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Revisiting the American action for public disclosure of private facts

BRIAN C. MURCHISON

The 1981 American film *Absence of Malice*, although lopsided against the press in its account of journalism gone bad, contains one indelible scene. In a Miami neighbourhood's early morning hours, a tense young woman sits on a front porch, waiting for the newspaper boy. Soon enough, he pedals up the street and tosses papers on all the identical yards, finally reaching hers. She anxiously pulls the paper from its plastic bag and clumsily unfolds it. The story is on page one. We don't see what it says, but we know. It reports that she, a Catholic secretary in a parochial school, had an abortion the previous year, and that on the day of the abortion, she was accompanied by a man who is suspected of killing a union leader on the same day. Her story is news; she could be the suspect's alibi. She slowly refolds the paper and forces it back in its container. She then runs in despair to all the other yards, gathering each paper: her world must not learn about the abortion. Of course, her efforts are futile.

The irony of the scene is compelling. Although American constitutional law strongly protects individuals from the state's usurpation of highly intimate decisions – relating to such things as contraception, abortion, and sexual conduct[1] – the common law is famously tentative in shielding individuals from privacy invasions by the press, even about the same matters.[2] To be sure, the *Restatement (Second) of Torts* provides that when

I wish to thank Dean David Partlett and Professors Blake Morant and Megan Richardson for their helpful comments; Christopher Vrettos for invaluable research assistance; and the Frances Lewis Law Center for supporting the project.

[1] For a review of the contraception and abortion cases, see Ellen Alderman and Caroline Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995) pp. 55–66. At the end of its 2003 term, the Supreme Court struck down on due process grounds a state law criminalising homosexual sodomy, *Lawrence* v. *Texas*, 539 US 558 (2003).

[2] See generally Diane L. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291.

one party publicises private facts about another, and disclosure would be highly offensive to a reasonable person and is unrelated to a matter of legitimate public concern, the subject of the disclosure has a cause of action for damages.[3] However, in such suits for 'public disclosure of private facts', plaintiffs often fail to establish that the disclosure lacked relevance to a matter of 'public concern'.[4] If the young woman in *Absence of Malice* had sued for public disclosure, she likely would have lost, perhaps not even reaching a jury.[5]

Consider a recent example. In *Shulman* v. *Group W Productions Inc.*,[6] a car ran off a highway and overturned. The plaintiffs, a mother and son, were trapped inside. A rescue team arrived, including a nurse who wore a wireless microphone provided by a television producer. The producer's cameraman was also at the site. Unknown to the victims, the nurse and cameraman recorded their condition after the crash, their removal from the car, the mother's expressions of 'disorientation and despair',[7] and her agony inside a rescue helicopter. Months later, a television station aired a programme on emergency medicine, including footage obtained that night, and the mother watched in disbelief from her hospital bed. In her action for public disclosure of private facts, she protested the 'gruesome' footage and testified that 'it's not for the public to see this trauma that I was going through'.[8] The television station defended on the ground that footage of the mother's appearance and speech during the rescue operation were 'substantially relevant' to a matter of public concern.[9] The California Supreme Court agreed, finding a public matter in the accident itself and 'the rescue and medical treatment of accident victims'.

[3] *Restatement (Second) of Torts* (St Paul, Minn.: American Law Institute, 1977) s. 625D. Building on a classic article, Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, William Prosser identified 'a complex of four' causes of action relating to invasion of privacy, see W. Page Keeton (ed.), *Prosser and Keeton on Torts* (5th edn, St Paul, Minn.: West, 1984) p. 851. The public disclosure tort has been called the 'quintessential cause of action for invasion of privacy': Rodney A. Smolla, 'Accounting for the Slow Growth of American Privacy Law' (2002) 27 *Nova Law Review* 289 at 296.

[4] Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (3rd edn, New York: Practising Law Institute, 1999), paras. 12–42 and 12–54 (noting difficulty of establishing lack of 'newsworthiness').

[5] The character's situation in the film is complicated by the fact that she herself gave the information about the abortion to a reporter, albeit without grasping that she was (in the reporter's words) 'talking to a newspaper' and therefore speaking 'on the record'. However, even if the reporter independently had discovered the private fact, a suit for 'public disclosure' would fail if a reasonable editor could conclude that the fact was substantially relevant to a newsworthy topic: *Gilbert* v. *Medical Economics Co.*, 665 F 2d 305 at 309 (10th Cir. 1981).

[6] 955 P 2d 469 (Cal. 1998). [7] Ibid. 488. [8] Ibid. 476. [9] Ibid. 488.

Because the specific footage of the mother showed the challenge faced by emergency workers, it was 'substantially relevant' to the general topic and had 'legitimate descriptive and narrative impact'.[10]

The plaintiffs in *Shulman* join a long list of others who have lost public disclosure claims: a one-time child prodigy, famous in youth but reclusive as an adult, whose odyssey became the subject of a 'merciless... dissection' by James Thurber in the *New Yorker* magazine;[11] a man who deflected an attempt on the life of an American President in 1975, and then became the subject of unwanted news accounts identifying him as homosexual;[12] a young adult who was sterilised against her will in a county home for troubled youths and then found her sterilisation reported in a newspaper's account of the home's practices;[13] a rape-murder victim's father, who sued after a television station found the victim's name in court papers and broadcast it over the air;[14] a rape victim whose family received anonymous threatening phone calls, possibly from her attacker, after a newspaper published her name;[15] an adoptive mother and her daughter, who sued a newspaper for printing details of the child's history and the conflict caused by the birth mother's sudden reappearance.[16] In each case, courts held that the disclosures were privileged.

Plaintiffs who fared better in the courts included a college student body president who sued a newspaper for disclosing that she was a transsexual,[17] a mother who sued a newspaper for publishing words she spoke over her dead son's body in a private hospital room,[18] and a celebrity couple who challenged the internet distribution of a videotape depicting their sexual activities.[19]

[10] Ibid. 488–9.

[11] *Sidis* v. *F-R Publishing Corporation*, 113 F 2d 806 at 807 (2nd Cir.), cert. denied, 311 US 711 (1940). See *Rosenbloom* v. *Metromedia Inc.*, 403 US 29 at 80 (1971) (Marshall J dissenting, noting that although the former prodigy 'had a passion for obscurity', disclosure of his 'somewhat peculiar behavior ... was found to involve a matter of public concern').

[12] *Sipple* v. *Chronicle Publishing Co.*, 201 Cal. Rptr 665 (1984).

[13] *Howard* v. *Des Moines Register & Tribune Co.*, 283 NW 2d 289 (Iowa 1979).

[14] *Cox Broadcasting Corp.* v. *Cohn*, 420 US 469 (1975).

[15] *The Florida Star* v. *BJF*, 491 US 524 (1989).

[16] *Hall* v. *Post*, 372 SE 2d 711 (NC 1988).

[17] *Diaz* v. *Oakland Tribune Inc.*, 188 Cal. Rptr 762 (App. 1983) (rejecting press argument that student leader's gender was newsworthy as a matter of law).

[18] *Green* v. *Chicago Tribune Co.*, 675 NE 2d 249 at 256 (App. Ct Ill. 1996) (holding that a jury could find that the public 'has no concern with the statements a grieving mother makes to her dead son').

[19] *Michaels* v. *Internet Entertainment Group Inc.*, 5 F Supp. 2d 823 at 842 (CD Cal. 1998) (holding that plaintiffs demonstrated a likelihood of success in meeting the burden of showing that contents of tape were not newsworthy). In a related case, the court held that

Although some commentators have proclaimed the death of the public disclosure tort,[20] the action has stubbornly survived, as if determined to outlast the courts' apparent confusion about the interest at stake and the proper means of addressing that interest without subverting hallowed rights of expression.[21] This chapter's thesis is that the public disclosure tort cannot be understood apart from the Supreme Court's development of another tort – the common-law action for libel – in the years just before the court's first public disclosure case. At the heart of libel jurisprudence was a concern for the dignity of citizens and publishers in speaking out on public issues. Protecting the value of equal democratic participation, the court energetically developed an elaborate matrix of libel doctrine. However, as the privacy tort came before the court in the mid-1970s, its own core proved comparatively elusive, and the court lacked theoretical fuel for doctrinal development. After comparing the court's extensive cultivation of one doctrinal field with its spare treatment of another, the chapter proposes a basis for a revitalised, if still narrow, public disclosure tort, drawing in particular on the court's recent decision in *Bartnicki v. Vopper*,[22] and the insights of several contemporary thinkers on the indispensable role of privacy in the development of self.

