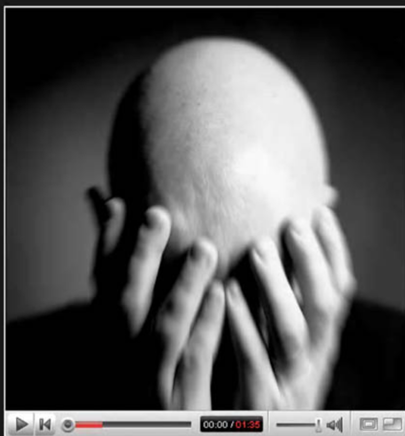
the future of reputation

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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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.

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CHAPTER 1. INTRODUCTION

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CHAPTER 3. GOSSIP AND THE VIRTUES OF KNOWING LESS

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47. As Hamilton explained: "The ability to be in the future useful, whether in resisting mischief or effecting good, in those crises of our public affairs which seem likely to happen, would probably be inseparable from a conformity with public prejudice in this particular." Alexander Hamilton, quoted in Meade, *The Duel, supra.*
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51. Holland, Gentlemen's Blood, *supra,* at 3.
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53. *Id.* at 45.
54. *Id.* at 44, 42, 61.
55. LaCroix, *Dueling, supra,* at 511–12, 454, 547–50, 552. Lawrence Lessig notes that al-

though legal prohibitions on dueling were ineffective, another type of legal sanction "might actually have been more effective." People engaging in duels were restricted from holding public office. Since holding public office was "a duty of the elite," the restriction gave gentlemen a reason for "escaping the duel" without "appealing to self-interest or the rules of commoners." Lessig, however, concedes that "even this sanction was ineffective for much of the history of the old South" because legislatures "would grandfather all duels up to the time of the legislation and would repass the grandfather legislation every few years." Lawrence Lessig, *The Regulation of Social Meaning,* 62 U. Chi. L. Rev. 943, 971–72 (1995).

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CHAPTER 6. FREE SPEECH, ANONYMITY, AND ACCOUNTABILITY

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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.").
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ernment because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy.").

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35. *See* Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26, 154–55 (1960).
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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).
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45. *Id.* at § 652D cmt. h.
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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.).
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98. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).
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CHAPTER 7. PRIVACY IN AN OVEREXPOSED WORLD

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46. *See, e.g.,* State v. DeLong, 456 A.2d 877 (Me. 1983) (refusal to testify against father); Port

v. Heard, 594 F. Supp. 1212 (S.D. Tex. 1984) (refusal to testify against son); United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (refusal to testify against father in grand jury).

47. In re A&M, 61 A.2d 426 (N.Y. 1978).
48. The Supreme Court has held that in Fourth Amendment law, people lack a reasonable expectation of privacy when they trust others with their information. *See, e.g.,* Smith v. Maryland, 442 U.S. 735, 744 (1979) (a person "assumes the risk that the [phone] company [will] reveal to the police the numbers he dialed."). Undercover agents are not regulated by the Fourth Amendment because people assume the risk of betrayal. *See* Hoffa v. United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206, 210–11 (1966).
49. Nader v. General Motors, Inc., 225 N.E.2d 765, 770 (N.Y. 1970).
50. See, e.g., Argyll v. Argyll [1967] 1 Ch. 302 (1964) (spouse liable for breach of confidence); Stephens v. Avery, [1988] 1 Ch. 449 (1988) (friend liable for breach of confidence); Barrymore v. News Group Newspapers, [1997] F.S.R. 600 (1997) (lover liable for breach of confidence).
51. Barrymore, *supra,* at 602.
52. *Id.* at 600, 601.
53. Douglas v. *Hello!* Ltd, [2003] 3 All Eng. Rep. 996.
54. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality,* 96 Geo. L.J. (forthcoming Nov. 2007). The article is available online at http://ssrn.com/abstract=969495.
55. Benjamin Franklin, Poor Richard's Almanac (July 1735) quoted in John Bartlett, Bartlett's Familiar Quotations 309:15 (Justin Kaplan, ed., Little Brown, 16th ed. 1992).
56. Times Mirror Co. v. Superior Court, 244 Cal. Rptr. 556 (Cal. Ct. App. 1988).
57. Y.G. v. Jewish Hospital, 795 S.W.2d 488 (Mo. Ct. App. 1990).
58. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. 1994).
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63. Joanne B. Freeman, *Slander, Poison, Whispers, and Fame: Jefferson's "Anas" and Political Gossip in the Early Republic,* 15 Journal of the Early Republic 25, 33 (1995).
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66. Dr. Laura Schlessinger, *Men Leave Because Liberal Feminism Gives Permission,* New Orleans Times Picayune, July 11, 1999, at E7; *Dr. Laura's Anti-Female Rant,* N.Y. Post, Sept. 14, 2006.
67. Patrizia DiLucchio, *Dr. Laura, How Could You?,* Salon.com, Nov. 3, 1998, http://archive.salon.com/21st/feature/1998/11/03feature.html.
68. *Id.*
69. Polly Sprenger, *Dr. Laura Drops Her Suit,* Wired, Dec. 15, 1998, http://wired-vig.wired.com/news/politics/0,1283,16843,00.html.

