University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

1991

Sunlight, Secrets and Scarlet Letters; The Tension Between Privacy and Disclosure in Constitutional Law

Seth F. Kreimer

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Common Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [First Amendment Commons](#), [Fourth Amendment Commons](#), [Jurisprudence Commons](#), [Legal Commons](#), and the [Privacy Law Commons](#)

Repository Citation

Kreimer, Seth F., "Sunlight, Secrets and Scarlet Letters; The Tension Between Privacy and Disclosure in Constitutional Law" (1991). *Faculty Scholarship at Penn Law*. 1409.

https://scholarship.law.upenn.edu/faculty_scholarship/1409

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 140

NOVEMBER 1991

No. 1

ARTICLES

SUNLIGHT, SECRETS, AND SCARLET LETTERS: THE TENSION BETWEEN PRIVACY AND DISCLOSURE IN CONSTITUTIONAL LAW

SETH F. KREIMER†

This is far more dangerous than McCarthyism. At least McCarthy was elected.
-Justice Clarence Thomas¹

† Associate Professor of Law, University of Pennsylvania. I would be gravely remiss in failing to acknowledge with thanks the support, insight, advice, and encouragement I have received on this project from Michael Ausbrook, Ed Baker, Charles Bosk, Owen Fiss, Michael Fitts, George Fletcher, Nancy Fuchs-Kreimer, Frank Goodman, Howard Lesnick, Steven Morse, Gerry Neuman, Robert Post, and Linda Wharton. Able research assistance from Gus Arnavat and Sean Halpin aided my efforts immeasurably. Any errors of fact or judgment, of course, remain my own.

¹ *Hearing of the Senate Judiciary Comm. on Thomas Supreme Court Nomination*, FEDERAL NEWS SERV., Oct. 11, 1991 available in LEXIS, Genfed Library, Nomine file [hereinafter *Hearing on Thomas*].

TABLE OF CONTENTS

INTRODUCTION	3
A. <i>The Constitution in an Age of Information</i>	3
B. <i>The Memory of McCarthyism</i>	13
1. The Political Legacy	15
2. The Judicial Heritage	22
I. THE STING OF THE SCARLET LETTER: DISCLOSURE AS AN EFFECTIVE SANCTION	25
A. <i>Doctrinal Doubts</i>	26
1. The McCarthy Era	26
2. The Modern Split: The Necessity of Concrete Impacts	30
B. <i>The Doubts Clarified and Allayed</i>	34
1. The Impact of Disclosures	35
a. <i>Disclosure as the Basis for Other Public Sanctions</i>	35
b. <i>The Varieties of Private Reactions</i>	39
i. Material Sanctions	39
a. <i>Violence</i>	39
b. <i>Economic Sanctions</i>	42
ii. Social Sanctions	51
2. The Significance of the Impacts	54
a. <i>The Import of Private Actions</i>	54
b. <i>The Constitutionally Protected Status of Social Pressure and the Constitutional Values of Privacy</i>	62
II. IN PRAISE OF SUNLIGHT: THE ARGUMENTS FOR OPENNESS .	72
A. <i>The Virtues of Knowing</i>	73
1. Accurate Decision-Making on Public Issues	73
2. You Can't Tell the Players Without a Scorecard: Consumer Protection in the Marketplace of Ideas .	78
B. <i>The Virtues of Being Known: Purification by Publicity</i> ...	89
1. Liberalism and Disclosure	91
a. <i>Liberal Arguments for Disclosure</i>	91
b. <i>Liberal Limits on Disclosure</i>	94
2. Authenticity, Virtue, and Community	98
3. Common Ground	107
III. SEEKING SUNLIGHT AND AVOIDING SUNBURN:	
BALANCING AND ITS ALTERNATIVES	108
A. <i>Clean Answers That Abandon the Field</i>	110
1. The Doctrine of Waiver	110

2. "Words Aren't Laws"	115
B. <i>Clean Answers That Set Boundaries</i>	126
1. Intent as a Boundary	127
2. Boundaries Based on Character of Information ..	130
a. <i>Constitutionally Shielded Activities</i>	131
i. Deterrent Effects	131
ii. Privacy as an Element of the Right .	132
b. <i>Intimate Information</i>	136
CONCLUSION: BACK TO BALANCING	143

INTRODUCTION

A. *The Constitution in an Age of Information*

The night watchman state is dead in America, if indeed it ever lived. Modern American government, like governments elsewhere, has taken progressively greater responsibility for functions that previously had been left to the market or other social structures. In the late twentieth century, the bureaucrat—who dispenses benefits and licenses, who hires and fires, who plans health care programs or fiscal policy—has replaced the police officer, judge, or soldier as the icon of government.

In the course of her job, the bureaucrat learns more intimate details about citizens than would the police officer or the judge. Implementation and planning personnel have voracious appetites for information, and every license, benefit, or exemption makes the government privy to the details of a citizen's life. Information gathered in one arena is available for use in others. Similarly, the increasing rationalization and routinization of the private sector has generated stores of information potentially available to the government. Every employer accumulates information about her employees, every granter of credit files data about her customers, every transfer of funds leaves an increasingly accessible data trail, all of which is susceptible to government subpoena or request.² The

² See GARY I. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 208-11 (1988) (describing growth of data banks in credit card companies, insurance companies, and financial institutions and the efforts of government to take advantage of the fact that "[b]its of scattered information that in the past did not threaten individual's privacy and anonymity now can be joined" by matching programs). AT&T estimated in 1977 that it receives 100,000 subpoenas for toll call records annually from law enforcement agencies alone. See PRIVACY J., Nov. 1987, at 2. The

farther pieces of data stray from an origin in personalized interaction, the less incentive the holders of data have to resist government inquiry. Indeed, the government often intervenes to facilitate the process by requiring private parties to compile records.³

These trends have been accentuated by changes in information technology. The capacities to gather, store, correlate, and retrieve data have increased by orders of magnitude, as both public and private data manipulation and storage has mushroomed. The ability to uncover and manipulate the informational traces of citizens has exploded as government combines its own information with data subpoenaed or scavenged from private sources.⁴

rate has doubtless increased since that time. See Jeffrey Rothfelder, *Is Nothing Private?*, BUS. WK., Sept. 4, 1989, at 74 (describing the 1987 Federal Bureau of Investigation (FBI) proposal to modernize the National Crime Information Center (NCIC) by linking the FBI criminal data banks with the computerized records of airline reservation systems, car rental companies, creditors, credit bureaus, insurance companies, and phone companies); John Shattuck, *In the Shadow of 1984: National Identification Systems, Computer-Matching, and Privacy in the United States*, 35 HASTINGS L.J. 991 (1984) (noting the introduction of increasingly intrusive computer matching and identification systems).

³ See, e.g., *Dole v. United Steelworkers*, 110 S. Ct. 929 (1990). The *Dole* court noted:

Typical information collection requests include tax forms, medicare forms, financial loan applications, job applications, questionnaires, compliance reports and tax or business records. These information requests share at least one characteristic: The information requested is provided to a federal agency, either directly or indirectly. Agencies impose the requirements on private parties in order to generate information to be used by the agency in pursuing some other purpose. For instance, agencies use these information requests in gathering background on a particular subject to develop the expertise with which to devise or fine-tune appropriate regulations, amassing diffuse data for processing into useful statistical form, and monitoring business records and compliance reports for signs or proof of nonfeasance to determine when to initiate enforcement measures.

Id. at 933 (citations and footnote omitted); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979) ("The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations.").

⁴ See DAVID H. FLAHERTY, *PRIVACY AND GOVERNMENT DATA BANKS, AN INTERNATIONAL PERSPECTIVE* 258-59, 266-67, 271-76 (1979); *GOVERNMENT INFOSTRUCTURES: A GUIDE TO THE NETWORKS OF INFORMATION RESOURCES AND TECHNOLOGIES AT THE FEDERAL, STATE, AND LOCAL LEVELS* 10-13 (Karen B. Levitan ed., 1987); Robert Garcia, "Garbage In, Gospel Out": *Criminal Discovery, Computer Reliability, and the Constitution*, 38 UCLA L. REV. 1043, 1048, 1052-68 (1991) (describing federal information resources, which include one billion reports per year of third party payments filed with the IRS and seven million reports annually of cash transfers, as well as proposals to integrate federal information systems and to develop data matching programs). For example, NCIC records increased from 20,000 in 1967 to

The expansion of government knowledge translates into an increase in the effective power of government.⁵ At its most mundane, an increase in government knowledge means an increase in the ability to deploy existing government sanctions effectively. At the time of *Roe v. Wade*,⁶ for example, the ability to prosecute abortions was limited by the capacity of the government to identify abortions and abortion providers. Even in states that sought to enforce prohibitions actively, the transaction costs of identifying violations produced a friction that softened the prospect of legal enforcement. Today, with the proliferation of health care records, insurance records, medicare records, and tax records, all subject to computerized retrieval and cross-reference, the zone of anonymity that formerly protected reproductive autonomy has shrunk considerably. A crusading prosecutor in a world without *Roe* stands a greater chance of stamping out abortions than did her predecessor

17 million in 1986. See *Criminal Records: Open or Closed?*, 13 PRIVACY J., Oct. 1987, at 1. Regarding the development of the NCIC criminal record system, see DONALD A. MARCHAND, *THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS* 66-71 (1980).

⁵ The concerns are not new. Leaving aside the dark projections of George Orwell, apprehensions about increasing government access to personal information have inspired a steady stream of commentary over the last three decades. See, e.g., DAVID BURNHAM, *THE RISE OF THE COMPUTER STATE* 185-90 (1980) (expressing the concern that the linkage of computers might lead to misuse of information); FRANK J. DONNER, *THE AGE OF SURVEILLANCE* 11-15 (Vintage Books 1981) (1980) (arguing that surveillance of dissenters is a method of governance in our political system); MARX, *supra* note 2, at 147-52 (analyzing the reasons for extensive use of police covert operations and their effects on law enforcement); ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BASES, AND DOSSIERS* 26-38 (1971) (considering the "blessings and blasphemies" of computer technology in light of the privacy dilemma); NATIONAL ACADEMY OF SCIENCES, *DATABANKS AND A FREE SOCIETY* 251-56 (Alan F. Westin & Michael A. Baker eds., 1972) (discussing the impact of data sharing and the informal exchange of information in the absence of legal guidelines); PRIVACY PROTECTION STUDY COMMISSION, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* 346 (1977) (suggesting that government's expanded ability to collect personal information has heightened "the dangers of official abuse"); FRANCIS E. ROURKE, *SECRECY AND PUBLICITY* 209-16 (1961) (claiming that publicity and public opinion can and do enable official power to expand beyond the limits of the legal system); JAMES RULE ET AL., *THE POLITICS OF PRIVACY* 51-68 (1980) (providing a critique of the "privacy issue" arising from documentary coverage of individuals); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 23-52 (1967) (postulating that the control of information allows government to narrow the gap between totalitarianism and democracy); Symposium, *Privacy*, 31 LAW & CONTEMP. PROBS. 251 (1966) (discussing the philosophical development of a constitutionally based right of privacy); Symposium, *Surveillance, Dataveillance and Human Freedom*, 4 COL. HUM. RTS. L. REV. 1 (1972) (essays concerning surveillance, computers, and privacy).

⁶ 410 U.S. 113 (1973).

a generation before.⁷

Information controlled by government provides a second, less straightforward, means of exerting government power. Even if formal prosecution of abortions remains beyond the constitutionally permitted power of the state, a health department official who is able to obtain and publish the names of women seeking abortions can exercise a deterrent almost as effective as prosecution. From Brandeis's advocacy of "sunlight as a disinfectant"⁸ to the hearings conducted by Senator Joseph McCarthy and his colleagues, the spotlight of "pitiless publicity"⁹ has been valued, not only for its light, but for its heat. The power of public opprobrium, once evoked, is often more pervasive and more penetrating than criminal punishment. As the volume of information controlled by the state increases, so too does the government's ability to sanction disfavored activities by the simple act of public disclosure.¹⁰

From the vantage point of constitutional law, this second aspect of the information explosion is the more intriguing, for it brings the ideal of rational and informed public decisions into conflict with the mistrust of government power at the heart of American constitutionalism. In many aspects of constitutional law the dissemination of information is applauded. Information is the currency of the "marketplace of ideas," the prerequisite for political self-determination, and a security against usurpation by secret cabals. Secrecy interferes with rational decision-making, accountability, and the choice of national goals. In general, scholarly analysis of the First Amendment disposes us toward the proposition that more informa-

⁷ When and if an effective abortifacient, such as RU-486, becomes available, the balance may shift again. As we have learned in the most recent "war" on drugs, the illicit transfers of medicine for cash is difficult, if not impossible, to trace and eradicate. See, e.g., Leonard A. Cole, *The End of the Abortion Debate*, 138 U. PA. L. REV. 217, 223 (1989) (arguing that RU-486 will render moot the controversy over early pregnancy abortions).

⁸ LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

⁹ See S. REP. NO. 1783, 75th Cong., 3d Sess. 2 (1938); H.R. REP. NO. 1381, 75th Cong., 1st Sess. 2 (1937).

¹⁰ This essay, directed toward issues of constitutional law, leaves largely unexamined the ability of private actors, who are accumulating information at an equivalent rate, to disseminate that information. (An exception is my discussion of boycotts, *infra* text accompanying notes 149-172). Although the impact of private dissemination is often comparable to that of government dissemination, the legal problems are distinct enough to be left for a future essay. Not least among the differences is First Amendment protection available for the dissemination of information by private entities, but not by government.

tion is better.¹¹ We esteem "sunlight" because it illuminates.

But constitutional law is also concerned with protecting sanctuaries of private liberty from state intervention. In this enterprise we acknowledge the necessity for shadows as well as sunlight upon the landscape of our republic. The use of exposure as a punishment and a deterrent is rooted in literature and political folklore. No one doubts that Hester Prynne's scarlet letter provided more than neutral information,¹² or that the effort of Senator Joseph McCarthy to "expose" the background of his political opponents was not simply public education.

This tension is not simply a matter of literary or historical interest, for the contemporary scene teems with constitutional issues linked to the government's dissemination of information. Although the end of the Cold War has made efforts to suppress Communists and fellow travellers in America seem quaint, hostility toward other exercises of First Amendment liberties makes the threat of exposure an effective contemporary sanction.

For this reason, political groups continue to seek exemptions from obligations to disclose their membership and supporters,¹³

¹¹ For a partially dissenting voice in the otherwise unanimous chorus, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 966-68 (1990); cf. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 299 (1990) (suggesting the benefits of inaccurate beliefs held by the judiciary); W. Robert Reed, *Information in Political Markets: A Little Knowledge Can Be a Dangerous Thing*, 2 J.L. ECON. & ORG. 355, 357 (1989) (providing a model of electoral competition showing that more politician-specific information can make voters worse off).

¹² NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bantam Books 1986) (1850). Hawthorne himself was acutely attuned to the interplay between the virtues and vices of disclosure. At the outset of his fable, he tartly characterizes the pillory "as effectual an agent, in the promotion of good citizenship, as ever was the guillotine among the terrorists of France" and places in Dimmesdales' mouth approval of the "[w]ondrous strength and generosity" of Hester Prynne's refusal to disclose her partner in sin. *Id.* at 52, 64.

By the end of the novel, however, Hawthorne proclaims that: "No man, for any considerable period, can wear one face to himself, and another to the multitude, without finally getting bewildered as to which may be the true." *Id.* at 197. Hester Prynne's scarlet letter has become in the minds of the populace a symbol to be "looked upon with awe, yet with reverence too." *Id.* at 239.

¹³ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (Socialist Workers Party); *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976) (political parties); *Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989) (identity of members of National Commodity and Barter Association); *Marshall v. Bramer*, 828 F.2d 355, 359-60 (6th Cir. 1987) (Ku Klux Klan (KKK) membership lists); *Adolph Coors Co. v. Movement Against Racism*, 777 F.2d 1538, 1540-42 (11th Cir. 1985) (anti-KKK activists); *Snedigar v. Hoddersen*, 786 P.2d 781, 783 (Wash. 1990) (Freedom Socialist

even as the FBI seeks to gather information about the identity of patrons of public libraries and their reading habits.¹⁴ A presidential commission has called on citizens' groups to boycott makers and distributors of "pornography,"¹⁵ and has threatened to issue lists identifying boycott targets.¹⁶ Universities claim immunity from disclosure of their tenure files on grounds of academic freedom,¹⁷ while church hierarchies seek shelter from discovery requests on the basis of free exercise of religion.¹⁸

Party); *cf.* *Meese v. Keene*, 481 U.S. 465, 472-77 (1987) (allowing description of film as "political propaganda" despite damage to the disseminator's reputation); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-99 (1981) (implicitly approving statutory disclosure requirements as applied to identity of campaign organization in a local referendum); *State v. Miller*, 398 S.E.2d 547, 551-53 (Ga. 1990) (rejecting a First Amendment challenge on behalf of KKK member to statute prohibiting wearing of masks in public).

¹⁴ See, e.g., Ulrika E. Ault, Note, *The FBI's Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 N.Y.U. L. REV. 1532, 1550-58 (1990) (arguing that FBI library monitoring program infringes on First Amendment and privacy rights).

¹⁵ ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 1317, 1339, 1346, 1348 (1986) [hereinafter COMMISSION ON PORNOGRAPHY]. The suggestion has been echoed in more measured form by Professors Hawkins and Zimring. See GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 200-05, 208-10 (1988).

¹⁶ See *Playboy Enter. Inc. v. Meese*, 639 F. Supp. 581, 587 (D.D.C. 1986); *cf.* *United States v. R. Enter., Inc.*, 111 S. Ct. 722, 727-29 (1991) (leaving for the lower court question whether the First Amendment limited broad grand jury subpoena of records of distributor of sexually oriented books, magazines, and video tapes); *Fabulous Assoc., Inc. v. Pennsylvania Pub. Util. Comm'n.*, 896 F.2d 780, 785-88 (3d Cir. 1990) (successful challenge to the loss of anonymity involved in requirements that sexually oriented telephone services pre-approve callers); *Acorn Inv. Inc. v. City of Seattle*, 887 F.2d 219, 225-26 (9th Cir. 1989) (successful challenge to required disclosure of identities of shareholders in "panorama" adult entertainment center); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 557 (2d Cir.) (unsuccessful challenge to a similar policy), *cert. denied*, 488 U.S. 924 (1988); *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1564-70 (M.D. Tenn. 1989) (successful challenge to required disclosures regarding shareholders in "adult oriented establishments"); *Techtow v. City Council*, 775 P.2d 227, 230-31 (Nev. 1989) (striking down requirement that massage parlors keep records of lists of patrons available to police); *Myrick v. Board of Pierce County Comm'rs*, 677 P.2d 140, 144-45 (Wash. 1984) (same).

¹⁷ See *University of Pa. v. EEOC*, 493 U.S. 182 (1990).

¹⁸ See, e.g., *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (challenge to discovery request for Catholic Conference's records); *St. German of Ala. E. Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1092-94 (2d Cir. 1988) (holding that IRS subpoenas of real estate records did not violate the free exercise clause); *Smith v. District Court*, 797 P.2d 1244, 1249-50 (Colo. 1990) (holding church not exempt from civil discovery of identity of contributors under First Amendment); *Michigan Dep't of Social Services v. Emmanuel Baptist Preschool*, 455 N.W.2d 1, 3 (Mich. 1990) (finding financial disclosure issue "unripe for review"); *cf.* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-36 (1984) (upholding protective order preventing a newspaper from publishing information

Reaction to the modern recognition of liberty interests in reproductive autonomy has occasioned efforts to require disclosure where criminal regulation is banned. Recent initiatives attempt to require the disclosure to parents of minors' birth control prescriptions and abortions¹⁹ and notice to spouses of womens' efforts to seek abortions.²⁰ Public identification of abortion providers increasingly subjects them to the threat of organized harassment.²¹

Disclosure is also problematic where informational privacy is valued for its own sake. In recent Terms, the Court has grappled with questions arising from dissemination of law enforcement records,²² official papers,²³ medical records,²⁴ and personnel files.²⁵ Although not yet before the Court, treatment and testing

concerning religious group membership obtained via discovery); *Church of Scientology Flag Servs. Org., Inc. v. City of Clearwater*, 756 F. Supp. 1498, 1524-25 (M.D. Fla. 1991) (upholding a municipal ordinance requiring registration of charitable organizations against free exercise claims).

¹⁹ See, e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972 (1990); *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983); *New York v. Schweiker*, 557 F. Supp. 354 (S.D.N.Y. 1983).

²⁰ See *Planned Parenthood v. Casey*, 1991 U.S. App. LEXIS 24,792 (3d Cir. Oct. 21, 1991), *petition for cert. filed*, Nov. 7, 1991. In the interests of full disclosure, I should note that I am a member of plaintiff's counsel team in this case and that I advised plaintiff's counsel in earlier litigation, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 765-68 (1986).

²¹ See, e.g., *Thornburgh*, 476 U.S. at 765-68; *Casey*, 1991 U.S. App. LEXIS 24,792, at *101.

²² See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 539-41 (1989) (disclosure of rape victim's name by police); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769-71 (1989) (denying Freedom of Information Act request for criminal records on the basis of a privacy exception); *Boettger v. Loverro*, 555 A.2d 1234, 1240 (Pa. 1989) (dissemination of the records of legal wiretaps), *vacated and remanded sub nom.*, *Easton Publishing Co. v. Boettger*, 110 S. Ct. 225 (1989), *rev'd. sub nom.*, *Boettger v. Loverro*, 587 A.2d 712 (Pa. 1991).

²³ See, e.g., *FBI v. Abramson*, 456 U.S. 615, 631 (1982) (FBI "name check" summaries of critics of Nixon Administration); *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (identity of U.S. passport holders); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-65 (1977) (Presidential papers); *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (police list of shoplifters); cf. *CBS, Inc. v. Block*, 725 P.2d 470, 474-76 (Cal. 1986) (applications for handgun permits); *Perkey v. Department of Motor Vehicles*, 721 P.2d 50, 53-56 (Cal. 1986) (fingerprints required for drivers licenses); *In re Bagley*, 513 A.2d 331, 338 (N.H. 1986) (reports of child abuse).

²⁴ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-604 (1977) (records of medical prescriptions); cf. *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602, 626 n.7 (1989) (noting that drug testing makes data available to the government regarding individual prescription drug use).

²⁵ See, e.g., *Siegert v. Gilley*, 111 S. Ct. 1789, 1793-94 (1991) (personnel recommendations). In a parallel context, the Court has regularly revisited the tension

for HIV infection is embroiled in controversy over questions of confidentiality and disclosure.²⁶

between First Amendment rights and privacy when private entities engage in dissemination of information. *See, e.g.,* Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2519 (1991) (enforcement of confidentiality agreement with news source); *Florida Star*, 491 U.S. at 539 (tort action for publication of identity of rape victim); *cf. Frisby v. Schultz*, 487 U.S. 474, 479-88 (1988) (holding an ordinance proscribing picketing outside of private residence not facially invalid).

²⁶ Areas of conflict include:

1) the obligation or prohibition of doctors to report the positive HIV status of their patients to those they may have infected, *see, e.g.,* Joseph D. Piorkowski, Jr., Note, *Between a Rock and a Hard Place: AIDS and the Conflicting Physician's Duties of Preventing Disease Transmission and Safeguarding Confidentiality*, 76 GEO. L.J. 169, 176-87 (1987); Jill S. Talbot, Note, *The Conflict Between A Doctor's Duty to Warn a Patient's Sexual Partner that the Patient Has AIDS and a Doctor's Duty to Maintain Patient Confidentiality*, 45 WASH. & LEE L. REV. 355, 357 (1988);

2) requirements to report HIV status to health authorities, *see, e.g.,* New York State Soc'y of Surgeons v. Axelrod, 555 N.Y.S.2d 911, 912 (App. Div. 1990) (rejecting medical society's challenge to Health Department decision not to designate HIV infection as a "communicable sexually transmitted disease," which would require reporting and contact tracing), *aff'd*, 572 N.E.2d 605 (N.Y. 1991); Jeff Glenney, Note, *AIDS: A Crisis in Confidentiality*, 62 S. CAL. L. REV. 1701, 1729-31 (1989) (discussion of disclosure by public health authorities to partners of HIV positive test results, contact tracing, and statistical data);

3) the confidentiality obligation of public authorities regarding such information, *see, e.g.,* Doe v. Borough of Barrington, 729 F. Supp. 376, 382-85 (D.N.J. 1990) (unjustified police disclosure of HIV positive status to neighbors states cause of action for violation of constitutional rights of privacy); Rodriguez v. Coughlin, No. CIV-87-1577E, 1989 U.S. Dist. LEXIS 15898 (W.D.N.Y. June 2, 1989) (requirement that HIV positive inmate wear distinctive clothing may violate right to privacy); Doe v. Coughlin, 697 F. Supp. 1234, 1240-41 (N.D.N.Y. 1988) (segregation of inmates with AIDS may violate right to privacy); Woods v. White, 689 F. Supp. 874, 876-77 (W.D. Wisc. 1988) (casual disclosure by prison medical service of prisoner's HIV positive status violated constitutional right of privacy), *aff'd*, 899 F.2d 17 (7th Cir. 1990); M. Nicole van Dam, Note, *The Scarlet Letter "A": AIDS in a Computer Society*, 10 COMPUTER/L.J. 233, 241-62 (1990) (discussing problems associated with establishing data bases regarding seropositive individuals);

4) government efforts to assure confidentiality in private HIV testing, *see, e.g.,* Harold Edgar & Hazel Sandomire, *Medical Privacy Issues in the Age of AIDS: Legislative Options*, 16 AM. J.L. & MED. 155, 163-207 (1990); Peter J. Nanula, Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315, 329-43 (1987) (discussing confidentiality in AIDS testing); *cf. St. Hilaire v. Arizona Dep't of Corrections*, No. 90-15344, 1991 U.S. App. LEXIS 11620, at *4-8 (9th Cir. filed May 30, 1991) (rejecting claim by inmate that prison officials were obligated to disclose to the population the identity of HIV positive inmates); Doe v. Hirsch, 731 F. Supp. 627, 632-33 (S.D.N.Y. 1990) (constitutional challenge to confidentiality requirement by policemen who feared infection by blood of dead suspect);

5) the obligation of health care professionals to disclose their own HIV status, *see, e.g.,* Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 832-33 (5th Cir. 1990) (upholding discharge of nurse for failure to disclose the results of HIV test to employer); Stephen Updegrove, *Ethical Issues in the AIDS Crisis: The HIV-Positive Practitioner*, 260 JAMA 790 (1988);

The tension between the attraction of sunlight and the fear of the scarlet letter reflects deep-seated conflicts in our intuitions. We know that the scarlet letter is a punishment not to be trifled with, and like Justice Brandeis, we consider "the right to be let alone" one of the prizes of civilization.²⁷ Yet we also believe, as did Brandeis, that "[s]unlight is . . . the best of disinfectants."²⁸

The article that follows parses those intuitions. Believing that constitutional argument is best conducted with an eye on concrete historical paradigms, I begin by situating the problem of disclosure in the McCarthy era, when governments at both state and federal levels sought to use the "spotlight of public opinion" to discourage activities apparently beyond the reach of direct criminal sanction.

I then map the contours of the scarlet letter by reviewing the forces that made the McCarthyite efforts efficacious. Section IA is

6) the status of discovery regarding HIV status in litigation, *see, e.g.*, *Inmates with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488, at *7-11 (N.D.N.Y. Feb. 7, 1991) (ordering discovery of identity of HIV positive inmates, but entering protective order to prevent dissemination); *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 650 (D.S.C. 1989) (denying both a motion to compel identification of blood donor and a motion for a "veiled deposition"); *Rasmussen v. South Fla. Blood Serv. Inc.*, 500 So. 2d 533, 534 (Fla. 1987) (denying discovery of identity of blood donor); *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954, 960 (Pa. Super. Ct. 1989) (sealing deposition relating to HIV positive litigants); Peter B. Kunin, Note, *Transfusion-Related AIDS Litigation: Permitting Limited Discovery From Blood Donors in Single Donor Cases*, 76 CORNELL L. REV. 927, 942-60 (1991) (discovery of identity of blood donor in transfusion related litigation); and

7) efforts by rape victims to compel accused rapists to submit to HIV testing, *see, e.g.*, *Virgin Islands v. Roberts*, 756 F. Supp. 898 (D.V.I. 1991) (requiring test).

²⁷ *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

²⁸ BRANDEIS, *supra* note 8, at 92. Shortly after publication of *The Right to Privacy*, Brandeis considered writing a "companion piece" on *The Duty of Publicity*, advancing the thesis that: "If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects." Letter from Louis Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS OF LOUIS D. BRANDEIS 100 (Melvin I. Urofsky & David W. Levy eds., 1971).

Professor Welsh argues that this tension has its roots in the structural transformations of the Victorian era, which simultaneously made public opinion a "social force that makes knowledge efficacious" as an engine of reform and made individual vulnerability to public obloquy an obsession. ALEXANDER WELSH, *GEORGE ELIOT AND BLACKMAIL* 66 (1985). Welsh continues:

The power of public opinion counts on literacy, education, and the rise of information but also . . . on shame. No wonder Mill was so concerned to separate social from private spheres, if the very same forces counted on for order and progress in society make almost anyone's business of interest to third parties.

Id. at 208.

a study of judicial treatment of constitutional challenges to efforts by government to wield the sanction of exposure. Section IB analyzes the mechanisms, both official and unofficial, by which government disclosures affect their victims and evaluates the objections to recognizing these effects in constitutional analysis. I argue that courts should neither doubt the impact of informational sanctions, nor the constitutional relevance of those impacts. Although the precise effects of disclosure will vary with context, our liberties are at risk when our constitutional law ignores the power of information to punish.

The affirmative claims of sunlight, however, cannot be easily dismissed. Disclosure may improve the choices of those who receive information, and can be argued to purify the character and choices of subjects whose actions and views become known. Section II reviews the liberal and civic republican arguments for disclosure, as exemplified by the claims advanced during the McCarthy era. Both theoretical frameworks yield a common conclusion. The attraction of sunlight is strongest within a relatively narrow set of boundaries: where the activities disclosed are matters of public trust, where the prospects of concrete retaliation are small, and where the freedom of intimate self-definition is not implicated.

In Section III of the article, I close with an analysis of the available methods of adjusting the tension between the costs and virtues of disclosure. I argue for three conclusions. First, courts cannot avoid the tension. Claims that citizens have waived constitutional protection are usually inappropriate. Questions of institutional competence can often be elided by relying on sub-constitutional doctrines and are irrelevant wherever the information at issue is initially obtained by government coercion. Second, constitutional rights that protect the formation of identity and private judgment are entitled to protection against government disclosure regardless of concrete consequence. Third, courts cannot escape a case by case adjustment of the tension between the merits of sunlight and the perils of the scarlet letter in cases involving either constitutionally protected but public activities or intimate facts not associated with constitutional rights.

B. *The Memory of McCarthyism*

Constitutional law is haunted by archetypes. Equal Protection jurisprudence is shadowed by slavery and Jim Crow; Fourth Amendment doctrine grapples with the ghosts of James Otis and the writs of assistance; and free speech analysis rings with denunciations of the Sedition Act. The inherent conservatism of the common law method is partly responsible; advocates and jurists thirst for precedent and authoritative or enlightening analogies. But the persistence of these images in constitutional law signifies their deeper roots. We know that the Constitution should be read through the lens of an evolving tradition, forged by confrontation with specific challenges.²⁹

The landmarks by which we guide ourselves in constitutional law are usually not positive ideals, but the dangers we have identified and seek to avoid. We define the Constitution as a photographic negative; its protections are thickest where evils have highlighted our history.³⁰ One element is a tendency to fight the last war, to return to controversies that are comfortably settled rather than attempting to confront the disturbing ambiguities of the present. But here again, there is a deeper truth to our practice: judges are better at identifying concrete tyrannies than at elaborating affirmative theories of the good. This truth is attributable not only to the fact-centered analysis inherent in the common law method, but also to the reality that, as Edmond Cahn observed, an appeal to a sense of injustice is more likely to be more broadly compelling than an effort to complete a definition of the just.³¹ Although American

²⁹ See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57, 1069-72 (1984) (arguing that constitutional argument and interpretation should proceed in light of the lessons of prior "constitutional moments" in our history that "control the meanings we give to our present constitutional predicaments"); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 460 (1985) (value commitments that should constitute the core of First Amendment doctrine "are those . . . forged in the foundry of political experience," which "tend to be simple, discrete, situation-oriented and accessible").