What's wrong with the public disclosure tort?

Commentators offer various explanations of the public disclosure tort's doctrinal thinness and uncertain reach. One account cites American culture's pervasive acquiescence in privacy invasion. A second emphasises the

a tabloid television programme's story on the videotape, including brief excerpts from the tape itself, was newsworthy as a matter of law: *Michaels* v. *Internet Entertainment Group Inc.*, 27 Med L Rep 1097 at 1104–5 (CD Cal. 1998).

[20] E.g., Zimmerman, 'Requiem for a Heavyweight', above n. 2, 365 (arguing that the public disclosure tort addresses a problem 'incapable of resolution in the courts' and therefore should be given 'a well-deserved rest'). However, the opinions of five justices in *Bartnicki* v. *Vopper*, 532 US 514 (2001), appear to 'endorse the principal ingredients' of the public disclosure tort: Rodney A. Smolla, 'Information as Contraband: The First Amendment and Liability for Trafficking in Speech' (2002) 96 *Northwestern University Law Review* 1099 at 1150.

[21] *New York Times* columnist Anthony Lewis suggests that 'it is not inconsistent with the great function of the press in keeping power accountable to have some concern for the feelings of those who have not sought power, for [the ex-prodigy profiled in the *New Yorker*] or [the crash victim recorded by the rescue nurse], for example': Anthony Lewis, 'Privacy and Civilization' (2002) 27 *Nova Law Review* 225 at 238. Lewis concludes that the privacy of private individuals 'is an essential component of a civilized life', at 242.

[22] 532 US 514 (2001).

reluctance of the narrower United States legal culture to accept responsibility for fashioning doctrine for the protection of privacy. A third explanation underscores the supposedly elusive nature of the privacy interest itself.

An example of the first account is David A. Anderson's suggestion that American citizens are two-faced about privacy: they claim to respect it 'but in fact [they] devour the private secrets of hundreds of people everyday'.[23] Anderson concedes that the culture values privacy, but he maintains that Americans simultaneously 'hunger to know – to know the shocking details of scandal, to see the drama of terror or grief or humiliation, to understand the strangeness of our neighbors. The law merely reflects our ambivalence.'[24] He notes that journalism schools stress that 'news is about people', and that the media's inclination to personify both breaking news and long-term social analysis is accepted by a populace whose 'curiosity' about private facts is insatiable.[25] Rodney A. Smolla similarly traces the weakness of legal privacy to Americans' penchant for gossip.[26] Given the culture's disregard of privacy, Smolla is unsurprised that invasion of privacy has small stature in tort law.

These arguments from sociology are intriguing but not altogether persuasive. American 'hunger' for details of scandal and public drama does not necessarily indicate approval of, or even ambivalence about, the sorts of revelations that prompt most public disclosure suits. Those revelations usually appear in local news or feature stories about individuals who have not consented to coverage and whose circumstances strongly suggest that media exposure will cause them harm. It is not at all self-evident that the curiosity of even American television audiences extends to the hidden plights of involuntary news figures such as car crash survivors, adoptive children, or rape victims. As for the argument that a culture of gossip signals a general disrespect for privacy, it is worth noting that everyday gossip is a far cry from the 'publicity' addressed by the public disclosure tort.[27] Moreover, since the impact of gossip is usually quite different from that of media publicity, participation in gossip is at best slim evidence of acquiescence in media dissemination of private facts. Gossipers chatter with others about a third party; the insult to the third party is usually

[23] David A. Anderson, 'The Failure of American Privacy Law' in Basil S. Markesinis (ed.), *Protecting Privacy* (Oxford: Oxford University Press, 1999) p. 141.

[24] Ibid. [25] Ibid. p. 142. [26] Smolla, 'American Privacy Law', above n. 3, 305.

[27] See *Restatement (Second) of Torts* s. 652D (distinguishing speech to 'a single person or even . . . a small group of persons' from 'publicity' required by the tort, and defining publicity as that which makes a matter 'public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge').

indirect.[28] In contrast, when a news outlet transmits a person's intimate facts to the public, the audience may well include the person in question. As the plaintiff in *Shulman* surely discovered as she watched her own suffering on television, the impact of a media outlet's invasion of privacy is direct. For these reasons, it is difficult to attribute the weakness of the privacy tort to widespread cultural acceptance of, or participation in, similarly invasive behaviour or speech.

Another explanation for the weakness of the tort relates to the country's *legal* culture. Anderson posits that judges are 'extremely reluctant to decide what is private' because they think that society is too diverse to produce common norms of privacy. He adds that judges are 'unwilling to decide what matters are of legitimate public concern' because they have no desire to second-guess editors and risk violating liberties of speech and press.[29] Similarly, Smolla cites the legal culture's 'ingrained skepticism' about penalising truthful publications, even if the published facts were private, and the judiciary's reluctance to overrule editorial choices.[30]

This account has more power than the first but still falls short. If the legal culture is reluctant to impose damages on accurate yet invasive publications, it has had the opportunity to declare a categorical privilege for truthful publications since at least 1975.[31] However, the Supreme Court has deliberately declined to take that course, and only a handful of states have rejected the public disclosure tort.[32] As for the intractability of issues relating to 'matters of public concern', such issues arise in libel cases fairly frequently without inhibiting judges. Similar questions concerning whether a plaintiff has voluntarily injected him or herself into a 'public controversy' are not considered beyond judicial capacity.[33] In deference

[28] See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Pantheon, 1982) p. 91 (defining gossip as 'informal personal communication about other people who are absent or treated as absent').

[29] Anderson, 'The Failure of American Privacy Law', above n. 23, 148–51.

[30] Smolla, 'American Privacy Law', above n. 3, 304.

[31] See *Cox Broadcasting Corp.* v. *Cohn*, 420 US 469 at 491 (1975) (recounting press argument for broad holding on truthful publications).

[32] Jonathan B. Mintz, 'The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain' (1996) 55 *Maryland Law Review* 425 at 432–3 n. 37 (citing West Virginia, New York, Minnesota, Nebraska, and North Carolina as jurisdictions that do not recognise the tort).

[33] See, e.g., *Dun & Bradstreet Inc.* v. *Greenmoss Builders Inc.*, 472 US 749 at 761–3 (1985) (discussing whether a credit report involved a 'matter of public concern'); *Waldbaum* v. *Fairchild Publications Inc.*, 627 F 2d 1287 at 1296 (DC Cir. 1980) (discussing whether a libel plaintiff had injected himself into a pre-existing 'public controversy', thereby meeting one of the requirements of a limited-purpose public figure); *Lohrenz* v. *Donnelly*, 350 F 3d 1272 (DC Cir. 2003) (finding that female combat pilot is a limited-purpose public figure).

to the First Amendment, judges may choose to favour speech interests in privacy cases,[34] but their readiness to decide a variety of similar issues in libel suits shows that legal resources are not lacking for the field of privacy.[35]

A third, more convincing analysis is that the privacy tort falters because the Supreme Court has failed to articulate a clear concept of privacy in this context, leaving lower courts in considerable doubt about the value of vigilant protection.[36] Courts clearly exhibit surer grasp of the countervailing interest – democratic society's dependence on open communication on public matters, even intimate matters touching on public issues – than of a plaintiff's need to withhold private facts from the public eye. Judicial pronouncements on privacy in the media context range from the unhelpfully broad, such as Justice Potter Stewart's declaration that 'the protection of private personality' is 'a basic of our constitutional system',[37] to the impossibly narrow, such as Judge Richard Posner's emphasis on the privacy of basic bodily functions.[38] Within these extremes, a few courts have been willing to intimate that privacy's basis is negative liberty,[39] or positive liberty,[40] but none has voiced anything resembling Justice Anthony Kennedy's account of the components of self-determination in the constitutional cases.[41]

[34] See, e.g., *Hall* v. *Post*, 372 SE 2d 711 at 721 (NC 1988) (Frye J concurring) (noting that 'the legitimate concerns to the public must be defined in the most liberal and far-reaching terms in order to avoid any chilling effect on the constitutional right of the media to publish information on public interest').