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71. DiLucchio, *Dr. Laura, supra.*
72. 17 U.S.C. §102(a).
73. Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication,* 52 Stan. L. Rev. 1201, 1203 (2002).
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75. Zittrain, *What the Publisher Can Teach the Patient, supra,* at 1206–12.
76. *See, e.g.,* Lawrence Lessig, The Future of Ideas 107–11 (2001); Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure,* 18 Berkeley Tech. L.J. 539, 567 (2003) ("[C]onsumer copying does little to reduce the incentives for creation because, for the most part, the creation of music is not funded by the sale of copies of that music."); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing,* 87 Cal. L. Rev. 113, 124–25 (1999) ("[G]ranting property rights to original creators allows them to prevent subsequent creators from building on their works, which means that a law designed to encourage the creation of first-generation works may actually risk stifling second-generation creative works."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society,* 106 Yale L.J. 283, 295 (1996) ("An overly expanded copyright also constitutes a material disincentive to the production and dissemination of creative, transformative uses of preexisting expression.").
77. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) (declaring that copyright is "compatible with free speech principles.").
78. Restatement (Second) of Torts §652C.
79. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity,* 17 Cardozo Arts & Ent. L.J. 213, 223 (1999).
80. Pavesich v. New England Life Insurance Co., 50 S.E. 68, 70 (Ga. 1905).
81. *Id.* at 80.
82. William Prosser, *Privacy,* 48 Cal. L. Rev. 383, 406 (1960).
83. Paulsen v. Personality Posters, Inc., 299 NYS2d 501 (1968).
84. Rosemont Enterprises, Inc. v. Random House, Inc., 294 N.Y.S.2d 122 (1968).
85. *See* Hosking v. Runting, [2004] NZCA 34, at [46] ("As the law currently stands, a successful action requires information that is confidential, communication of that information to another in circumstances importing an obligation of confidence and unauthorised use or disclosure."); International Corona v. Lac Minerals, [1989] 2 S.C.R. 574 (stating elements of breach-of-confidentiality tort); ABC v. Lenah, [2004] HCA 63, at [34] (discussing the breach-of-confidentiality tort).

CHAPTER 8. CONCLUSION

1. Google keeps a cache of old versions of websites, so even after a name is removed from a website, it still exists in Google's cache and is accessible to a person doing a search. But the cache is refreshed at regular intervals, so it will eventually disappear. There is also a project called the Internet Archive that saves old versions of the Internet. *See* http://

www.archive.org. But information can be removed from the Internet Archive upon request. *See* Frequently Asked Questions, http://www.archive.org/about/faqs.php.

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3. Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 62, 54, 5 (1991).
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5. John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy,* 87 Journal of American History 825, 825 (2000).
6. *Id.* at 835.
7. *Id.* at 842.
8. *See* Rodney A. Smolla, Free Speech in an Open Society 134 (1992) ("When the press avoided reporting on the sexual liaisons of John Kennedy, however, it engaged in a paternalistic decision that the behavior was not probative of Kennedy's fitness for public life."); Jeffrey B. Abramson, *Four Criticisms of Press Ethics, in* Democracy and the Mass Media 229, 234 (Judith Lichtenberg, ed. 1990) ("There was also the nonreporting of the love lives of Lloyd George, Franklin Roosevelt, Dwight Eisenhower, John Kennedy, and Martin Luther King, Jr.").
9. *See* Ellen O'Brien, *Chelsea Comes of Age, but Not Before Our Eyes,* Boston Globe, Sept. 4, 1994, at 1; Joan Ryan, *Clintons Let Go—Chelsea Enters Stanford,* S.F. Chron., Sept. 20, 1997, at A1; *see* Howard Kurtz, *First Daughter's Privacy No Longer Off Limits,* Chi. Sun-Times, Nov. 27, 1998, at 32 ("For six years the media followed an unspoken pact to avoid coverage of Chelsea Clinton, allowing the president's daughter to grow up outside the harsh glare of publicity.").
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13. *See id.* ("So the media were tripping all over themselves trying to stick to policy—but hardly anyone questioned whether the policy itself is outdated."); Chris Frates, *L.A. Radio Show Names Bryant's Accuser,* Denver Post, July 24, 2003, at B1.
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26. Lessig, Code, *supra,* at 5–6, 236. For a discussion of how physical architecture can influence behavior, see Neal Kumar Katyal, *Architecture as Crime Control,* 111 Yale L.J. 1039 (2002).
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28. Gross & Acquisti, *Information Revelation, supra,* at §3.5.
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