” and “cause trickles of defamation to swell into rivers of harm.” Gould continued: “Congress wanted to ensure that excessive government regulation did not slow America’s expansion into the exciting new frontier of the Internet. But Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice.”¹⁰⁹

What Should the Law Do?

Although existing law lacks nimble ways to resolve disputes about speech and privacy on the Internet, completely immunizing operators of websites works as a sledgehammer. It creates the wrong incentive, providing a broad immunity that can foster irresponsibility. Bloggers should have some responsibilities to others, and Section 230 is telling them that they do not. There are certainly problems with existing tort law. Lawsuits are costly to litigate, and being sued can saddle a blogger with massive expenses. Bloggers often don’t have deep pockets, and therefore it might be difficult for plaintiffs to find lawyers willing to take their cases. Lawsuits can take years to resolve. People seeking to protect their privacy must risk further publicity in bringing suit.

These are certainly serious problems, but the solution shouldn’t be to insulate bloggers from the law. Unfortunately, courts are interpreting Section 230 so broadly as to provide too much immunity, eliminating the incentive to foster a balance between speech and privacy. The way courts are using Section 230 exalts free speech to the detriment of privacy and reputation. As a result, a host of websites have arisen that encourage others to post gossip and rumors as well as to engage in online shaming. These websites thrive under Section 230’s broad immunity.

The solution is to create a system for ensuring that people speak responsibly without the law’s cumbersome costs. The task of devising such a solution is a difficult one, but giving up on the law is not the answer. Blogging has given amateurs an unprecedented amount of media power, and although we should encourage blogging, we shouldn’t scuttle our privacy and defamation laws in the process.

FREEDOM ON BOTH SIDES OF THE SCALE

Words can wound. They can destroy a person’s reputation, and in the process distort that person’s very identity. Nevertheless, we staunchly protect expres-

sion even when it can cause great damage because free speech is essential to our autonomy and to a democratic society. But protecting privacy and reputation is also necessary for autonomy and democracy. There is no easy solution to how to balance free speech with privacy and reputation. This balance isn't like the typical balance of civil liberties against the need for order and social control. Instead, it is a balance with liberty on both sides of the scale—freedom to speak and express oneself pitted against freedom to ensure that our reputations aren't destroyed or our privacy isn't invaded.

As I have tried to demonstrate in this chapter, a delicate balance can be reached, but it is not an easy feat. In many instances, free speech and privacy can both be preserved by shielding the identities of private individuals involved in particular stories. With the Internet, a key issue for the law is who should be responsible for harmful speech when it appears on a website or blog. Much speech online can be posted by anybody who wants to comment to a blog post or speak in an online discussion forum. Commentators can cloak themselves in anonymity and readily spread information on popular blogs and websites. The law currently takes a broadly pro-free speech stance on online expression. As a result, it fails to create any incentive for operators of websites to exercise responsibility with regard to the comments of visitors.

Balancing free speech with privacy and reputation is a complicated and delicate task. Too much weight on either side of the scale will have detrimental consequences. The law still has a distance to go toward establishing a good balance.

Notes

CHAPTER 6. FREE SPEECH, ANONYMITY, AND ACCOUNTABILITY

1. JOHN MILTON, *AREOPAGITICA* (George H. Sabine, ed. 1954) (originally published in 1644).
2. U.S. CONST. amend. I.
3. *Cohen v. California*, 403 U.S. 15, 24–25 (1971).
4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
5. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).
7. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
8. *Id.* at 342.
9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
10. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. 754, 774–75, 763–64 (1999).
11. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).
12. *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring)).
13. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 423 (1960).
14. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 556 (1970).
15. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1050–51 (2000).
16. Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424, 1424 (1962); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 246.
17. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61, 63 (1961) (Black, J., dissenting).
18. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 867 (1960).
19. Elizabeth S. Black, *Hugo Black: A Memorial Portrait*, The Supreme Court Historical Society (1982), http://www.supremecourthistory.org/04_library/subs_volumes/04_c17_j.html.
20. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 943 (1987).
21. *See, e.g., Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down a ban on indecent dial-a-porn services under strict scrutiny).
22. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