[35] See Smolla, 'American Privacy Law', above n. 3, 300 (arguing that 'basic legal standards which have evolved' with respect to the category of 'public controversy' in libel law 'are coherent and functional').

[36] For an interesting survey of the multiple interpretations of privacy in American legal thought, see Jonathan Kahn, 'Privacy as a Legal Principle of Identity Maintenance' (2003) 33 *Seton Hall Law Review* 371.

[37] *Rosenblatt* v. *Baer*, 383 US 75 at 92 (1966) (Stewart J concurring).

[38] *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F 3d 1222 at 1229 (7th Cir. 1993).

[39] E.g., *Hall* v. *Post*, 355 SE 2d 819 at 824–6 (NC App. 1987) (characterising plaintiff's interest as the 'right to have others not know', and 'the individual's right to be free from unwarranted exposure'), reversed on other grounds, 372 SE 2d 711 (NC 1988) (declining to recognise public disclosure tort in North Carolina).

[40] E.g., *Beaumont* v. *Brown*, 257 NW 2d 522 at 527 (Mich. 1977) (noting that '[i]n this ever advancing society all are concerned that the individual's integrity and independence are not obliterated by the dissemination of unnecessary information about his private life').

[41] E.g., *Lawrence* v. *Texas*, 539 US 558 at 562 (2003) (stating that '[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct', and that respect for 'the dignity of free persons' counsels against state attempts 'to define the meaning of [a voluntary personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects'). *Lawrence* also cited a famous

Perhaps the courts cannot be faulted for failing to develop a strong concept of privacy in the media context; after all, leading public disclosure cases have presented a dizzying diversity of claims, obscuring any common feature that could facilitate grasp of a core interest. For some plaintiffs, privacy seems to be a means of isolating seriously limiting past events in order to surmount their emotional effects and set one's own terms for current relationships.[42] In such cases, the privacy interest as a concept of self-realisation arguably assumes its most compelling form. Less persuasively, other plaintiffs invoke privacy as a means of barring mention of a traumatic present event, as if to maintain that, on some level, the event did not actually happen.[43] Here, privacy is a form of denial, with nothing obvious to commend it. In other cases, privacy is a means of resisting the market, a vehicle for withholding consent from the media's use of intimate facts to garner ratings and advertising dollars.[44] This sort of claim is less about self-realisation or emotional distress than it is about checks and balances, the felt need to resist exploitation. Privacy can also function as a security interest against possible physical harm resulting from mass disclosure of identity.[45] If the shadings of privacy are indeed this various, courts may be reluctant to enforce an interest whose meanings shift, with some less strong than others.

A number of scholars, however, argue that the meaning of privacy is not ambiguous. They maintain that at privacy's core is a clear interest in dignity. Thus, forty years ago, Edward Bloustein posited that a concern for 'the individual's independence, dignity, and integrity' was the basis of each of the torts of invasion of privacy.[46] More recently Jonathan Kahn has suggested that privacy and dignity are related in a specific way: privacy lays the groundwork for dignity by creating conditions of 'individuation'.[47] For

passage from *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 US 833 at 851 (1992): 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.'

[42] E.g., *Sidis* v. *F-R Publishing Corp.*, 113 F 2d 806 at 807 (2nd Cir.), cert. denied, 311 US 711 (1940). See below nn. 127–9 and accompanying text.

[43] E.g., *Cox Broadcasting Corp.* v. *Cohn*, 420 US 469 (1975). See below nn. 70–2 and accompanying text.

[44] E.g., *Shulman v. Group W Productions Inc.*, 955 P 2d 469 (Cal. 1998). See above nn. 6–10 and accompanying text.

[45] E.g., *The Florida Star* v. *BJF*, 491 US 524 (1989). See below nn. 73–80 and accompanying text.

[46] Edward J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962 at 971.

[47] Kahn, 'Privacy as a Legal Principle', above n. 36, 378.

Kahn, 'invasions of privacy . . . affront dignity insofar as they undermine the integrity of one's identity'.[48] But how does individuation occur, and why have American courts been deaf to arguments relating common law privacy to dignity? This chapter next suggests that, wisely or not, the Supreme Court's libel jurisprudence effectively pre-empted the concept of dignity, treating it as a value of political participation relevant to the dynamics of libel disputes but less clearly applicable to cases involving non-public dimensions of life. As a result, the public disclosure tort has been in search of its own animating basis, a project that is still underway.

Dignity and the libel tort

In 1964, the Supreme Court issued its decision in *New York Times Co.* v. *Sullivan*,[49] contemporaneously hailed as 'the best and most important [opinion] ever produced in the realm of freedom of speech'.[50] In an action for libel brought by a state police commissioner against civil rights workers and the *Times*, the Supreme Court held that the libel tort could not be squared with the dictates of the speech and press clauses of the First Amendment. Writing for the court, Justice Brennan likened the libel tort to the infamous Sedition Act of 1798, and declared that the 'central meaning of the First Amendment' was that 'the censorial power is in the people over the Government, and not in the Government over the people'.[51] The court thus ruled that, in addition to the tort's common law elements, a public official who sues a 'citizen critic'[52] of his or her official conduct must prove clearly and convincingly that the contested statement was false and that the speaker either knew it was false or had serious doubts about its truth.[53]

48 Ibid. 49 376 US 254 (1964).

50 Harry Kalven Jr, 'The New York Times Case: A Note on "The Central Meaning of the First Amendment"' [1964] *Supreme Court Review* 191 at 194. First Amendment lawyer Floyd Abrams has called Sullivan a 'majestic decision', quoted in Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Random House, 1991) p. 156.

51 376 US 254 at 275, 282 (1964). Justice Brennan's opinion exemplified what Benjamin Cardozo decades earlier had called the 'chief worth' of the 'restraining power of the judiciary': 'making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges': Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) p. 94. Cardozo was a defender of judicial review 'exercised with insight into social values, and with suppleness of adaptation to changing social needs'.

52 *New York Times Co.* v. *Sullivan*, 376 US 254 at 282 (1964).

53 Ibid. pp. 270, 279–80.

Sullivan thus embodied the First Amendment's self-governance value, which emphasises that a citizen's duty to participate in the life of a democratic republic has no meaning without the freedom to express ideas and to receive expression from others.[54] Underlying this value is a commitment to the dignity of the citizen as the constant, fundamental source of all political authority. In the years before *Sullivan*, Alexander Meiklejohn had grounded the First Amendment's speech clause in a theory of self-governance, arguing that 'freedom to govern ... implies and requires what we call "the dignity of the individual". Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.'[55] Citing 'the dignity of a governing citizen', Meiklejohn argued that the First Amendment should absolutely prohibit libel suits brought against speakers for attacking the fitness of public candidates.[56] A similar understanding fuelled Justice Brennan's only marginally less expansive opinion in *Sullivan*.[57] In a case pitting the wounded reputational dignity of the police commissioner against the ill-protected political dignity of his citizen-critics, the court levelled the playing field by ensuring that citizens and the press have substantial legal protection for critical comment, even for comment that turns out to be both defamatory and factually wrong. 'Dignity', then, was a value on both sides of *Sullivan*, but the dignity associated with equal participation in democratic life gave much greater force to the speech and press interests in the case.

In non-judicial writings later in his life, Justice Brennan explicitly identified 'the essential dignity and worth of each individual' as the lynchpin

[54] On the principal values animating the First Amendment liberties of speech and press, see generally Thomas I. Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877. For a useful overview of the roots of the self-governance value, see Vincent Blasi, 'Learned Hand and the Self-Government Theory of the First Amendment: *Masses Publishing Co.* v. *Patten*' (1990) 61 *University of Colorado Law Review* 1.

[55] Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245 at 255.

[56] Ibid. 259.