³⁰ Justice Scalia is, thus, misguided and misleading in his recent advocacy of a principle by which traditions of tacit toleration for government practices constitutionally validate those practices. For examples of Scalia's views, see *Rutan v. Republican Party*, 110 S. Ct. 2729, 2748-49 (1990) (Scalia, J., dissenting); *Burham v. Superior Court*, 110 S. Ct. 2105, 2118-19 (1990) (plurality opinion); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989) (plurality opinion); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 33 (1989) (Scalia, J., dissenting). History functions best as a warning, rather than a stamp of approval.

³¹ See EDMOND N. CAHN, *THE SENSE OF INJUSTICE* 13-14 (1949); cf. ROBERT C.

constitutional jurisprudence finds no unanimity in an affirmative definition of the good society, certain evils are highlighted in our national experience and acknowledged by consensus. This consensus most legitimately claims the status of fundamental law.

Pursuing this approach, this article frames its analysis of the scarlet letter problem in concrete terms, focusing on a core instance of the problem in our history, and tracing the arguments that arise from it. The activities of Senator Joseph McCarthy during the 1950s provide the historical focus.

Senator McCarthy has achieved the status of a negative archetype in contemporary political discourse. In the most recent presidential campaign, partisans of Governor Dukakis saw the shadow of McCarthyism in Vice President Bush's denunciation of his opponent as a "card-carrying member of the ACLU." More recently, during his confirmation hearing, Justice Clarence Thomas accused his detractors of activities "far more dangerous than McCarthyism,"³² while proponents of Professor Anita Hill criticized her attackers for "doing a pretty good imitation of Joe McCarthy."³³ McCarthyism has become a term of opprobrium, of classic political impropriety.

In the judicial arena, Senator McCarthy's image is less clear. Although the precise targets of his activities have achieved constitutional protection,³⁴ the judicial status of his methods remain a matter of equivocation.

SOLOMON, *A PASSION FOR JUSTICE* 299 (1990) (describing the passion for justice as "a sensibility that is more fundamental to morality and politics than the intellectual prominence of the ideologue and the moral superiority of the uninvolved"); JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 8-9 (1990) ("[M]odels of justice [do not] offer an adequate account of injustice because they cling to the groundless belief that we can know and draw a stable and rigid distinction between the unjust and the unfortunate."); Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1151 (1989) ("No theory of either justice or injustice can be complete if it does not take account of the sense of injustice.").

This approach to judicial review is rooted as well in a limited moral pluralism: if there are many paths to the good, the role of the Constitution is to hold off conceded evils sufficiently to allow citizens, singly or politically, to shape their own goods.

³² *Hearing on Thomas*, *supra* note 1.

³³ Richard Cohen, *Thomas's Missed Chance*, WASH. POST, Oct. 15, 1991, at A23.

³⁴ *Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539, 557-58 (1963), was the first case to turn back an effort to publicly expose Communists. Ironically, the legacy of McCarthyism in contemporary constitutional law is the ostracized left's protection from disclosure, which is denied to mainstream political enterprises. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (striking down requirement that political parties publicly list contributors and recipients of campaign disbursements, as applied to Socialist Workers Party).

1. The Political Legacy

The "Red Scare" of which Joseph McCarthy was emblematic did not begin with Senator McCarthy's announcement of his anti-Communist crusade in 1950 nor did it end with his censure by the Senate in 1954. Rooted in international frustrations and increasing tensions with the Soviet Union following the end of World War II,³⁵ die-hard opposition to the socialist aspects of the New Deal,³⁶ and evidence and charges of Communist espionage in the past at the national level,³⁷ the resolve to cleanse America of Communist influence moved to the center of the national stage when the Republicans took control of the House of Representatives after the 1946 elections.³⁸

³⁵ Examples of these frustrations and tensions include the refusal of the Soviet Union to join the Marshall plan in 1947, the overthrow of the democratically elected government of Czechoslovakia in 1948, the triumph of Mao in China despite massive American aid to the Nationalists in 1949, the explosion of a Soviet nuclear device in 1949, and the outbreak of the Korean War in 1950.

³⁶ See, e.g., RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 17 (1990) [hereinafter FRIED, NIGHTMARE] ("To critics on the Right, the New Deal was Communist, Fascist, or both."); MICHAEL P. ROGIN, THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER 250 (1967) ("Most of those who mobilized behind McCarthy at the national level were conservative politicians and publicists, businessmen, and retired military leaders discontented with the New Deal, with bureaucracy, and with military policy."); see also RICHARD M. FRIED, MEN AGAINST MCCARTHY 8 (1976) [hereinafter FRIED, MEN AGAINST MCCARTHY] (describing as one example of this opposition the assertion by the 1944 Republican Vice-Presidential nominee that Roosevelt and the New Deal were controlled by Communists); MARY S. MCAULIFFE, CRISIS ON THE LEFT, COLD WAR POLITICS AND AMERICAN LIBERALS 1947-1954, at 28 (1978) (noting that one commentator felt that Truman's loyalty program was a measure conceived by Republicans to attack the New Deal).

³⁷ Top secret documents were found at *Amerasia* magazine offices in 1945. See FRIED, MEN AGAINST MCCARTHY, *supra* note 36, at 6; ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH MCCARTHY AND THE SENATE, 35-38 (2d ed. 1987). The next year, a Canadian investigation revealed widespread Soviet spying in Canada, and by implication, in the United States. See *The Royal Comm'n Appointed Under Order in Council P.C. 411 of February 5, 1946 to Investigate the Facts Relating to and Circumstances Surrounding the Communication by Pub. Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power*, THE REPORT OF THE ROYAL COMMISSION (1946). The reports were followed in 1948 by allegations of State Department penetration by Communist agents, including Alger Hiss, and Hiss's indictment for perjury. The year 1950 brought Hiss's conviction, revelations of wartime spying on America's atomic weapons program by American agents of the Soviet Union, and the prosecution of those agents. See GRIFFITH, *supra*, at 43-47.

³⁸ Prior investigations of "loyalty" at the federal level and local level had set the stage. See, e.g., GEORGE H. CALCOTT, MARYLAND AND AMERICA, 1940 TO 1980, at 109 (1985) (noting that Maryland passed the strongest loyalty oath in the country and compiled lists of its potentially disloyal citizens well before McCarthyism became a national phenomenon); VERN COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE

With many of their members newly elected on platforms of anticommunism, the Republicans announced their intent to use the investigations of the House Un-American Activities Committee (HUAC) to drive Communist sympathizers from the (Democrat-controlled) federal executive branch. In March of 1947, President Truman responded with a preemptive strike. Truman issued an executive order setting up an administrative apparatus to examine the "loyalty" of all government employees. The loyalty boards were entitled to act upon anonymous accusations, to explore the political beliefs of employees, and to proceed on evidence gathered by investigating committees and the FBI. They were to determine whether "reasonable grounds exist[ed] for belief that the person involved [was] disloyal to the Government of the United States," a finding of which would warrant dismissal.³⁹ The Order authorized the Attorney General to publish an expanded list of "subversive organizations" connected with Communist activities,⁴⁰ with which a previous "sympathetic affiliation" would constitute prima facie proof of disloyalty. State governments followed suit with loyalty investigations of their own. The Defense Department investigated

OF WASHINGTON (1951) (detailing investigations of the Canwell Committee, established by the state of Washington to monitor allegedly subversive activities); FRIED, NIGHTMARE, *supra* note 36, at 104-08 (discussing anti-Communist activities in New York, California, Washington, and Oklahoma prior to 1946); JAMES T. SELCRAIG, THE RED SCARE IN THE MIDWEST 1945-55: A STATE AND LOCAL STUDY 1-86 (1982) (analyzing the Red Scare in Wisconsin, Illinois, Indiana, Ohio, and Michigan); THE STATES AND SUBVERSION (Walter Gellhorn ed., 1952) (chronicling government investigations designed to control disloyal or subversive conduct in California, Illinois, Maryland, Michigan, New York, and Washington).

For recent discussions of state statutes adopted in the McCarthy era, see James L. Gibson, *Pluralism, Federalism and the Protection of Civil Liberties*, 43 W. POL. Q. 511, 518-20 (1990); James L. Gibson, *Political Intolerance and Political Repression During the McCarthy Red Scare*, 82 AM. POL. SCI. REV. 511, 513-16 (1988). For a discussion of the pre-1946 history of the House Committee on Un-American Activities, see WALTER GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 3-189 (1968).

³⁹ See Exec. Order No. 9835, 3 C.F.R. 627, 630 (1948), *reprinted as amended in* 5 U.S.C. § 631 (1952). Topics explored by the loyalty boards included attitudes toward race relations, domestic politics, premarital sex, social theory, and international affairs. For examples of questions asked by the loyalty boards, see ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 125-42 (1953); Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 73-75 (1948); see also RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES 21-60 (1958) (discussing loyalty programs for federal civil servants).

⁴⁰ The organizations included the National Lawyers Guild and the Washington Book Club.

the loyalty of defense contractors, while private industry and some unions adopted loyalty programs. During the next eight years, approximately one American worker out of five was subjected to loyalty review programs.⁴¹

Truman's gambit proved unsuccessful in channeling the anti-Communist concern into administrative forums. In 1947, the HUAC, under its new Republican chairman, Representative Parnell Thomas, responded with the first set of a long series of hearings which made famous the inquiry, "Are you now or have you ever been a member of the Communist party?" HUAC publicized what it regarded as "Communist influence" in education, media, industry, and government by focusing on the past associations of protagonists in each area.⁴² Witnesses were placed under oath and questioned about their political beliefs and associations, as well as those of their friends and colleagues. Refusal to respond to such questions left the witness vulnerable to prosecution for contempt of Congress or dismissal from employment as an uncooperative witness, a "Fifth Amendment Communist."⁴³

⁴¹ See FRED J. COOK, *THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE MCCARTHY* 558 (1971) (noting that the Eisenhower loyalty program affected approximately 2.5 million federal employees, 3.5 million in the armed forces, 3 million in private industry, and half a million merchant seamen and port workers); FRIED, *NIGHTMARE*, *supra* note 36, at 70-72, 92, 140, 173, 181-82 (estimating that 13.5 million employees came under these programs).

⁴² HUAC's counterpart in the Senate, the Senate Internal Subversion Subcommittee (SISS), established in 1951, pursued similar enterprises. See, e.g., DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 104-06 (1978) ("In January 1951 the Senate . . . established a subcommittee of the Judiciary Committee . . . [which] was the [SISS], with the intention of rivaling the HUAC."); M.J. HEALE, *AMERICAN ANTICOMMUNISM, COMBATting THE ENEMY WITHIN 1830-1970*, at 158 (1990) ("HUAC remained the instrument of anticommunists in the lower house, but was joined in 1951 by the [SISS], so that senators too could win some Communist scalps.").

⁴³ The chair of the HUAC, Parnell Thomas, characterized its activities in this way: "The chief function of the committee has always been the exposure of unamerican activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government once such efforts have been pointed out." 80 CONG. REC. A4604 (1947). The Committee program sought "to expose and ferret out . . . Communist sympathizers in the Federal Government . . . [and] to spotlight . . . Communists controlling . . . vital unions." HOUSE COMM. ON UN-AMERICAN ACTIVITIES, 80TH CONG., 2D SESS. *INVESTIGATION OF UN-AMERICAN ACTIVITIES IN THE UNITED STATES* 2 (Comm. Print 1948). See generally *Barenblatt v. United States*, 360 U.S. 109, 133 n.33 (1959) ("The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party . . . and the identity of the individuals responsible for its success."); *id.* at 157-59, 163-68 (Black, J., dissenting) (detailing Committee's efforts to use exposure as a sanction); CAUTE, *supra* note 42, at 102-03

The Committee regularly issued indices of identified "communist sympathizers," which became the basis of formal and informal blacklists in the public and private sectors.⁴⁴ Although Chairman

(detailing efforts to forward names to inquiring employers); HEALE, *supra* note 42, at 155-61 ("Use of the Fifth Amendment protected witnesses from prison but not from their employers, and HUAC was soon smugly subpoenaing hostile witnesses, knowing that their appearance would lose them their jobs.").

The approach was inherited from efforts adopted before World War II. See SPECIAL COMM. TO INVESTIGATE UN-AMERICAN ACTIVITIES AND PROPAGANDA IN THE U.S., INVESTIGATION OF UN-AMERICAN ACTIVITIES AND PROPAGANDA, H.R. REP. NO. 2, 76th Cong., 1st Sess. 13 (1939) ("While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, communism, fascism, and nazism, it does have the right to focus the spotlight of publicity [on] their activities . . .").

⁴⁴ In addition to providing evidence or proof of disloyalty to government loyalty boards, defiance of or designation by HUAC meshed with sanctions administered by the private sector. Between 1949 and 1959, HUAC directly furnished to employers information on 60,000 persons. See CAUTE, *supra* note 42, at 102-03. In addition, private networks disseminated the findings of the Committee. See HEALE, *supra* note 42, at 139, 156, 170, 173.

In the area of entertainment:

For blacklisting to work, HUAC's hammer needed an anvil. It was duly provided by other groups who willingly punished hostile or reluctant witnesses. American Legion publications spread the word about movies whose credits were fouled by subversion. . . . [Employers] paid to have the names of those they might hire for a show or series checked against "the files." . . . It became habit for Hollywood, radio and TV networks, advertisers, and stage producers . . . not to employ entertainers whose names cropped up in . . . [those] files.

FRIED, NIGHTMARE, *supra* note 36, at 156-57; see also LARRY CEPLAIR & STEVEN ENGLUND, *THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-60*, at 161-73, 210-20 (1983) (detailing blacklisting practices in the radio, television, and motion picture industries); GOODMAN, *supra* note 38, at 218-25, 376-86 (describing interaction between HUAC procedures and entertainment blacklist, noting that American Federation of Television and Radio Artists authorized sanctions against members who failed to cooperate with HUAC); VICTOR S. NAVASKY, *NAMING NAMES* 84 (1980) (noting that after 1951, "the blacklist became institutionalized. No Hollywood Communist or ex-[Communist] who had ever been accused, or called to testify, or refused to sign a studio statement would get work in the business—at least under his own name—unless he went through the ritual of naming names."); *id.* at 85-96 (describing blacklist); *id.* at 321-22 (hearings and indices of HUAC "alerted the free-lance blacklisters, who functioned as the enforcement arm"); RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE* 302-09 (1985) (describing the process by which HUAC provided a "forum in which an individual could choose either to absolve himself of all radical heresies . . . or suffer banishment to an indefinite blacklist"); Harold W. Horowitz, *Legal Aspects of "Political Black Listing" in the Entertainment Industry*, 29 S. CAL. L. REV. 263 (1956) (discussing the various legal positions of an employee accused of having affiliations with the Communist Party, under employment law, defamation law, and the law of unprivileged interference with business relations).

In the field of higher education, "almost 20 percent of the witnesses called before congressional and state investigating committees were college teachers or graduate

Thomas ultimately left Congress in 1948, six years before the fall of Senator Joseph McCarthy, HUAC and its imitators continued their efforts with substantial effect through the mid-1950s. They were aided and applauded by large newspaper chains, the American Legion, the Catholic Church, and large numbers of concerned citizens for whom radical associations were a sign of disloyalty.⁴⁵ As one commentator observed,

it helps to view McCarthyism as a process First the objectionable groups and individuals were identified [through] a committee hearing, for example, or an FBI investigation. . . . Then, they were punished, usually by being fired. . . . In most

students. Most of those academic witnesses who did not clear themselves with the committees lost their jobs." ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 10 (1986); *see also id.* at 126-307 (describing academic imposition of sanctions and blacklist); LIONEL S. LEWIS, *COLD WAR ON CAMPUS: A STUDY OF THE POLITICS OF ORGANIZATIONAL CONTROL* 49 (1988) ("Over 60 percent of the [academic dismissal] cases were occasioned when individuals were called before some governmental body to give testimony about their knowledge of or contributions or connection to communist influence on education.").

⁴⁵ *See, e.g.,* *Gojack v. United States*, 384 U.S. 702, 709-10 & n.7 (1966) (reversing conviction for refusal to testify at 1955 HUAC hearings, described by chair as part of a "plan for driving Reds out of important industries," because once exposed, "loyal Americans who work with them will do the rest of the job"); *Russell v. United States*, 369 U.S. 749, 767 (1962) (detailing 1955 and 1956 investigations by SISS into alleged Communist influence in the press); GOODMAN, *supra* note 38, at 367-98 (discussing subpoenas of 1956, including that of folk singer Pete Seeger, who was a popular figure in "popular front" activities and was subsequently blacklisted for a decade).

In some areas, the efforts at the state level to expose Communist sympathizers lasted past the end of the decade. *See, e.g.,* *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828-30 (1966) (overturning conviction obtained in 1964 prosecution for failure to respond to questions about Communist activities in early 1950s); *Uphaus v. Wyman*, 364 U.S. 388, 389 (1960) (New Hampshire successfully continues confinement of director of World Fellowship Camp who refuses to disclose guest register from early 1950s); *cf. Stanford v. Texas*, 379 U.S. 476, 480-86 (1965) (striking down statutory authorizations of general searches to discover "books, records, pamphlets, cards, receipts, [and] lists" showing Communist affiliation).

The FBI participated in, and on some accounts instigated, these enterprises, both executive and legislative. With the waning of the official activities of HUAC, the FBI entered a phase of engaging in active dissemination of information regarding leftists in its COINTELPRO program, which began in 1956. For a description of later FBI activities under the COINTELPRO and COMINFIL programs, *see* FRANK J. DONNER, *AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 177-240 (1980) (discussing disclosures to news media and to employers); *see also* KENNETH O'REILLY, *HOOVER AND THE UN-AMERICANS: THE FBI, HUAC AND THE RED MENACE* 194-229 (1983) (discussing counterintelligence and HUAC); RICHARD G. POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 340, 341 (1987) (detailing anonymous telephone calls to prevent renting of halls and the release of information about alleged Communist participants in marches and rallies).

cases it was a government agency which identified the culprits and a private employer which fired them."⁴⁶

The McCarthy apparatus did not touch everyone, but for those who ran afoul of it the impact was brutal. Even citizens who were not called before loyalty boards or investigating committees felt what would later be called a "chilling effect." In 1954, as Senator McCarthy's power began to wane, a national opinion survey found that 41% of a national sample felt that "some [or all] people do not feel as free to say what they think as they used to," although only 13% said they personally were chilled.⁴⁷ In 1955, among a national sample of academic social scientists, 36% stated that their colleagues were less willing to express unpopular views in the community than they had been seven years earlier, while 22% said that they themselves had refrained from expressing controversial opinions.⁴⁸ When investigating committees explored the petitions witnesses signed and the parties they attended 20 years earlier, a

⁴⁶ SCHRECKER, *supra* note 44, at 9. Support for this analysis also comes from Senator McCarthy and his admirers. See JOSEPH MCCARTHY, MCCARTHYISM: THE FIGHT FOR AMERICA 2-100 (1952); William F. Buckley, Jr. & L. Brent Bozell, *The Question of Conformity, in THE MEANING OF MCCARTHYISM* 41, 55 (Earl Latham ed., 2d ed. 1973) ("The McCarthyites are doing their resourceful best to make our society inhospitable to Communists, fellow-travellers, and security risks in the government . . . [by] conducting operations on two fronts: (1) they seek to vitalize existing legal sanctions and (2) they seek to harden existing anti-Communist prejudices and channel them into effective social sanctions.").

⁴⁷ SAMUEL A. STOUTER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND 78-80 (1955). Among community leaders, 48% felt that some or all of the country was chilled, and 13% felt chilled themselves. See *id.* From 1948 to 1954, the proportion of Americans who felt that "most people can be trusted" dropped from 66% to 62%, but among Jewish respondents, the drop was from 71% to 57% and black trust went from 39% to 31%. See *id.* at 86-87.

At the time of the Stouffer study, 34% of Americans in another national sample expressed qualified or strong approval for Senator McCarthy. See *id.* at 231. Six months earlier, approval for McCarthy was at the level of 60% among those expressing an opinion in a Gallup survey. See FRED I. GREENSTEIN, THE HIDDEN HAND PRESIDENCY: EISENHOWER AS LEADER 201 (1982).

In 1950, the American Bar Association recommended that legislators be required to take loyalty oaths, and in 1951 the American Civil Liberties Union (ACLU) adopted an amendment to its constitution banning Communists from holding ACLU office. See HEALE, *supra* note 42, at 148-49.

⁴⁸ See PAUL F. LAZARSFELD & WASNER THIELENS, JR., THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS 78, 195 (1958). In addition, the survey results indicated that 27% worried that political opinions might affect job security, 9% had toned down writing to avoid controversy, and 20% felt that their colleagues were less willing to express unpopular political views in the classroom than seven years earlier. See *id.* at 76, 78, 194.

citizen avoided risks by keeping her head down.

For purposes of this article, the striking thing about the enterprise which Senator McCarthy embodied was that it achieved, strictly through the use of information, a substantial impact on citizens' lives, the discourse of the republic, and the exercise of the First Amendment rights of speech, belief, and association. Conventional criminal sanctions ultimately were invoked against active members of the Communist Party itself. Fellow travelers and former members, however, were not prosecuted in their own right unless they refused to reveal information. Official loyalty dismissals were often predicated on previous disclosures, and were themselves effective intimidation because of the stigma that would attach. The sanctions at the command of Senator McCarthy, and his precursors and imitators, were primarily the ability to obtain and publish information.

The use of the "method of exposure"⁴⁹ as a sanction against activities shielded from more direct intervention was neither inadvertent nor unprecedented. A generation earlier, when Louis Brandeis touted the virtues of sunlight as a disinfectant,⁵⁰ progressives pursued public disclosure as a mechanism to reach fields barred from direct regulation by prevailing canons of dual federalism or insufficient legislative support.⁵¹

⁴⁹ The phrase appears to have originated in efforts to suppress native fascist movements before World War II. See Institute of Living Law, *Combatting Totalitarian Propaganda, The Method of Exposure*, 10 U. CHI. L. REV. 107, 108-09 (1943).

⁵⁰ See BRANDEIS, *supra* note 8, at 92.

⁵¹ See, e.g., SEYMOUR M. LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790-1977*, at 214-15 (2d ed. 1978) (discussing liberal use of congressional committees "to foster an antibusiness and anticongervative climate of opinion"); Louis B. Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143, 145-48 (1949) (detailing liberal defense of and conservative attack on investigations during the 1920s and 1930s); Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission: I*, 28 COLUM. L. REV. 708, 708 (1928) ("Control is exercised through the reflex effects of an informed public opinion educated by the publications of the fact-gathering agency.").

Brandeis praised the Money Trust investigations as informing the public, but he was not insensitive to the usefulness of hearings as a method of punishing wrongdoers in the court of public opinion. See BRANDEIS, *supra* note 8, at 98, 104-05; see also THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 90-91 (1984) (describing Brandeis's use of press leaks, combined with public cross-examination, in the Ballinger-Pinchot affair).

Senator Hugo Black was also an enthusiastic practitioner of the method of exposure as a means "to restrain the activities of powerful groups who can defy every other power." Hugo L. Black, *Inside a Senate Investigation*, 172 HARPER'S MAG. 275, 286 (1936); see also JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 87-96 (1989) (detailing

In the years before World War II, registration and disclosure of the identity and activities of foreign agents were promoted as a "democratic way . . . of destroying the poison of totalitarian propaganda."⁵² The "spotlight of pitiless publicity"⁵³ directed through the lenses of the Voorhis Anti-Propaganda Act⁵⁴ and the Foreign Agents Registration Act⁵⁵ was thought to provide a mechanism for suppressing antidemocratic propaganda without overstepping the bounds of the First Amendment.

When the principle was taken up and expanded upon by the congressional investigators of the post-war era the result was McCarthyism. In its full flower, the evils of the "method of exposure" were at least three-fold: the arbitrary and uncontrolled imposition of disabilities on citizens subjected to compelled disclosure, the substantive impact of exposure on individual exercise of constitutionally protected rights of speech, thought, and association, and the constraint on public thought and discourse from the fear of public investigation of private or long-buried beliefs and associations.

2. The Judicial Heritage

Despite these widely conceded evils, the courts never forthrightly repudiated Senator McCarthy's enterprise. During the early years of the Red Scare that bears his name, judicial response to the loyalty crusade began as sympathetic endorsement.⁵⁶ When judicial

Senator Black's uses of publicity as a sanction).

⁵² Institute of Living Law, *supra* note 49, at 107-08; see also Bruce L. Smith, *Democratic Control of Propaganda Through Registration and Disclosure I*, 6 PUB. OP. Q. 27, 30 (1942) (explaining the importance to American democracy of allowing both a balance of popular discussion and "[t]he development of administrative agencies for disclosing to the average voters the real affiliations of influential propagandists").

⁵³ S. REP. NO. 1783, 75th Cong., 3d Sess. 2 (1938); H.R. REP. NO. 1381, 75th Cong., 1st Sess. 2 (1937). The "pitiless publicity" language may have originated with Senator Hugo Black. See Black, *supra* note 51, at 275, 286 ("[S]pecial privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity.").

⁵⁴ Pub. L. No. 870, 54 Stat. 1201 (1940) (codified at 18 U.S.C. § 2386 (1988)) (requiring registration of certain organizations subject to foreign control).

⁵⁵ Pub. L. No. 319, 53 Stat. 1244 (codified at 18 U.S.C. § 611 (1988)). See Viereck v. United States, 318 U.S. 236, 242-43 (1943) (construing Act); BONTECOU, *supra* note 39, at 164 & n.26 (noting that the Act required "the registration of groups engaged in political propaganda on behalf of a foreign principal or acting under its order or direction").

⁵⁶ For one classic sample of this sympathy, see *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950), in which the court stated:

No one can doubt in these chaotic times that the destiny of all nations

enthusiasm cooled, successful challenges to McCarthyite tactics were couched in terms of opposition to their procedure, rather than their substance. Statutes requiring disclosure of political activities were construed narrowly in light of First Amendment values,⁵⁷ efforts to brand "Communist front organizations" were held to be problematic because they lacked due process,⁵⁸ and legislative efforts at regulation by disclosure, when they were subject to challenge,⁵⁹ were turned aside only because they lacked explicit congressional authorization.⁶⁰ Even after the public tide had turned against McCarthy, "abuses" were held legally improper because they had been undertaken without adequate legislative mandate, or because they punished without adequate warning.⁶¹

Such oblique approaches may well have reflected institutional wisdom. They may have protected the Court from direct confrontation with Congress⁶² by couching libertarian results in less contro-

hangs in the balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world. . . . [I]t is absurd to argue, as these appellants do, that questions asked men who, by their authorship of scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions.

Id. at 53; see also *Barsky v. United States*, 167 F.2d 241, 273 (D.C. Cir.) (Edgerton, J., dissenting) (discussing the majority's holding that Congress has the power to elicit answers regarding whether a witness is "a believer in Communism or a member of the Communist Party"), *cert. denied*, 334 U.S. 843 (1948); *United States v. Josephson*, 165 F.2d 82, 92 (2d Cir.) (stating that "Congressional power to investigate [the affiliations of individuals] is as flexible as its power to legislate"), *cert. denied*, 333 U.S. 838 (1948). But see *In re United Electrical, Radio and Machine Workers*, 111 F. Supp. 858, 869-70 (S.D.N.Y. 1953) (upbraiding the government for using grand jury presentment to smear union).

⁵⁷ See *United States v. Harriss*, 347 U.S. 612, 618 (1954).

⁵⁸ See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142-43 (1951) (Black, J., concurring); cf. *Watkins v. United States*, 354 U.S. 178, 214-15 (1957) (holding a contempt conviction invalid under the Due Process Clause of the Fifth Amendment, but refusing to "prevent the Congress . . . from obtaining any information it needs for the proper fulfillment of its role").

⁵⁹ See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951) (finding absolute immunity for legislative investigations against damage action for violation of constitutional rights).

⁶⁰ See *United States v. Rumely*, 345 U.S. 41, 46-48 (1953).

⁶¹ See *Sweezy v. New Hampshire*, 354 U.S. 234, 254 (1957); *Watkins*, 354 U.S. at 208-09.

⁶² That such a confrontation was in the air should not be doubted. In 1958 Congress came within a few votes of passing a statute limiting the power of the Supreme Court to construe statutes as preempting state regulation, and removing Supreme Court appellate jurisdiction in certain internal security cases. See DONALD MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 269-91

versial values that could mobilize broader support. It is far from clear, however, that skeptical pupils in the national seminar fully grasped their tutor's distinction between protecting Communists and fellow travelers from unfair procedures and standing in the way of the national crusade against Communism on the merits. Whatever the popular reaction, the decisions were not a condemnation of McCarthyism that could be carried into other fields.

Judicial ambivalence, embodied in ad hoc balancing, characterized the response to the echoes of McCarthy-style inquiries after the height of the McCarthy era passed.⁶³ The balancing approach

(1966); C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-60, at 72-85, 96-106 (1961).

⁶³ The balancing approach hardly charted a straight course. The Court invalidated compulsory disclosure of NAACP membership lists because of the absence of a "compelling and subordinating interest" in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-66 (1958), and *Bates v. Little Rock*, 361 U.S. 516, 524-28 (1960). In the interim, disclosure of the list of guests at the World Fellowship Summer Camp in New Hampshire was upheld because of the "compelling" interest of the state of New Hampshire in "self-preservation." *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959). The *Uphaus* Court also distinguished *Sweezy* on the somewhat narrow ground that "World Fellowship is neither a university nor a political party." *Id.* at 77. Inquiries regarding membership which would have been dubious regarding the Progressive Party were held appropriate in respect to membership in the Communist Party. *See Barenblatt v. United States*, 360 U.S. 109, 129 (1959).

The inchoate prospect of private retaliation was enough to raise successful First Amendment objections to requirements that teachers disclose membership in the NAACP, *see Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960), and that handbills in support of equal employment opportunity carry the name of their author, *see Talley v. California*, 362 U.S. 60, 64 (1960). Yet the "public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization" was outweighed by the "danger[s] inherent in concealment" of American Communists, who probably numbered under 10,000 at the time. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 102-03 (1961); *cf. Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (holding that State can deny bar admission to applicant refusing to answer relevant questions). At the same time, the exigencies of the search for hidden Communists were insufficient to justify public inquiry into the membership of the Miami branch of the NAACP. *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 550-57 (1963).

These cases brought the first flowering of the extensive academic discussion of balancing as a judicial technique, reflecting the high-pitched dialogue between Justice Black and Justice Frankfurter on the issue. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 53-56 (1966); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 737-44 (1963).

continues to frame analysis of recent exposure problems.⁶⁴ Long after any political necessity for delicacy has faded, the image of Senator McCarthy's crusade remains out of focus. Judicial reticence regarding McCarthy's legacy is not so much a matter of inherited delicacy as it is a reflection of the deep-seated conflicts that form the focus of the next sections.

I. THE STING OF THE SCARLET LETTER: DISCLOSURE AS AN EFFECTIVE SANCTION

Any discussion of the use of information as a sanction runs aground initially on the wisdom of childhood: "Sticks and stones can break my bones but words can never hurt me." Whatever the views of Shakespearian villains,⁶⁵ a strong undercurrent of modern culture situates cognizable harm only in the physical realm. Thus, reluctance to place McCarthyite exposure in the rogues gallery of constitutional paradigms that call forth condemnation may reflect an intuition that the sanction of disclosure is no sanction at all. Professor Epstein observes in a related context: "False words are the weak sidekick of force—presumptively bad in themselves, though

⁶⁴ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-98 (1982) (balancing the government's interest in disclosure of political party contributors against the individual's right to associate with a political organization in private); *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (same); cf. *Meese v. Keene*, 481 U.S. 465, 480-83 (1987) (balancing the state's interest in disclosing the identity of a person engaged in political propaganda on behalf of foreign powers against an individual's First Amendment rights); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 765-68 (1986) (balancing a woman's right to end her pregnancy in private against the state's interest in gathering health-related information).