23. Volokh, *Freedom of Speech*, *supra*, at 1083–84.
24. *See, e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“We have long recognized that not all speech is of equal First Amendment importance.”). Cass Sunstein has argued that a workable system of free speech depends upon “making distinctions between low and high value speech, however difficult and unpleasant that task may be.” Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. Rev. 555, 557 (1989).
25. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).
26. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).
27. Although the Supreme Court has applied strict scrutiny to restrictions on speech of public concern, it has not done so to restrictions on speech of private concern. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (refusing “to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question.”); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (noting that the Court has “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).
28. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 Cornell L. Rev. 291, 294, 362 (1983).
29. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 990–1009 (1978) (explaining three theoretical models addressing the scope of First Amendment speech protection); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875 (1994) (asserting and applying two theories relating to the autonomy-based First Amendment doctrine); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) (“[F]ree speech ultimately serves only one true value, which I have labeled ‘individual self-realization.’”).
30. Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 Wash. L. Rev. 683, 723 (1996).
31. *See* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1609, 1665 (1999) (noting that privacy shapes “the extent to which certain actions or expressions of identity are encouraged or discouraged”).
32. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1426 (2000); *see also* ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 44 (1988) (“The value of privacy is, in part, that it can enable moral persons to be self-determining individuals.”); Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 455 (1980) (“Privacy is also essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.”).
33. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L.J. 2381, 2397 (1996).
34. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 37 (1967).
35. *See* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26, 154–55 (1960).

36. Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1411 (1986).
37. Quoted in John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 Journal of American History 825, 826 (2000).
38. As Keith Boone contends: “Privacy seems vital to a democratic society [because] it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal.” C. Keith Boone, *Privacy and Community*, 9 Soc. Theory & Prac. 1, 8 (1983).
39. JOHN STUART MILL, ON LIBERTY 18 (David Spitz, ed. 1975) (originally published in 1859).
40. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
41. Frederick Schauer, *Reflections on the Value of Truth*, 41 Case W. Res. L. Rev. 699, 706 (1991); see also Anita L. Allen, *The Power of Private Facts*, 41 Case W. Res. L. Rev. 757, 766 (1991) (arguing that allocations of power can sometimes be more valuable than the protection of true speech); Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 Geo. L.J. 2029, 2036 (2001) (“The belief that more personal information always reveals more truth is ideology, not fact, and must be recognized as such for informational privacy to have a chance.”). For a critique of Schauer’s position, see Erwin Chemerinsky, *In Defense of Truth*, 41 Case W. Res. L. Rev. 745 (1991).
42. *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (Ch. 1846) (Bruce, V.C.).
43. Restatement (Second) of Torts §652D.
44. *Id.* at § 652D cmt. d.
45. *Id.* at § 652D cmt. h.
46. See *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 837 (C.D. Cal. 1998) (acknowledging the president of Internet Entertainment Group’s estimate that the company would lose one third of its \$1,495,000 subscription revenue without the Bret Michaels and Pamela Anderson sex video).
47. *Barber v. Time, Inc.* 159 S.W.2d 291, 295 (Mo. 1942).
48. *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Cal. 1998).
49. Zimmerman, *Requiem, supra*, at 357 (recognizing the argument that editors of an article have a right to strengthen the force of their evidence by naming names).
50. *Bonome v. Kaysen*, 32 Media L. Rep. 1520 (Mass. Super. 2004).
51. *Id.*
52. <http://underneaththeirrobes.blogs.com/>.
53. Article III Groupie, *Hotties in the Holding Pen: Untimely SFJ Nominations*, Underneath Their Robes, July 17, 2004, http://underneaththeirrobes.blogs.com/main/2004/06/greetings_welco.html.
54. Jeffrey Toobin, *SCOTUS Watch*, New Yorker, Nov. 21, 2005, http://www.newyorker.com/talk/content/articles/051121ta_talk_toobin.
55. Jonathan Miller, *He Fought the Law. They Both Won*, N.Y. Times, Jan. 22, 2006, at sec. 14NJ, at 1.
56. Will Baude, *The Other 10 Questions for Article III Groupie*, Crescat Sententia, Aug. 29, 2005, http://www.crescatsententia.org/archives/2005_08_29.html#005865.
57. Comment to Orin Kerr, *Article III Groupie Comes Out of the Closet*, Volokh Conspiracy, Nov. 14, 2005, <http://volokh.com/posts/1131979281.shtml>.