[57] By twice invoking Madison's understanding of the citizen's censorial power – 376 US 254 at 275, 282 (1964) – by maintaining that 'it is as much [the citizen's] duty to criticize as it is the official's duty to administer' (ibid. 282) and by declaring that citizens do and must possess 'a fair equivalent of the immunity granted to [federal] officials' for speech on public matters (ibid. 282–3), Justice Brennan clearly recognised dignity in the sense of the citizen's centrality as source of power and legitimacy in the American form of government. Kalven noted that Justice Brennan 'almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official': Kalven, 'The New York Times Case', above n. 50, 209.

of American citizenship.[58] He stated that '[r]ecognition of broad and deep rights of expression and conscience reaffirm the vision of human dignity' by facilitating public debate and encouraging the development of political convictions.[59] 'The constitutional vision of human dignity', Justice Brennan wrote, 'rejects the possibility of political orthodoxy imposed from above; it respects the rights of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or to the elite.'[60] This theme lent itself quite readily to the construction of a complex edifice of libel doctrine. The court fleshed out the meaning of actual malice, mandated independent judicial review of findings of constitutional fault, stymied end-runs around libel law by enterprising plaintiffs who tried to use other torts for the same purposes, and clarified differences between statements of fact and non-fact.[61]

However, the concept of participatory dignity had little to say about non-political or less clearly speech-centred dimensions of contemporary life. Thus, the argument that a 'private plaintiff' should be permitted to win a libel case by meeting a less demanding fault requirement than a public official elicited no sympathy from Justice Brennan. He disagreed with others on the court who in the late 1960s and 1970s focused on categories of plaintiffs (public or private), rather than on categories of speech (public concern or private concern). By urging that speech relating to matters of public concern should be protected under the actual malice test, without reference to plaintiff status, Justice Brennan expressed a predominating concern for the speech interests of citizen-critics and the press, as well as for the interest of citizens at large in receiving an untrammelled flow of information on public matters. As for the private realm, he believed that it was not entirely distinct from the realm of political participation and

[58] William J. Brennan Jr, 'Reason, Passion, and "The Progress of the Law"' (1988) 10 *Cardozo Law Review* 3 at 15.

[59] William J. Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1985) 27 *South Texas Law Review* 433 at 442–3, cited in Stephen J. Wermiel, 'Law and Human Dignity: The Judicial Soul of Justice Brennan' (1998) 7 *William and Mary Bill of Rights Journal* 223 at 238–9.

[60] Ibid.

[61] *St Amant* v. *Thompson*, 390 US 727 (1968) (defining 'reckless disregard' component of actual malice); *Bose Corp.* v. *Consumers Union*, 466 US 485 (1984) (mandating de novo review of findings of actual malice); *Hustler Magazine Inc.* v. *Falwell*, 485 US 46 (1988) (adding element of actual malice to public figure suits for intentional infliction of emotional distress); *Milkovich* v. *Lorain Journal Co.*, 497 US 1 (1990) (differentiating between statement of fact and non-fact for purposes of libel).

should not be treated as if it were. 'Voluntarily or not', he wrote for the plurality in *Rosenbloom* v. *Metromedia Inc.*, 'we are all "public" men to some degree.'[62] In his view, no party seeking damages in connection with a story about a public matter should skirt the test of *Sullivan*.[63]

A majority of the court ultimately rejected Justice Brennan's idea that 'we are all "public" men to some degree', and drew a line between private and public figures for purposes of defining fault requirements in libel cases. However, it was only a line; the majority did not develop the concept of privacy in a significant way. Fuelling this majority was another strand of the self-governance value, emphasising neither the dignity of the citizen nor the dignity of private identity, but something quite different: the perception of governmental legitimacy advanced by strong legal protections of speech and press. Justice Powell voiced this second strand of the self-governance value in his opinion for the majority in *Gertz* v. *Robert Welch Inc.*,[64] where the court recognised that governmental legitimacy requires substantial tolerance of diverse ideas,[65] yet fashioned rules that were less protective of expression than the rules Justice Brennan had advocated under the citizen-dignity rationale.[66] Although the two strands emphasised quite different aspects of self-governance, *Gertz* resembled *Sullivan* in one key way: it displayed the same willingness to create legal doctrine.

[62] 403 US 29 at 48 (1971) (Brennan J) (rejecting separate fault requirements for private and public figures, and noting that 'the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction'). Elsewhere in the same opinion, Justice Brennan wrote, 'It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press . . . A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly': ibid. 47 n. 15.

[63] On the other hand, the same person might be entitled to a non-damages vindication remedy in the form of a retraction of statements that have been adjudicated false and defamatory: *Rosenbloom* v. *Metromedia Inc.*, 403 US 29 at 47 n. 15 (1971). A vindication remedy would serve both the defamed individual's interest in his or her community standing, and the citizen's interest in receiving a correction of earlier-publicised, mistaken facts.

[64] 418 US 323 (1974).

[65] Ibid. 340 n. 8 (quoting Thomas Jefferson's first Inaugural Address inviting dissent even as to the republican form of government and extolling the role of reason in the competition of ideas).

[66] The *Gertz* majority revamped the common law rules for private plaintiffs in libel actions. It prohibited strict liability, 418 US 323 at 347 (1974); limited plaintiffs proving negligence to damages for actual injury, at 349–50; and forbade presumed and punitive damages absent proof of actual malice, at 350.

Following self-governance as a core jurisprudential guide, both cases produced a complex set of implementing rules.[67]

The court's first public disclosure case, *Cox Broadcasting Corp.* v. *Cohn*,[68] arose soon after *Gertz* and contained no hint of dignity as central to the plaintiff's side of the case, as if the libel cases had exhausted the concept or appropriated it substantially to the realm of political consciousness. To be sure, dignity had played a key role in the contemporaneous abortion decision,[69] and one might have expected it to migrate easily to other contexts. But, the abortion controversy dealt with the *citizen*'s dignitary right to be exempt from governmental restrictions on intimate decisions. Without a concept of personal dignity for a setting that did not involve state efforts to control intimate decisions, the court had few theoretical resources for understanding what privacy could mean in a suit concerning dissemination of intimate facts. And, by the time of *Cox Broadcasting*, the court may have been unwilling to look hard for a dignitary interest that would less compellingly launch another exercise in complex federal rule-making for a common law tort.

The court may also have sensed that dignity, even a non-political concept of dignity, did not fully capture the core value at stake in common law privacy. Perhaps the justices saw that *Sullivan*'s concept of dignity, although appropriate for considerations of equality central to that case, was essentially static in nature, and that the nature of privacy, as a process of self-realisation, was dynamic. As discussed below, the justices moved only slowly toward a sense that privacy implicates not equality of the one, speaking on a public stage, but the free interaction of the several, just off the public stage, in the flourishing of emotional and intellectual growth.

A liberty-based approach to privacy

How did this slow movement unfold? In *Cox Broadcasting*, the father of a girl who had died following a gang rape sued a television station for broadcasting the girl's name. Although a state law barred use of a rape victim's name, the reporter lawfully came across the name in court documents during the prosecution of the girl's attackers. The court held that a state may not impose sanctions on the accurate publication of information obtained from judicial records that were available for public

[67] For the classic treatment of the court's democracy-promoting function, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[68] 420 US 469 (1975). [69] *Roe* v. *Wade*, 410 US 113 (1973).

inspection in the course of a public prosecution.[70] The court cast no light on common law privacy, perhaps because the plaintiff was the father of the deceased girl, not the victim herself, and his interest was vague at best. The lower court's opinion had summarised the father's puzzling claim: that public disclosure of his daughter's name 'intruded upon his right to be left alone, free from and unconnected with the sad and unpleasant event that had previously occurred'.[71] It would not be unreasonable to interpret this claim as the father's right to disconnect himself from the crime, as if the 'event' of his daughter's rape and death could be wished away. An interest in fleeing the reality of a very recent, publicised, and prosecuted crime could have little or no weight, especially when the victim's name appeared in court documents.[72] The Supreme Court's narrow ruling left open the possibility that a more plausibly defined privacy claim could fare differently in a future case.