⁶⁵ In *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990), Chief Justice Rehnquist quoted eight lines from Iago's speech regarding the observation that "good name . . . [i]s the immediate jewel of [the] soul." *Id.* at 2702 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act III, sc. 3, lines 155-56 (W.J. Craig ed. 1905)). This seems to be a step forward both from Chief Justice Rehnquist's casual attitude toward reputation in *Paul v. Davis*, 424 U.S. 693, 701-10 (1976) (holding that inclusion of plaintiff's name in list of "active shoplifters" disseminated by police without notice or a hearing was not a violation of the Due Process Clause), and his taste in literature in *Texas v. Johnson*, 491 U.S. 397, 424 (1989) (Rehnquist, C.J., dissenting) (quoting at length from John Greenleaf Whittier's poem "Barbara Frietchie").

less dangerous"⁶⁶ True words, one could claim, hold less danger.⁶⁷

This skepticism, which underlay the early reluctance of federal judges to intervene in McCarthyite investigations, recurs in modern judicial approaches to constitutionally shadowed disclosure. Upon close examination, however, initial doubts concerning disclosure's impact, or the legitimacy of such impacts, do not militate against judicial review of informational sanctions. Rather, careful exploration of the societal context of disclosure and the theoretical structure of the rights endangered becomes a necessary judicial task.

A. Doctrinal Doubts

1. The McCarthy Era

The first major post-war challenges to HUAC foundered in part on judicial skepticism regarding the theory "that the investigation of Un-American or subversive propaganda impairs in some way not entirely clear the freedom of expression guaranteed by the Bill of Rights."⁶⁸ One panel regarded it as "doubtful" that the witness had shown that "the free exercise of his rights has been impaired in

⁶⁶ Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 466 (1978); cf. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of N.C. Press 1954) (1787) ("[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.").

⁶⁷ Cf. *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) (The line of permissible First Amendment conduct falls "between the disparagement of ideas . . . and the suppression of ideas through the exercise or threat of state power. If the latter is rigorously proscribed, the former can hold no terror." (citation omitted)), *cert. denied*, 478 U.S. 1021 (1986).

A similar position has been unsuccessfully urged in cases involving the Establishment Clause such as *County of Allegheny v. ACLU*, 492 U.S. 573 (1989):

Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. . . . The creche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

Id. at 662-64 (Kennedy, J., concurring in part and dissenting in part); see also *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting) ("Speech is not coercive; the listener may do as he likes. We must distinguish threats from shadows.").

⁶⁸ *United States v. Josephson*, 165 F.2d 82, 90 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

some way.”⁶⁹ A second court noted an argument that “fear of, or distaste for . . . unpopularity” would inhibit “the most timid and sensitive,” and observed that public voting, before the introduction of the secret ballot in the late nineteenth century, “subjected even the most hardy to pressure and also to violence. But it was never thought, or suggested, that public voting violated constitutional rights.”⁷⁰ Two Justices joined Justice Reed in maintaining that the promulgation of a list of “Communist-action” organizations by the Attorney General did not constitute an abridgement of the First Amendment rights of organizations so listed: “They are in the position of every proponent of unpopular views. Heresy induces strong expressions of opposition. So long as petitioners are permitted to voice their political ideas . . . it is hard to understand how any advocate of freedom of expression can assert that their right has been unconstitutionally abridged.”⁷¹

These hesitations were understandable, for being pilloried in the press as a “Communist dupe” is a far cry from being lined up against the wall and shot as a traitor. Indeed, the wide reliance on informational sanctions rather than criminal ones in the McCarthy period was in part a testimony to the degree to which ideals of free speech and belief retained a hold on the body politic as well as the executive and judicial branches of government. Even at the height of the McCarthy phenomenon, America remained a reasonably well-ordered liberal society. It was in part because the executive was reluctant to prosecute and courts were wary of punishing “Un-American” thoughts that congressional investigators turned to publicity as a sanction. Still, to admit that the sanction was not draconian should not suggest that it was ineffective.

During the McCarthy era, the argument that government disclosures themselves caused no cognizable impact on First Amendment freedoms quickly crumbled under the impact of the political realities outside of the courtroom.⁷² First, the Court

⁶⁹ *Id.*

⁷⁰ *Barsky v. United States*, 167 F.2d 241, 249 & n.28 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

⁷¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 200 (1951) (Reed, J., dissenting); *cf.* Buckley & Bozell, *supra* note 46, at 51 (“The traditional view among libertarians has always been that freedom tends to be maximized for both majorities and minorities, and thus for society in general, if social sanctions are preferred to legal ones.”).

⁷² Justice Black’s experiences with the power of “pitiless publicity” as an investigating Senator, *see* SIMON, *supra* note 51, at 95; Black, *supra* note 51, at 286, may well have been sharpened by the experiences of his sister, Virginia Foster Durr,

acknowledged in dicta that "[u]nder some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes. A requirement that adherents of particular . . . political parties wear identifying arm-bands . . . is obviously of [that] nature."⁷³ The next year, the Court's majority joined in Justice Frankfurter's conclusion that "[i]t would be blindness . . . not to recognize that in the conditions of our time . . . designation [as a Communist-front organization] drastically restricts the organization[], if it does not proscribe [it]."⁷⁴

By 1957, as the shadow of Senator McCarthy began to fade, only Justice Clark dissented from the proposition that

[t]he mere summoning of a witness and compelling him to testify . . . about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy.⁷⁵

Since then, Justices have remarked regularly upon the efficacy of public hostility as a means of suppressing the exercise of constitutional rights.⁷⁶ The legacy of the McCarthy era was

and his brother-in-law, Clifford Durr, as victims of McCarthyism. See VIRGINIA F. DURR, *OUTSIDE THE MAGIC CIRCLE* 254-73 (Hollinger F. Barnard ed., 1985) (describing the social stigma resulting from a SISS investigation); FRIED, *NIGHTMARE*, *supra* note 36, at 177-78 (describing investigation of the Durrs by SISS).

⁷³ *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

⁷⁴ *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 161 (Frankfurter, J., concurring); see also *id.* at 158 ("Publicity and meeting places have become difficult . . . to obtain. . . . [T]ax exemptions . . . have been revoked . . . licenses . . . have been denied [T]he organizations assert [that they] lost supporters and members, especially from present or prospective federal employees."); *United States v. Rumely*, 345 U.S. 41, 44 (1953) ("[W]e would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished . . . that does not see what 'all others can see and understand' not to know that there is wide concern . . . over some aspects of the exercise of the congressional power of investigation." (citation omitted)).

⁷⁵ *Watkins v. United States*, 354 U.S. 178, 197 (1957), see also *Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957) ("The sanction emanating from legislative investigations is of a different kind than loss of employment. But the stain of the stamp of disloyalty is just as deep. The inhibiting effect in the flow of democratic expression . . . is equally grave.")

⁷⁶ See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986) ("[R]eporting requirements raise the specter of public exposure

illuminated by the potential for private suppression manifest in the civil rights struggles of the 1950s and 1960s. The two combined to fix in the judicial consciousness the destructive power of exposure as a sanction. Courts have realized that words lead to sticks and stones; both physical and social sanctions form legal reality.⁷⁷

and harassment of women who choose to exercise their . . . right . . . to end a pregnancy.”); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 98 (1982) (“risk of harassment” of contributors to minority party); *Bellotti v. Baird*, 443 U.S. 622, 645-47 (1979) (plurality opinion) (parental bypass procedure must be completed with anonymity); *id.* at 655 (Stevens, J., concurring) (a right “to make the abortion decision . . . may be exercised without public scrutiny and in defiance of the . . . opinion of . . . third parties”); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (woman may be chilled from asserting her own rights in abortion suit “by a desire to protect the very privacy of her decision from the publicity of a court suit”); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 143 & n.20 (1961) (Black, J., dissenting) (disclosure is “part of a pattern of suppression” and makes it “almost impossible to get or retain employment”); *Talley v. California*, 362 U.S. 60, 64 (1960) (“no doubt that such . . . requirement would tend to restrict freedom to distribute information”); *id.* at 67 (Harlan, J., concurring) (identification requirement is likely to have a “deterrent effect on free speech”); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) (compelled disclosure of NAACP membership would work a significant interference with the freedom of association by virtue of “fear of community hostility and economic reprisals”); *Uphaus v. Wyman*, 360 U.S. 72, 84 (1959) (Brennan, J., dissenting) (“[I]n an era of mass communications . . . [and] international tensions . . . exposure and group identification by the state of those holding unpopular and dissident views are fraught with such serious consequences for the individual as inevitably to inhibit seriously the expression of views which the Constitution intended to make free.”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (“[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [taxes or punishments].”).

⁷⁷ This is not to say that the argument against recognizing the impact of exposure is not still made, but simply that it is a loser. *Cf. Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1385 n.41 (E.D. Pa. 1990) (holding that “any statute which requires a physician to notify a third party of a woman’s abortion decision is, as a matter of law, a constitutionally significant burden on a woman’s right to an abortion It would be disingenuous for the Commonwealth to claim that any burden . . . is not the result of state action.”), *aff’d in part and rev’d in part*, 1991 U.S. App. LEXIS 24,792 (3d Cir. Oct 21, 1991), *petition for cert. filed*, Nov. 7, 1991; *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 636-37 (D.R.I. 1984) (rejecting the defendant’s contention “that even if forced notification [to] the husband of the wife’s decision to have an abortion] results in the husband taking action to delay or frustrate his wife’s decision to proceed with an abortion, that the burden is not imposed by the law itself”).

2. The Modern Split: The Necessity of Concrete Impacts

Although judges have not returned to the skepticism of the early McCarthy era, the degree to which adverse effects must be proved, as the prerequisite to judicial scrutiny, has divided courts. One group of cases simply assumes the deterrent effect of disclosure. Analysis then proceeds strictly in terms of the persuasiveness of governmental justifications. Thus, in *Talley v. California*,⁷⁸ though the dissenters observed that the record was "barren of any claim, much less proof, that [the Plaintiff] will suffer any injury whatever by identifying the handbill with his name,"⁷⁹ Justice Black's opinion for the Court proclaimed: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information" by the National Consumer Mobilization.⁸⁰ In another such case, *Shelton v. Tucker*,⁸¹ the dissenters pointed out that the statute in question did not authorize the publication of the associations to which Arkansas public school teachers belonged,⁸² while the majority found the fear of disclosure "neither theoretical nor groundless," and observed that even in the absence of disclosure "pressure . . . to avoid any ties which might displease those who control his professional destiny would be constant and heavy."⁸³ Most recently, in *Thornburgh v. American*

⁷⁸ 362 U.S. 60 (1960).

⁷⁹ *Id.* at 69 (Clarke, J., dissenting).

⁸⁰ *Id.* at 64; see also *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down a requirement that addressees of "communist political propaganda" affirmatively request delivery, and holding that "this requirement is almost certain to have a deterrent effect," because "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda'").

⁸¹ 364 U.S. 479 (1960).

⁸² See *id.* at 491 (Frankfurter, J., dissenting); see also *id.* at 499 (Harlan, J., dissenting) ("[I]f it turns out that this statute is abused . . . by an unwarranted publicizing of the required associational disclosures . . . we would have a different kind of case . . .").

⁸³ *Id.* at 486; see also *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 828-29 (1966) (striking down conviction for failure to reveal "political associations of an earlier day" and stating that "exposure . . . is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval"); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544, 555-56 (1963) (holding that the First Amendment "encompasses protection of privacy of association in organizations such as [the NAACP]").

A three-judge court protected the financial records of the Arkansas Republican Party in 1968, despite the absence of record evidence of deterrent effect, on the ground that disclosure of the identities of contributors would "subject at least some of them to potential economic or political reprisals of greater or lesser severity" and

College of Obstetricians & Gynecologists,⁸⁴ the Court, relying on *Talley*, struck down a statute requiring the public reporting of the age, race, marital status, and political subdivision of residence, though not the name, of women who obtained abortions in Pennsylvania. Despite a contrary district court finding, the Supreme Court held that the requirements "raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right . . . to end a pregnancy," and hence pose "an unacceptable danger of deterring the exercise of that right."⁸⁵

On the other side of the fence, recent applications of the disclosure doctrine in the realm of free speech manifest skepticism

"well may tend to discourage both membership and contributions." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark. 1967) (panel included Blackmun, J.), *aff'd per curiam*, 393 U.S. 14 (1968); *cf.* *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 75 (1988) (noting that Catholic Conference resisted discovery into its political activities, which were alleged to have violated tax exemption limitations, on grounds that it could not "in conscience, comply with the subpoenas in question"); *Seattle Times v. Rhinehart*, 467 U.S. 20, 38 (1984) (Brennan, J., concurring) (Aquarian Foundation is entitled, despite protections of free speech, to prohibition of private disclosure of information obtained in discovery on basis of "interests in privacy and religious freedom," without a discussion of the substance for claims of oppression).

⁸⁴ 476 U.S. 747 (1986).

⁸⁵ *Id.* at 767-68. Indeed, it was precisely the conclusion that the "specter" of disclosure was sufficient to strike down the statute that provoked the dissenters:

I can accept the proposition that a statute whose purpose and effect are to allow harassment and intimidation of citizens for their constitutionally protected conduct is unconstitutional, but . . . striking down the . . . statute on this basis is . . . indefensible.

. . . .

. . . [The majority did not have a sufficient basis] for a conclusive finding on the complex question of the motive and effect of the reporting requirements and the adequacy of the statute's protection of the anonymity of doctors and patients.

Id. at 805 (White, J., dissenting).

In the cognate area of parental consent and notification regarding abortions for pregnant minors, a plurality of the Court held in *Bellotti v. Baird*, 443 U.S. 622 (1979), that exemptions from such requirements must be provided by judicial procedures that "assure . . . anonymity" without any concrete showing that disclosure would tangibly harm the minors in question. *Id.* at 644. Most recently, in *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972 (1990), a majority of the Court held that anonymity was not required where the identity of the minor requesting an abortion was to be "kept confidential," and disclosure was criminally punishable. *See id.* at 2979. The dissent by Justices Blackmun, Brennan, and Marshall took the position that the possibility of unauthorized disclosure of the required statements of identity was enough to render the statute unconstitutional. *See id.* at 2991 (Blackmun, J. dissenting).

regarding the reality of disclosure-based deterrence. These cases demand affirmative and concrete showings of adverse impact. In *Buckley v. Valeo*,⁸⁶ the Court required "reasonable probability that the compelled disclosure of . . . contributors names will subject them to threats, harassment or reprisals from either [g]overnment officials or private parties."⁸⁷ The Court held that the standard was not met, although granting that it was "undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute."⁸⁸

⁸⁶ 424 U.S. 1 (1976) (per curiam).

⁸⁷ *Id.* at 74.

⁸⁸ *Id.* at 68; see also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1982) ("The integrity of the political system will be adequately protected if contributors [to ballot-initiative campaigns] are identified in a public filing[;] . . . if it is thought wise, legislation can outlaw anonymous contributions."); cf. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 799 n.11, 800 (1988) (holding that state could require fundraisers for constitutionally protected causes to "disclose unambiguously his or her professional status," or may "publish the detailed financial disclosure forms it requires professional fundraisers to file").

Justice Burger, in his dissent in *Buckley*, suggested some "facts of political life" that support this conclusion:

Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent.

Buckley, 424 U.S. at 237.

The failure of proof in *Buckley* might be interpreted in two ways. First, it may be that "reprisals and harassment" are cognizable only when they reach, or threaten to reach, a level where they "deter contributions to the point where the movement cannot survive." *Id.* at 71. The Court might be arguing that the value of contributions is primarily their addition to the political marketplace of ideas. Although one can predict that some contributions will be deterred, the viewpoints represented by the unpopular parties are not driven from the political stage. See Geoffrey R. Stone and William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 610 (interpreting *Brown* and *Buckley* as protecting against content-neutral disclosure scheme only where "there is a risk that particular ideas or viewpoints may be driven completely from the marketplace of ideas").

This, however, seems implausible, both because the Court has elsewhere shown itself to be sensitive to the effect of government regulation that mutes but does not eliminate particular voices, (even NAACP cases had no showing that participation would be entirely eliminated), and because the rest of the *Buckley* opinion seems to value political contributions as a form of political expression in themselves.

It seems more reasonable to conclude that the *Buckley* Court reacted to an effort to invalidate legislation on its face, and was simply unwilling to paint with a broad brush, either because of skepticism as to the magnitude of the effect, or because of reluctance to allow a narrow class of plaintiffs to raise arguments based on effects on the rights of others.

Following *Buckley*, the Court in *Brown v. Socialist Workers '74 Campaign Committee*,⁸⁹ found that the record of harassment and unpopularity of the Socialist Workers Party supported a showing of "reasonable probability of threats, harassment, or reprisals"⁹⁰ of contributors and recipients of campaign funds. Justices O'Connor, Rehnquist, and Stevens, however, took the position in dissent that "persons providing business services to a minor party are not generally perceived by the public as supporting the party's ideology, and thus are unlikely to be harassed if their names are disclosed."⁹¹ They further maintained that disclosure of the identity of campaign workers "is unlikely to increase the degree of harassment so significantly as to deter the individual from campaigning for the party."⁹²

This skepticism regarding the adverse effects of disclosure attracted a majority of the Court in *Meese v. Keene*,⁹³ a challenge to the Attorney General's designation of a film of the Canadian Film Board as "foreign propaganda" under the Foreign Agents Registration Act. Justice Stevens's majority opinion did confer standing, since evidence introduced by the Plaintiff established potential harm to the political candidate who wished to show these films.⁹⁴ But, on his reading, the Act "does not pose any obstacle to appellee's access to the materials he wishes to exhibit . . . Congress simply required the disseminators of such material to make additional disclosures" and "allows appellee to combat any such bias simply by explaining [his side of the story]."⁹⁵

⁸⁹ 459 U.S. 87 (1982).

⁹⁰ *Id.* at 100-01.

⁹¹ *Id.* at 111 (O'Connor, J., dissenting). A recollection of the use of boycott threats to eliminate employment opportunities and other facilities for blacklisted performers during the McCarthy era, *see supra* note 43 and accompanying text, might have suggested another conclusion.

⁹² *Id.* at 111-12; *see also* *Chandler v. Florida*, 449 U.S. 560, 580-81 (1981) (distinguishing the argument in *Estes v. Texas*, 381 U.S. 532, 565 (1965), that the broadcast of trials is "potentially a form of punishment in itself" on the ground that the question of public humiliation is an empirical issue that "must also await the continuing experimentation").

⁹³ 481 U.S. 465 (1987).

⁹⁴ *See id.* at 473-74 n.7 (finding that 49% of the public would be less likely to vote for a candidate who showed foreign films that the Justice Department had classified as "political propaganda"); *cf.* *Block v. Meese*, 793 F.2d 1303, 1308 (D.C. Cir. 1986) (evidence introduced to show that potential customers declined to take the films labeled as political propaganda).

⁹⁵ *Keene*, 481 U.S. at 480-81. One defect of this argument is that, just as with the McCarthy disclosure mechanism, the plaintiffs' explanations have neither the same authority nor the same scope of dissemination as the government's labels. Another

The modern version of the "sticks and stones" objection, therefore, does not absolutely exclude protection. Courts recognize that disclosures by the government can interfere cognizably with constitutional rights. The open question is what showing plaintiffs must make to evoke this recognition. The issues here are both positive and normative. Under what circumstances should we expect disclosure to have substantial effects on constitutionally protected behaviors, and under what circumstances should courts give weight to those effects?

B. *The Doubts Clarified and Allayed*

To take a sensible position on what types of disclosures should be cognizable as unconstitutional burdens, we must first examine in some detail the mechanisms by which exposure can achieve a deterrent effect and the situations in which the effect is most likely. Three discrete types of effects can be identified.

First, publicity by one agency can form the basis for actions by other government entities. This is the most easily analyzed situation. Official retaliation against constitutionally protected activities is impermissible, but the costs of claiming judicial protection on a case by case basis may well be prohibitive. Protection against initial disclosure is an effective prophylactic measure against dispersed contemporary threats, as well as a means of embodying current constitutional limitations in a form that has some binding effect on the future. Where there is a history of governmental hostility or a plausible threat of future official retaliation, the memories of the McCarthy era suggest protection against involuntary disclosure of protected activities.

Second, government disclosure can trigger concrete private actions against the object of publicity. Despite the early doubts of

difficulty is the dubious status of the claim that the government may legitimately burden the exercise of constitutional rights with the requirement of "explaining" their exercise to the public.

Judicial skepticism was also evident in the decision to allow grand jury subpoenas regarding newspaper sources. *See Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972) ("Estimates of the inhibiting effect of such subpoenas [to newspaper reporters] on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.").

The Court has similarly expressed an unwillingness to review Army domestic intelligence operations directed against political dissenters. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm . . .").

courts during the McCarthy period, and the claims of some contemporary commentators, the prospect of private violence or economic coercion triggered by government disclosures is a danger against which citizens exercising their constitutional rights are entitled to constitutional safeguards. In evaluating these threats, the vulnerability of particular plaintiffs to coercion is central to the analysis. Incidence of physical violence should trigger full protection, and in evaluating economic threats, judges must be wary of excessive reliance on countervailing forces and of excessive faith in the perfection of the market.

Finally, disclosure can lay the basis for social stigma and expose to public view information the victim wishes to remain private. These effects suggest two normative issues. First, stigma, like private economic pressure and violence, is the result of actions by private individuals. To suggest, as some commentators do, that pressures resulting from private decisions should not be the basis for constitutional concern is unpersuasive. That argument gains strength, however, from a second point: efforts to invoke public opinion are often entitled to constitutional protection. In approaching the prospect of stigma, therefore, courts must establish the degree to which particular constitutional rights carry an immunity from public scrutiny.

1. The Impact of Disclosures

a. *Disclosure as the Basis for Other Public Sanctions*

During the McCarthy years, a good deal of the sting associated with public accusations of Communist affiliation by the investigating committees or the Attorney General lay in the collateral consequences attached to the disclosure by other agencies of federal, state, and local government. Sometimes those consequences flowed explicitly, as in the case of New York's Feinberg Law,⁹⁶ which made membership in an organization listed by the Attorney General a *prima facie* basis for disqualification from employment in the public schools, or Maryland's Ober Law,⁹⁷ which contemplated use of the Attorney General's list as a basis for disqualification from public office.⁹⁸ More often, public accusations and disclosure of

⁹⁶ N.Y. EDUCATION LAW § 3022 (McKinney 1949) (repealed 1958).

⁹⁷ MD. ANN. CODE OF 1957 Art. 85A (1949) (repealed 1978).

⁹⁸ See, e.g., CAUTE, *supra* note 42, at 404, 413 (detailing state requirements that teachers execute oaths disclaiming membership in organizations listed by the Attorney

affiliation rendered citizens subject to the adverse exercise of administrative discretion.⁹⁹ Whether the sanction was explicit, implicit, or covert, at a time when government employment and benefits were regarded as gratuities that could be withdrawn at will,¹⁰⁰ disclosure of unpopular but constitutionally protected activities invited public retaliation.

In *Shelton v. Tucker*,¹⁰¹ the Court wrote in the shadow of its experience with McCarthyism:

To compel a teacher to disclose his every associational tie is to impair that teacher's right of free association. . . . Such interference . . . is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those

General); FRIED, NIGHTMARE, *supra* note 36, at 109 (detailing states which copied the Ober Law: Mississippi (1950), New Hampshire (1951), and Washington (1951)); *cf.* CAUTE, *supra* note 42, at 103 (discussing a Florida town that passed an ordinance revoking a license of an unfriendly witness); *id.* at 181-82 (discussing Gwinn Amendment, which prohibited occupancy of federally assisted housing by members of Attorney General-listed organizations, which was struck down); *id.* at 182 (discussing attempt to cut off old age benefits to Communist Party members); *id.* at 183 (discussing efforts to exclude "Fifth Amendment communists" from unemployment benefits).

⁹⁹ See, e.g., CAUTE, *supra* note 42, at 224-44 (deportation); *id.* at 403-30 (efforts by committees at state level to generate firings at universities); *id.* at 403-45 (detailing efforts by the FBI to force the dismissal of teachers); SCHRECKER, *supra* note 44, at 9 (explaining how government agencies identified allegedly disloyal employees and universities fired them); SELCRAIG, *supra* note 38, at 54-57 (describing the Detroit experience, including a ban on newsstands selling subversive newspapers and magazines and the eviction of leftists from public housing); *id.* at 73-75 (discussing HUAC attacks on public school teachers and student allegations of teacher disloyalty). For a more recent example, see GOODMAN, *supra* note 38, at 425-27 (describing how HUAC sent names of California teachers suspected of being Communists to local school boards.).

Informal disclosures as well as public denunciations were used. Thus, the FBI often fed information on alleged Communist affiliations to other government agencies. See, e.g., KENNETH O'REILLY, HOOVER AND THE UNAMERICANS 6-12 (1983) (discussing the role of FBI informants during the HUAC investigations); DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE, THE WORLD OF JOSEPH MCCARTHY 117, 257, 321 (1982) (reporting that "[m]uch of what [McCarthy] got came directly from the FBI" and that many of McCarthy's informants were former FBI agents). One study suggests, however, that at least in the area of higher education, it was primarily the formal activities of investigative committees that triggered other sanctions. See LIONEL S. LEWIS, COLD WAR ON CAMPUS 49 (1988).

For later uses of the technique, see for example DONNER, *supra* note 5, at 198-200 (describing FBI efforts to provoke local governmental action against Socialist Workers Party); *id.* at 209 (same tactics against Klan).

¹⁰⁰ See, e.g., *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir. 1950) ("In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority . . ."), *aff'd*, 341 U.S. 918 (1951).

¹⁰¹ 364 U.S. 479 (1960).

who any year can terminate the teacher's employment without . . . notice . . . hearing . . . or opportunity to explain. . . .

Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.¹⁰²

The modern threat of adverse governmental action associated with disclosure of unpopular exercises of constitutional rights remains a matter for concern. Contemporary constitutional doctrine frowns upon retaliation for the exercise of constitutional rights, and legal protections against illegitimate use of government discretion have multiplied since the McCarthy years in many areas.¹⁰³ Explicit statutes mandating such retaliation, like the Ober Law, would be constitutionally vulnerable on their face. Even so, successful judicial challenges cost time, tears, and money.¹⁰⁴ Where official retaliation is imminent, it will often be more appealing to abandon the exercise of the constitutional right when exposure is threatened.

¹⁰² *Id.* at 485-87 (citations omitted). The Court expressed similar concerns in *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), striking down a requirement that citizens request in writing delivery of "Communist propaganda." The Court commented:

This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason.

Id. at 307.

¹⁰³ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (summarizing prohibitions on government retaliation for the exercise of constitutional rights); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-45 (1985) (procedural protections required before deprivation of property interest); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (same).

The proposition that "even though a person has no 'right' to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests" has in the last thirty years attained the status of a new orthodoxy. *Rutan v. Republican Party*, 110 S. Ct. 2729, 2736 (1990) (citation omitted). This orthodoxy is now, however, subject to the attacks of new iconoclasts. See *id.* at 2749-52 (Scalia, J., dissenting).

¹⁰⁴ For representative studies, see for example KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 25-32 (1988); GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 34-40 (1987).

Covert retaliation is even more difficult to protect against. A prudent citizen must consider the costs of vindicating her rights as well as the possibility that retaliation will go undetected by the courts. Unlike the prospect of retaliation triggered in the private economy, there is limited hope that a competitive market will operate to limit or circumvent retaliation by public officials. Nor can one take comfort in a belief that official retaliation occurs only in times of broad political pathology. Individual public decision-makers may exact retribution from groups that they regard as unsavory. Moreover, when responding to public opinion, politicians, like decision-makers in the private economy, are likely to respond to the desires of the volatile fraction of the population they must attract to be elected. If 10% of voters desire a government purged of ACLU members, for example, and the remainder are neutral on the subject, a promised purge may provide the margin of victory at the polls.¹⁰⁵

Much turns, therefore, on the appropriate evaluation of the propensity of other public entities to retaliate against those who exercise constitutional rights, whether such retaliation is constitutionally legitimate, and the ability of post-hoc legal remedies to constrain such retaliation. Acknowledging a right of anonymity elides the difficulties of obtaining effective relief; it prevents unconstitutional administrative actions without requiring case by case judicial intervention.¹⁰⁶ It is also a means of binding the future to current constitutional norms. The probability of administrative harassment of a dissident group may be small today, but administrators ten years hence may not be so self-restrained. If we

¹⁰⁵ This example assumes that there is no equally powerful and volatile group of marginal voters who support the ACLU. It is here that the legal protections developed since the McCarthy years may come into play. To the extent that politicians announce an intention to retaliate against the exercise of constitutional rights in order to reap electoral benefits, they are more vulnerable to judicial control. An election-year promise to purge the public payroll of members of the ACLU (or the KKK) casts significant light on the "intent" behind a subsequent discharge of such employees.

This protection should not be exaggerated, however. Coded announcements may be sufficient to garner political support without providing judicially cognizable proof, and decisions to avoid public controversy by declining to hire or provide benefits to a controversial figure, or by deleting her name from the payroll need not be carried out with the clarity necessary to make out a constitutional claim.

¹⁰⁶ Anonymity will certainly be more effective in preventing abuses than would post-hoc damage relief. It often will be more effective than an injunction. An injunction can be disobeyed or evaded, but an administrator cannot harass those whom she cannot identify.

are skeptical of the measure of protection available from future courts, preventing today's administrators from obtaining information that could be used to harass imposes a measure of restraint on their successors.¹⁰⁷

b. *The Varieties of Private Reactions*

i. Material Sanctions

The reactions to government disclosure easiest to identify as constitutionally problematic are those that threaten the physical or economic interests of the victim. The law traditionally provides a remedy for violence or economic loss, and it is reasonably straightforward to account for these threats in a constitutional analysis.

a. *Violence*

Disclosure of the exercise of unpopular constitutional rights, at its most devastating, leads to physical violence. Such private violence is generally conceded to be illegitimate, but it is a regular outgrowth of public hostility in the United States.¹⁰⁸

¹⁰⁷ The problem of the future takes on particular poignancy when recalling the experience of the McCarthy era, in which the answer to the crucial "have you ever been" question often turned on events fifteen or twenty years earlier. Cf. *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828 (1966) (overturning appellant's conviction for contempt based on his refusal to answer questions based on events over ten years old).

This same experience, however, should suggest that the confidentiality of files is no substitute for their destruction, and imbue a certain skepticism that any information-limiting strategy will impose substantial restraints on a government committed to repression. In good times, most groups will be unwilling to sacrifice the benefits of publicity in order to avail themselves of the cloak of anonymity, while in bad times an information-processing capacity far in excess of that available to the McCarthy investigators will render anonymity almost unattainable.

This analysis leads again to the conclusion that the limitation of information is a strategy that is fitted to a reasonably well-ordered society, as a tax on repression, not an impenetrable bulwark.

¹⁰⁸ During the McCarthy era, reported violence against left wing activities appears to have been predominantly linked to public confrontations at voluntarily publicized rallies. See, e.g., CAUTE, *supra* note 42, at 164-65 (documenting a stone-throwing confrontation immediately following an open concert raising money for the Harlem Chapter of the Civil Rights Congress); FRIED, NIGHTMARE, *supra* note 36, at 96 (discussing a savage beating of a farm worker attempting to circulate a petition at a union rally); SELCRAIG, *supra* note 38, at 89-90 (describing the forceful ejection from a plant of a union worker who circulated a copy of the Stockholm peace petition before the Korean War).

During the civil rights struggles of the 1950s and 1960s in the South, it was

Hostility toward a given exercise of constitutional rights need not be widespread for the threat of physical retaliation to be an effective deterrent; a single pair of hands can wield a match, an axe, or an explosive device, while threatening letters or telephone calls are virtually impossible to prevent. Although prosecution or protection may deter attacks, prosecution may be welcomed by would-be martyrs and the cost of protection may make continued exercise of constitutional rights prohibitive.

Anonymity is the only sure defense. To the extent that government penetrates the screen of anonymity in situations where violence is threatened, it imposes vulnerability to violent private sanctions.¹⁰⁹ Where the relations between the subject of disclo-

generally accepted that public affiliation with civil rights organizations or public avowal of constitutional rights carried with it the risk of private violence. *See, e.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("harassment and threats of bodily harm . . . community hostility and economic reprisals"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("economic reprisal, loss of employment [and] threat of physical coercion" accompanied the exercise of civil rights); *NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950s* 215-20 (1969) (detailing the reactions of the Florida, Georgia, Texas, and South Carolina legislatures to the NAACP, including enjoining planned activities, demanding membership lists, discontinuing public facilities, and calling out state militias); *TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 197-203, 503-04, 508-11, 528-29, 633-39, 690-91, 715, 717-20, 759-62, 781-82, 793-94, 866 (1988) (describing tactics of harassment and resistance to derail King's civil rights movement in the South).