58. Miller, *He Fought the Law*, *supra*.
59. Amanda Lenhart & Susannah Fox, *Bloggers: A Portrait of the Internet's New Storytellers*, Pew Internet & American Life Project, July 19, 2006, <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf>.
60. Talley v. California, 362 U.S. 60 (1960).
61. SMITH, BEN FRANKLIN'S WEB SITE, *supra*, at 41–43.
62. McIntyre v. Ohio Elect. Comm'n, 514 U.S. 334, 342–43 (1995).
63. Gary T. Marx, *Identity and Anonymity: Some Conceptual Distinctions and Issues for Research*, in DOCUMENTING INDIVIDUAL IDENTITY 311, 316, 318 (Jane Caplan and John Torpey, eds. 2001).
64. A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & Comm. 395, 408 (1996).
65. ADAM SMITH, THE WEALTH OF NATIONS 854 (Modern Library edition 1994) (originally published in 1776).
66. McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 382 (1995) (Scalia, J. dissenting).
67. <http://harrietmiers.blogspot.com/>.
68. <http://jmluttig.blogspot.com/>.
69. Joyce Pellino Crane, *Internet Bullying Hits Home for Teen: Anonymous Attacks a Growing Concern*, Boston Globe, June 30, 2005.
70. Margaret K. Collins, *Push to Criminalize False Info on Web*, NorthJersey.com, Sept. 20, 2006/.
71. Denise Grady, *Faking Pain and Suffering on the Internet*, N.Y. Times, Apr. 23, 1998, at G1.
72. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 177 (2000).
73. Katharine Q. Seelye, *Rewriting History: Snared in the Web of a Wikipedia Liar*, N.Y. Times, Dec. 4, 2005. Wikipedia is located at <http://en.wikipedia.org/>.
74. Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 Harv. J.L. & Tech. 163 (2006).
75. Alexa.com keeps track of the current most visited websites around the world. See http://www.alexa.com/site/ds/top_500.
76. John Seigenthaler, *A False Wikipedia "Biography"*, USA Today, Nov. 29, 2005, http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm.
77. *Id.*
78. Katharine Q. Seelye, *A Little Sleuthing Unmasks Writer of Wikipedia Prank*, N.Y. Times, Dec. 11, 2005.
79. Seigenthaler, *False Wikipedia "Biography"*, *supra*.
80. Seelye, *A Little Sleuthing*, *supra*.
81. John Seigenthaler, Sr., Wikipedia, Sept. 30, 2006, http://en.wikipedia.org/wiki/John_Seigenthaler_Sr.
82. Simon Freeman, *Wikipedia Hit By Surge in Spoof Articles*, The Times (London), Dec. 15, 2005, <http://www.timesonline.co.uk/article/0,,3-1933568,00.html>.
83. Comment to Daniel J. Solove, *Fake Biographies on Wikipedia*, Concurring Opinions, Dec. 1, 2006, http://www.concurringopinions.com/archives/2005/12/fake_biographic.html.

84. Yuki Noguchi, *On Capitol Hill, Playing WikiPolitics*, Wash. Post, Feb. 4, 2006, at A1.
85. Evan Hansen, *Wikipedia Founder Edits Own Bio*, Wired News, Dec. 15, 2005, <http://www.wired.com/news/culture/0,1284,69880,00.html>.
86. Orin Kerr, *More on Wikipedia (Plus Updates)*, Volokh Conspiracy, Oct. 18, 2004, <http://volokh.com/posts/1098119066.shtml>.
87. Wikipedia, *Wikipedia: Replies to Common Objections*, Dec. 20, 2006, http://en.wikipedia.org/wiki/Wikipedia:Replies_to_common_objections.
88. Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. Miami L. Rev. 991, 1028, 1032, 1044 (2004).
89. The Electronic Frontier Foundation, a digital rights organization, created a manual to help people better protect themselves from being traced. Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, Apr. 6, 2005, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>.
90. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, ACM Workshop on Privacy in the Electronic Society, Nov. 7, 2005, at §4.2.
91. Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. Times, Aug. 9, 2006, at A1.
92. *See* Talley v. State of California, 362 U.S. 60, 64 (1960).
93. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 342 (1994).
94. *See, e.g.*, Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); Dendrite International, Inc. v. John Doe No. 3, 775 A.2d 756 (N.J. Super. A.D. 2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005).
95. In some cases, courts have required that people demonstrate that their case is strong enough to defeat a summary judgment motion. The plaintiff “must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff’s control*.” *See* Doe v. Cahill, 884 A.2d 451, 462–63 (Del. 2005).
96. The facts are taken from the complaint in Clifton Swiger v. Allegheny Energy, Inc. (E.D. Pa.).
97. The facts in this section are taken from Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997); Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997); and Zeran v. Diamond Broadcasting, Inc., 203 F.3d 714 (10th Cir. 2000).
98. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).
99. 47 U.S.C. §230(c)(1).
100. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).
101. *Id.*
102. Barnes v. Yahoo! Inc., 2005 WL 3005602 (D. Oregon 2005).
103. The Digital Millennium Copyright Act, 17 U.S.C. §512.
104. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

105. Appellants Reply Brief, *Carafano v. Metrosplash.com, Inc.* No. 02-55658, 2003 WL 22023295 (Feb. 11, 2003).
106. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).
107. The facts are taken from Jori Finkel, *The Case of the Forwarded E-mail*, Salon.com, July 13, 2001, http://archive.salon.com/tech/feature/2001/07/13/museum_security_net_work/index.html; *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).
108. *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003).
109. *Id.* at 1038, 1040 (Gould, J. dissenting).