However, the court's second case, another dispute over naming a rape victim, was not much more enlightening. In *The Florida Star* v. *BJF*,[73] a sheriff's department inadvertently included the name of a rape victim in an incident report that was made publicly available in the department's pressroom. A newspaper's trainee gathered the information, and the paper published the name in mistaken violation of its own policy. In a civil action based on a state misdemeanour statute, the victim invoked her own interest in freedom from distressing publicity about her experience of rape. She also sought to differentiate her case from *Cox Broadcasting* by asserting an interest in physical security. In the wake of the newspaper's account of the assault, she had received threatening calls, possibly from the rapist,[74] causing her 'to change her phone number and residence, to seek police

[70] *Cox Broadcasting Corp.* v. *Cohn*, 420 US 469 at 490–5 (1975).

[71] *Cox Broadcasting Corp.* v. *Cohn*, 200 SE 2d 127 (Ga. 1973).

[72] '[G]enerally, as with defamation and false light claims, . . . recovery for the invasion of a family member or friend's privacy, is not recognized', Sack, *Sack on Defamation*, above n. 4, pp. 12–35, although authority exists for a parent's independent privacy interest in non-publication of photographs of a deceased child or family member: see *Reid* v. *Pierce County*, 961 P 2d 333 (Wash. 1998). In a case interpreting the personal privacy exemption of the Freedom of Information Act, 5 USC s. 552(b)(7)(c), the US Supreme Court recognised a surviving family's privacy interest in non-disclosure of death-scene photographs of a deceased family member who had served in the Clinton White House: *National Archives and Records Admininstration* v. *Favish*, 541 US 157 (2004). The court observed generally that the 'the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution': 541 US 157 at 170 (2004) (citing *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 US 749 at 762 n. 13 (1989)).

[73] 491 US 524 (1989). [74] Ibid. 528.

protection, and to obtain mental health counseling'.[75] Although a jury awarded her compensatory and punitive damages, BJF's claim fared no better in the US Supreme Court than the father's claim in *Cox Broadcasting*. To be sure, the Supreme Court credited as 'highly significant' three interests supporting the suit: the 'privacy of victims of sexual offences; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure'.[76] However, the court ruled that the action for damages was insufficiently tailored to justify 'the extraordinary measure'[77] of punishing the publication of truthful information lawfully obtained from a government record. According to the court, it would be anomalous to hold the press responsible for the government's failure to keep the information secure; moreover, because BJF's statutory remedy lacked several of the elements of the common law public disclosure tort, recovery was too 'automatic' to satisfy the First Amendment.[78] The court found a public interest in favour of transparency of records made available to the public, and against saddling reporters with a duty to sift such records for invasiveness.[79] The court added that it might recognise in a future case a 'zone of personal privacy within which the State may protect the individual from intrusion by the press',[80] but the court offered no hint about the kind of facts that would qualify.

Lower courts following the lead of *Cox Broadcasting* and *Florida Star* have avoided critical reflection on common law privacy and have opted for result-driven emphasis on the use of government records. A dramatic recent example is *Gates* v. *Discovery Communications, Inc.*,[81] where the California Supreme Court dismissed a public disclosure case brought against makers of a documentary that revisited a ten-year-old crime and identified its participants. One of the participants, the plaintiff, had pled guilty to a felony, completed a prison term, and subsequently settled into 'an obscure, lawful life', becoming 'a respected member of the community'.[82] The documentary, he argued, exposed his past and unreasonably disrupted his new life. Citing the rape victim cases and other precedents, the court reaffirmed the First Amendment's protection of truthful reporting of information found in 'public (i.e., not sealed) official records', and

[75] Ibid. [76] Ibid. 537. [77] Ibid. 540.
[78] Ibid. 535, 538–9. [79] Ibid. 535–6. [80] Ibid. 541.
[81] 101 P 3d 552 (Cal. 2004) (overruling *Briscoe* v. *Reader's Digest Association, Inc.*, 483 P 2d 34 (Cal. 1971)).
[82] Ibid. 554.

noted that the relevant precedents 'neither logically nor practically lend themselves to temporal limitation'.[83] Accurate disclosures from records of yesteryear therefore enjoy the same privilege as disclosures drawn from contemporary judicial proceedings and comparable public sources, seemingly regardless of the privacy interest at stake.

Even if a statute prohibits the government from releasing highly sensitive materials, such as juvenile arrest records, it appears that the press loses no right to publish their contents when lawfully received. In *Bowley* v. *Uniontown Police Department*,[84] a federal appeals court dismissed a public disclosure case brought against a newspaper for naming a juvenile who had been arrested in the rape of a child. A statute prohibited officials from disclosing information in juvenile arrest records but did not make it unlawful to receive the information. In the court's view, then, the case involved a government entity whose stewardship of information went awry, and a newspaper that innocently gathered and published facts of legitimate public concern. On this characterisation of the case, imposing damages on the press was an insufficiently tailored means of protecting the juvenile; the proper solution would have been non-release by the government in the first place. This logic enabled the court to bypass any consideration whatsoever of the sufficiency of the juvenile's interest in privacy.

The Colorado Supreme Court gave greater attention to privacy in *In re People* v. *Bryant*[85] – but it was perhaps too much attention with too little analysis. In a sensational criminal case involving an allegation of rape against a celebrity athlete, the court unexpectedly upheld a prior restraint against the press and justified the order on privacy grounds. Pursuant to the state's rape shield law, the victim had testified in a closed pre-trial hearing to determine the relevance and admissibility of evidence concerning any sexual activities she engaged in just before and after the alleged rape.[86] A court reporter accidentally sent transcripts of the 'intensely private and personal'[87] sealed testimony to members of the press. When the error was discovered, the trial judge ordered the press not to publish the contents. The press then petitioned the state supreme court to invalidate this extraordinary restraint on information that the press had done nothing wrong to obtain and that the court itself had delivered into the press's hands. In a 4–3 decision, the high court ruled that the victim's privacy

[83] Ibid. 555, 561–2. [84] 2005 WL 948842 (3rd Cir. 2005).
[85] 94 P 3d 624 (Col. 2004). [86] Ibid. 626. [87] Ibid. 635.

interests were of the highest order[88] and that a carefully tailored prior restraint met the First Amendment's most unforgiving requirements.[89] Though daring, the decision will likely have minor impact on the law's consideration of privacy. First, the court unpersuasively relied on authorities that neither involved prior restraints nor upheld privacy interests in damages actions. Second, the court failed to treat adequately the point (stressed by a strong dissent) that, because most of the 'private' information about the victim had already appeared in public court documents, the order could not be effective.[90] Third, although the decision evidenced understandable compassion for the victim and any future complainant whose rape shield testimony reaches the public domain, the court offered nothing conceptually new about the meaning of privacy and arguably nothing on the facts that could warrant a prior restraint. Ultimately, *Bryant* may be considered a product of its unique circumstances, including the stricken court's sense that it had run out of options to cure its own error.

It took the US Supreme Court's decision in *Bartnicki* v. *Vopper*[91] to offer seeds of richer thinking about privacy. The case involved not the common law tort but a statutory cause of action brought by union officials whose private cell-phone conversation about a contentious labour negotiation was intercepted by an unknown person. The interceptor handed a tape of the call to an anti-union figure, who leaked it to a talk-radio host, who played it over the air some months later.[92] The union officials sued the radio host, among others, under federal and state statutory provisions aimed at protecting the privacy of electronic communications.[93] Once the plaintiffs successfully resisted summary judgment at the trial level, the question before the court was whether the First Amendment prohibited

[88] The Colorado Supreme Court cited three interests: protecting victims' privacy, encouraging victims to report sexual assault, and furthering the prosecution and deterrence of sexual assault: ibid. 632.

[89] The high court ordered the trial judge to rule expeditiously on the admissibility of evidence under the rape shield law and to consider public release of transcripts containing portions that were relevant and material to the case: ibid. 638. Soon after, the trial judge ruled that 'much of the material in the hearing could be made public', Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* (3rd edn, New York: Clark Boardman Callaghan, 1996–2005) [15:33.50], as Justice Breyer had anticipated when the media sought a stay of the original order, *Associated Press* v. *District Court*, 125 S. Ct 1 (2004) (denying application for stay). The prosecution was ultimately dropped.