Such reactions were in tune with traditions of private enforcement of social order in the South. *See, e.g.*, *EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY SOUTH* 9-33 (1984) (examining the history of violence in the South); *ROBERT P. INGALLS, URBAN VIGILANTES IN THE NEW SOUTH: TAMPA, 1882-1936*, at 1-30 (1988) (discussing the roots and development of traditional Southern lynch law).

In recent years, courts have been cognizant of the potential for violence directed against abortion clinics. *See, e.g.*, *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 660-65 (E.D. Pa. 1985); Anthony Paonita, *Embattled Judge at Center of Abortion Clinic Battle*, NAT'L L.J., Aug. 19, 1991, at 6 (reporting that U.S. district judge received death threats for issuing an injunction against Operation Rescue and had been placed under protection of U.S. marshals). *See generally Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1985-86).

As international travel increases, the United States may suffer from the export of other traditions of violent direct action. *See, e.g.*, *DANIEL PIPES, THE RUSHDIE AFFAIR: THE NOVEL, THE AYATOLLAH, AND THE WEST* 27-29 (1990) (discussing the death sentence proclaimed and the million dollar reward offered by Ayatollah Khomeini for the execution of author Salman Rushdie); *id.* at 167-71, 204-05 (describing how bombings and harassment require security precautions by authors, publishers, and bookstores); *They Also Serve*, N.Y. TIMES, Mar. 19, 1989, § 4, at 9 (discussing terrorist bombing attack in California against wife of captain of USS Vincennes, which had previously shot down an Iranian airliner).

¹⁰⁹ These forms of harassment are not limited to physical violence. In addition

sure and the recipient of the disclosed information are already charged with violent potential, disclosure is a virtual invitation. Abortion, for example, is today an issue laden with threats of physical confrontation. Efforts to expose to parents and husbands the identity of women who seek abortions, like attempts to publicize the identity of professionals who provide abortions, threaten to precipitate violent retaliation.¹¹⁰

Required disclosure mechanisms in a violent atmosphere are threats even in situations where their subject has not chosen total anonymity. A campaign worker for a fringe political party may willingly expose herself to physical harassment while distributing leaflets in the business district of a city if she can retire to substantial anonymity at home. When her name and address are publicized by the government, she is exposed to both the retaliation of neighbors and to hooligans drawn from elsewhere. Furthermore, the threat of violence entailed by publication may itself cause customers, suppliers, neighbors, and co-workers to shun the victim.¹¹¹ Where the exercise of constitutional rights requires the

to the possibility of disruptive midnight telephone calls and malicious accusations to law enforcement authorities or news media, modern reliance on computers makes Americans vulnerable to more exotic electronic harassment. See, e.g., John Markoff, *Cyberpunks Seek Thrills In Computerized Mischief*, N.Y. TIMES, Nov. 26, 1988, § 1, at 1 (expressing fears that computer hackers are so skilled at tampering with computers that they might be able to alter credit ratings or have electricity turned off).

¹¹⁰ See, e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2938-39, 2945 n.36 (1990) (noting that required parental notification can result in violence and harassment and that the "most common reason for not notifying the second parent was that that parent was a child or spouse-batterer and notification would have provoked further abuse"); *Planned Parenthood v. Casey*, 1991 U.S. App. LEXIS 24,792, at *76-93 (3d Cir. Oct. 21, 1991) ("real world consequences" of husband notification are likely to include violence, economic and psychological coercion), *petition for cert. filed*, Nov. 7, 1991; *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 660-65 (E.D. Pa. 1985) (discussing and listing "unwanted and unwarranted acts of violence, threats, intimidation, and harassment" caused by state disclosure requirements). But see *Planned Parenthood*, 1991 U.S. App. LEXIS 24,792, at *97-101 (while acknowledging threats of "substantial public protest," holding that disclosure of information regarding abortion clinics had not been shown to "so enlarge the number or escalate the severity of protests that they will become an absolute obstacle"). In this last holding the *Planned Parenthood* court seems to have forgotten its own observation that "the principal power of Damocles' sword is in its hanging rather than its fall." *Id.* at *83.

¹¹¹ See, e.g., Barry Dyller, *Not in his Good Books*, NEWSDAY, Feb. 23, 1989, at 78 (reporting bookstores refusing to sell Rushdie's *Satanic Verses* due to terrorist threats); *They Also Serve*, supra note 108 (describing how wife of captain of U.S.S. Vincennes was dismissed from position teaching at private school after she had been the target of an apparent terrorist attack).

cooperation of third parties, as in the cases of publishing and reproductive autonomy, the effect of disclosure in a violent atmosphere turns also on the willingness of others to risk a dangerous association.¹¹²

Government disclosure may increase the level of harassment by decreasing the costs of engaging in effective intimidation. For acts of spontaneous vandalism, the availability of obvious targets highlighted by the government may serve as lightning rods for impulses that would otherwise dissipate relatively harmlessly. For more organized efforts of repression, government disclosure frees resources otherwise spent searching out targets for harassment. Where the disclosure carries a taint of disapproval, government disclosure may also serve to legitimize the impulse to harass.

b. *Economic Sanctions*

In a market economy every participant is hostage to the willingness of others to trade with her. Robert Nozick praises this situation as one which enforces the principle of "to each as they are chosen."¹¹³ John Stuart Mill put it another way: "In respect to all persons but those whose pecuniary circumstances make them independent of the good will of other people, [public] opinion on this subject is as efficacious as law; men might as well be imprisoned, as excluded from the means of earning their bread."¹¹⁴

This economic threat was a substantial weapon of the red-baiters of the 1950s. In an era when 68% of the populace believed that Communists should be fired from jobs as sales clerks, and 91% believed that Communist teachers should be discharged,¹¹⁵ public registration as a member of the Communist party was economic suicide, and being named as an "uncooperative" witness was a pathway to ruin.¹¹⁶ The prospect of economic retaliation likewise

¹¹² See, e.g., Lisa Belkin, *Women in Rural Areas Face Many Barriers to Abortions*, N.Y. TIMES, July 11, 1989, at A1 (discussing the unwillingness of small town hospitals and doctors to risk harassment and violence by providing abortions or associating with abortion clinics).

¹¹³ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 160 (1974).

¹¹⁴ John Stuart Mill, *On Liberty* (1849) [hereinafter Mill, *On Liberty*], reprinted in THE UTILITARIANS 506 (1961).

¹¹⁵ See STOUFFER, *supra* note 47, at 40-43.

¹¹⁶ See, e.g., CAUTE, *supra* note 42, at 103 (describing how Rose Edelmam Anderson was driven from the drug store she had owned for 22 years upon taking the Fifth Amendment before HUAC); DURR, *supra* note 72, at 269 (discussing how legal practice of C. Durr "dropped away" after V. Durr was an uncooperative witness before SISS and how independent newspaper publisher Aubrey Williams was driven

shaped the perceptions of courts called upon to adjudicate the issue of required publication of the membership lists of civil rights organizations.¹¹⁷

Unlike the effect of threatened violence, the economic threat implicit in public disclosure must exceed the dislike of a few angry bigots in order to be an effective deterrent. If the vast bulk of Americans today bear no animus toward Masons, the disclosure of the membership list of a Masonic lodge is not likely to be a substantial economic disincentive to joining.¹¹⁸

It will not do, however, to exaggerate the security to be sought in countervailing forces. The times need not sanction pogroms to generate repression. Indeed, employers need not even harbor hostility toward a pariah group for employment opportunities to dry up, as long as a sufficient proportion of customers are unwilling to do business with those who hire pariahs. In an industry with low profit margins, great competition, or high fixed costs, the level of public hostility need not be overwhelming to block employment opportunities, since management's attention is riveted upon the marginal consumer.¹¹⁹

out of business by the American Legion after being called before SISS); *supra* note 44 and accompanying text (discussing Hollywood and academic blacklists).

¹¹⁷ See, e.g., *Bates v. Little Rock*, 361 U.S. 516 (1960) (holding that NAACP's refusal to disclose membership lists in an effort to protect members freedom of association was protected by the Due Process Clause); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (holding that Alabama's efforts to force the NAACP to release membership lists interfered with members' freedom of association); cf. *ACLU v. Mabus*, 719 F. Supp. 1345, 1348-50 (S.D. Miss. 1989) (relating the activities of Mississippi State Sovereignty Commission, which "harassed individuals who assisted organizations promoting desegregation or voter registration" by disseminating lists of activists and urging job actions by employers), *vacated on other grounds*, 911 F.2d 1066 (5th Cir. 1990).

¹¹⁸ A prospective Mason must take into account, however, the possibility of an emergence of anti-Masonic sentiment in the future.

¹¹⁹ See, e.g., ERIK BARNOUW, *THE SPONSOR: NOTES ON A MODERN POTENTATE* 48-49 (1978) (describing the effect of the threat of "listing" by anti-Communists on Block Drug Company, whose toothpaste success was based on heavy advertising expenditures). Compare the unyielding response of Alcoa, in a relatively noncompetitive and differentiated market, to hostility generated by Edward R. Murrow's attack on McCarthy. See *id.* at 51-52; HUGH C. DONAHUE, *THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT?* 114-15 (1989); A. M. SPERBER, *MURROW, HIS LIFE AND TIMES* 357, 420, 453-54, 482-83 (1986).

In the case of modern conglomerates, as long as one of the affiliated entities participates in a vulnerable market, the entire group is vulnerable. For example, Roussel Uclaf, a French company, has declined to license the abortion pill RU-486 out of fear of a boycott directed at its majority shareholder, the German pharmaceutical company Hoechst. See Alan Riding, *Abortion Politics are Said to Hinder Use of French*

At the height of the McCarthy era, slightly more than one third of the population was willing to boycott sponsors of radio programs on which "Communists" appeared, and only one tenth were willing to boycott sponsors of programs involving alleged Communists who denied such involvement under oath.¹²⁰ Nonetheless, an allegation of "controversial" involvement was generally enough to make a performer unacceptable.¹²¹ As one official of the movie industry observed in 1946: "20,000,000 people have to see every picture Universal makes before you get five cents of your salary. We can't afford to offend *anybody*."¹²²

Although a majority of Americans today favor access to abortions,¹²³ the threat of consumer boycotts has, at least temporarily, dissuaded all major drug manufacturers from pursuing development of the abortifacient RU-486.¹²⁴ Current efforts to generate consumer pressure to control broadcast programming, whether from the right or left, seem to have a substantial im-

Pill, N.Y. TIMES, July 29, 1990, at A1.

¹²⁰ See STOFFER, *supra* note 47, at 39, 43.

¹²¹ See BARNOUW, *supra* note 119, at 44-45, 49 (describing the television "terror of controversial people" and the blacklists which conquered television and radio); CAUTE, *supra* note 42, at 500 (quoting a studio production head who explained that "the freedom of the industry" required the rejection of "anyone thought to be a Communist"); NAVASKY, *supra* note 44, at 78-85 (discussing the HUAC hearings concerning the "unfriendlies"). The McCarthy blacklisting techniques also tapped into the market power of intermediaries. See BARNOUW, *supra* note 119, at 49 (describing the tactics of the president of the National Association of Supermarkets in exerting pressure on programmers).

¹²² EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS 71 (1982); *cf. id.* at 42-46 (describing the efforts of the ten million members of the Catholic Legion of Decency to affect the quality and morality of films in 1934); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM 160-68 (1968) (The Catholic church "probably ranks as the most important single group in the control of movies . . . at any level.").

¹²³ See, e.g., George Gallup, Jr. & Frank Newport, *Americans Shift Toward Pro-choice Position*, 295 GALLUP POLL MONTHLY 2, 3 (1990) (53% of Americans favor law allowing abortion until viability, while 36% oppose; 52% oppose law prohibiting abortion with exceptions for rape, incest, deformed fetus, and health of the mother, 42% favor); Larry Hugick, *Abortion: Majority Critical of Abortion Decision, But Most Americans Favor Some New Restrictions*, 286 GALLUP REP. 5, 8 (1989) (58% oppose overturning *Roe v. Wade*, while 34% favor).

¹²⁴ See, e.g., Mindy J. Lees, Note, *I Want a New Drug: RU-486 and the Right to Choose*, 63 S. CAL. L. REV. 1113, 1126-28 (1990) (discussing how the protests of American anti-abortion groups have hindered distribution of RU-486 in other countries); Riding, *supra* note 119, at A15 ("Although some small American pharmaceutical companies have offered to market RU-486 in the United States, Roussel Uclaf has turned down their proposals, apparently out of fear that anti-abortion groups might organize a boycott of Hoechst in the United States.").

pact.¹²⁵ Hostility toward a number of constitutionally protected groups and activities stands at national levels that could generate substantial pressure on suppliers or employers implicated in such activities.¹²⁶ Local pockets of intolerance may be much deeper, putting rights at risk locally which receive broad support nationwide.¹²⁷ Further, local repression may spread as routinized

¹²⁵ See BARNOUW, *supra* note 119, at 33 (noting that the CIO boycott of Philco in 1938 forced Philco to drop sponsorship of news commentator Boake Carter); KATHRYN C. MONTGOMERY, *TARGET: PRIME TIME 155-65* (1989) (describing the history of a recent effort to use commercial threats to alter media practices); Roger Cohen, *With Boycott and Ads, a Battle Over Selling*, N.Y. TIMES, Apr. 23, 1990, at C18 (detailing efforts to generate boycotts of national bookstore chains by Rev. Donald Wildmon's American Family Association to force them to stop carrying Playboy and Penthouse); Walter Goodman, *Commercial TV Gets Commercial Threats*, N.Y. TIMES, Apr. 24, 1989, at C13 (citing effort by Terry Rakolta of Michigan to persuade sponsors to abandon television show *Married With Children*, efforts to exclude elements offensive to minority groups, and efforts by nurses to boycott sponsors of an allegedly sexist program about nurses); *TV Boycott Is Criticized*, N.Y. TIMES, July 19, 1989, at D23 (reporting boycott of Clorox and Mennen by Christian Leaders for Responsible Television because of sponsorship of "offensive" programs).

¹²⁶ Roughly one third of the American public is opposed to legal abortions. See *supra* note 123. Hostility toward HIV positive individuals, gays, and lesbians is at similar levels. See *Attitudes on AIDS Shifting Toward Acceptance of Victims' Rights*, 268 GALLUP REP. 30, 38 (1988) (25% would refuse to work alongside person with AIDS); Diane Colasanto, *Tolerance of Homosexuality Is on the Rise Among the Public*, 289 GALLUP REP. 11, 14-15 (1989) (13% think a "homosexual" should not be hired as salesperson; 32% as doctor; 43% as high school teacher); George Gallup Jr. & Alec M. Gallup, *AIDS: 35 Nation Survey*, 273 GALLUP REP. 2, 27 (1988) (32% avoid or seek to avoid homosexuals); *Public Expresses Compassion for AIDS Victims, But Holds Them Responsible for Contracting the Disease*, 263 GALLUP REP. 12, 13 (1987) (33% of Americans believe employers should have the right to fire employees with AIDS).

Hostility toward the availability of sexually explicit materials is more pervasive. See HERBERT MCCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE* 208 (1983) (44% of the public believes that selling pornographic books should be forbidden by law); Tom W. Smith, *The Polls—A Report: The Sexual Revolution?*, 54 PUB. OPINION Q. 415, 426-27 (noting that in 1989, 40.3% of respondents believed there should be laws against distribution of pornography to purchasers of all ages, while in 1986, 45% strongly agreed that the government should crack down more on pornography in books, movies and nightclubs, and believed that standards regarding the sale of sexually explicit material should be stricter).

Stouffer found that 89% of respondents would have fired a Communist teaching in college during the McCarthy era. See STOUFFER, *supra* note 47, at 43. Subsequent replications between 1972 and 1985 found that at least 50% of respondents believed that college teachers who are Communists should be fired. See MCCLOSKEY & BRILL, *supra*, at 54-55 (66% of public would refuse to hire professor because of "extreme" and unusual political beliefs); John Mueller, *Trends in Political Tolerance*, 52 PUB. OPINION Q. 1, 6 (1988) (only 20% would allow least favorite groups to teach in public school).

¹²⁷ Cf. STOUFFER, *supra* note 47, at 109-31 (finding that levels of tolerance and nonconformity vary according to region and type of community); Mark Abrahamson

national businesses adopt standard operating procedures forced on them by local boycotts.¹²⁸

Economic threats arising from disclosure ultimately may prove unstable. Even in the worst of times, market forces may tend to undercut efforts to use disclosure to impose economic sanctions. If hostility toward the target group is not rooted in economic

& Valerie J. Carter, *Tolerance, Urbanism and Region*, 51 AM. SOC. REV. 287, 290 (1986) (discussing difference in intolerance between large and small cities); George E. Marcus et al., *Rural-Urban Differences in Tolerance: Confounding problems of Conceptualization and Measurement*, 45 RURAL SOC. 731, 732-34 (1980) (comparing tolerance in urban and rural areas). Thus, in 1989, while only 8% of respondents in the East took the position that homosexuals should not be hired as salespersons, 18% of Southern respondents would have barred such hiring. See Colasanto, *supra* note 126, at 14.

A recent study has found that the number of doctors and facilities providing abortions in rural areas has declined, while the availability in cities has remained constant. See Tamar Lewin, *Abortions Harder to Get in Rural Areas of Nation*, N.Y. TIMES, July 28, 1990, at A18; see also Belkin, *supra* note 112, at A1 (attributing the decline of availability of abortions in rural areas to boycotts of doctors and hospitals providing abortions).

¹²⁸ In 1986, more than 8,000 chain store outlets discontinued sales of adult magazines in response to a letter from the Attorney General's Commission on Pornography threatening to identify them as distributors of "pornography." The threat was enjoined, but the magazines did not return to the stores, which represented about 5% of the retail outlets selling magazines in the United States. See RICHARD S. RANDALL, *FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED* 292 n.58, 293 n.63 (1989).

The economic effects of disclosure of controversial involvements need not always be adverse. The same disclosure that generates pressure against a particular enterprise can also open up marketing opportunities among more sympathetic elements of the population. If there are enough consumers who are supportive of the publicized activity, or even curious about it, the disclosure may be a net advantage. The fact that a book had been "banned in Boston" by means of informal censorship served as a marketing tool in more free-wheeling jurisdictions. See PAUL S. BOYER, *PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA* 171-90 (1968) (describing the activities of Boston's Watch and Ward Society, which was formed to prevent the sale of "unacceptable books"). On a more contemporary note, the efforts to organize a boycott of *The Last Temptation of Christ* have probably generated as much revenue from free advertising as has been lost in boycott-reduced attendance. See Russel Chandler, *Protests Aided 'Temptation,' Foes Concede*, L.A. TIMES, Aug. 14, 1988, § 2, at 1. The Ayatollah's attempt to ban *The Satanic Verses* was an effective ticket to the best seller list. See PIPES, *supra* note 108, at 200-01. Robert Mapplethorpe and 2 Live Crew are two other unintended beneficiaries of efforts at suppression.

The positive effect of an attempted boycott, however, is limited to exercises of constitutional rights that tap a sympathetic commercial market. Although the controversial artist or writer may be glad to receive publicity in 1990, the research scientist portrayed as a fellow traveller was not a more attractive employee in the 1950s, and the doctor whose abortion is publicized against her will cannot be sure she will gain patients. In most situations where the subject seeks anonymity, disclosure is unlikely to bring economic benefit.

reality, some firms will discover that there are profits to be made by hiring pariahs at lower wages.¹²⁹ In the long run, one may hope that firms that refuse to bow to economically "irrational" public demands would win back market share by exploiting technical advantages to attract marginal consumers on grounds of price and quality, or that employees excluded from one industry as a consequence of public hostility would find employment in some less vulnerable industry, thereby reducing the impact of the economic sanction.¹³⁰ In a market with easy entrance, firms structured to reach supporters without relying on sales to opponents may evolve.¹³¹

One of the bases for the effectiveness of the McCarthy blacklists in the entertainment industry may have been the absence of competitive pressures and the existence of industry-wide cartels that previously enforced other limitations.¹³² With the decline of the

¹²⁹ Thus, toward the end of the McCarthy era, the black market ate away at the Hollywood blacklist. See NAVASKY, *supra* note 44, at 326-29 (describing successful efforts by blacklisted Hollywood writers and directors to avoid the effects of blacklisting through the use of pseudonyms); see also CAUTE, *supra* note 42, at 519-20 (discussing black market scripts); *id.* at 535 (explaining that Broadway was less affected because of a more liberal market); cf. BARNOUW, *supra* note 119, at 33 (detailing the 1938 CIO boycott of Philco, which forced Philco to drop sponsorship of news commentator Boake Carter, who was subsequently picked up by General Foods and others). Less talented or fortunate directors and writers, however, were effectively shut out of their careers by the blacklist for a decade, and actors were unable to pursue their careers under pseudonyms. See CAUTE, *supra* note 42, at 515-20 (noting that about 250 Hollywood personalities were blacklisted); *id.* at 557-60 (listing 69 film personalities without credits for the decade after blacklisting).

¹³⁰ In the frictionless and perfectly informed world of economic theory, noncontroversial workers and controversial workers might exchange places with only marginal changes in wages. In the world as we know it, controversial workers are likely to suffer substantial wage penalties.

¹³¹ Thus, pornographers usually do not rely on sales to mainstream audiences. The difficulty is that firms that narrow their market narrow their economic base.

¹³² In 1934, the Motion Picture Producers and Distributors Association (MPPDA) reacted to the boycott threats of the ten million member Catholic Legion of Decency by establishing the Production Code Administration, which undertook more rigorous enforcement of a moral code promulgated four years earlier. All member studios were required to obtain clearance from the Administration before releasing their motion pictures. See DE GRAZIA & NEWMAN, *supra* note 122, at 42-46; LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP AND THE PRODUCTION CODE FROM THE 1920s TO THE 1960s*, 47-54 (1990). A good deal of the power of the Production Code Administration came from the fact that most first-run theaters were part of vertically integrated studio conglomerates that subscribed to the Production Code; the theater circuits, whether implicitly or explicitly, agreed not to run noncomplying films. See *id.* at 187.

The activities of the MPPDA were not limited to script and film review. During the early 1920s, in response to popular objection to his involvement in the death of

entertainment cartels¹³³ and the rise of rival media and international competition, a contemporary effort to establish controls by threat of boycott might not be as effective in motion pictures.¹³⁴ Increasing concentration could revive the threat in the media,¹³⁵

an actress, the MPPDA effectively banned from Hollywood a comedian named Fatty Arbuckle, by "advis[ing] the industry to 'refrain from showing pictures in which Mr. Arbuckle appears.'" DE GRAZIA & NEWMAN, *supra* note 122, at 27.

Thus, it was no novelty when, in 1947, fifty Hollywood executives agreed to ban from employment any "Communists or other subversives." NAVASKY, *supra* note 44, at 83. Shortly thereafter, the Motion Picture Association of America, (the former MPPDA), announced that no uncooperative witnesses would be employed by its members. *See id.* at 86-87.

In television and radio, the limited number of networks served the same coordinating function; by contrast, the relatively unconcentrated media of publishing and legitimate theater were "largely immune to the intimidations of the Red Scare." STEPHEN J. WHITFIELD, *THE CULTURE OF THE COLD WAR 180-81* (1991).

Similarly, the efficacy of white economic pressure directed against black voting registrants in the South during the 1950s and 60s reflected in part the market defects associated with geographical immobility and racial exclusion from economic opportunity. *See, e.g.*, BRANCH, *supra* note 108, at 330, 332-34 (describing blacklists, evictions, and credit squeezes directed against blacks who attempted to register); DAVID J. GARROW, *PROTEST AT SELMA 9* (1978) (detailing the introduction of literacy tests and "persuasion" to discourage black voters); NEIL R. MCMILLEN, *THE CITIZENS' COUNCIL 216* (1971) (describing economic coercion designed to inhibit black registration); MARGARET PRICE, *THE NEGRO AND THE BALLOT IN THE SOUTH 20-21* (1959) (discussing obstacles to black voting rights).

¹³³ *United States v. Paramount Pictures*, 334 U.S. 131 (1948), which required divestiture of theater chains by production studios, marked the beginning of the decline of the ability of the MPPDA to enforce its Production Code. *See* LEFF & SIMMONS, *supra* note 132, at 187.

¹³⁴ Efforts to generate in-house censorship in video markets have in part focused on lifting antitrust constraints on agreements to exclude programming and on the creation of agreed-upon standards among television networks, video producers, independent stations, and cable networks. *See* Michael Oreskes, *Voluntary Curb on TV Violence Urged by House*, N.Y. TIMES, Aug. 2, 1989, at A1. There seems to be substantial doubt that such efforts will succeed, given the economic incentives to "undercut" standards, and the divergence in economic incentives that face the participants. Cable companies, for example, since they do not depend on advertisers, may be less vulnerable to boycott threats than broadcast networks, and better able to capitalize on narrow demands for otherwise offensive programming.

¹³⁵ The current trend toward concentration in the communications industry may well make free expression more vulnerable to boycotts, in several dimensions. *See* BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY 18-26* (1990). First, the larger the conglomerate, the more points of attack are open to groups which seek to exert pressure. NBC, for example, as a subsidiary of General Electric (GE) is vulnerable to threats against GE even if GE is not an advertiser. A large conglomerate with an ideological interest in resisting a boycott may have more resources with which to do so, but the less personalized the communications business becomes, the more likely it is to focus on financial rather than ideologically principled considerations. Second, the more concentrated the industry, the less opportunities there are for employees to flee to a safer sector.

however, while other industries have structures that make them vulnerable.

Scenarios predicting the instability of economic sanctions are empirically conditioned, and take time to develop.¹³⁶ Entities which themselves have no stake in the exercise of the constitutional right at issue may or may not be willing to take the economic gamble that the market will work quickly enough. Publishers may discontinue controversial publications, universities may decline to hire named "Communists," doctors may decline to associate with birth control clinics when their association becomes public, and convenience stores may pull magazines from their shelves rather than be named as pornographers, even though there is a chance that contrary actions would accumulate profits in the long run. While the market is working its magic, those who seek to exercise the unpopular constitutional right will suffer or drift away.

To the extent that the right in question is a First Amendment freedom valued for its role in maintaining a political system, this may be of less moment. Under some versions of the "marketplace of ideas" approach, the important issue regarding a limitation on speech is not whether any particular citizen can express an idea, but whether the idea is expressed at all. If one can be sure that some stubborn Socialists will continue to defy public opinion until alternative employment becomes available, there is some reassurance that the message of Socialism will not be lost to the marketplace of ideas.

But even under marketplace theories, the loss of speakers is not without significance. An idea confined to the margins of public discourse is not likely to have as powerful an impact. Speech, moreover, is valued not only for its capacity to inform the search for truth, but for its ability to check government abuses. The availability of the *Daily Worker*, or the possibility of *Ramparts* being available ten years hence does little to constrain the government if the *Times*, *Post*, and *Tribune* are deterred from criticism today.

More importantly, the exercise of constitutional prerogatives is valuable for its own sake. The market may provide assurances that someone else, at some future time, will exercise those rights punished by economic sanctions today. But this is no consolation

¹³⁶ Actors, for example, because their identity was more obvious to the public, found it more difficult to break the McCarthy era blacklist than did writers. With contemporary information processing technology, a writer's identity may be harder to hide.

to those who cannot freely exercise rights themselves. Prospective NAACP members in Little Rock cannot commute to Boston daily for their meetings. The fact that gynecologists who perform abortions can move to New York and continue to perform them there does little to calm the fears of residents of Allentown or Wichita who are left without the opportunity to obtain an abortion short of disruptive travel. Actors who could not work during the 1950s because of their politics might have been punished more severely had the blacklists been fully effective. Punished, however, they were.

Like physical sanctions, economic sanctions may be warded off by legal protection. Efforts to organize boycotts of book chains have evoked RICO suits, while attempts to exert pressure on abortion providers have been countered by antitrust actions.¹³⁷ Such responses, however, suffer from both legal and practical defects. As a legal matter, some ideologically motivated boycotts can claim First Amendment protection themselves. Thus, the scope of legal relief available is constrained. As a practical matter, legal action against economic harassment requires the expenditure of time and effort, while ultimate vindication may be long delayed and bring little relief.¹³⁸

Real protection requires the prevention of economic sanctions in the first place. Government disclosures often facilitate or precipitate effective economic sanctions against constitutionally protected activities. Disclosures undercut two of the most important forces militating against effective economic sanctions: the difficulty of coordinating sanctions and the difficulty of policing their effectiveness. Government identification of pariahs may both legitimate a prospective boycott and provide a signpost to coordinate its efforts. Where government disclosures perform such a role, effective protection of constitutional rights requires that disclosure be barred.

¹³⁷ See Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1345-49 (1990); Dinah R. PoKempner, Note, *The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, 89 COLUM. L. REV. 662, 665-68 (1989).

¹³⁸ See JOHN H. FAULK, FEAR ON TRIAL (1963) (detailing a successful case, tried in 1962 against McCarthy-era red-hunters who blacklisted the plaintiff-author in 1956, which found the defendants dead or bankrupt by the end of the appeal).

ii. Social Sanctions

During the 1950s, the impact of red hunting was felt by society as well as the economy, as McCarthyism mobilized public opinion against disfavored targets. Judicial responses to the McCarthy era considered the effects of "exposure, obloquy, public scorn,"¹³⁹ "public opprobrium,"¹⁴⁰ and "public stigma"¹⁴¹ as seriously as they considered diminished economic prospects.¹⁴²

A century earlier, John Stuart Mill suggested that public opinion's power to alter behavior, without the aid of material sanctions, was a threat to liberty as effective as criminal laws. He observed:

Reflecting persons perceived that when society is itself the tyrant . . . its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates . . . it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.¹⁴³

¹³⁹ *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting).

¹⁴⁰ *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 102-03 (1961).

¹⁴¹ *Watkins v. United States*, 354 U.S. 178, 197 (1957). A lineal descendant of this idea is Justice O'Connor's concern for the "offensive and disturbing nature" of picketing outside of personal residences. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); see also *Carey v. Brown*, 447 U.S. 455, 478-79 (1980) (Rehnquist, J., dissenting) ("To those inside . . . the home becomes something less than a home. . . . [T]ensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility. . . . [T]here are few of us that would feel comfortable knowing that a stranger lurks outside our home." (quoting *Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971))).

¹⁴² One reason for this concern might have been the difficulty of proving concrete economic impact, since many blacklisting organizations denied blacklisting. Cf. FAULK, *supra* note 138, at 240-43, 261-62 (detailing an attempt to prove economic damages from blacklisting).

¹⁴³ Mill, *On Liberty*, *supra* note 114, at 478-79. Mill further observed:

For a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective, and so effective is it, that the profession of opinions which are under the ban of society is much less common in England than is, in many other countries, the avowal of those which incur risk of judicial punishment. . . . Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion.

Id. at 505-06.

In this perception, Mill stands in a long line of political thinkers and social theorists.¹⁴⁴ Contemporary social psychologists find that the prospect of continued exposure to adverse public opinion reduces not only a subject's willingness to advocate nonconformist positions, but also the willingness to entertain such positions privately.¹⁴⁵

¹⁴⁴ Consider the words of John Locke:

And as to the punishments due from the laws of the commonwealth, they frequently flatter themselves with the hopes of impunity. But no man escapes the punishment of their censure and dislike, who offends against the . . . opinion of the company he keeps, and would recommend himself to. Nor is there one of ten thousand, who is stiff and insensible enough, to bear up under the constant dislike and condemnation of his own club.

1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 479 (Alexander C. Fraser ed., Dover Publications, Inc. 1959) (1690); see also 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Phillips Bradley ed., 1945) (1840) ("[I]n a democratic country . . . public favor seems as necessary as the air we breathe, and to live at variance with the multitude is, as it were, not to live. The multitude require no laws to coerce those who do not think like themselves: public disapprobation is enough . . ."). Another theorist writes:

The opinion an individual has of himself and his doings, like all judgments not grounded on the perceptions of the senses, is greatly affected by suggestion. . . . Rarely can one regard his deed as fair when others find it foul, or count himself a hero when the world deems him a wretch. The first hold of a man's fellows is, therefore, their power to set him against himself, and to stretch him on the rack of whatever ideas of excellence he may possess.

EDWARD A. ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER 90 (1901).