[90] *In re People v. Bryant*, 94 P 3d 624 at 642–4 (Col. 2004) (Bender J dissenting).

[91] 532 US 514 (2001). [92] Ibid. 518–19.

[93] Ibid. 523–4 (summarising relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968).

imposing civil damages for disclosure of an illegally intercepted telephone conversation. The case was complicated by the fact that the conversation included angry remarks about the plaintiffs' opponents in the labour dispute, including seemingly hyperbolic statements about doing violence to them.[94]

In an opinion for a six-member majority, Justice Stevens concluded that the intercepted conversation addressed a matter of public concern and that the statutory provisions therefore were unconstitutional as applied.[95] This familiar protection of speech deemed 'public' placed *Bartnicki* in the long line of *Sullivan*-driven, dignity-based speech decisions of the Supreme Court: Justice Stevens implicitly extolled both the media's right to disseminate speech relevant to civic needs, and the citizen's right to receive the speech in the exercise of self-rule. However, there was more to *Bartnicki* than the familiar. Justice Stevens' comments about the other side of the case, particularly his recognition of the plaintiffs' speech-based interest in privacy, made the case distinctive. 'Privacy of communication is an important interest', the justice wrote, and 'the fear of public disclosure of private conversations might well have a chilling effect on private speech'.[96] Justice Stevens thus established that private speech is constitutionally significant, indeed part of 'the constitutional calculus', and that when private and public speech clash, the calculus reveals a tension not often noted by judges or parties. However, without further elaboration of the nature or value of private speech, he concluded that, on the scales of the First Amendment, public airing of the conversation outweighed the plaintiffs' interest in keeping it confidential. Justice Stevens ignored the possibility that private dialogue about a public issue could well have stronger significance for the speakers – and serve greater social purpose – than speech about the same issue addressed to a general public over the airwaves.[97]

Justice Breyer's concurring opinion, joined by Justice O'Connor, underscored the majority's insight that privacy can have an important speech component. Justice Breyer strongly suggested that the analogous public disclosure tort was neither dead nor obsolete, and he declared that courts

[94] Smolla correctly questions whether some of the justices who ruled for the defendants took the cell-phone conversation too literally: Smolla, 'Information as Contraband', above n. 20, 1144.

[95] *Bartnicki* v. *Vopper*, 532 US 514 at 534 (2001).

[96] Ibid. 532–3.

[97] Ibid. 535. Discussing the majority opinion's 'nods to privacy', Smolla calls them 'perfunctory and obligatory, if not downright miserly': Smolla, 'Information as Contraband', above n. 20, 1141.

should eschew 'rigid constitutional rules' in adjudicating clashes between privacy and the claims of new information-gathering technologies.[98] On the facts of *Bartnicki*, Justice Breyer rejected a simplistic 'public interest' exception to the statutory protections of privacy, but he concurred in the majority's conclusion, viewing the case as involving 'unusually low privacy expectations' on the part of the plaintiffs, and an 'unusually high' public interest in broad dissemination of the violence-tinged conversations.[99] Justice Rehnquist's dissent rejected First Amendment protection for the statutory violations, whether the intercepted conversation addressed a public issue or not.[100]

Bartnicki broke ground by associating privacy with speech and withholding any sort of presumptive privilege for media disclosure of private electronic conversations.[101] The case intimated that privacy is relational, that its core consists of freedom to interact with others in a certain way for a certain purpose. It is important now to follow these hints and to consider more deeply the relational aspects of contemporary life's private dimension.

Today a sizeable body of writing about 'the modern self and its predicament'[102] can assist in filling in conceptual gaps of the privacy tort. For example, just as the court in libel cases took important cues from Meiklejohn to illuminate a political concept of human dignity,[103] legal thought today may profit from the writings of Richard Rorty on the development of the person.[104] Offering a 'way of looking at human beings',[105] Rorty draws on a number of potent sources: the ethic of self-creation associated with nineteenth-century essayist Ralph Waldo Emerson;[106] John Dewey's

[98] *Bartnicki* v. *Vopper*, 532 US 514 at 537, 540–1 (2001) (Breyer J concurring).
[99] Ibid. 540. [100] Ibid. 554–5 (Rehnquist CJ dissenting).
[101] Despite the plaintiffs' loss, Smolla aptly calls *Bartnicki* 'a backhanded victory' for privacy: Smolla, 'Information as Contraband', above n. 20, 1150.
[102] Stephen K. White, *Sustaining Affirmation: The Strengths of Weak Ontology in Political Theory* (Princeton: Princeton University Press, 2000) p. 63.
[103] See William J. Brennan Jr, 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 *Harvard Law Review* 1.
[104] Richard Rorty, 'Freud and Moral Reflection' in Joseph H. Smith and William Kerrigan (eds.), *Pragmatism's Freud* (Baltimore: Johns Hopkins University Press, 1986); Richard Rorty, 'The Contingency of Selfhood' in *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).
[105] Rorty, 'Contingency of Selfhood', above n. 104, 35. For a judge's reflection on the judiciary's obligation in hard cases 'not to define humanity, but to describe and recognize it', see Jeffrey L. Amestoy, 'Uncommon Humanity: Reflections on Judging in a Post-Human Era' (2003) 78 *New York University Law Review* 1581.
[106] Rorty sees Emerson as 'not a philosopher of democracy but of private self-creation': Richard Rorty, *Philosphy and Social Hope* (London: Penguin, 1999) p. 26.

broad concept of education as 'a constant reorganizing or reconstructing of experience' for the purpose of personal growth;[107] and Freud's concept of 'private morality', meaning the part of existence pertaining less to issues of justice and more to the self's own search for character.[108] What interests Rorty is the 'attempt of individuals to be reconciled with themselves',[109] through a process of engaging in 'what Freud considered the most difficult of all personal accomplishments: a genuinely stable character in an unstable time'.[110] This search does not imitate the ancient Greek pursuit of essential human nature but entails a recognition of the self as a 'web of relations',[111] and an understanding of growth as the self's adaptation to the 'sheer contingency of individual existence'.[112] How is adaptation achieved and a sense of identity forged? Rorty connects identity to an ability to define, in one's own speech, 'the causes of our being what we are', not accepting 'somebody else's description' but 'sketch[ing] a narrative' of our development and creating a self out of 'the contingencies of our upbringing'.[113] In this sense, 'the self continually attempts to construct a narrative about its place in the world'.[114] Such a narrative enables us 'to make something worthwhile out of ourselves, to create present selves whom we can respect'.[115] Rorty's Freud would define freedom as the self's 'recognition of contingency', and he would define failure as an inability to 'break free from an idiosyncratic past'.[116]

This view of self-development crucially depends on articulating a narrative of one's past. One of Rorty's contemporaries, the philosopher Charles Taylor, has argued that the process of self-definition is inherently dialogic, a conversational engagement with one's past and with others.[117] For Taylor, self-definition is possible only through 'dialogue with, and sometimes in struggle against, the identities our significant others want to recognize in us'.[118] In a complex body of work, Taylor has explored the 'ideal of authenticity' underlying self-realisation in Western character.

[107] John Dewey, *Democracy and Education* (New York: Macmillan, 1961) p. 76.
[108] Rorty, 'Moral Reflection', above n. 104, 10–11. [109] Ibid. 11. [110] Ibid. 9.
[111] Rorty, *Philosophy and Social Hope*, above n. 106, p. 53.
[112] Rorty, 'The Contingency of Selfhood', above n.104, 26. [113] Ibid. 27–32.
[114] Richard H. King, 'Self-Realization and Solidarity: Rorty and the Judging Self' in Smith and Kerrigan (eds.), *Pragmatism's Freud*, above n.104, p. 38.
[115] Rorty, 'The Contingency of Selfhood', above n. 104, 33. [116] Ibid.
[117] Of course, Rorty and Taylor disagree on various aspects of moral experience, and they have engaged in a long-running exchange. See, e.g., Richard Rorty, 'Taylor on Truth' in James Tully (ed.), *Philosophy in an Age of Pluralism* (Cambridge: Cambridge University Press, 1994). Those disagreements are not pertinent here.
[118] Charles Taylor, *The Ethics of Authenticity* (Cambridge, Mass.: Harvard University Press, 1992) p. 33.