John Braithwaite has recently reviewed the literature suggesting that the prospect of public shaming before relevant reference groups exerts a far greater deterrent impact on illegal behavior than does the prospect of legal punishment. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 69-74 (1989); see also *id.* at 124-27 (examining the impact of shaming on white collar criminals); BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 229, 233-36 (1983) (same).

¹⁴⁵ In a classic experiment, Asch found that 35% of subjects could be induced regularly to voice a clearly incorrect opinion when confronted with a group that unanimously voiced that erroneous opinion. See S.E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in GROUPS, LEADERSHIP AND MEN 177, 181 (Harold Guetzkow ed., 1951); see also Knud S. Larsen, *The Asch Conformity Experiment: Replication and Transhistorical Comparisons*, 5 J. SOC. BEHAV. & PERSONALITY 163, 166-67 (1990) (finding that conformity rates correspond to prevailing political and social values); Serge Moscovici, *Social Influence and Conformity*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 347, 377 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (explaining that the coercive power of the majority operates "not by virtue of its numerical strength but by virtue of the unanimity of consensus"); Nigel Nicholson et al., *Conformity in the Asch Situation: A Comparison Between Contemporary British and U.S. University Students*, 24 BRITISH J. SOC. PSYCH. 59 (1985)

The impact of stigma depends upon the strength and pervasiveness of the mobilized hostility. To be branded a Socialist in 1954 is quite different than being branded a Socialist in 1990.¹⁴⁶ The effectiveness of social pressure is also dependent on its uniformity; tolerance and pluralism both vitiate the threat of social sanctions.¹⁴⁷

The opportunity to cluster with like-minded members of a political minority makes the threat of majority disapprobation less fearsome, and the knowledge of the existence of other dissenters may be sufficient to resist the tyranny of the majority.¹⁴⁸ In evaluating the climate of public opinion, it is not sufficient to determine national averages. Social sanctions against nonconformi-

(finding that a minority yield to pressure of uniformity).

When subjects in such experiments were allowed to voice their opinions in private, away from exposure to the group, conformity plummeted. See Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgment*, 51 J. ABNORMAL AND SOC. PSYCH. 629, 633 (1955); Jane S. Moulton et al., *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 J. PERSONALITY 339, 342-43 (1956). The prospect of continued exposure to groups seems to induce a change of private as well as public beliefs. See Charles A. Kiesler et al., *Deviation and Conformity: Opinion Change as a Function of Commitment, Attraction and Presence of a Deviate*, 3 J. PERSONALITY AND SOC. PSYCH. 458, 463-66 (1966); see also SHOSHANA ZUBOFF, *IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER* 344-51 (1988) (observing "powerful conformity-inducing effects of shared information" in computerized workplace, and explaining the tactic of internalizing "the normative standard of the observer" as a method of avoiding the threat of shame); cf. Alice H. Eagly et al., *Sex Differences in Conformity: Surveillance by the Group as a Determinant of Male NonConformity*, 40 J. PERSONALITY & SOC. PSYCH. 384, 389-90 (1981) (finding surveillance decreased male but not female conformity).

Note, however, that subjects predict the effect on others to be stronger than it is. See Robert J. Woloson et al., *Predictions of Own and Other's Conformity*, 43 J. PERSONALITY 357, 358 (1985).

¹⁴⁶ Being branded a "liberal" has its own political consequences, however, and being labelled a Communist in Russia may be more hazardous today than it ever was in the U.S.

¹⁴⁷ Thus, whether the decrease in hostility today towards particular dissenting views is a function of greater tolerance or simply a splintering of the locus of hostility, the result is less constraining social pressure. Compare Mueller, *supra* note 126, at 3 (arguing that there is increased tolerance of leftists with no redirection towards other groups) with JOHN L. SULLIVAN ET AL., *POLITICAL TOLERANCE AND AMERICAN DEMOCRACY* 77, 250-52 (1982) (concluding that "pluralistic intolerance" has replaced the focused intolerance of the 1950s).

¹⁴⁸ Existence of either allies or nonconforming opponents substantially reduces the above described Asch effect. See Ehor O. Boyanowsky et al., *Generalization of Independence Created by Social Support*, 31 PSYCHOL. REC. 475, 481 (1981); William N. Morris & Robert S. Miller, *The Effects of Consensus-Breaking and Consensus-Preempting Partners on Reduction of Conformity*, 11 J. EXPERIMENTAL SOC. PSYCHOL. 215, 221-22 (1975).

ty achieve their impact on a retail not wholesale level. Just as the availability of a sheltering community of dissenters can blunt a social threat, the inhabitant of an island of narrow-mindedness may find social pressure exposure unendurable.

These considerations suggest that if we are troubled by the impact of social pressure on the exercise of individual autonomy, we should be particularly alert to protect the formation of small communities of dissenters. Protection of these communities from social sanctions, in addition to the protection of individual anonymity, provides shelter for the exercise of other individual liberties.

2. The Significance of the Impacts

However real the effects of disclosure may be, many of them do not derive from regulatory or criminal measures that invoke state coercion. They depend on intermediary private parties. Whether this fact justifies lenient treatment of such effects is not immediately obvious. In a constitutional regime whose focus is the control of governmental authority, and which values citizens' association for collective action, one might argue that sanctions resulting from private obloquy or economic pressure fall outside of the scope of constitutional concern. Ultimately, this objection is unpersuasive; courts must take account of social pressure in constitutional analysis.

a. *The Import of Private Actions*

Few doubt that the administration of public affairs by the government is subject to constitutional constraint. Whether private reactions to public disclosures are a legitimate element of constitutional analysis, however, has been a subject of disagreement. The question was raised in early judicial encounters with the Red Scare of the 1950s. In *Barsky v. United States*,¹⁴⁹ in the course of upholding a contempt citation against an unfriendly witness before HUAC, the majority observed:

It is no doubt true that public revelation at the present time of Communist belief and activity on the part of an individual would result in embarrassment and damage. This result would not occur because of the Congressional act itself; that is, the Congress is not imposing a liability, or attaching by direct enactment a stigma.

¹⁴⁹ 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

The result would flow from the current unpopularity of the revealed belief and activity.¹⁵⁰

Justice Jackson picked up the theme in his concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*,¹⁵¹ arguing that "mere designation as subversive deprives the organizations themselves of no legal right or immunity. . . . Their claim of injury is that they cannot attract audiences, enlist members, or obtain contributions as readily as before. These, however, are sanctions applied by public disapproval"¹⁵²

The Court ultimately repudiated the claim that the mediation of private sanctions removed constitutional concerns.¹⁵³ In *NAACP v. Alabama ex rel. Patterson*,¹⁵⁴ Justice Harlan wrote for a unanimous court:

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* [action]. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.¹⁵⁵

Since *NAACP v. Alabama ex rel. Patterson*, attempts by states to disavow responsibility for public reaction have been consistently rebuffed.¹⁵⁶ The Court will probably have the opportunity to

¹⁵⁰ *Id.* at 249.

¹⁵¹ 341 U.S. 123 (1951).

¹⁵² *Id.* at 183-84 (Jackson, J., concurring).

¹⁵³ The first clear announcement came in *Watkins v. United States*, 354 U.S. 178 (1957). Speaking for all but Justice Clark, Chief Justice Warren described the impact of HUAC investigations on freedom of speech and association and rejected the claim that the government was not responsible: "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction." *Id.* at 198. Justice Clark maintained that "remote and indirect disadvantages such as 'public stigma, scorn and obloquy' may be related to the First Amendment, but they are not enough to block investigation." *Id.* at 232 (Clark, J., dissenting).

¹⁵⁴ 357 U.S. 449 (1958).

¹⁵⁵ *Id.* at 463.

¹⁵⁶ See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767-68 (1986) ("Pennsylvania's . . . harassment of women who choose to exercise their personal, intensely private, right . . . to end a pregnancy [by requiring disclosure of their identities poses] an unacceptable danger of deterring the exercise of that right"); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93 (1982) ("[E]vidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats,

address the argument again in *Planned Parenthood v. Casey*.¹⁵⁷

Under a conventional "state action" analysis, disclosures by government officials are bound by constitutional constraints. Some recent commentary, however, suggests that governmental efforts to generate private retaliation, at least in the area of the First Amendment, should be viewed with a tolerant eye. Professor Schauer, for example, takes the position that the "fact that there is an absence of governmental force behind private intolerance is a difference in kind and not a difference in degree. . . . If social intolerance has a practical effect similar to that caused by governmental coercion, it is because people *choose* to respect the views of the majority"¹⁵⁸

In his initial scholarly statement of his views, Professor Schauer characterized his argument as "tentative."¹⁵⁹ With somewhat larger stakes on the table, however, he joined without reservation in

harassment, or reprisals from either Government officials or *private parties*." (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)); *Buckley*, 424 U.S. at 65 (exacting scrutiny is "necessary even if any deterrent effect on the exercise of First Amendment Rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the . . . names."); cf. *Konigsberg v. State Bar*, 366 U.S. 36, 52-53 (1961) ("There is here no likelihood that deterrence of association may result from foreseeable private action, for bar committee interrogations such as this are conducted in private." (citation omitted)).

¹⁵⁷ 1991 U.S. App. LEXIS 24,792, at *76-85 (3d Cir. Oct. 21, 1991) (invalidating a statutory requirement that married women in Pennsylvania inform their husbands before obtaining an abortion as an "undue burden," where such notice predictably results in the exercise of physical, psychological, and economic coercion to prevent abortions), *petition for cert. filed*, Nov. 7, 1991; cf. *id.* at *97-99 (upholding requirement of confidential reports to state of identity of referring physician); *id.* at *99-105 (upholding requirement of public disclosure of identity of abortion providers receiving government funds).

¹⁵⁸ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 121 (1982); cf. *Buckley & Bozell*, *supra* note 46, at 51-52 (social sanctions are preferred to legal sanctions because they "more accurately reflect the real 'lay' of community sentiment. . . . A legal sanction is, in theory 100 percent effective: all . . . are made to conform, even if only 51 percent . . . entertain the views that prompted the legislation. . . . Social sanctions, by contrast, are effective roughly in proportion to the number of persons who wish to exercise them . . ."); William Glaberson, *Trapped in the Terror of New York's Holding Pens*, N.Y. TIMES, Mar. 23, 1990, at A1, B4 ("[P]olice officers put a sign on the back of [a suspect] saying the man was accused of raping his own daughter. Then . . . the officers sent him into the [holding] pens in a Brooklyn courthouse.").

¹⁵⁹ SCHAUER, *supra* note 158, at 125.

the *Report of the Attorney General's Commission on Pornography*,¹⁶⁰ which sought to encourage "[c]itizen action in the area of lawful economic boycotts and picketing of establishments which produce, distribute or sell sexually explicit materials in the community."¹⁶¹ The Commission suggested that "citizen groups may wish to focus on materials which are not legally obscene and which are constitutionally protected from government regulation."¹⁶² Professor Schauer's position on the Commission staff's abortive efforts to facilitate "citizen action" by drafting a final section on "identif[ied] . . . distributors of . . . pornographic material"¹⁶³ is unclear, as is his stance on earlier Commission efforts to induce distributors not to sell certain publications by threatening to include that final section.¹⁶⁴

In an argument similar to Professor Schauer's, Professor Sherry sees in the work of Dean Bollinger the seeds of approbation for government efforts to deter or educate through nongovernmental

¹⁶⁰ COMMISSION ON PORNOGRAPHY, *supra* note 15. At least two reports credit Professor Schauer with being the author of both the draft that formed the basis of the ultimate report, and the reporter who assimilated the views of the Commission into a final draft. See Hendrik Hertzberg, *Big Boobs: Ed Meese and His Pornography Commission*, NEW REPUBLIC, July 14, 1986, at 21; Robert Scheer, *Inside the Meese Commission*, PLAYBOY, Aug. 1986, at 154, 164-66.

¹⁶¹ COMMISSION ON PORNOGRAPHY, *supra* note 15, at 1317.

¹⁶² *Id.* at 1318. The Report continues:

Some types of pornographic materials may be harmful, offensive and incompatible with certain community values, but nonetheless fall short of the legal standard for prosecution. . . . In these instances grassroots efforts may be an effective countermeasure. . . . Grassroots measures may include picketing and store boycotts . . . contacting sponsors of television and radio programs . . . and the use of the media Pickets and boycotts . . . [may] be an effective means of . . . alerting retailers that every option available will be exercised to discourage . . . circulation.

Id. at 1339-40. For more advice on grassroots organization, read further:

Businesses can be encouraged to insure that they are not being unknowingly used as an instrument for the spread of obscene or pornographic material which the community has requested not be produced or sold on moral, social or other legitimate grounds. . . . In the case of credit card companies, a review of the types of businesses that their "merchant" members are conducting might be useful.

Id. at 1348.

¹⁶³ *Playboy Enters. v. Meese*, 639 F. Supp. 581, 588 (D.D.C. 1986) (enjoining publication of a list of identified distributors of pornography). Although the executive director of the Commission issued a letter referring to the "drafting" of such a "final section," the Commission advised the court they would not publish such a section. See *id.*

¹⁶⁴ See *id.* (requiring retraction of a letter threatening inclusion in the blacklist).

intolerance. "Under this version of Bollinger's tolerance theory, however, there is no reason for the government to remain neutral; it need only permit the speech, not condone it."¹⁶⁵

These arguments seem to view constitutional protection of speech as a by-product of the pursuit of more important values. If the effort to provoke suppression by private action avoids danger to those values, there is no constitutional bar. If, for Professor Schauer, or the contemporary Court, the speech of pornographers and Nazis is protected only because such protection is necessary to disable the government from suppressing truly valuable forms of speech,¹⁶⁶ facilitating private suppression of pornographers and Nazis is permissible because the Constitution still protects gay-rights activists and controversial artists. If, under Dean Bollinger's theory, legal protection for obnoxious speech is a mere training ground in

¹⁶⁵ Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963, 988-89 (1987).

Bollinger's own stand on the issue is less clear. In his view, there is a clear distinction between government intolerance, which is improper, and private intolerance, which is constitutionally tolerated and often appropriate. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY, FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 12-13 (1986) ("When we compare our reluctance to impose *legal* restraints against speech with our readiness to employ a host of informal, or *nonlegal*, forms of coercion . . . the paradox is striking. . . . We may respond [to deeply offensive speech] with ridicule or humiliation . . . social shunning, . . . [or the withholding of] employment opportunities."); see also *id.* at 71 ("A subtle, but nonetheless extensive process of dissolution can [occur] by denying the . . . group the means of responding to the behavior they find troublesome.").

The relations between the two are muddy, however. On one hand, the burden of much of Bollinger's argument is that government must provide a model of toleration, which will serve to control overreactions in the social sphere. See *id.* at 109-10. On the other hand, he suggests that we "use natural curbs whenever we can," and that anonymous speech is unprotected because "the anonymity of the act makes the vast web of social, unofficial constraints and penalties ineffective." *Id.* at 212.

¹⁶⁶ The Supreme Court in recent years has evinced a repeated tendency to distinguish between high value speech, which is regarded as truly protected, and low value speech, which is protected only as a hedge against erroneous suppression of high value speech. See, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991) (holding that nude dancing was only "[marginally] within the outer perimeters of the First Amendment"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (concluding that false statements about public figures have "little value" but must be tolerated in order to protect speech with "constitutional value"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate" (quoting *Young v. American Mini Theatre, Inc.*, 427 U.S. 50, 70 (1976))); *Young*, 427 U.S. at 61 ("[T]here is . . . a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

tolerance, encouragement of private suppression of intolerant speech might lead to a net increase in the tolerance which is to be fostered by First Amendment protections.

By the nature of its premises, the Schauer/Bollinger/Sherry argument is limited in its applicability. When it is legitimately applicable, its predictions of probable outcomes are dubious.

On a theoretical level, the arguments are rooted in a particular conception of freedom of speech. They assume that freedom of speech is valued instrumentally, as a means of encouraging tolerance, or preserving political discourse, rather than as an intrinsic human good. This is not an uncontroversial assumption,¹⁶⁷ and if free speech is intrinsically valuable, the radical distinction between private and public censorship dissolves. If free expression is a virtue, its suppression is a vice, regardless of the source of the suppression.

More importantly, whatever the proper conception of freedom of speech, a variety of constitutional rights vulnerable to governmentally triggered private suppression are generally conceded to be of intrinsic, not instrumental, value. We value reproductive freedom, family autonomy, and freedom of religion as liberties in their own right, not as means to other political goals. When disclosures adversely affect these rights, the Schauer/Sherry/Bollinger argument is simply irrelevant.

Leaving aside such theoretical objections, analyses that exonerate private intolerance incorporate the dubious empirical judgment that the encouragement of private suppression is consistent with the social goals of the First Amendment. The McCarthy years attest to the dangerousness of the suggestion that the government may encourage private actors to achieve what it is prohibited from doing. An aura of neat hypocrisy surrounds HUAC's assertion that "while Congress does not have the power to deny citizens the right to believe in, teach, or advocate communism . . . it does have the right to focus the spotlight of publicity upon their activities."¹⁶⁸ Vice

¹⁶⁷ Many commentators regard free speech rights as intrinsically valuable. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47 (1989); THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 6-7 (1971); STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 113-20 (1990); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215-22 (1972).

¹⁶⁸ HOUSE COMM. ON UN-AMERICAN ACTIVITIES, *INVESTIGATION OF UN-AMERICAN ACTIVITIES AND PROPAGANDA*, H.R. REP. NO. 2, 76th Cong., 1st Sess. 13 (1939); see also *Barsky v. United States*, 167 F.2d 241, 256 (D.C. Cir.) (Edgerton, J., dissenting) ("The Committee and its members have repeatedly said in terms or in effect that its

pays homage to virtue. Public sanctions are confessed to be improper, and constitutional values are affirmed, back-handedly. The piquancy of the contrast between private sanctions and government's sense of its constitutional duty might strengthen support for the virtues of tolerance.

Social evolution is more likely to follow a different course, however. The moral drawn from official attempts to evade a norm will probably be that the norm is not worthy of respect. The evolution from the assumption that Congress "has no right to deny citizens the right to advocate Communism" to the outlawing of the Communist Party was not unrelated to the efforts to "focus the spotlight of publicity." One of the lessons of "massive resistance" to desegregation orders is that local government efforts to evade constitutional commands reduced the likelihood of their peaceful implementation.¹⁶⁹

Similarly, one can speculate that recurrent efforts to deter abortions by the back door of burdensome regulations have contributed to the credibility of private anti-abortion activities, both inside and outside the law. The message that "we can't get them, but you can" seems less likely to evoke measured reflection than to provoke witch hunts, vigilantes, and fervent calls for more active government participation.

Once loosed against the soft-core pornographer, the genie of social pressure is not likely to spare gay-rights activists or provocative artists. Fine discriminations between valuable and valueless speech, barely plausible in the imposition of legal sanctions, are still less likely in private conduct. Court hearings prior to incarceration provide an opportunity to demonstrate "redeeming social value" or the "political" nature of speech. Private sanctions, by contrast, are unburdened by the formal constraints of notice and hearing. The

main purpose is to do by exposure and publicity what it believes may not validly be done by legislation."), *cert. denied*, 334 U.S. 843 (1948).

¹⁶⁹ See, e.g., HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, COERCION TO COMPLIANCE 65-67 (1976) (concluding that resistance by school officials had a high negative correlation with acceptance of the legitimacy of the desegregation decisions); FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 41-48 (1973) (discussing local government resistance to school desegregation); cf. DAVID J. KIRBY ET AL., POLITICAL STRATEGIES IN NORTHERN SCHOOL DESEGREGATION 136-37 (1973) (finding decentralized opposition to desegregation in the North, which readily capitulated to court order requiring desegregation); D. GARTH TAYLOR, PUBLIC OPINION AND COLLECTIVE ACTION, THE BOSTON SCHOOL DESEGREGATION CONFLICT 81-95 (1986) (concluding that opposition by community leaders in Boston to bussing led neighborhood residents to oppose the bussing remedy).

probability that consumers will distinguish the varying literary merit of articles in offensive magazines before boycotting convenience stores is infinitesimally small.

Nonviolent social sanctions, unlike legal sanctions, intrinsically require a substantial public following. If constitutional protections are designed primarily to prevent a minority of governors from suppressing a majority of the governed, one could claim that social sanctions are less inimical than official prosecution to constitutional principles.¹⁷⁰ In the short run, the government can shut down opposition newspapers by brute force in the face of an apathetic, or even hostile, populace. A boycott declared against newspapers read by, or even tolerated by, the great bulk of the populace, however, is unlikely to have either immediate or long-term effects on the target.¹⁷¹

But constitutional protections are counter-majoritarian. Rights are protected against the sincerely expressed will of the people in the fields of religion, association, reproductive autonomy, expression, and criminal procedure. Although disclosure likely will be ineffective against targets who do not violate broadly held social norms, adherence to broadly held norms is not the litmus test of constitutional protection.¹⁷²

The groups most likely to benefit from limitations on government exposure are those who generate the most public antagonism. In contemporary America, this means both Nazis and gays, not to mention those who incinerate the American flag. The fact that most of us are usually safe from the effects of exposure does not suggest that constitutional values are equally secure.

¹⁷⁰ See, e.g., Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 779-85 (1986) ("[W]e might wish to be especially sensitive to restrictions on political speech by unaccountable public officials. But whether we should be equally concerned with restrictions inspired, supported and implemented by the people is far more problematic.").

¹⁷¹ Note, however, as observed *supra* notes 114-38 and accompanying text, that a boycott need not have a majority following to be effective; public hostility allowing for violent harassment can be effective if even a small minority engages in it.

¹⁷² One might also argue that social sanctions are brought to bear even without government involvement, and that sponsors clearly shape modern communications media. See BARNOUW, *supra* note 119, at 149-51. Intense and cohesively organized groups will obtain information on how to exert leverage over sponsors, and hence over the media, without any government involvement. See MONTGOMERY, *supra* note 125, at 48-55, 112. In this view, all government exposure does is correct for collective action problems by placing less organized groups on a similar plane. But whatever the empirical merits of the argument, the "efficient" result here is less freedom of speech.

b. *The Constitutionally Protected Status of Social Pressure and the Constitutional Values of Privacy*

However real the impact of social pressure may be, raising it to the level of a constitutional impairment may conflict with other parts of the constitutional scheme. On the surface, a tension exists between the proposition that public opinion's effects raise constitutional concerns and the recently reaffirmed First Amendment doctrine that unwilling recipients of public offensive messages may "effectively avoid further bombardment of their sensibilities simply by averting their eyes."¹⁷³ In general, contemporary constitutional doctrine recognizes that public life in a democratic society requires a reasonably thick skin. If the state is legally disabled from shielding its citizens from verbal offenses to their dignity, why, one may ask, should it be precluded from enlisting attacks on dignity in socially constructive causes? Periodically, the Court reiterates that boycotts and "threats of [vilification or] social ostracism" are constitutionally protected.¹⁷⁴

On one level, the tension is easily resolved. First Amendment protection for words evoking social opprobrium does not presuppose a belief that the targets of social pressure experience no harm. Protection need only rest on the claim that such harm does not overcome the general principle prohibiting government punishment of speech. The possibility of "public obloquy" cannot be eliminated; it is a cost of freedom that must be borne. The government's

¹⁷³ *Cohen v. California*, 403 U.S. 15, 21 (1971). The Court has unanimously reiterated its "longstanding refusal to [punish speech] because the speech in question may have an adverse impact on the audience." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); see also *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" [for] the First Amendment.'" (quoting *Hustler Magazine, Inc.*, 485 U.S. at 56)).

¹⁷⁴ *NAACP v. Claiborne Hardware*, 458 U.S. 886, 921 (1982). The Court has noted that "[s]peech does not lose its protected character . . . because it may embarrass others or coerce them into action." *Id.* at 910; cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988) (holding that the peaceful distribution of leaflets by a union did not "threaten, coerce, or restrain any person"). *But cf.* *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425-28 (1990) (holding a politically motivated, but self-interested, boycott illegal despite lack of showing of market power); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (upholding a prohibition on picketing targeted at a residence).

contribution to ostracism, on the other hand, raises constitutional objections, for the government can be bound in ways that private parties are not.¹⁷⁵

This explanation adequately accounts for those cases that condemn the imposition of psychic injury, while protecting the offending speech from punishment. The First Amendment imposes a need for "breathing space,"¹⁷⁶ and it is difficult to draw bright lines distinguishing "outrageousness" from politics,¹⁷⁷ or lyrics from vulgarity.¹⁷⁸

The explanation is less successful in reconciling those cases that contemplate social pressures directed against private parties as a legitimate, and perhaps essential, element of free expression protected by the First Amendment.¹⁷⁹ As Tocqueville recognized, America is a nation of joiners. From colonial nonimportation associations, to temperance rallies, to open-housing marches, the collective voice of the "public out of doors" is traditionally thought

¹⁷⁵ Thus, although interference with private erection of a crèche would be a violation of First Amendment protections of free expression and free speech, a religious nativity scene at a courthouse violates the Establishment Clause. *See* County of Allegheny v. ACLU, 492 U.S. 573, 598-602 (1989). Although private racist speech may be protected by the First Amendment, *see* Terminiello v. Chicago, 337 U.S. 1 (1949), government speech that encourages racist activity may violate the equal protection clause, *see* Anderson v. Martin, 375 U.S. 399, 402-03 (1964). Similarly, the Court has made clear that disclosures of private information that could not constitutionally be punished if made by private parties, are subject to sanction if disclosed by public officials. *See* Florida Star v. B.J.F., 491 U.S. 524, 538-41 (1989).

¹⁷⁶ *Boos*, 485 U.S. at 322.

¹⁷⁷ *See Hustler Magazine, Inc.*, 485 U.S. at 55.

¹⁷⁸ *See* Cohen v. California, 403 U.S. 15, 25 (1971).

¹⁷⁹ *See, e.g.,* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988) ("The loss of customers because they read a handbill urging them not to patronize a business . . . is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do."); NAACP v. Claiborne Hardware, 458 U.S. 886, 911-12 (1982) ("Through exercise of [their] First Amendment rights, petitioners sought to bring about political, social and economic change. Through speech, assembly and petition . . . [the boycott] sought to change a social order that had consistently treated them as second-class citizens."); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("Petitioners [residential picketing] plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."); *cf.* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 447 (1990) (Brennan, J., dissenting) ("Expressive boycotts have been a principal means of political communication since the birth of the Republic. . . . From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott, . . . boycotts have played a central role in our Nation's political discourse."); BAKER, *supra* note 167, at 189-90 (concluding that assemblies and boycotts are constitutionally as important as each individual's exercise of free speech).

to be appropriately directed to a variety of social problems.¹⁸⁰ If the interplay of social pressure is a crucial element of the formation of public opinion, itself protected and fostered by the First Amendment, disclosures that facilitate the deployment of such social pressures should be, if not required, at least constitutionally favored.

Perhaps, therefore, the grounding for the distinction between direct and privately mediated sanctions raised by Bollinger, Sherry, and Schauer is quite different than what they claim. The case for private social sanctions can rest on the argument that they are constitutionally protected, not constitutionally irrelevant.

Memories of the McCarthy era, like those of the civil rights struggles in the South, recall the danger of exempting government precipitation of private sanctions from constitutional scrutiny. Two lines of argument, both rooted in recent Supreme Court cases, suggest that such an exemption is also legally inappropriate.¹⁸¹

The first approach proposes that the constitutional value of social pressure depends on the goal for which it is exercised.¹⁸²

¹⁸⁰ For an excellent survey of the history of popular pressure, arguing that its protection should be embodied in the constitutional right to assembly, see James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

¹⁸¹ A third response should also be considered, but ultimately rejected: that any protection of social pressure is wrong and lacks intrinsic constitutional merit. Cf. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (denying protection to targeted residential picketing efforts); *id.* at 498 (Stevens, J., dissenting) (acknowledging that "picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home" is not constitutionally protected). In the labor law there was an early history of hostility toward joint actions designed for this effect. See, e.g., *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502 (1949) (holding that a peaceful secondary boycott could constitutionally be enjoined); *Gompers v. Bucks Stove & Range*, 221 U.S. 418, 437 (1911) (holding that listing in union publication of employers as "unfair" was an unprotected "verbal act"); see also *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) (holding that petitioner's political boycott of Soviet goods after invasion of Afghanistan was an unprotected secondary boycott). Later cases seem to rely on claims that boycotts call for "coercion," as distinguished from social pressure. See *International Longshoremen's Ass'n*, 456 U.S. at 226; *NLRB v. Retail Stores Employees Union*, 447 U.S. 607, 619 (1980) (enjoining picketing calculated to coerce a neutral party in a labor dispute).

The protection for social pressure is too deeply woven into our constitutional law and political practice to be uprooted. See, e.g., Pope, *supra* note 180, at 324-44, 349-56 (finding constitutional and historical support for the exercise of vast social pressure for societal change).

¹⁸² See Randall Kennedy, *Martin Luther King's Constitution*, 98 YALE L.J. 999, 1039 (1989) ("[N]o ahistorical, noncontextual, normative judgment can properly be made about a political boycott *per se*; its legitimacy depends upon the circumstances in which it occurs."). Professor Pope flirts with a reading of recent cases that would

Efforts to further constitutional ideals would not be regarded as illegitimate coercion. Thus, the Court in *NAACP v. Claiborne Hardware*,¹⁸³ upheld the constitutionally protected status of a civil rights boycott in Port Gibson, Mississippi, emphasizing that "the purpose of petitioners campaign was to . . . vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself . . . to force governmental and economic change."¹⁸⁴

hold that "popular republican tactics are constitutionally protected, but only if they exhibit the virtues of popular republicanism." Pope, *supra* note 180, at 351. He ultimately suggests that such protection would be inadequate, although he fails to directly delineate the dimensions of an adequate approach. See *id.* at 354.

¹⁸³ 458 U.S. 886 (1982).

¹⁸⁴ *Id.* at 914. Petitioners' purpose was "to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure." *Id.* at 918; cf. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (allowing distribution of leaflets to prevent "block-busting" and to further racial integration); *Talley v. California*, 362 U.S. 60, 63-64 (1960) (protecting boycott in support of equal employment opportunity).

More recent discussion in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), lends support to this argument. Writing for a six-member majority, Justice Stevens, who also authored *Claiborne Hardware*, distinguished an unprotected boycott by appointed counsel for criminal defendants in the District of Columbia, who sought increased remuneration, from the protected boycott by the black citizens in Port Gibson, Mississippi, who sought equal political and economic opportunities: "Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. . . . They sought only the equal respect and equal treatment to which they were constitutionally entitled." *Id.* at 426; see also *id.* at 428 (power to regulate economic activity "applies with special force when a clear objective of the boycott is to economically advantage the participants").

This cannot mean that the *Superior Court Trial Lawyers Ass'n* boycott was unprotected because it was merely self-interested; the *Claiborne Hardware* boycotters also stood to benefit personally from increased black political and economic opportunities. The claim must rather be that efforts to obtain "special" advantages are unprotected, while efforts to obtain constitutional entitlements are constitutionally privileged. *Superior Court Trial Lawyers Ass'n* also suggests that the test is not the purity of the motives of the participants, but the substantive constitutional value of their goals. See *id.* at 427 n.11 (finding the claim that the boycott sought to vindicate the constitutional rights of indigent defendants to be insufficient: "*Claiborne Hardware* does not, and could not, establish a rule immunizing from prosecution any boycott based upon sincere constitutional concerns."). The distinction suggested by *Claiborne Hardware* is more than simply the distinction between "political" and "nonpolitical" speech, for the goals of the *Claiborne Hardware* boycott included the demand that "[a]ll stores must employ Negro clerks and cashiers." *Claiborne Hardware*, 458 U.S. at 900.

It is possible that the economic demands in *Claiborne Hardware* were so intertwined with the political that the whole was rendered "political." This is not compatible with the tone of the opinion, however. Moreover, the Court has since taken the position that the right to petition the government for redress of grievances provides no protection beyond the general guarantees of the First Amendment. See *McDonald v. Smith*, 472 U.S. 479, 485 (1985). *Superior Court Trial Lawyers Ass'n*

Under this interpretation, private exertion of social pressure to induce actions that accord with constitutional values is intrinsically protected, while social pressure to suppress constitutionally valued activities is protected only insofar as "breathing space" is necessary to protect "core" First Amendment activities. Government actions facilitating the first form of pressure would be more defensible than those which expedite the latter. Thus, governmental denunciations of named members of discriminatory private clubs would stand on a different footing than the publication of the names of members of the NAACP.¹⁸⁵

This approach presses too hard on the notion of "constitutional values." It presumes that certain private actions are constitutionally favored, and not simply protected from governmental sanction. This, alone, is a matter of some controversy for those who envision the Constitution as a charter of limits upon government. More problematic is the hierarchy among constitutional provisions that courts would be required to establish. The attempts to obtain employment opportunities for blacks or racially integrated neighborhoods reflect the "values" of the Civil War amendments. These efforts are, if current law is any indication, accorded greater weight than the rights of property and contract reflected in the Contracts Clause, the Fourth, Fifth, and Fourteenth Amendments, or the freedom of association read into the interstices of due process and free speech.¹⁸⁶ Absent a strong theory of constitutional hierar-

demonstrates that political motivation or subject matter does not remove a boycott from legal regulation. See also *International Longshoremen's Ass'n*, 456 U.S. at 224-26 ("We would create a large and undefinable exception to the statute if we accepted the argument that 'political' boycotts are exempt from the secondary boycott provision.").

One doubts that a similar status would be accorded to a boycott designed to induce the discharge of black employees, or a boycott designed to induce local authorities to eliminate antidiscrimination laws. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 625-29 (1984) (finding a compelling state interest in eliminating sexual discrimination—discrimination "entitled to no constitutional protection").

¹⁸⁵ Compare *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 294-97 (Cal. Ct. App. 1991) (striking subpoena for membership list of club that engages in discriminatory admissions practices) with *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 185-86 (3d Cir. 1990) (remanding challenge to regulations requiring disclosure of identification of residents of a homeless shelter).

If one took this approach seriously, the question of intermediate cases would become troublesome, such as the publication of a list of the ten worst polluters in a city, or the violators of wage-price guidelines. Disruption of price stability and pollution are not constitutional rights, but neither is their elimination a constitutional imperative.

¹⁸⁶ On the other hand, the most recent case raising the issue sensibly suggests that private attempts at social pressure in service of a goal constitutionally prohibited to

chy, the approach dissolves.

A second approach is better grounded. We may grant the general propriety of social pressure, as part of a free social system, while shielding certain constitutionally privileged areas from exposure to such pressure. A presupposition of the political system embodied in the Constitution is the autonomy of citizens in the formation of their personality and opinions. Constitutional analysis should thus draw a line between actions and activities that are in the public domain, and others that require the incubation of privacy to maintain autonomy.¹⁸⁷ Only the former class of activities is a legitimate object of social pressure. The latter is presumptively shielded from government disclosures.¹⁸⁸

the government is constitutionally protected. See *Frisby v. Schultz*, 487 U.S. 474, 479-91 (1988) (according constitutional protection to anti-abortion demonstrators picketing the home of a doctor who performed abortions).

Frisby could be reconciled with a "constitutionally protected purpose" approach if abortion were not constitutionally protected. Note, however, that the justices most sympathetic to protection of the speech in *Frisby* were also those who are least inclined to overrule *Roe v. Wade*, 410 U.S. 113 (1973). Compare *Frisby*, 487 U.S. at 491 (Brennan, J., dissenting, joined by Marshall, J.); *Frisby*, 487 U.S. at 496 (Stevens, J., dissenting) with *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2951 (1990) (Marshall, J., concurring in part and dissenting in part, joined by Brennan & Blackmun, JJ.); *Ohio v. Akron Center for Reprod. Health*, 110 S. Ct. 2972, 2984 (1990) (Blackmun, J., dissenting, joined by Brennan & Marshall, JJ.); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 537 (1989) (Blackmun, J., concurring in part and dissenting in part, joined by Brennan & Marshall, JJ.).

¹⁸⁷ Cf. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1026-27 (1987) (arguing for distinctions between actions attributable to the government and inactions leaving private decisions untouched); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 108-10 (1988) [hereinafter, Seidman, *Fourth Amendment*] (arguing that similar protections are required by civic republicanism).

Private refuges are part of what has saved America from the tyranny of the majority, perceived by Tocqueville as a likely consequence of social equality. See DE TOCQUEVILLE, *supra* note 144, at 9-10, 261-63; cf. S. N. EISENSTADT & L. RONIGER, PATRONS, CLIENTS AND FRIENDS, INTERPERSONAL RELATIONS AND THE STRUCTURE OF TRUST IN SOCIETY 282-84 (1984) (arguing that shelter from the "glare of public life" is a prerequisite to the development of intimate dyadic relations characteristic of an open society).

¹⁸⁸ Although the Court has never fully resolved when the state may prohibit media communication in the interest of "privacy," it has suggested that some occasions may warrant limits. Although the Court has struck down restrictions on free speech in every encounter with the interest of personal privacy, it has invariably crafted its holdings to leave open the door for more narrowly tailored protections of the privacy interests. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102-04 (1979) (protecting the publication of the identity of a juvenile court defendant); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-94 (1975) (protecting the broadcast of rape victim's name contained in public records); *Time Inc. v. Hill*, 385 U.S. 374,

The importance of a line between presumptively public and presumptively private varieties of information is obvious in the case of dissenting political views. The "spotlight of pitiless publicity" in the McCarthy era radically constricted contemporaneous political discourse, and narrowed the public resources available for a generation. The Court has regularly recognized that shelter from public exposure is often a prerequisite to the contribution of unorthodox views to the marketplace of ideas.

The principle, moreover, is not limited to activities of direct political relevance. The offensiveness of the inquiries by HUAC and the loyalty boards lay not only in their potential impact on the future political activities of the witnesses. The inquiries were experienced, and intended, as violations of witnesses' personal autonomy. So, too, the ritualistic requirement that former

389-91 (1967) ("false light" privacy action).

In its most recent venture into the area, the Court struck down a damage award to a rape victim whose name, in violation of a Florida statute, had been published in a local newspaper while her assailant was still at large; the victim suffered harassment, telephoned threats and mental breakdown. *Florida Star v. B.J.F.*, 491 U.S. 524, 528-29 (1989). The Court's majority pointedly emphasized the "limited" nature of the holding:

Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," . . . [w]e continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

Id. at 533. In particular, the majority relied on the fact that the newspaper initially "lawfully obtained" the victim's name from an inadvertent and unauthorized disclosure by the local police department in the absence of "individualized adjudication" regarding the impropriety and harmful nature of the publication. *See id.* at 538-40.

The facts of the *Florida Star* case might evoke some skepticism regarding the narrowness of the holding. The initial release took place in violation of department policy, and in a room where the applicable Florida statute was clearly displayed. The publication took place in violation of the newspaper's own internal policy, and the harm to the victim was palpable.

In contrast to its protection of intrusive private speech, the Court has regularly suggested that the clash between values of privacy and hostility to government regulation of communication appropriately can be avoided by official policies requiring the retention of confidential information unduly impinging on private realms. *See, e.g., id.* at 534 (noting that government may classify certain sensitive information to protect private interests); *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (stating that risk of premature disclosure can be eliminated "through careful internal procedures to protect . . . confidentiality"); *Cox Broadcasting*, 420 U.S. at 496 (noting that, if there are privacy rights to be protected, the states must respond by means which avoid any disclosure).

Communists "name the names" of their leftist friends and colleagues as a condition of avoiding blacklists was objectionable even when the names had been published previously. The public betrayal of intimate relations assaulted both the witnesses and those they identified by denying their autonomy as citizens.

The citizen who is truly free in forming her identity should have the opportunity to experiment with roles she does not wish to adopt in public.¹⁸⁹ Women have a constitutional right to exercise their reproductive autonomy and then distance themselves from that exercise, even in their own minds.¹⁹⁰ Similarly, the First Amendment interest in "freedom of thought and expression" provides authors a constitutionally protected right to tear up their manuscripts without disclosing them to the public.¹⁹¹

These rights gain import from two phenomena. First, the sense of exposure to public view encourages individuals to engage in actions that society desires. Unorthodox but protected activities are less likely to be undertaken when subject to public examination.¹⁹² The author who must expose every draft to the public is likely to turn out a more timid product than the one who can experiment in private.

Second, exposure as the author of an action or statement links that action to our identity; the broader the exposure, the more indissoluble the link and the harder it is to disavow it. Forcing citizens to publicly link themselves to identities they are constitu-

¹⁸⁹ See, e.g., JOHN A. HALL, *LIBERALISM: POLITICS, IDEOLOGY AND THE MARKET* 86-87 (1987) ("[T]wo facts . . . give the individual a meaningful sense of freedom: his ability to control information about himself and his right to choose to separate the audiences before whom he can play separate roles."); cf. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 187 (1977) ("It is the fact of being constantly seen, of being able always to be seen, that maintains the disciplined individual in his subjection."); ERVING GOFFMAN, *On the Characteristics of Total Institutions*, in ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 23-24, 28, 33 (1961) (describing debilitating effect of forced disclosure, which violates "informational preserve regarding the self" of inmates in total institutions).

¹⁹⁰ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766-67 (1986).

¹⁹¹ See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 559 (1985).

¹⁹² See, e.g., ARNOLD H. BUSS, *SELF-CONSCIOUSNESS AND SOCIAL ANXIETY* 67-68, 93 (1980) (describing public self-awareness when a person focuses his attention on how others see him); ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 336, 374-77 (arguing that individuals adopt social norms through observation of members of the social group); Hans L. Zetterberg, *Compliant Actions*, 2 *ACTA SOCIOLOGICA* 179, 183-88 (1957) (concluding that visibility leads to convergence toward norm).

tionally entitled to eschew is a violation of their constitutionally protected autonomy—their right to define themselves.¹⁹³

The ability to experiment in the realm of the intimate is valuable not only for the society it builds, but for our own sense of freedom and character. The prospect of promiscuous disclosure is likely to stunt the development of our character. As Professor Zuboff observes: "To be visible in this way evokes a sense of vulnerability and powerlessness. The person observed begins to wonder, 'Am I exposed in some way I would not choose to be? How can I be certain about precisely what I have exposed? What is it that they might see?'"¹⁹⁴

¹⁹³ Justice Rehnquist, in his dissent in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, (1986), linked the right to decline to salute the flag, the right to decline to place state-required slogans on one's license plate, an author's right to block publication of her own manuscript, and the right to prevent use of union dues for objectionable ideological purposes as manifestations of "negative free speech rights" which "natural persons enjoy . . . because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience." *Id.* at 32-33 (Rehnquist, J., dissenting); see also *id.* at 18 (plurality recognizing right of corporation to avoid "forced association with potentially hostile views"); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (finding a right of non-union employees not to contribute to objectionable political expenditures); *Keller v. State Bar*, 110 S. Ct. 2228, 2235-37 (1990) (finding a similar right for state bar association members).

This interest is not only the right to avoid being forced to misrepresent one's conscience to the public—it is a right of a citizen to choose her identity in certain areas. The core objection is the government's forcing a citizen to take on an identity that the citizen would prefer to avoid, whether by associating her involuntarily with certain views, or having thoughts published against her will. "[A]t the heart of the First Amendment is the notion that . . . in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abouod v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Forcing publication of those beliefs is a mode of coercion.

¹⁹⁴ ZUBOFF, *supra* note 145, at 344. On the basis of her observations of workplaces in which visibility has been enhanced by increased information-processing capacity, Professor Zuboff notes a phenomenon which she calls "anticipatory conformity":

The behavioral expectations of the observer can be so keenly anticipated by the observed that the foreknowledge of visibility is enough to induce conformity to those normative standards. Anticipatory conformity is a tactic for avoiding the dread associated with the possibility of shame. . . . As the immediate environment is saturated with measurement, the pressure of visibility begins to reorganize behavior at its source, shaping it in conformity with the normative standards of the observer.

Id. at 345. Compare the observations of the German Constitutional Court, as it struck down parts of the German Census Law as intrusions on privacy:

If someone cannot predict with sufficient certainty which information about

The phenomena extend beyond actions to conditions of mind and body. Unwanted observation by others is itself a limitation of autonomy, and the more intimate the observation, the greater the sense of violation. To retain a sense of control over who can observe us nurtures our sense of independence; to retain such control over disclosure of intimate matters may be essential to our sense of identity. Conversely, the power of the state to inflict the sense of vulnerability is itself a sanction.

Under this analysis, public disclosures by government should be evaluated according to what is being disclosed, not merely the purpose of the disclosure. The subject of disclosure is relevant in two dimensions. First, the freedom to form unorthodox political commitments undergirds self-government. Nondisclosure benefits our commitment to political openness. Second, the importance of individual autonomy weighs heavily against government disclosures in areas of life that shape intimate identity and provide autonomy of character. The citizens needed to maintain a free society gain independence from the capacity to make initial intimate commitments in private and from the retirement to a sanctuary free of public scrutiny. The phrase, "it's none of your business," is no less crucial to the vocabulary of a free citizen than the phrase, "it's a free country."¹⁹⁵

This second approach also may appear to place undue weight on a particular political conception, in this case, an individualistic liberalism no less controversial than a hierarchy of constitutional values. A view that public dialogue defines, refines, and purifies the tastes of the citizenry may suggest that shielding information about "private" activities from public debate truncates judgment and pollutes decisions with private domination. As we will observe in section III, however, both liberal individualism and its communal competitors find virtues in disclosure, and retain substantial

himself in certain areas is known to his social milieu . . . he is crucially inhibited in his freedom to plan or to decide freely The right to self-determination . . . precludes a social order and a legal order enabling it, in which the citizens no longer can know who knows what, when and on what occasion about them.

Judgment of Dec. 15, 1983, BVerfG, 65 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, *translated in* 5 HUM. RTS. L.J. 94, 100 (1984) [hereinafter German Census Judgment].

¹⁹⁵ See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (noting that the importance of "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits" justifies prohibition of residential picketing (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980))).

sanctuaries from public observation.

II. IN PRAISE OF SUNLIGHT: THE ARGUMENTS FOR OPENNESS

Having established the cognizable impact of government exposures, how can we account for the reluctance of courts to condemn disclosures unequivocally? The answer returns us to Louis Brandeis's claim that "sunlight is the best of disinfectants" and faith in the forum of public opinion. Judicial reluctance is rooted in the virtues of disclosure.

In one aspect, information is a prerequisite to the effective exercise of choice. As knowledge increases so does societal and individual freedom. Full and accurate data is required for appropriate government policy-making and informed private decision-making.¹⁹⁶ Those who suppress information may be seeking to manipulate an audience's choices.

Dissemination of information also may improve the actions of those who are the subject of disclosure. Mutual disclosure and confrontation by citizens is on some views a prerequisite to appropriate participation in public discourse. Exposure to the public is thought to improve the character of the participants in public deliberations, and the quality of their decisions.¹⁹⁷ Even personal decisions, when shielded from public view, it is claimed, are less likely to be defensible with reasoned and responsible argument.

¹⁹⁶ In the market, informed private decision-making is also usually a prerequisite for efficient outcomes. For possible exceptions, see, for example, Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 568 (1971) (arguing that in certain market models, it is more efficient to prevent disclosure of market information prior to trading); J. Gregory Sidak & Susan E. Woodward, *Corporate Takeovers, The Commerce Clause and the Efficient Anonymity of Shareholders*, 84 NW. U. L. REV. 1092, 1098-1100 (1990) (arguing that participation of shareholders in decisions regarding takeovers would result in lower profits).

¹⁹⁷ As Professor Post observed, dissemination of information can also form a common core of public identity that holds a society together. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 633-37 (1990). With regard to this function no particular information is necessary. As long as some information is held in common, public identity will be constituted. Nondisclosure of particular types of information will result in different types of public identities, but it cannot be said that any particular level of disclosure is necessarily superior to nondisclosure.

A. *The Virtues of Knowing*

1. Accurate Decision-Making on Public Issues

Good social policy requires accurate information. Whether resources should be devoted to homelessness or hunger depends, in part, on the number of homeless and hungry; whether heroin should be legalized depends, in part, on the number of likely heroin addicts; whether free syringes and needles should be disseminated depends, in part, on the rate of HIV infection in the drug-using population. An increasingly activist state demands increasingly high levels of information.¹⁹⁸

During the McCarthy era, defenders of the investigations maintained that the enactment of proper regulations regarding the Communist party and associated dissidents required public disclosure of dissident activities, even if constitutionally protected activities were adversely affected.¹⁹⁹ The argument was neither new nor without successors; similar claims have been made regarding disclosure of membership in the Ku Klux Klan,²⁰⁰ membership in the civil rights and antiwar movements,²⁰¹ campaign contributions,²⁰² and abortions.²⁰³ If we grant that these activities are subject to some regulation, further disclosures appear appropriate to ensure that such regulation is both effective and efficient.²⁰⁴

¹⁹⁸ Cf. *California v. Byers*, 402 U.S. 424, 452 (1971) (Harlan, J., concurring) ("Technological progress creates an ever-expanding need for governmental information . . .").

¹⁹⁹ See *Konigsberg v. State Bar*, 366 U.S. 36, 52 (1961); *Barenblatt v. United States*, 360 U.S. 109, 112, 127-28 (1959); *Watkins v. United States*, 354 U.S. 178, 195-98 (1957); *American Communications Ass'n v. Douds*, 339 U.S. 382, 409 (1950) ("If it is admitted that beliefs are springs to action, it becomes highly relevant whether the person who is asked whether he believes in overthrow of the Government by force is a general . . . or a village constable."); *Lawson v. United States*, 176 F.2d 49, 53-54 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); *United States v. Josephson*, 165 F.2d 82, 88-91 (2d Cir. 1948), *cert. denied*, 333 U.S. 838 (1948).

²⁰⁰ See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 73-75 (1928).

²⁰¹ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504-05 (1975); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 547-49 (1963).

²⁰² See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92-95 (1982); *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976).

²⁰³ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 804-05 (1986) (White, J., dissenting); *Planned Parenthood v. Danforth*, 428 U.S. 52, 79-81 (1976).

²⁰⁴ See *University of Pa. v. EEOC*, 110 S. Ct. 577, 583, 587-88 (1990); *Thornburgh*, 476 U.S. at 804 (White, J., dissenting); *Buckley*, 424 U.S. at 65; *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 101-02 (1961) (noting

On one level, the claims for disclosure are one side of the familiar conflict between the competing demands of government efficiency and of constitutional rights. Whatever mechanisms adjust the conflict generally might settle this issue as well. The problem is a more poignant one, however. Adjustment of the tension between rights and interests requires at least that they be compared. Acquisition of contested information is thus needed to establish the magnitude of considerations on either side of the conflict. When the government does not know how many Communists are in the United States, how can it determine what the costs of not knowing are?

Moreover, even if one denies that the rights in question are subject to defeasance by the mine run of governmental interests, the tension raised by problems of disclosure may be more than a conflict between "rights" and efficiency. In some areas, it is a decision between "rights" and the system of self-governance that justifies those rights. To the extent First Amendment rights are rooted in the "marketplace of ideas," disclosure of information cannot but contribute to the functioning of that marketplace. In a well-functioning market, more information moves the market closer to truth.²⁰⁵ Hence, the argument that a constitutional doctrine that inhibits disclosure "[by withholding] information from the public" out of a "zeal to protect the public from 'too much information' could itself not withstand First Amendment scrutiny."²⁰⁶

that "secrecy itself [can be] made an active instrument of public harm").

²⁰⁵ See, e.g., LOUIS PHILIPS, *THE ECONOMICS OF IMPERFECT INFORMATION* 12 (1988); Joe A. Oppenheimer, *Public Choice and Three Ethical Properties of Politics*, 45 PUB. CHOICE 241, 242-43 (1985). But see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 939-82 (1990) (analyzing situations under which limited information may lead to better political decisions).

²⁰⁶ Meese v. Keene, 481 U.S. 465, 481-82 (1987); cf. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) (arguing that disclosure legislation implements rather than detracts from freedoms guaranteed by the First Amendment).

The paradox has not gone unnoticed in the commentary. See, e.g., FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 360 (1981) (arguing that the "First Amendment claim of a right to silence is opposed by another First Amendment value—the public's right to know"); Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 322 (1984) (protection of NAACP membership lists "protected free speech by denying the public access to important information . . . [for reasons that] conflicted with traditional first amendment theory"). Another commentator put it this way:

If truth can be discovered only by the free trade of ideas . . . any provision which has the effect of excluding an idea . . . should . . . be abolished. . . .

Insofar as freedom of speech and political association are grounded on ideals of democratic self-rule, suppression of information relevant to public decisions carries costs of a constitutional magnitude. An uninformed citizenry cannot meaningfully address itself to the substance of public affairs. Public decisions taken without public information risk not only inaccuracy, but illegitimacy.²⁰⁷

The somewhat distinct vision of the First Amendment that contemplates the use of public information to hold government in check through public accountability²⁰⁸ points initially toward a preference for disclosure of information regarding government

But if disclosure—which promotes full information—does have the effect of deterring and thereby excluding ideas, it is obvious that free trade of ideas and full information are conflicting values which cannot be achieved simultaneously.

Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1112 (1961).

²⁰⁷ See, e.g., 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) ("A popular government without popular information, or the means of acquiring it is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power that knowledge gives."); EDWARD A. SHILS, *THE TORMENT OF SECRECY* 23 (1956) ("The struggle for constitutional government . . . was directed against privacy in government. Almost as much as the extension of the franchise and constitutional restraint on monarchical absolutism, publicity regarding political and administrative affairs was a fundamental aim of the modern liberal democratic movement."); GEORG SIMMEL, *SOCIOLOGY OF GEORG SIMMEL* 337 (Kurt H. Wolff trans. & ed., 1950) ("Every democracy holds publicity to be an intrinsically desirable situation, on the fundamental premise that everybody should know the events and circumstances that concern him . . . [to] contribute to decisions about them."); Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 731 (1987) ("The more . . . that privacy is equated with a deliberate and legally protected seclusion of the individual, the more the right to be let alone develops into an impediment to the transparency necessary for a democratic decisionmaking process.").

The claim goes beyond the objection to judicial review most recently articulated by Chief Justice Rehnquist in his dissent in *Texas v. Johnson*, 491 U.S. 397 (1989): "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people Uncritical extension of constitutional protection . . . risks the frustration of the very purpose for which organized governments are instituted." *Id.* at 435 (Rehnquist, C.J., dissenting). A lack of information interferes not only with the achievement of public purposes, but with the very ability to form those purposes.

²⁰⁸ See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 631-49 (arguing that the checking power of free expression should be more openly considered in First Amendment adjudication). This "checking function" does not presume that the citizenry is actively engaged in defining public policy on a regular basis, but rather that it can be roused to "check" particular government tyrannies.

operations.²⁰⁹ But such a vision suggests the necessity for public dissemination of information bearing on the legitimacy of government decisions, as well as the decisions themselves. Whether a particular act of government is an unjustified usurpation or an appropriate effort to further the public interest depends, not only on the nature of the official act taken, but on the situation to which it responds.²¹⁰ A public that is informed about the state, but not about society, therefore, will flail blindly in wielding its "checks" against its rulers. Indeed, one of Joseph McCarthy's claims was that public ignorance of the extent of Communist infiltration prevented the public from adequately guarding against betrayal by its government.

Only First Amendment theories grounded exclusively on claims of individual liberty²¹¹ do not permit the potential benefits of government disclosure to attain countervailing constitutional status.²¹² But even in these systems, individual freedom may require information as a precondition for its exercise. Whenever individual choice is contingent upon a state of the world, information about that state is needed to exercise that freedom legitimately.²¹³

²⁰⁹ See, e.g., Blasi, *supra* note 29, at 491-95 (arguing that abuse of governmental power "can be warded off by a strict insistence, as a matter of constitutional doctrine, that traditional standards of openness in government be maintained"); Anton M. Revedin, *Information Activities of Parliaments and Political Parties*, 9 HUM. RTS. L.J. 456, 467 (1988) ("[I]nformation constitutes a *guarantee* [to] the citizen, . . . it becomes part of [a] series of guarantees which control individual freedom. . . . [I]nformation as an instrument . . . could be used by the electorate to supervise their elected representatives.").

²¹⁰ In this regard, the majority in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), made the issue too easy for itself. *Reporters Committee for Freedom of the Press* construed an exemption from disclosure under the Freedom of Information Act, which protects against "unwarranted" infringements on privacy. In holding that the infringement resulting from disclosure of "rap sheets" of government contractors was unwarranted, the Court avoided comparing interests in privacy and disclosure by limiting considerations favoring disclosure to the interest in finding out "what the government was up to," rather than the private context in which the government's actions took place. See *id.* at 771-75, 780.

²¹¹ See, e.g., BAKER, *supra* note 167, at 47-51.

²¹² The author of *The Constitutional Right to Anonymity* attempts to escape the tension between self-rule and the costs of disclosure by rooting First Amendment protections in a Millian skepticism of settled orthodoxies. For him, the need to allow articulation of unorthodox opinions stands on a different footing than the need to inform orthodoxies. See Note, *supra* note 206, at 1116-24. In the McCarthy era, this effort runs aground, since McCarthy was, in his own view, attempting to uproot a liberal orthodoxy.

²¹³ See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1783 (1991) (Blackmun, J.,

The prevalence of the conflict between the constitutional costs and benefits of disclosure illuminates the continuing tendency of courts to adopt ad hoc accommodations in this area. Constitutional values can be threatened by both disclosure and secrecy. Either choice may be a sacrifice of constitutional magnitude, and that decision cannot be made in the abstract. The crucial question is the degree of sacrifice in the particular context.

Still, not all claims from self-governance are equally compelling. In many instances extensive disclosures are unnecessary. McCarthyite tales of subversion, if plausible at all, are difficult to evaluate sensibly without knowing the identity of the alleged protagonists. A foreign agent in the motor pool creates a very different threat than one in the code room. The identity of the unreliable employee may be crucial to making sensible policy regarding classification procedures.

On the other hand, public policy tends to deal in aggregates rather than specifics. The names of particular patients who test positive for AIDS, or of specific women who obtain abortions, are of only tangential relevance to informed public opinion. For this reason, the claim that disclosure of the identity of individuals is crucial to public decision-making should be greeted with some skepticism.²¹⁴

dissenting) (arguing that the reproductive interests of family planning clients demand comprehensive information); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760-63 (1986) (striking down Pennsylvania "informed consent" disclosures required in abortion situations as "state medicine imposed upon the woman, not the professional medical guidance she seeks"); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (protecting advertisements containing "information of potential interest and value" regarding abortion).

²¹⁴ See, e.g., *ACLU v. Mississippi*, 911 F.2d 1066, 1071 (5th Cir. 1990) (concluding that disclosure of the names of individuals targeted by the state's former secret intelligence commission "would rarely, if ever, be necessary to enumerate and demonstrate the Commission's divers [sic] dealings"); *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977) (emphasizing that census data containing names and addresses is not subject to disclosure under the Freedom of Information Act); *German Census Judgment*, *supra* note 194, at 104, 106, 110-11 (statistics for planning must be aggregated in a fashion that eliminates individually identifiable data as a way of accommodating the right of informational privacy and the legitimate needs of government).

2. You Can't Tell the Players Without a Scorecard: Consumer Protection in the Marketplace of Ideas

A second argument for disclosure puts individual identity not at the periphery, but at the core of information that deserves public disclosure. During the McCarthy era, when fears of covert Communist subversion of public opinion were rampant, identification of potential sources of subversion was thought to be a remedy. Identifying the background of groups and individuals who participated in public debate, it was argued, would provide the facts for accurate decision-making, and also avoid covert manipulation.

To produce consent legitimately, public debate must be informed. According to one school of thought, part of the necessary information is the identity and background of the bidders in the marketplace of ideas. Just as government and citizens must obtain information about regulated activities to choose among proposals for further regulation, citizens are entitled to information about the source of the proposals that come before them. Thus, at the outset of the McCarthy era, the President's Committee on Civil Rights maintained that "the principle of disclosure is . . . the appropriate way to deal with those who would subvert our democracy,"²¹⁵ and recommended "[t]he enactment by Congress and the state legislatures of legislation requiring all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves."²¹⁶ The proposal stood in a long line of arguments that anonymous speech is to be distrusted.

The recurring concern in this line of argument is deception. Anonymity allows a speaker to pretend to be something that she is not, and to convince her interlocutor under false pretenses. Disclosure safeguards the freedom of choice of the listener who seeks to further her own goals. Identifying speakers allows the recipients of communication to guard themselves against manipulation.

As early as the First World War, the Court upheld a requirement that ownership of publications receiving second class postage be publicly disclosed, because "[i]t is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interest

²¹⁵ THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 52 (1947).

²¹⁶ *Id.* at 164.

the publication represents."²¹⁷

The prelude to World War II, and the accession to power of fascist governments in Europe, was accompanied by uneasiness concerning the vulnerability of the American polity to the dark arts of propaganda. Congress "had discovered . . . that business enterprises had been utilized as a means for propagandizing, and that many [foreign agents] . . . had published articles . . . concealing their identity behind pseudonyms. . . . 'They were employing the same method they had employed in Germany for the purpose of obtaining control of the government over there.'"²¹⁸ But naming the devils was thought to deprive them of their power. Disclosure legislation, according to Justice Black, rested on

the fundamental constitutional principle that our people, ade-

²¹⁷ *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 312 (1913) (quoting S. REP. NO. 955, 62d Cong., 2d Sess. 24 (1912)); *see also id.* at 316 (approving requirement that paid advertisements be identified on the ground that such identification "enable[s] the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement"); *cf.* 47 U.S.C. § 317 (1988) (requiring identification of paid political announcements on federally licensed broadcasting stations).

²¹⁸ *Viereck v. United States*, 318 U.S. 236, 250 n.2 (1943) (Black, J., dissenting) (quoting manuscript of House Committee hearings on Nazi propaganda); *see also* Institute of Living Law, *supra* note 49, at 141 (calling for stronger disclosure requirements in order to stem propaganda's "poisonous growth on American soil"); Smith, *supra* note 52, at 40 (arguing that registration and disclosure are the only "non-dictatorial" methods of limiting subversive propaganda).

Disclosure was not universally thought to be a sufficient response to the threat of foreign infiltration:

With respect to the propaganda studies, there was a period between World War I and the early 1950s in which the so-called "bullet theory" of mass communications . . . held sway. . . . Propaganda was an "insidious force" wielded by the mass media The critical assumptions were that people were defenseless and passive . . . and that "communication could shoot something into them, just as an electric circuit could deliver electrons to a light bulb." . . . Many of these notions surely flowed from the fear generated by World War I and, later, Communist and Nazi propaganda.

MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 74 (1983) (quoting Wilbur Schramm, *Nature of Communication Between Humans*, in *THE PROCESS AND EFFECTS OF MASS COMMUNICATIONS* 9 (Wilbur Schramm & Donald Roberts eds., 1971)).

Many of the theorists supporting the "method of exposure" as a weapon against totalitarian propaganda were dubious as well about the propriety of granting free speech rights to totalitarian movements at all, and doubtful of the conception of the state as neutral regulator in the marketplace of ideas. *See, e.g.*, Norman L. Rosenberg, *Another History of Free Speech*, 7 *LAW & INEQ. J.* 333, 352 (1989) (outlining David Reisman's arguments that "free speech policy 'must be selective and discriminating . . . on the basis of an overall judgment of the social forces which favor democracy'" (quoting David Riesman, *Civil Liberties in a Period of Transition*, 3 *PUB. POL'Y* 33, 83 (1942))).

quately informed, may be trusted to distinguish between the true and the false[;] the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.²¹⁹

In the postwar period, labor unions were viewed as vulnerable to the covert tactics of Communist infiltrators, and in need of government aid to reveal the hidden infestation. Here again, sunlight was thought to disinfect, and an adequately informed populace could be trusted:

[The Communist Party's] labor leverage, however, usually can be obtained only by concealing the Communist tie from the union membership. Whatever grievances American workman may have with American employers, they are too intelligent and informed to seek a remedy through a Communist Party which defends Soviet conscription of labor, forced labor camps and the police state. Hence the resort to concealment, and hence the resentment of laws to compel disclosure of Communist Party ties.²²⁰

²¹⁹ *Viereck*, 318 U.S. at 251 (Black, J., dissenting); see also *Meese v. Keene*, 481 U.S. 465, 480 (1987) (disclosure "enable[s] the public to evaluate" political propaganda coming from foreign sources). Some light is cast on Justice Black's initial hospitable attitude toward "the method of exposure" by his own successful efforts as a senator to expose manipulative lobbying efforts by public utility holding companies. See *SIMON*, *supra* note 51, at 90-96; Black, *supra* note 51, at 286 ("special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity").