The ideal stems from the 'idea that each of us has an original way of being human', that 'I am called upon to live my life in this way, and not in imitation of anyone else's'.[119] Dialogue, 'partly overt, partly internalized', makes possible the discovery of one's own way.[120] Like Rorty, who argued that the recognition of contingency defined freedom,[121] Taylor sees authenticity as an idea of freedom.[122] For both, freedom is the self's power to define and create an individual path.

These reflections combine well with a strain of American jurisprudence that takes self-determination to be the core meaning of liberty. John L. Hill has argued that the ideal of freedom in American political and legal consciousness transcends negative and positive liberty as a third concept altogether, marked in part by a strong emphasis on privacy as a means of self-determination.[123] To the extent that the law recognises that 'the self must be protected from the great levelling force of social influences that threaten to submerge it', the interest in privacy is negative; to the extent that the law protects privacy as a means of encouraging growth, development, and ultimately participation in society, the interest is essentially positive.[124] Hill concurs that the self's participation with others – its unfettered 'connection with smaller groups and associations' – can be central to the formation of identity.[125]

These sources lead to a conclusion that the three-sided model of a privacy dispute may be erroneous. It should no longer be possible to say that a privacy suit involves only a complainant, a disclosing entity (usually a media outlet), and the public recipient of the media's information (the electorate, always ready to receive information of public concern). A more textured account of privacy would hold that the model has four sides: a complainant, a disclosing entity, recipients of the information, and the complainant's intimate group of associates. This is the circle that Rorty, Taylor, and Hill would see as the facilitating dialogic milieu in which the self learns to separate from an 'idiosyncratic past' and forge its own stable identity. Media dissemination of highly personal details arguably disrupts the freedom of close interaction between the complainant and the group by shocking their relationships with previously unknown facts, or

[119] Ibid. pp. 28–9. [120] Ibid. p. 47.
[121] Rorty, 'The Contingency of Selfhood', above n. 104, 33.
[122] Taylor, *Ethics of Authenticity*, above n. 118, pp. 67–8.
[123] John L. Hill, 'A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought' (2002) 29 *Hastings Constitutional Law Quarterly* 115.
[124] Ibid. 173. [125] Ibid. 174.

pre-empting the complainant's ability to bring the facts into the conversation on his or her own terms, in his or her own time. If growth takes place within a zone of dialogue and facilitating ties, the risks of injuring relationships within that zone can be substantial.

Some plaintiffs have come close to presenting an interest of this kind. In public disclosure cases not involving the media, several US jurisdictions recognise damage to 'special relationships' as a substitute for the publicity element of a plaintiff's case.[126] This chapter proposes that, in media cases where the publicity element has been met, such damage should be central to the law's understanding of the nature of the privacy interest. In *Sidis*, for example, the ex-prodigy interacted with a very small circle whose support clearly nurtured his effort to 'break free from [an] idiosyncratic past'.[127] His complaint alleged that the *New Yorker*'s article tracing his early public life, his subsequent revulsion and desire for obscurity, and his odd fate as an adult, caused him 'grievous mental anguish', specifically that 'for a long time to come [he] will be severely damaged and handicapped in his employment as a clerk or in any other employment and in his social life and pursuit of happiness'.[128] In the latter phrase, Sidis may have been struggling to articulate an idea of disrupted pivotal relationships.[129] Perhaps Sidis lost his case in part because the court lacked understanding that his principal harm was relational – an impairment of the freedom to interact with people of his choice, on his own terms, in a zone made safe for personal development.[130]

[126] E.g., *Hill* v. *MCI WorldCom Communications Inc.*, 141 F Supp. 2d 1205 (SD Iowa 2001), *Beaumont* v. *Brown*, 257 NW 2d 522 (Mich. 1977).

[127] Rorty, 'The Contingency of Selfhood', above n. 104, 33. A popular biography of Sidis, including the story of his efforts to move beyond his parental influence, is Amy Wallace, *The Prodigy* (New York: E. P. Dutton, 1986).

[128] Wallace, *The Prodigy*, above n. 127, p. 234.

[129] On Sidis' few friendships, see Wallace, *The Prodigy*, ibid. p. 222. A poem by Philip Larkin, 'Nothing significant was really said', echoes the story of the American prodigy. In the poem, a 'brilliant freshman' has given a public talk, presumably at a university, and has been acclaimed a 'genius', as in Sidis' life: see Wallace, *The Prodigy*, ibid. pp. 59–60. But Larkin writes that one who had heard the brilliant talk had 'found the genius crying when alone' and saying, 'O what unlucky streak/ Twisting inside me, made me break the line?/ What was the rock my gliding childhood struck,/ And what bright unreal path has led me here?' Philip Larkin (with introduction by A. Thwaite), *Collected Poems* (London: Marvell/Faber and Faber, 1988) p. 235.

[130] Other cases contain traces of a theory of disrupted personal relationships necessary for growth, e.g., *Howard* v. *Des Moines Register & Tribune Co.*, 283 NW 2d 289 at 292 (Iowa 1979), in which a teenager who was involuntarily sterilised at a county home claimed that before a newspaper publicised her name and condition, 'she led a quiet and respectable life and made friends and acquaintances who were not aware of her surgery'. She alleged that

The plaintiffs in *Hall* v. *Post*[131] may have argued along similar lines. A newspaper reported the local arrival of a woman seeking the daughter that she had left behind seventeen years earlier. The news story helped the birth mother locate Mary Hall, who had adopted the child, and led to a confrontation by telephone between the two mothers. A follow-up story included the names of Mary Hall and the adoptive child, related the 'emotional telephone encounter' between the mothers, and 'dwelt heavily upon the emotions of both families – the [birth family's] joy and desire to see [the daughter], and the distress, shock, and fear of the [adoptive family]'.[132]

In a suit for public disclosure, Mary Hall included a claim for 'intrusion into [the family's] private affairs and solitude', which the court associated with another cause of action, the intrusion tort of the *Restatement (Second) of Torts*.[133] However, Hall may have been alleging something other than that trespass-related action. 'Intrusion' for Hall may have referred to harm to intimate associations, including family and other relationships, caused by the newspaper's report of the facts of the adoption and the mothers' exchange. Publicity forces private persons to address history that they would not otherwise address, or forces them to confront matters at a time or in a context that they would not choose. Publicity also pre-empts the first telling of facts; despite a plaintiff's best efforts, it may be impossible to dislodge a media account from the minds of those whose support is crucial yet perhaps imperfect and subject to outside influence. The plaintiffs in *Hall* v. *Post* may have meant to capture these or other concerns in their claim of 'intrusion,' but the argument was too indirect to be heard by the court.[134]

the story 'subjected her to 'public contempt, humiliation, and "inquisitive notice"'. For a valuable discussion linking privacy to John Stuart Mill's concept of human flourishing, see Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia' (2002) 26 *Melbourne University Law Review* 381 at 388–93. For an interesting analysis of the importance of confidentiality for the 'maintenance of relationships critical to self-realization', see David F. Partlett, 'Misuse of Genetic Information: The Common Law and Professionals' Liability' (2003) 42 *Washburn Law Journal* 489 at 502 (noting that '[o]rganization of human and communal affairs depends upon individuals' willingness to enter cooperative relationships with one another').

[131] 372 SE 2d 711 (NC 1988).

[132] *Hall* v. *Post*, 355 SE 2d 819 at 822 (NC Ct App. 1987).

[133] Ibid. 823.

[134] The North Carolina Supreme Court dismissed the 'intrusion' claim: ibid. The court also chose not to recognise the public disclosure tort, stating that the action would create tension with freedoms of speech and press, and that it overlapped substantially with the

A changed tort?

Several doctrinal implications flow from a concept of privacy as liberty to develop character through close, dialogic relationships with others. The following proposals are ordered in terms of the extent to which they depart from the status quo. The first proposal involves least change in existing doctrine, the second moves further beyond the status quo, and so forth.