²²⁰ *American Communications Ass'n v. Douds*, 339 U.S. 382, 431 (1950) (Jackson, J., concurring in part and dissenting in part). Justice White expressed similar sentiments: "Although one of the classic and recurring activities of the Communist Party is the infiltration of other organizations,"

[t]he freedom of association which is and should be entitled to constitutional protection would be promoted, not hindered by disclosure which permits members of an organization to know with whom they are associating and affords them the opportunity to make an intelligent choice as to whether certain of their associates who are Communists should be allowed to continue their membership.

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 583-84 (1963) (White, J., dissenting).

Members of Congress also needed help in avoiding concealed manipulation: Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

The crucial perceived failure of the marketplace of ideas was the ability of Communists to convey ideas to the public without labeling their origins. The Supreme Court lamented that "through communist-front organizations they are able to obtain the support of persons who would not extend such support knowing of their true nature."²²¹ Such effective dissimulation posed "a threat to . . . the effective, free functioning of our national institutions," and the solution was to be found in the capacity of the marketplace: "to bring foreign-dominated organizations out into the open where the public can evaluate their activities informedly against the revealed background of their character, nature and connections."²²²

In recent terms, similar arguments have influenced the Court's decisions upholding required disclosure of political contributions,²²³ praising identification of political advertisers,²²⁴ and

United States v. Harriss, 347 U.S. 612, 625 (1954) (upholding a federal requirement that lobbyists disclose and register their activities).

²²¹ *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 94 (1960); see also *id.* at 103 (sustaining a requirement that "Communist-action organizations" register with the Attorney General). Compare Congressman John S. Wood's proposal in 1945 that news programs be distinguished from opinion programs, and that the place of birth, nationality, and political affiliations of commentators on news programs be open to public inspection. See GOODMAN, *supra* note 38, at 175-76.

²²² *Subversive Activities Control Bd.*, 367 U.S. at 97, 103; cf. THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *supra* note 215, at 53 ("The federal government . . . ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion.").

Under the legislation adopted at the height of the McCarthy period, the information is brought to attention, not just to light. Mail sent by a registered organization was required to be stamped to show it was disseminated by a Communist Action organization. See *Subversive Activities Control Act of 1950*, ch. 1024, tit. 1, § 10, 64 Stat. 996 (codified as amended at 50 U.S.C.S. § 789(1) (1991)) (Subversive Activities Control Board ceased operation in 1973 as unfunded).

²²³ In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld the required disclosure of the identity of contributors to political campaigns in part on the ground that "[t]he sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive." *Id.* at 67. The Court's approval of a requirement that independent expenditures be registered rested entirely on registration's effect of "increas[ing] the fund of information concerning those who support the candidates." *Id.* at 81.

²²⁴ Acknowledging that "when individuals or corporations speak through committees, they often adopt seductive names that tend to conceal the true identity of the source," the Court has spoken approvingly of mechanisms designed "to make known the identity of supporters and opponents of ballot measures." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981). Although the Court struck down a cap on contributions to ballot proposition committees, the Justices

sustaining identification requirements for charitable solicitors.²²⁵ These cases suggest that the same words from different sources should be accorded different weights, and perhaps different meanings. The ability to conceal this information from the public, in this view, is a means of manipulation by which speakers gain their objects without public consent.

This emphasis on origin accords with our everyday experience as lawyers and citizens. Witnesses are impeached or accredited by showing their background, and the weight of opposing counsel's assurances may depend on counsel's character. Our reaction to a request to sign a petition might well differ depending on whether it was circulated by Ralph Nader, Jerry Falwell, or Lyndon Larouche, and an attempt to pass off Nader's petition as Falwell's or vice versa would constitute outright fraud.

Still, the First Amendment generally does not permit the government to erect mechanisms to sift true ideas from the false in public discourse. While concern with eliminating falsehood has been an element in the development of the constitutional law of libel, our tradition has equally affirmed that "there is no such thing

were unanimous in their presupposition that measures employed to identify and publicize the identities of contributors were appropriate. *See id.* at 299-300, 303 (Blackmun, J., concurring); *id.* at 308-09 (White, J., dissenting) ("[I]nformation concerning who supports or opposes a ballot measure significantly affects voter evaluation of the proposal.").

²²⁵ *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 800 (1988) ("[T]he State may itself publish detailed financial disclosure forms it requires professional fundraisers to file."). Justice Scalia rejected the contention that solicitors should be required to reveal their status:

[W]here core First Amendment speech is at issue, a state cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made. . . . [W]here dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.

Id. at 804 (Scalia, J., concurring in part).

Justice Rehnquist's dissent, by contrast, concludes that disclosure of facts to prospective contributors is "directly analogous to mandatory disclosure requirements that exist in other contexts such as securities transactions." *Id.* at 811 (Rehnquist, J., dissenting). Justice Rehnquist's enthusiasm for identification extends as well to a requirement that door-to-door canvassers register with the police "for identification only." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 611 (1976) (Rehnquist, J., dissenting). The *Hynes* majority struck down the requirement on vagueness grounds, but was itself ambiguous as to whether a more precise version would be sustained. *Id.* at 620-21 n.4. The Court also failed to resolve the issue with regard to identification of the source of election materials in *Hill v. Printing Indus.*, 422 U.S. 937 (1975) and *Golden v. Zwickler*, 394 U.S. 103 (1969).

as a false idea," under the First Amendment, in part because the government should not be in the business of evaluating political truth and falsehood.²²⁶ There is something anomalous about allowing the government to require disclosure as a means of avoiding manipulation by ideas flying false colors.²²⁷ Moreover, to the extent that the speaker consciously declines to identify herself and believes that anonymity is a part of the message she wishes to convey, requirements of revelation effectively prohibit communication of that message.

Our history also shows that anonymity does not necessarily entail either bad faith or deception. Justice Black pointed out in *Talley v. California*,²²⁸ that "the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."²²⁹ *Talley* seems to stand for the principle that it is not disclosure, but political privacy, that is fundamental to our political system. In reversing the conviction of a California pamphleteer seeking to initiate a boycott of a discriminatory employer, the Court struck down a requirement that handbills bear the identity of their author, without any concrete showing of dangers of retaliation against that writer.²³⁰

²²⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)); cf. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990) (statements of opinion on matters of public concern which do not contain provably false factual connotations are fully protected).

²²⁷ Although the identity of the author of a statement is a matter of "fact," anonymity does not misrepresent the "fact." Moreover, the "fact" is relevant not as an aid to judgment itself, but as a means of determining the accuracy of the ideas that the author disseminates.

²²⁸ 362 U.S. 60 (1960).

²²⁹ *Id.* at 65. It is not clear whether the anonymity of the Federalists was real or a pose designed to preserve civility in other spheres.

[T]he demarcation between public and personal remained so delicately thin that the gentry had to buffer it with additional layers, one of which was public debate through pseudonyms. . . . Although the authors behind these masks were often quite obvious, the persona of a pseudonym still released them from a degree of responsibility for their statements, and hence extended another measure of protection against revenge.

ROBERT H. WEIBE, *THE OPENING OF AMERICAN SOCIETY* 100-01 (1984); cf. DREW R. MCCOY, *THE LAST OF THE FATHERS*, 46-47 (1989) (suggesting that Madison did not tell Jefferson of his co-authorship of *The Federalist Papers* in part because it attacked Jefferson's position in *Notes on the State of Virginia*).

Particularly where the anonymous pieces appeared in partisan newspapers, the possibility of public deception was probably minimal.

²³⁰ *Talley*, 362 U.S. at 65. The chord was struck again three years later, when the Court in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963),

Professor Post has recently proposed that *Talley* should be read as exemplifying an affirmative preference for anonymous speech in the public sphere. In his view, the law should not consider the origins of the ideas and proposals we evaluate. At least as a "regulative ideal," "many of the criteria . . . which ultimately derive from that context must be 'bracketed' out. . . . [S]peakers [should be able to] divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience."²³¹ On this view, arguments in the public arena should be entitled to stand or fall on their own merits, rather than on the identity of their proponents.²³²

In addition to the social theorists upon whom Professor Post relies,²³³ the proposal has a certain intuitive appeal. Many law

capped a series of cases which established at least a presumptive right to "protection of privacy of association in [political] organizations." *Id.* at 544. While taking note of the hostility towards the NAACP that surrounded demands for its membership records, the Court grounded its holding in a general right to privacy that encompassed "all legitimate organizations." *Id.* at 556; *see also id.* at 545-46 ("The interests here at stake are of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon the particular parties here involved.").

Gibson enunciated a "privacy of association in organization" defeasible upon a showing of a "substantial relation between the information sought and a subject of overriding . . . state interest." *Id.* at 544, 546. The majority implicitly rejected Justice White's argument in dissent that disclosure furthered First Amendment interests in accurately identifying participants in the marketplace of ideas.

The reach and vitality of *Talley*'s principle, in light of *Buckley v. Valeo*, 424 U.S. 1 (1976), which upheld campaign finance disclosure requirements, have been a matter of disagreement in the lower courts. The most recent cases, relying on the precedent of *The Federalist Papers* and the broad language of *Talley*, have struck down identification requirements for campaign literature. *See, e.g.,* *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987); *Rosen v. Port of Portland*, 641 F.2d 1243, 1251 (9th Cir. 1981); *People v. White* 506 N.E.2d 1284 (Ill. 1987); *State v. N.D. Educ. Ass'n*, 262 N.W.2d 731 (N.D. 1978). *But see* *State v. Acey*, 633 S.W.2d 306 (Tenn. 1982); *Messerli v. State*, 626 P.2d 81 (Alaska 1981).

²³¹ Post, *supra* note 197, at 640.

²³² One who takes Professor Post's view might avoid the conflict between *Talley* and *Buckley* by contrasting the "public discourse" in *Talley*, on one hand, with "contributions" in *Buckley*, on the other, which might be said to constitute "action" rather than "discourse." The gambit fails, however, for two reasons. First, the leaflet in *Talley* was not simply the advancement of the abstract principle of racial equality, but a concrete and directed solicitation to boycott the target stores. Second, many of the expenditures in *Buckley* seem as purely discursive as one can get.

²³³ Professor Post roots this conception in the theories of Jurgen Habermas and Alvin Gouldner. Habermas' position, as I understand it, is that the abstraction from the contexts of experience and action is appropriate, as a heuristic device, to achieve a "discourse" from which "all motives except the cooperative search for truth are excluded." JURGEN HABERMAS, *LEGITIMATION CRISIS* 107-08 (Thomas McCarthy trans., 1975). The problem in a less than ideal speech situation, like the political

schools, after all, believe that anonymous grading is more conducive to fair evaluation, and scholarly journals rely on anonymous peer reviews to mute biases. Ultimately, however, the approach Post suggests reaches too far, for reliance upon the identity of a speaker is often an appropriate part of political practice.

Even in the relatively pristine environment of the academy, the costs of anonymity to rational discourse can be significant. The identity of the speaker conveys information that improves the quality of discussion. An assertion by Carl Sagan regarding astronomy claims more credence than one by the neighborhood auto mechanic, not by virtue of Sagan's social position, but because of his proven judgment. If we do not know who is making an assertion, we must evaluate it from first principles, a burdensome approach indeed.

In one dimension, the identity of a speaker is a proxy for previous communications. Sagan *could* preface each remark with an account of his entire previous corpus, but, even in an academic seminar, it seems simpler just to sign his name. Conversely, identification makes other communications available to listeners. When evaluating an argument of Richard Posner regarding "efficiency," it is useful to be able to refer to his other work.²³⁴

arena, where participants are motivated by considerations other than a search for the truth, is whether abstraction from identity will in fact aggravate the *defects*. What, in other words, is the "second best" speech situation? See Bruce Ackerman, *Why Dialogue*, 86 J. PHIL. 5, 8 (1989) ("[T]he world of practical politics does not seem at all close to anybody's idea of an ideal speech situation. Politicians do talk a lot, but it is not unduly cynical to suppose they mean less of what they say than other folk.")

Gouldner links "rationality" to an attempt to sever secular authority from communicative authoritativeness. Post, *supra* note 197, at 140. This may or may not be inconsistent with "earned" authoritativeness. (There is nothing irrational about believing Carl Sagan more than Eliot (either George or T.S.) when it comes to astronomy, and the reverse when it comes to poetry.) But it certainly does not support a regime of *optional* anonymity, since speakers will not take advantage of anonymity precisely when their secular status is most distorting.

Professor Post seems to concede that Habermas and Goulder are not "descriptive," but rather should be regarded as a "regulative ideal." *Id.* at 640. The question is whether, in the real world, the proposed rule of optional anonymity takes practice further from the ideal. In private communications, Professor Post suggests that my discussion improperly slips from contextualization to expert authority. My "slip" is dictated by the structure of reality. A principle of anonymity cuts off knowledge of both the context and the speaker's qualities of mind, soul, and expertise.

²³⁴ Compare this effect with the views of Jeffersonian lawyer John Thomson, an advocate of identification in lieu of legal suppression. Thomson argued that once a writer proved unreliable he "would forever after be deprived of giving currency to his calumnies." NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN* 98 (1986) (quoting JOHN THOMSON, *AN ENQUIRY CONCERNING THE LIBERTY AND LICENTIOUS-*

Equally important is a second dimension of a speaker's identity, its representation of life experience. Not all data relevant to decision-making is susceptible to proof within the confines of a seminar. The price a work of art will fetch at auction, the effect of currency manipulation on world monetary markets, and the likelihood that an argument will persuade the Supreme Court are all matters of judgment, where the training and record of the proponent are crucial to her persuasiveness. So, too, perceptions and value judgments are informed by life experiences. An account of the impact of affirmative action on black self-image may take on different meanings depending on whether the account is provided by Justice Scalia or Justice Thomas; a man's description of the effects of separate seating of men and women in a religious service legitimately has an import different from a woman's account.

To the extent that practical wisdom and experience are proper elements of decision-making, anonymity is less desirable even in principle. When what is at issue is a choice of values, a decision-maker who affirmatively desires to hear the voices of a variety of constituencies and to grapple with the perspectives of groups of which she is not a member²³⁵ will be impossible unless the identities of the speakers are known.

As an ideal for the world as we know it, the prospect of speech abstracted from speaker is still more problematic outside the academy. Real political discourse is neither costless nor disinterested.²³⁶ We regularly observe communications substantially less

NESS OF THE PRESS 84 (reprint 1970) (1800)); see also *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2523 (1991) (Souter, J., dissenting) (contending that the identity of the source of a news leak regarding an opposing candidate was important to Minnesota voters because "[t]he propriety of his leak . . . could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an advisor").

²³⁵ For advocacy of the necessity of legal decision-makers seeking to take seriously alternative perspectives, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1648-50 (1990).

²³⁶ The time and energy that Americans can devote to public affairs is dwarfed by the information with which they are confronted. Although it is barely plausible that an academic seminar could start from first principles in each discussion, the prospect of facing each evening's news with the same task is a recipe for paralysis. The regular tendency of the public to use chosen "opinion leaders" as proxies may be the only option for coping with information overload that preserves the possibility of public choice in any form. This suggests that "divorce from context" is not a plausible ideal.

Still, the *Talley* principle does not mandate anonymity, but simply permits it. So few speakers appear to take advantage of the permission that, realistically, the

candid and disinterested than those of an academic seminar. If public discussion carries with it the prospect of gain and the danger of material loss to the participants as individuals, as any discussion of moment does, the reliability of assertions and the impact of proposals may be closely correlated to the speaker's interests. An analysis of tobacco-linked cancer deaths sponsored by the Tobacco Institute is rationally evaluated on a different basis than one sponsored by the Surgeon General. Similarly, we can expect a proposed tax change sponsored by the Business Roundtable to have a different distributional impact than one proposed by the AFL-CIO.

Abstracting from authorship is a willful sacrifice of relevant, and perhaps vital, information. If anonymity can be invoked at will by the speaker, the *Talley* principle may sacrifice freedom as well, for the speaker may use anonymity strategically to induce the listener to act in accord with the speaker's will. Selective silence can manipulate preferences as effectively as speech and the *Talley* principle may be seen as facilitating that manipulation.²³⁷

Talley, therefore, cannot rest on an a priori dismissal of the virtues of disclosure. Rather, a right to anonymity must be defended on the basis of a realistic evaluation of the dangers it seeks to avoid and the dangers it poses. Absent the *Talley* principle, some messages may never enter the marketplace of ideas at all. As we saw in section I, public identification with the unorthodox may bring with it substantial, and occasionally insupportable, pressures. Moreover, a citizen with a prudent concern for the future and a knowledge of history may feel these pressures even in times of relative tolerance.²³⁸

prospects of drowning in a sea of anonymous information are slim.

²³⁷ Cf. *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990) (upholding antimask statute as applied to KKK as a means of avoiding terrorism); Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 786, 787 n.50 (1980) (arguing that the refusal to disclose embarrassing information improves the position of the person compiling at the expense of those with whom she deals); Anthony T. Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. LEGAL STUD. 727, 739 (1980) (discussing the power of an individual to disclose selectively embarrassing facts about himself as one of the interests protected by exemptions from FOIA); Richard A. Posner, *Privacy, Secrecy and Reputation*, 28 BUFF. L. REV. 1, 11-17, 43-44 (1979) (discussing privacy as the concealment of discreditable facts about oneself to enhance reputation).

²³⁸ Four years ago, a speaker at the University of Pennsylvania Law School's placement conference suggested that students omit affiliations with the ACLU from their resumes. My skepticism concerning the accuracy, if not the legitimacy of that advice, has waned somewhat after seeing use of the epithet "card carrying member

In addition to avoiding the "chilling effects" of disclosure, the *Talley* principle may improve the quality of public evaluation of discourse. In general, the messages that benefit from the *Talley* principle are those whose messenger are greeted with skepticism or hostility by the public. The Surgeon General is unlikely to claim the benefits of anonymity, although the CIA may do so. Popular speakers need no shelter.²³⁹ The *Talley* principle will, therefore, be counter-cyclical. Unpopular minorities or powerless majorities will be the primary beneficiaries, and disclosure requirements are likely to have a disparate impact on the unorthodox. The memory of the McCarthy era suggests that the hostility that greets unorthodox views are extreme and irrational. In terms of accurate and undistorted decision-making, allowing messages the opportunity to escape intolerance and start afresh on their merits is appealing, and may be worth the cost of the manipulation permitted by *Talley*.

On the other side of the scale, the interests that purport to justify disclosure, at least in the case of political discourse, are probably exaggerated. The arguments for the necessity of disclosure were formed at a period in which marketing manipulation was thought to be substantially more efficacious than it now appears to be.²⁴⁰ It seems unlikely that our media-saturated electorate will be duped into self-destruction by nefarious forces hiding behind "institutes" or "coalitions." *Talley* is right, not because disclosure is valueless, but because anonymity is more valuable.

of the ACLU" in political discourse.

²³⁹ But even a popular speaker may seek anonymity to speak in a discreditable or inconsistent fashion. In this regard, consider the current proposals to require identification of the sponsors of negative campaign advertisements.

²⁴⁰ The presuppositions regarding how easily voters may be misled have been largely undercut. See YUDOF, *supra* note 218, at 74-78 (describing the decline of the bullet theory); David D. Sears, Book Review, 52 PUB. OPINION Q. 262-65 (1988) (reviewing RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE (1986) (presenting the theory of message elaboration—when recipients care, they are not misled)); cf. Jeremy Cohen et al., *Perceived Impact of Defamation*, 52 PUB. OPINION Q. 161, 169-70 (1988) (finding that mock jurors assume that others are affected by propaganda more than they are themselves).

B. *The Virtues of Being Known: Purification by Publicity*

Disclosures not only inform their recipients, they expose their subjects. There is a tradition that regards this exposure as a beneficial and purifying process. The willingness to "stand up and be counted," or to subject oneself to the rigors of debate on a difficult moral decision, may be a guarantor of seriousness of moral purpose. Thus, the early defenses of the investigations of the McCarthy era dismissed entirely the claims of witnesses to constitutional protection. They called such claims "a fallacy essentially based upon the idea that the Constitution protects timidity. . . . There is no restraint resulting from the gathering of information by Congress . . . which does not flow wholly from the fact that the speaker is unwilling to advocate openly what he would like to urge under cover."²⁴¹

The argument was far from an isolated aberration. Justice Clark argued in dissent that the statute struck down in *Talley* "makes for the responsibility in writing that is present in public utterance."²⁴² Courts have maintained elsewhere that disclosure creates public pressure or a sense of vulnerability to legitimate legal sanctions that deters antisocial conduct.²⁴³ It is an article of faith that the

²⁴¹ *United States v. Josephson*, 165 F.2d 82, 92 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948); *see also, e.g., Barsky v. United States*, 167 F.2d 241, 249 (D.C. Cir.) ("[I]t is suggested that since the pressure of unpopularity affects only sensitive or timid people, there need be less concern, on the theory that democratic processes must necessarily contemplate rugged courage on the part of those who hold convictions . . . on government."), *cert. denied*, 334 U.S. 843 (1948); *cf. JAMES A. WECHSLER, THE AGE OF SUSPICION* 279 (1953) ("I have no brief for anybody who refuses to testify before a congressional committee; no matter how foolish or fierce the committee, an American ought to be prepared to state his case in any public place at any time."); Charles E. Wyzanski, Jr., *Standards for Congressional Investigations*, 3 *RECORD OF THE ASS'N OF THE BAR OF N.Y.* 93, 102 (1948) ("The democratic process is an open process in which we . . . sacrifice a large measure of privacy. . . . Congressional investigations are only one . . . example of our belief that exposure is the surest guard not only against official corruption . . . but against private malpractices, divisive movements, and antisocial tendencies in the body politic . . .").

²⁴² *Talley v. California*, 362 U.S. 60, 71 (1959) (Clark J., dissenting).

²⁴³ *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 110 (1982) (O'Connor, J., dissenting) (arguing that the requirement of a full and verifiable reporting of expenditures is important to deter vote buying); *Whalen v. Roe*, 429 U.S. 589, 598 (1977) (noting that maintenance of files produces a "reasonably expected deterrent effect on potential violators"); *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"); *Burroughs & Cannon v. United States*, 290 U.S. 534, 548 (1934) ("Congress reached the conclusion that public disclosure of political contributions,

public character of votes by legislators and judges are relevant to their likely responsiveness to appropriate constraints. Although there may be a federal privilege to inform the government of violations of law,²⁴⁴ anonymous accusations are distrusted because they are thought particularly prone to abuse.²⁴⁵ Some now claim that the impact of disclosure on the difficult decision of abortion should be viewed as a legitimate means of ensuring morally serious choices.²⁴⁶

The claim that the prospect of disclosure has a salutary effect on the decisions of citizens can be grounded in both classical liberalism

together with the names of contributors . . . would tend to prevent the corrupt use of money to affect elections."); *Bryant v. Zimmerman*, 278 U.S. 63, 72 (1928) ("[P]ublic files will operate as an effective or substantial deterrent from the violations of public and private right . . .").

²⁴⁴ See *Motes v. United States*, 178 U.S. 458, 463 (1900); *In re Quarles*, 158 U.S. 532, 535 (1895).

²⁴⁵ See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome and the corrupt to play the role of informer undetected and uncorrected."). But see *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987) ("Relatives and neighbors who suspect [child] abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth . . . has made a commendable effort to assure victims and witnesses that they may speak to the . . . counselors without fear of general disclosure.").

²⁴⁶ The attitude is exemplified by Judge Gee's comments in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (declining to grant an injunction against "right to life" counseling outside of abortion provider). As Judge Gee viewed the matter:

The clinic wishes potential clients to be shielded from hearing advocacy with which it disagrees so that they will obtain abortions. But obtaining abortions is not in issue; the availability of abortion services at MPMC continues. The clinic's real complaint is that the choice has been made more difficult because of adverse information communicated to potential patients. Yet making choices more difficult is not the same as eliminating the right to choose. In fact, in a polity where the people are sovereign, informed choice enhances responsible decision-making. . . . "[a] difficult choice meant to accept difficult consequences in the form of suffering, disapproval of others, ostracism, punishment and guilt. Without this, choice was believed to have no significance."

Id. at 796 & n.9 (quoting ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 228 (1987)).

This attitude may underlie both parental notice and husband notice requirements imposed as preconditions for abortions. For recent discussions of the parental notice requirement, see *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972 (1990). For the most recent discussion of the spousal notice requirement, see *Planned Parenthood v. Casey*, 1991 U.S. App. LEXIS 24,792 (3d Cir. Oct 21, 1991), *petition for cert. filed*, Nov. 7, 1991.

and in the civic republican tradition. Each source, however, implicitly limits the scope of these salutary effects to particular types of choices.

1. Liberalism and Disclosure

a. *Liberal Arguments for Disclosure*

The liberal arguments for disclosure rest partly on incentives. One incentive for responsible behavior associated with publicity is the concrete benefit of a good reputation. In the area of speech, when the identity of the speaker is known, future influence stands hostage to current good behavior. Not only will listeners who have been duped in the past be able to take measures to avoid being misled in the future, but the speaker also knows that such measures will be taken. Thus, the prospect of disclosure encourages the speaker to speak in a way that keeps the respect of listeners whom she wishes to persuade or do business with in the future.

The constraints of publicity reach beyond calculations of concrete gains or losses, because citizens regard the respect of their fellows as a good in itself. As Bentham remarked in his plea for publicity of judicial proceedings:

[U]nder the auspices of publicity, the original cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many by-standers as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness;—so many ready executioners—so many industrious proclaimers, of his sentence.²⁴⁷

²⁴⁷ JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 6 THE WORKS OF JEREMY BENTHAM 355 (John Bowring ed., 1962) [hereinafter BENTHAM, *Judicial Evidence*]; see also THE COLLECTED WORKS OF JEREMY BENTHAM, FIRST PRINCIPLES PREPARATORY TO A CONSTITUTIONAL CODE 56-76, 279, 283-98 (Philip Schofield ed., 1989) [hereinafter BENTHAM, FIRST PRINCIPLES] (arguing for a “tribunal of public opinion” as “counterforce” to potentially corrupt governmental power); *id.* at 80-83 (examinations for public office should have maximum publicity); *id.* at 102-03 (opposing bicameral legislature because complication results in “want of transparency . . . [by which] the tutelary counterforce . . . [of] the popular or moral sanction . . . is diminished. . . . Complication is a jungle in which sinister interest has its lurking place.”); cf. LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., 2d prtg. 1968) (“Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.”).

Bentham’s enthusiasm for publicity as a means of assuring conformity with public norms extended beyond the surveillance of public officials. See JEREMY BENTHAM, *The Panopticon Versus New South Wales*, in 4 THE WORKS OF JEREMY

The effect is not limited to the prospect of ostracism or explicit social pressure by one's peers. The classic liberal argument for disclosure suggests that the prospect of observation alters the quality of judgment. The sense of being exposed to public view spurs us to engage in the actions of the person we would like to be. Exposure as the author of an action or statement links it to our identity; the broader the exposure, the more indissoluble the link and the harder it is to disavow the action. Long before the findings of modern social psychology regarding the norm-reinforcing effect of public observation,²⁴⁸ John Stuart Mill opposed secret ballots:

The best side of their character is that which people are anxious to show, even to those who are no better than themselves. People will give dishonest or mean votes from lucre, from malice, from pique, from personal rivalry, even from the interests or prejudices of class or sect, more readily in secret than in public. And cases exist . . . in which almost the only restraint upon a majority of knaves consists in their involuntary respect for the opinion of an honest minority.²⁴⁹

Even when public opinion or prevailing norms are ultimately flouted, the impact of publicity can improve the nature of decisions. In Mill's words:

Nothing has so steadying an influence as working against pressure. . . . Even the bare fact of having to give an account of their

BENTHAM 173 (John Bowring ed., 1962).

²⁴⁸ See, e.g., BUSS, *supra* note 192, at 93 (reviewing literature on norm-reinforcing effects of observation); *id.* at 67-69 (discussing the norm re-enforcing effects of the presence of mirrors); Philip G. Zimbardo, *The Human Choice: Individuation, Reason and Order versus Deindividuation, Impulse, and Chaos*, in 17 NEB. SYMP. ON MOTIVATION 237, 270 (William J. Arnold & David Levine eds., 1969) (anonymous and unidentifiable subjects tend to act more aggressively); see also Hans L. Zetterberg, *Compliant Actions*, 2 ACTA SOCIOLOGICA 179 (1957) (stating that where visibility is high, actions will quickly converge toward a norm).

²⁴⁹ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 164 (Currin V. Shields ed., 1958) (London, 1861). The effect of publicity sought by nineteenth-century liberals reached beyond the particular decision to which publicity was applied. It was thought, as well, to form the habits and character of the decision-makers. Thus, Bentham would allow exceptions to his principle of publicity in particular cases because

[U]nder a judge trained up (as it were) from infancy to act under the controul of the public eye, secrecy in this or that particular cause will be comparatively exempt from danger: the sense of responsibility, the habit of salutary self-restraint, formed under the discipline of the public school, will not be suddenly thrown off in the closet.

BENTHAM, *Judicial Evidence*, *supra* note 247, at 369.

conduct is a powerful inducement to adhere to conduct of which at least some decent account can be given. . . . Publicity is inappreciable even when it does no more than prevent that which can by no possibility be plausibly defended—than compel deliberation and force everyone to determine, before he acts, what he shall say if called to account for his actions.²⁵⁰

In American constitutional law, the argument that transparency perfects judgment is voiced most often in the concern with secrecy in government. As Justice Frankfurter commented:

The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. . . .

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.²⁵¹

²⁵⁰ MILL, *supra* note 249, at 162; cf. Immanuel Kant, *Eternal Peace*, reprinted in CARL JOACHIM FRIEDRICH, *INEVITABLE PEACE* 241, 277 (1948) ("[I]t is possible to call the following statement the *transcendental formula* of public law: 'All actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity.'"); BENTHAM, *Judicial Evidence*, *supra* note 247, at 357 ("Publicity therefore draws with it, on the part of the judge . . . the habit of giving reasons from the bench. . . . In legislation, in judicature, in every line of human action . . . giving reasons is, in relation to rectitude of conduct, a test, a standard, a security, a source of interpretation.").

When Kant agrees with Mill and Bentham on a proposition, one might think that proposition is tightly linked to modern liberalism.

²⁵¹ Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (citation omitted); see also Press-Enterprise Corp. v. Superior Court, 464 U.S. 501, 508 (1984) (remarking that openness gives assurance that standards of fairness are being observed and deviations will become known); *In re Oliver*, 333 U.S. 257, 270 (1948) (footnotes omitted) (describing "the guarantee to an accused that his trial be conducted in public" as "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

The conventional American wisdom is that of Woodrow Wilson:

I, for one, have the conviction that government ought to be all outside and no inside. . . . Everybody knows that corruption thrives in secret places and avoids public places, and we believe it a fair presumption that secrecy means impropriety.

....

. . . Government must, if it is to be pure and correct in its processes, be absolutely public in everything that affects it.

WOODROW WILSON, *THE NEW FREEDOM* 76, 84 (William E. Leuchtenburg ed., Prentice-Hall 1961) (1913).

In a democratic system, governmental acts should, by definition, respond to public sentiments. Transparency to public review facilitates that responsiveness; it reinforces the duties government has already undertaken.²⁵² The disclosures with which the scarlet letter problem is concerned, however, are disclosures concerning individuals, not government. The question, therefore, is whether this liberal preference for exposure can be applied with equal force to individual actions.

b. *Liberal Limits on Disclosure*

John Stuart Mill, though sensitive to the tyranny of public opinion,²⁵³ pressed the argument for transparency one step beyond the state. He argued against the secret ballot on the ground that the vote of an individual citizen should itself be responsive to the public. Mill viewed an elector's vote as a "[public] trust"; and, he asked rhetorically, "if the public are entitled to his vote, are not they entitled to know his vote?"²⁵⁴ The secret ballot constitutes a half-way house of individual rights that are, on liberal premises, arguably public. It is thus a useful laboratory in which to observe the interaction between anonymity and responsibility.

Granting the citizen's obligation to cast a ballot in accordance with judgment rather than interest,²⁵⁵ there are often practical reasons to support the accepted wisdom that the secret ballot is a cornerstone of democracy.²⁵⁶ Mill conceded that where the

²⁵² Even with regard to government, however, Bentham and Frankfurter contend for disclosure in judicial matters that are responsive to the rule of law, not public opinion.