Nexus test

What follows if courts accept the idea that harm in a privacy case can be more significant than usually acknowledged, in that the media's dissemination of intimate facts can burden private speech, impairing the individual's ability to develop character through dialogic exchange? Would the courts consider altering existing doctrine to reflect a more evenly struck balance of interests? At present, the most difficult requirement for plaintiffs is the showing that a disclosure bears no connection to a 'matter of legitimate public concern'. Courts usually err on the side of the media on this issue, granting summary judgment if any reasonable editor could find a substantial nexus between the intimate fact and a public matter.[135] However, where the constitutional calculus involves private speech, and the value of that speech for freedom of self-development is recognised, favouring media defendants so dramatically on the nexus question is no longer justified. The test should be whether reasonable editors could differ on the existence of a substantial nexus between the intimate fact and the public matter. If they could differ, the question should go to the jury.

Thus, in *Hall* v. *Post*, where the newspaper printed details of the emotional collision between two mothers in a telephone conversation, the details of the conversation would likely be considered private facts. Whether they related to a matter of public concern – the workings of state adoption policies – should surely be left to the judgment of a jury.

action for intentional infliction of emotional distress: *Hall* v. *Post*, 372 SE 2d 711 at 714–17 (NC 1988). The court speculated that plaintiffs 'could more easily establish a claim' under the already recognised intentional infliction tort than under the public disclosure tort: ibid. 716–17. For discussion of the intentional infliction tort, see generally Dan B. Dobbs, *The Law of Torts* (St Paul, Minn.: West, 2000) pp. 824–35.

[135] E.g., *Gilbert* v. *Medical Economics Co.*, 665 F 2d 305 (10th Cir. 1981).

Public controversy/duty to notify requirements

Under the existing public disclosure tort, matters of 'legitimate public concern' need not predate the story in question and arguably include almost anything that the media decides to publish. As a result, the media are free to publish facts that plaintiffs cannot see coming. Plaintiffs therefore lack the opportunity to forewarn their intimate circles that private disclosures are imminent or to address the details in advance of publication. These relationships are more likely to be disrupted if such forewarning is absent and a shocking story appears.

The tort would incorporate the plaintiff's relational interest more fairly if the defendant's privilege depended not on the broad category of 'legitimate public concern' but on a narrower category of pre-existing public controversy.[136] This category is familiar from libel law. If the tort were revised in that way, and if the plaintiff proved that the defendant gave publicity to private facts that were highly offensive to a reasonable person and involved no matter of pre-existing public controversy, then the plaintiff would prevail. In effect, the plaintiff would be arguing, 'There was no public controversy, so I had no notice of the need to confer with the persons whose support is crucial to me, and the disclosures have impaired my ability to continue these relationships.'

On the other hand, if a related public controversy has preceded the media's disclosure, arguably the existence of the controversy has provided the plaintiff an advance opportunity to discuss relevant intimate facts with a close circle, or otherwise to prepare them for eventual disclosures. Given that the plaintiff has had such an opportunity, the media rightfully can claim a privilege to disclose intimate facts substantially related to the public controversy.[137]

If a media outlet wishes to publish a story containing intimate facts about a private person, and the story involves a matter of public concern, but no pre-existing public controversy, does the outlet publish at its risk? Civil liability appears harsh in view of constitutional interests of speech and press, even with a new understanding of the role of private, dialogic

[136] In libel cases, a limited purpose public figure is defined in part as one who has voluntarily injected him or herself into a public controversy: *Gertz*, 418 US 323 at 345 (1974). A public controversy 'is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way': *Waldbaum* v. *Fairchild Publications Inc.*, 627 F 2d 1287 at 1296 (DC Cir. 1980).

[137] Smolla has made a similar proposal for somewhat different reasons: Smolla, 'American Privacy Law', above n. 3, 300–1.

relationships in the growth of the person and the harm posed by media dissemination. In these circumstances, courts should consider imposing on the media a duty to inform the private person of an imminent invasive disclosure. This information would afford a private person the same opportunity of advance contact with an intimate circle that the private person would have in the context of a pre-existing public controversy. A media entity's satisfaction of this duty to notify would eliminate the possibility of punitive damages, and should be relevant to the amount of compensatory damages. It would not automatically eliminate compensatory damages, however, because the disclosures were not substantially related to a pre-existing public controversy.

An example would come from *Sidis.* The court held that the magazine profile of the prodigy involved a matter of public concern,[138] but did it involve a pre-existing controversy? The author, noted writer James Thurber, thought that the story involved the social issue of whether parents should thrust their talented children so forcibly into the limelight. Thurber was disturbed that the court did not understand this.[139] It may be that a jury would understand it no better and would find that the topic of parental pressure was not a 'controversy' in the law's sense of a 'real dispute'.[140] The jury would award damages, not needing to reach the further question of whether details in the story – including depictions of the plaintiff's personal hygiene, bedroom, and odd behaviour – satisfied the nexus requirement addressed above. If the defendant had given the plaintiff advance notification of the story, no punitive damages would be available and compensatory damages might be reduced. If on the other hand, the jury did find a pre-existing public controversy, and found that some or all of the intimate disclosures reasonably related to the controversy, Sidis would lose as to those disclosures.

Revised action for intentional infliction of emotional distress

If courts wish greater change, a third alternative would be to reject the public disclosure tort and turn to the action for intentional/reckless infliction of emotional distress as the vehicle for disclosure suits against the media. A proper balance, of course, would need to be struck between the opposing interests. Arguably, the scienter element in the intentional/reckless

[138] *Sidis* v. *F-R Publishing Corporation*, 113 F 2d 806 at 809 (2nd Cir. 1940).

[139] Wallace, *The Prodigy*, above n. 127, p. 236. [140] See above n. 136.

infliction tort would be defined as conscious disregard of a high probability that publication of intimate facts would impinge materially on the plaintiff's emotional health. The element of 'outrageous conduct' would involve analysis of whether the published information at issue lacked a plausible nexus to a pre-existing public controversy. The injury element would be met by evidence of severe emotional distress, caused by both disrupted personal relationships and other effects of disclosure.

How would this remedy fare on the facts of *Sidis*? The *New Yorker* story reflected its author's awareness of Sidis' social isolation and reliance on a small set of crucial relationships; the scienter element, therefore, could well be resolved against the defendant. The element of outrageous conduct would depend on a jury's grappling with whether a specific controversy pre-dated the profile and if so, whether the story's details substantially related to the controversy. Probably this element would also be resolved against the defendant. Finally, the element of severe emotional distress would not be difficult to prove, especially given the plaintiff's troubled emotional history, which the story itself recounted. As predicted in *Hall* v. *Post*,[141] the intentional infliction tort may be an easier claim for plaintiffs to prove, and thus unsatisfactory as a matter of policy.[142] Then again, few cases will have the factual configuration of *Sidis*, particularly the defendant's extensive knowledge of the plaintiff's history and emotional fragility.

Conclusion

Although the public disclosure tort has had an unpromising past, it appeals to what Anthony Lewis suggests is a sense of basic fairness to 'those who have not sought power' but have become illustrations of public issues. The tort's weakness may be a function of cultural indifference or constitutional qualms, although the most likely explanation is institutional: until recently, the Supreme Court offered no illumination of a core interest. Libel law had reserved the obvious candidate, dignity, for civic contexts. Now, with the court's decision in *Bartnicki* and the insights of a

[141] 355 SE 2d 819 at 822 (NC Ct App. 1987).

[142] For a case in which the court dismissed a public disclosure claim but declined on the same facts to dismiss a claim of intentional infliction of emotional distress, see *Armstrong* v. *H & C Communications Inc.*, 575 So 2d 280 (Fla. Dist Ct App. 1991). It remains to be seen whether the Supreme Court will constitutionalise actions brought by private plaintiffs under this tort, as it did in actions brought by public figures: see *Hustler* v. *Falwell*, 485 US 46 (1988).

number of contemporary thinkers, it may be time to recognise privacy as a dynamic concept involving the self's interest in growth through unhampered dialogic exchange. At the core of a reconsidered tort should be an idea of freedom – to engage in a 'web' of secure relationships that promote an essential task of human experience: creating what Rorty called 'stable character in an unstable time'.