²⁵³ See Mill, *On Liberty*, *supra* note 114, at 478-79; *supra* note 143 and accompanying text.

²⁵⁴ MILL, *supra* note 249, at 154. Mill elaborated that an elector is "bound to give it according to his best and most conscientious opinion of the public good." *Id.* at 155.

²⁵⁵ One could challenge Mill's conception of the franchise as a trust, and stop the discussion immediately. Voting in the United States, after all, is not a legal duty, and electioneering is rife with appeals to interest. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 56 (1982) ("So long as the hoped for personal benefit is to be achieved through the normal processes of government . . . it has always been, and remains, a reputable basis upon which to cast one's ballot."); cf. *McCormick v. United States*, 111 S. Ct. 1807 (1991) (holding that it is not extortion for a legislator to accept political contributions, even if the legislator's vote may be influenced thereby).

²⁵⁶ See WESTIN, *supra* note 5, at 24 (arguing that the secret ballot "ensure[s] maximum freedom for political choice"); see also UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 21.3 (declaring the guarantee of the secret ballot, or equivalent free voting procedures, is a basic human right).

probability of bribery or coercion was great, secret ballots were the lesser evil, but contended that, "the power of coercing voters has declined and is declining . . . a much greater source of evil is the selfishness or the selfish partialities of the voter himself."²⁵⁷ In circumstances where the empirical preconditions of independence are absent, a secret ballot will clearly emerge as a second best solution.

Objections to publicity go beyond the force of potentially coercive circumstances. The appropriate standards of judgment in matters of public trust are themselves contested. Although Mill champions a claim for judgments defensible in the public spotlight, the liberal heritage recognizes a conception of judgment rooted in Protestant tradition, which holds that deep moral decisions are best made in private confrontation with the actor's conscience.²⁵⁸ In

Historically, the secret ballot was introduced in the U.S. in the 1880s under the banner of reducing bribery and intimidation of voters (and arguably as a means of breaking the power of political machines). See L.E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* ix (1968). In the South, it also constituted a means of disenfranchising often illiterate black voters, who needed assistance denied by ballot secrecy. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS, SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE PARTY SOUTH 1880-1910*, 51-56 (1974).

²⁵⁷ MILL, *supra* note 249, at 157-58.

²⁵⁸ See, e.g., RONALD BEINER, *POLITICAL JUDGMENT* 56-58 (1983) (discussing the importance of autonomy in the Kantian conception of judgment—"The autonomy of judgment requires that it exclude accommodation to the judgment of the public."); BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 283 (1984) ("Christianity itself . . . included a tradition of private contact with the [D]eity unmediated by any ecclesiastical and bureaucratic mechanism."); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 104-09, 147 (Talcott Parsons trans., 1958) (describing the significance of the "inner testimony of the Spirit in reason and conscience").

There has been a recent revival of interest in the version of this tradition of "self-reliance" linked with Thoreau and Emerson, which regards judgment as primarily individual rather than communal, and served ultimately by self-discovery and reflection. See, e.g., NANCY L. ROSENBLUM, *ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT* 103-24 (1987) (arguing that Thoreau gives heroic individualism a place in liberal thought); George Kateb, *Democratic Individuality and the Meaning of Rights*, in *LIBERALISM AND THE MORAL LIFE* 183, 190-91, 195 (Nancy L. Roseblum ed., 1989) ("The Emersonians work in their own manner with the idea that the highest relationship is an unmediated relationship between each individual and the most important thing, which must be nonsocial . . ."); see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 78, 93-94, 141, 143 (1990) (discussing the importance of Emerson and the independent spirit in the American tradition).

The preference for private and autonomous judgment may be connected, as well, with a preference for guilt rather than shame as a constraint on moral action. Cf. DEREK L. PHILLIPS, *TOWARD A JUST SOCIAL ORDER* 213-18 (1986) (noting that guilt

this tradition, just as the citizen should not be tempted to be false to her conscience by threat or bribe, she equally should not be traduced by a temptation to "go along" with the majority.²⁵⁹ Thus, Justice Frankfurter, hardly a proponent of unbridled individualism, announced, "I do not suppose it is even arguable that Congress could ask for a disclosure of how union officers cast their ballots at the last presidential election,"²⁶⁰ and was joined by Justice Harlan in writing that, "the inviolability of privacy belonging to a citizen's political loyalties has [an] overwhelming importance to the well-being of our kind of society."²⁶¹ On this view, even if the discussion of public issues is a public act, the ultimate judgment of the citizen is a private one, to be reached between the citizen and her conscience.²⁶²

Even abstracting away the possibility of coercion in the absence of secret ballots, the choice that liberal premises present between the responsibility of public disclosure and the authenticity of private reflection in voting is unclear. Resolving the question requires a contested choice between alternative conceptions of political judgment.

In some areas, however, the question is not close. Under liberal premises, not all exercises of right are matters of public trust. The

relies on sanctions internal to the individual, while shame relies on external sanctions); WILLARD GAYLIN, *FEELINGS: OUR VITAL SIGNS* 46-58 (1979) (discussing guilt and contrasting it with shame by reference to *The Scarlet Letter*).

²⁵⁹ Cf. JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 33, 69 (1980). (noting the "coercive effect" of a voice vote and the possibility of "conformity through intimidation" in the absence of a secret ballot, despite her initial preference for "face to face" democracy).

²⁶⁰ *American Communications Ass'n v. Douds*, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring in part).

²⁶¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring in the result); cf. *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, J., dissenting) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society.").

²⁶² Cf. *Estes v. Texas*, 381 U.S. 532, 545 (1965) ("[T]elevised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused, a televised juror . . . may well be led 'not to hold the balance nice, clear, and true between the State and the accused'"); *id.* at 566-68 (Warren, C.J., concurring) ("The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go through trial without considering the effect of their conduct on the viewing public. . . . No one could forget that he was constantly in the focus of the 'all-seeing eye.'"); *id.* at 595 (Harlan, J., concurring) ("A trial in Yankee Stadium . . . would be a substantially different affair from a trial in a traditional courtroom [T]he witnesses, lawyers, judges, and jurors in the stadium would [not] be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence.").

border between the public and the private has an irreducible importance in liberal thought, and the enterprises confided to the sphere of private choice can properly claim immunity from public observation. For Mill, concern for preserving possibilities of experimentation justifies shielding private realms from unenlightened public opinion.²⁶³

The objection to disclosure in these areas need not rest only on a fear of a benighted public. If, as many modern liberals maintain, the realm of private identity should be judged and controlled by standards of creativity and authenticity radically different from the standards of solidarity appropriate to political action,²⁶⁴ the compulsory exposure of choices of intimate self-definition to public scrutiny results in their corruption, not purification. If diversity of social fabric is an affirmative good—leading as it does to a wider array of options among which citizens can choose to establish their lives—the conformity-inducing effects of disclosure are to be avoided. Particularly where anonymity protects the formation of communities that can provide mutual support to fragile and unorthodox identities, compulsory disclosure is pernicious. Liberal analysis suggests, therefore, a line in matters of disclosure drawn between subjects of self-definition and subjects of public trust.

²⁶³ See *supra* note 143 and accompanying text. Even Bentham suggested that the principle of utility-maximization counseled limitations on disclosure where

the mischief produced is produced—not by the act itself, but by the disclosure of it. In this case are comprehended all those [instances] in which, for want of sufficient maturity in the public judgment, or by the influence of some sinister interest, the sentiment of antipathy has, in the breasts of the people considered as members of the Public Opinion Tribunal, turned itself against this or that act the nature of which upon the balance is not of a pernicious nature.

BENTHAM, *FIRST PRINCIPLES*, *supra* note 247, at 290. He gives as examples religious intolerance and hostility to “eccentricity of any sensual appetites, the sexual for example, by which no pain in any assignable shape is produced any where.” *Id.*

²⁶⁴ See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 1-30 (1980); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY*, 69-74, 123-24 (1987); THOMAS NAGEL, *Ruthlessness in Public Life*, in *MORTAL QUESTIONS* 75, 82-85 (1979); RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY*, 34, 65-69, 91-92, 141-43 (1989); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *PHIL. & PUB. AFF.* 215 (1987).

Larmore concedes, as Rorty does not, the possibility that the public and private might be regulated by the same ideals, but takes the position that in modern pluralistic societies, this would require an agreement on regulative ideals unlikely to arise without massive coercion.

2. Authenticity, Virtue, and Community

The secret exercise of the franchise and other personal rights can be approached from a different angle, by utilizing more communal conceptions of judgment. An ideal of decisions made in personal confrontation can be premised on the claim for salutary psychological effects of such confrontation. As Professor Mansbridge articulates the argument:

There is no logical reason why individuals who meet face to face should not see most human relations in terms of conflict Experience teaches us, however, that in practice face-to-face contact increases the perception of likeness, encourages decision making by consensus, and perhaps even enhances equality of status. . . . [I]t seems to increase the actual congruence of interests by encouraging the empathy by which individual members make one another's interests their own. It also encourages the recognition of common interest by allowing subtleties of direct communication.²⁶⁵

Obviously, the possibilities for such interaction are limited where communication or voting is anonymous. Disclosure of judgment is necessary to enter into the processes of mutual accommodation.

This empirical argument is subject to rebuttal by the force of circumstances. Attracted though she is to the ideal of personal interaction, Professor Mansbridge concludes her own empirical study skeptical of the ideal's validity for large political entities.²⁶⁶

²⁶⁵ MANSBRIDGE, *supra* note 259, at 33. See BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 178-90 (1984) (discussing the functions of "strong democratic talk" and personal confrontation in encouraging "mutualism").

Although he does not play out the implications of his theory, I rather suspect that Professor Ackerman's view of dialogue as a pragmatic imperative for liberal citizens who seek to come to terms with one another's world views would require a degree of self-revelation at least sufficient for the participants in dialogue to identify each other's value commitments in the effort to find common ground on public questions. See Ackerman, *supra* note 233, at 5, 12. The requirement would be stronger in analyses that value political dialogue for its qualities of interpersonal recognition. Cf. HANS-GEORG GADAMER, *TRUTH AND METHOD* 324 (1986) (stating that "[i]n human relations the important thing is . . . to experience the 'Thou' truly as a 'Thou'—an attitude requiring complete existential openness and availability).

²⁶⁶ See MANSBRIDGE, *supra* note 259, at 274 (concluding that mass meetings result in "anonymity without even the guarantee of representation"); *id.* at 291 ("the lesson of this volume for a small collective is that when a group grows larger and more diverse it must find a substitute for the discussion and genuine persuasion"); *id.* at 293 ("the larger the polity, the more likely it is that some individuals will have

Her final judgment is that the rejection of "adversary" procedures in favor of "unitary" ones, relying on empathy and mutual adjustment, is a plausible ideal only in communities small and homogeneous enough to avoid deep conflicts of interest. Unitary processes

tend to obscure conflict in such a way that the initially disadvantaged become even more so [F]reedom is also in jeopardy. When the assumption of common interest makes conflict illegitimate, a polity may no longer tolerate dissent.

The depressing conclusion is that democratic institutions on a national scale can seldom be based on the assumption of a common good.²⁶⁷

A second rejection of the role of private and sheltered conscience finds a home in the normative demands of the strand of civic republican thought that attended the formation of our own polity.²⁶⁸ This strand has found new favor in contemporary

conflicting interests" and where interests conflict, "a democracy encompassing those interests must employ adversary procedures").

²⁶⁷ *Id.* at 295.

²⁶⁸ A third approach, which could inform a less individualistic view of the issue, is feminism. I am not adept enough with feminist analysis to venture a full-blown exposition of a feminist approach to the disclosure problem. But I am likewise reluctant to ignore what is becoming a major scholarly voice. I suspect a feminist analysis would point initially toward a preference for publicity in decision-making. Cf. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987) (taking a position skeptical of privacy as value); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 638 (1986) (maintaining that privacy is linked with nonfeminist concerns). Feminist analysis tends to value connection, concrete contexts, and empathetic interaction. See, e.g., KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 159, 171-74, 196-205 (1984) ("Women's moral judgments are closely tied to feelings of empathy and compassion for others, and more directed toward the resolution of particular 'real life' problems than toward abstract hypothetical dilemmas."); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836-67 (1990) (analyzing feminist methods of "doing law," including the use of feminist practical reasoning and consciousness-raising); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 621 (1990) ("Critical feminism's most common response to questions about its own authority has been reliance on experiential analysis."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1988) ("For women, the creation of value, and the living of a good life, therefore depend upon relational, contextual, nurturant and affective responses to the needs of those who are dependant and weak . . ."). Any ability to distance political judgment from personal interactions would tend toward the abstraction and linearity of a stereotypically "male" analysis.

Mansbridge's conclusions, however, suggest a countervailing feminist concern analogous to Mill's acceptance of the secret ballot as a second best alternative. A feminist analysis under current conditions should be wary both of the distributional consequences of disclosure between women and men, and the possibility that "public" judgment would be patriarchal. If under current conditions, women are more likely to respond to peer pressure than men in decision-making groups comprised of

constitutional commentary; recent years have seen a luxuriant profusion of constitutional theorizing rooted in a tradition that conceives of values as shaped in the public sphere, instead of being individually chosen.²⁶⁹ Such theories claim that sound judgment is irreducibly the result of social interaction. They are certainly consistent with, and indeed may underlie, the original American

women and men, men may gain a disproportionate advantage from a procedure that allows such pressures to be brought to bear. Cf. BRAITHWAITE, *supra* note 144, at 92-94 (reviewing literature suggesting that, under current cultural conditions, women are more vulnerable to shaming than men); JANET SHIBLEY HYDE & B.G. ROSENBERG, *HALF THE HUMAN EXPERIENCE, THE PSYCHOLOGY OF WOMEN* (1976) (women tend to be more vulnerable to social pressure than men); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 158 (1990) (discussing research indicating that women's conversational style tends to avoid direct confrontation); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1600-07 (1991) (suggesting that women's "ethic of care" and "connection" puts them at a disadvantage in mediation proceedings, and that women may experience compelled personal engagement as "psychic rape"). So too, to the extent that public pressures are likely to incorporate patriarchal values, private decision-making may be preferred.

Some feminists have supported the need for privacy and solitude as a particularly important element of the project of reclaiming autonomy for women. See ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 36, 46-47, 51-52, 57, 71-75 (1988); see also JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 217, 222, 321-22, 326, 335-36, 351 (1981) (arguing for the importance for feminist analysis of retaining realm of privacy); Ruthann Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 WOMEN'S RTS. L. REP. 177, 196 (1990) (maintaining a position of ambivalence toward view of privacy as a lesbian doctrine).

²⁶⁹ See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 160-68 (1988) ("The recent attention to 'public values' in constitutional theory may foreshadow[] a revival of [the republican tradition]."); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 68 (1987) ("[T]he republican synthesis enables us to see the deeper roots of what previously were deemed anomalous positions. . . . [It also] promotes the concept of an autonomous public interest"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1505-07 (1988) (suggesting a version of "civic republican" constitutional theory protective of individual rights); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988) (discussing the role civic republicanism could play in reforming areas of public law); see also WILLIAM M. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* 181-84 (1982) (discussing civic republicanism and its goal of an "inclusive community").

My colleague Professor Fitts has demonstrated that the new civic republicans have not come to terms with the empirical realities that undercut their prescriptions. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1612-45 (1988). My colleague Professor Goodman has suggested that their claims to historical pedigree may be tenuous. See Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259, 2263, 2293-2318 (1989) (reviewing TUSHNET, *supra*).

practice of open and personalized voting procedures.²⁷⁰

On this view, the vision of the autonomous conscience is a chimera. Good decisions follow from good character, and good character is both formed and evidenced by a willingness to submit one's opinions to the realm of the political. The modern exemplar of this thinking is Hannah Arendt who has commented on the "gulf between the sheltered life in the household and the merciless exposure of the polis," and noted that in classical democracy the "virtue of courage" became "one of the most elemental political attitudes" and the "political virtue par excellence."²⁷¹

This argument works in two directions. First, publicity assures the quality of debate by acting as a check on the qualities of the debaters. Requiring participants in a public debate to stand up and

²⁷⁰ For example, one strand of opposition to the secret ballot in the United States ran as follows:

"Here the people are upon an equality, and at the ballot-box are freemen and equals. It has never heretofore been regarded as a crime for one citizen peaceably to discuss with his neighbor at the polls the merits of various parties and candidates and to compare views and to inform each other, if they desired, how they intended to vote."

FREDMAN, *supra* note 256, at 43-44 (quoting Governor Hill of N.Y.); see also MARK A. KISHLANSKY, *PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY MODERN ENGLAND 180-91* (1986) (detailing the even more socially conditioned and organic nature of early English elections).

Modern enthusiasts for civic republicanism have opposed the secret ballot as draining the sense of public responsibility:

[O]ur primary electoral act, voting, is rather like using a public toilet: we wait in line with a crowd in order to close ourselves up in a small compartment where we can relieve ourselves in solitude and in privacy of our burden, pull a lever, and then, yielding to the next in line, go silently home. Because our vote is secret—'private'—we do not need to explain or justify it to others (or indeed, to ourselves) in a fashion that would require us to think, publicly or politically.

BARBER, *supra* note 265, at 188.

²⁷¹ HANNAH ARENDT, *THE HUMAN CONDITION* 33 (1958); cf. Stanley I. Benn, *Privacy, Freedom and Respect for Persons*, in *NOMOS XIII: PRIVACY* 1, 25 (J. Roland Pennock & John W. Chapman eds., 1971) ("the case for privacy begins to look like a claim to the conditions of life necessary only for second-grade men in a second-grade society," and the independent man "does not hesitate to stand and be counted. . . . Socrates did not ask to be allowed to teach philosophy in private").

A claim for the virtue of courage as central to democracy is scarcely foreign to our constitutional tradition. See, e.g., Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 680-89 (1988); see also LEARNED HAND, *THE SPIRIT OF LIBERTY* 216 (Irving Dilliard ed., 1952) ("I believe that that community is already in the process of dissolution . . . where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose.").

be counted acts as a screen for political participants. It assures us that the arguments expressed flow from citizens of good character, for only those with the courage to face public scrutiny will participate in public debate. Second, publicity improves the character and judgment of the citizenry. Open participation in public life exercises and develops the virtue of courage. It instills in the participants the firmness of character necessary to evaluate properly arguments made by others and to reach decisions without undue timidity. In Arendt's view, the political faculty of judgment matures only in confrontation with others.²⁷²

Decisions made publicly are also thought to be more valuable, authentic, and human than those of the isolated individual. In Arendt's words, "[e]very activity performed in public can attain an excellence never matched in priva[te]; . . . for excellence, by definition, the presence of others is required."²⁷³ A public action is more real, more vivid, and more significant.²⁷⁴ It is only by publicly avowing a position that we are able to make it our own. A claim for anonymity, therefore, becomes not only a claim at odds with virtue, but a claim that seeks to truncate the discussion by which both our own values and the public's are formed. Private conscience is a less appropriate basis for governance than publicly achieved insight.²⁷⁵

Even accepting the vision of publicly formed political values as an appealing one, an advocacy of openness rooted in that vision has internal limits that mirror the limits that emerge from liberal analysis. The ideal of open participation presumes that the primary impact of public revelation on the self arises strictly in discursive persuasion.²⁷⁶ The memory of the McCarthy era should suggest

²⁷² See GEORGE KATEB, HANNAH ARENDT: POLITICS, CONSCIENCE AND EVIL 38 (1983).

²⁷³ ARENDT, *supra* note 271, at 44.

²⁷⁴ See *id.* at 50, 52, 57-58, 180.

²⁷⁵ See KATEB, *supra* note 272, at 27, 37 (individual "conscience" is excluded from political judgment); cf. BARBER, *supra* note 265, at 166-67, 188 (concluding that political judgment must form the basis for principle); Glenn Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROBS. 319, 321 (1966) (citing Hegel's distinction between moralitat—referring to individual private judgment—and sittlichkeit—defined in terms of duties that are in turn defined by corporate institutional order).

²⁷⁶ See, e.g., KATEB, *supra* note 272, at 21 ("[T]ruly political action . . . must involve the relations of equals; it must proceed by persuasion, not coercion . . . it cannot deal with interests . . ."); cf. ARENDT, *supra* note 271, at 182 (decrying the advancement of certain people through a "perverted form of 'acting together'—by pull and pressure and tricks of cliques").

that in the third-best world of politics as we know it, revelation carries with it the danger of boycott, the specter of browbeating, the lure of wealth, and the threat of ostracism, as well as the promise of mutual persuasion. There is room for doubt, therefore, whether the promise of purification through disclosure rooted in the republican conception is, on balance, any better adapted to this world than the claims for purification of dialogue through anonymity adumbrated by Professor Post.²⁷⁷ The distortions introduced by privacy may be less profound than those introduced by fear and manipulation. For the civic republican, as for Mill, the desirability of exposure will necessarily be a function of external circumstances.

Leaving aside empirical questions, the civic republican shares another insight with Mill. Most modern American civic republicans believe that people who throw themselves into the cauldron of public discourse are not entirely constituted by that discourse.²⁷⁸

²⁷⁷ In personal communication, Professor Post has emphasized that his advocacy of decontextualization is a regulative ideal only for the state and not for participants in public discourse. In these matters, however, the state cannot be neutral; if the state is barred from requiring disclosure, the information will often be unavailable to the citizenry.

²⁷⁸ See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982) (discussing the strong theory of community as a "mode of self-understanding partly constitutive of the agent's identity," hence enabling members to "conceive their identity . . . as defined to some extent by the community of which they are a part") (emphasis added); *id.* at 181 (describing virtue of friendship as deliberation on the "description[] of the person I am"); Alasdair MacIntyre, *The Virtues, the Unity of a Human Life, and the Concept of a Tradition*, in *LIBERALISM AND ITS CRITICS* 142-43 (Michael J. Sandel ed., 1984):

I am never able to seek for the good or exercise the virtues only *qua* individual I am someone's son or daughter, . . . cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession

. . . .

. . . [T]he fact that the self has to find its moral identity in and through its membership in communities . . . does not entail that the self has to accept the moral limitations of the particularity of those forms of community.

There are, to be sure, communitarians who see as an ultimate goal the total effacement of any boundaries between public and private, down to the prospect of "group decisions about reproduction." Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237, 257 (1987). Freeman and Mensch claim that the existence of a private sphere entails objectionable contradictions. For them it is inextricably bound up with alienation, power hierarchies, and a lack of accountability for important aspects of society. See *id.* at 250-55. Many of the claimed links are to my mind at best contingent, and it is difficult to square such visions with any traditions or plausible revision of American constitutional law. Most importantly, as Mensch and Freeman tacitly admit, absent

A republican who retains a separation between citizen and state must contemplate character substantially formed, sheltered, and nurtured in private spheres.²⁷⁹ Thus, along with her celebration of the public, Arendt recognizes that, "[t]he full development of the life of hearth and family into an inner and private space we owe to the extraordinary political sense of the Romans who . . . understood that these two realms could exist only in the form of coexistence."²⁸⁰ "A life spent entirely in public, in the presence of others becomes . . . shallow. While it retains its visibility, it loses the quality of rising into sight from some darker ground which must remain hidden if it is not to lose its depth in a very real, non-subjective sense."²⁸¹ Although there is doubt as to where the

reconstruction of social processes more radical than any that has been observed in the modern world, elimination of realms of privacy is likely to lead to oppression rather than human flourishing. See *id.* at 255-57.

²⁷⁹ Thus Aristotle, for example, rejected the Platonic prescription for maximizing the unity of the polis: "we ought not to achieve this [unity]: it would be the destruction of the polis." ARISTOTLE, *POLITICS* § 1261a.15 (Ernest Baker trans., 1946). His rejection rested both on the grounds that a state of excessive unity would lack the resilience and resources of a more diverse polity and on the belief that such unity would be inconsistent with the goal of fostering real friendship. See *id.* §§ 1261a.25-1262b.20.

The goal for Aristotle is a community in which arises "an association of households . . . in a good life, for the sake of attaining a perfect and self-sufficing existence." *Id.* § 1280b.31-40; see also ARISTOTLE, *NICOMACHEAN ETHICS* § 1171a.15-.20 (Martin Ostwald trans., 1962) ("[T]o be a friend of many people is impossible if the friendship is to be based on virtue or excellence and on the character of our friends."); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 353 (1986) ("Aristotle argues at length that [Plato's concept of unity] destroys personal separateness, an essential ingredient of human social goodness . . . [And that to] make it one in the Platonic way is to eliminate the bases of political justice and of *philia*, two of its central goods.").

²⁸⁰ ARENDT, *supra* note 271, at 54; see also Hannah Arendt, *Reflections on Little Rock*, 6 *DISSENT* 45, 55 (1959) (children "are first of all part of the family . . . they are, or should be, brought up in that atmosphere of idiosyncratic exclusiveness which alone makes a home . . . strong and secure enough to shield its young against the demands of the social and the responsibilities of the political realm"); *id.* at 53 (marriage must remain "private business," and government must "safeguard the rights of every person to do as he pleases within the four walls of his own home").

²⁸¹ ARENDT, *supra* note 271, at 63. Arendt recognized not only the instrumental value of private life as the basis for public involvement, but the intrinsic value of experiences of love and self-realization that could not be realized in public view. See *id.* at 46, 218; cf. EISENSTADT & RONIGER, *supra* note 187, at 282-84 (arguing that intimate relations of friendship presuppose publicly recognized realms sheltered from the "glare of public life").

Arendt is acutely sensitive to the political pathologies of total exposure. See HANNAH ARENDT, *TOTALITARIANISM* 129-34 (1951) [hereinafter ARENDT, *TOTALITARIANISM*] (describing systems of constant surveillance, mutual denunciation, and recording of relationships characteristic of totalitarian regimes, and their effects on

boundaries should be drawn, most "republican" legal theorists would concede, with Arendt, that a "distinction between things that should be shown and things that should be hidden"²⁸² is necessary to form and preserve the citizens who can constitute a true republic.²⁸³ Privacy in the polling booth may be debatable; privacy in the confessional, the diary, or the bedroom is not.

It is hard to dispute the civic republican vision of the self as constituted and realized through social action. Such a vision, however, need not efface the distinction between individual and society or cast the individual's self-definition to the mercy of social forces. A society like ours, which is rich in a variety of social roles and overlapping communities, provides the forum for realization of an ideal that allows the citizen to choose the self she wishes to develop from among the plurality of identities offered.²⁸⁴ The availability of these possibilities provides a space for human agency and renewal as well as a bulwark against tyranny.

the character of the populace). In Arendt's view, however, the process of separation of private and public carries dangers of its own extreme. Her diagnosis of Eichmann was that "[h]e has driven the dichotomy of private and public functions . . . so far that he can no longer find in his own person any connection between the two." HANNAH ARENDT, *THE JEW AS PARIAH* 234 (1978); see also ARENDT, *TOTALITARIANISM*, *supra*, at 36 ("Nothing proved easier to destroy than the privacy and private morality of people who thought of nothing but safeguarding their private lives.").

²⁸² ARENDT, *supra* note 271, at 64.

²⁸³ See, e.g., Michelman, *supra* note 269, at 1535 ("Just as property rights . . . become in a republican perspective, a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy."); Seidman, *Fourth Amendment*, *supra* note 187, at 109-10 (arguing for privacy on basis of republicanism); cf. Seyla Benhabib, *Liberal Dialogue Versus a Critical Theory of Discursive Legitimation*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 258, at 155 ("[A]ll human societies live with a boundary between the public and the private; there will always be a realm that we simply will not want to share with others and that we will wish to be protected from the intrusion of others."); C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 17 (1983) ("[P]rivacy must be viewed . . . as . . . a condition of and contributor to the self-social dialectic."); *id.* at 21-22 ("As a condition for the free cultivation and exercise of all rights, privacy is Cerberus at the gates of the house of rights, intrinsic to the community of free persons.").

Thus, in his otherwise admirable article, Rubinfeld is mistaken in supposing that the "republican vision" is necessarily at odds with claims of a protected sphere of "personhood." See Joel Rubinfeld, *Right of Privacy*, 102 HARV. L. REV. 737, 761-67 (1989).

²⁸⁴ See, e.g., DIANA T. MEYERS, *SELF, SOCIETY, AND PERSONAL CHOICE* 95 (1989) ("Though people cannot choose directly to change their constitutive characteristics, they can choose to place themselves in situations and to act in ways designed to bring about such changes.").

This ideal requires that the citizen have available more limited communities than society as a whole. The self formed in private dialogue within a consciousness-raising group is likely to be different from the self formed in a nuclear family, an NAACP chapter, a Catholic church, or one formed in confrontation with the national news media.²⁸⁵

Given the preference of contemporary civic republicans for decentralization,²⁸⁶ it is unlikely that many would defend on grounds of civic virtue a regime that forces citizens to forge their identities in dialogue with the national public. Yet compelled publicity undermines the possibility of establishing less than totally inclusive communities.

A community defines itself in part by sharing secrets and where disclosure is the rule, there are no secrets. In the absence of informational privacy, involvement in an unorthodox community allows no shelter from the threat of social and economic sanctions. The dialogue of the consciousness-raising group becomes no less a matter of public record than the proceedings on the floor of Congress.²⁸⁷ The option of shaping the self in the exchange of confidences is no longer available. Such a result is inappropriate as a matter of social structure and individual freedom; it is no more attractive to the sensible communitarian than to the liberal.²⁸⁸

²⁸⁵ See EISENSTADT & RONIGER, *supra* note 187, at 285-86 (arguing that "oppositional orientations" in "informal relations" tend to evolve into forms that "go beyond the glare of public life into the realm of privacy"); JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 118, 120 (1990) (in order to resist domination, "the subordinate group must carve out for itself social spaces insulated from control and surveillance"—resistance requires "sequestered social milieu . . . composed entirely of close confidants who share similar experiences of domination").

²⁸⁶ See TUSHNET, *supra* note 269, at 12-17, 245-46, 314-17; Michelman, *supra* note 269, at 1531; Michael J. Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15, 17; Sunstein, *supra* note 269, at 1578-79.

²⁸⁷ One reader of this manuscript questioned whether anyone seriously contemplated requiring disclosure of the minutes of consciousness-raising groups. In fact, during the Nixon Presidency, the FBI and federal prosecutors, while pursuing two fugitives, engaged in extensive grand jury inquiry into the lesbian and feminist communities in Lexington, Kentucky, Hartford, Connecticut, and New Haven, Connecticut. See DONNER, *supra* note 5, at 384; RICHARD HARRIS, FREEDOM SPENT 318-49 (1974). During the McCarthy era, quite analogous disclosures were required regarding discussions in leftist organizations. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 114 (1959) (involving discussions of the Haldane Club); cf. NAVASKY, *supra* note 44, at 128-42 (discussing the role of a Hollywood psychotherapist in encouraging patients to "name names" to the FBI and HUAC).

²⁸⁸ The importance of nonpublic sub-communities for the formation of identity has emerged explicitly as an element of constitutionally protected liberty in recent

3. Common Ground

The force of claims to anonymity turns on their factual setting and the subject threatened with disclosure. For both liberals and civic republicans, disclosure can claim substantial virtues. Yet, for both groups, the presence of coercive circumstances saps the force of arguments for openness. Thus, in a flawed political world, anonymity is often a second-best strategy. If the insights of both liberalism and civic republicans are to be taken seriously, courts cannot abandon the concrete analysis of the situations in which claims of anonymity are exerted. Doctrine must leave open an opportunity for citizens to focus the attention of courts on the real and concrete coercion of compelled disclosure.

In addition, both liberal and republican analyses point toward a more abstract set of distinctions. Not all liberals would adopt the claim that privacy of conscience is inappropriate in matters of public trust. But even for those who do, Mill's analysis suggests that when the constitutional rights at issue are instead conceived of as matters of personal authenticity, the observation that publicity is likely to constrain becomes an argument against publicity, rather than one in its favor. So, too, the republican insight that even the public self requires roots in private realms suggests that one should look carefully at attempts to require disclosure of matters that shape the soul.

Thus, a right to procreative choice, rooted in individual autonomy rather than public duty, is rightly said to be one that should be exercised "without public scrutiny and in defiance of the contrary opinion."²⁸⁹ Cognate to the right to receive information and form private opinions is a right to be free of "inquiry into the contents of [one's] library."²⁹⁰ A citizen is not obliged to shape

years. See *New York State Club Ass'n v. New York*, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring) (affirming rights of "intimate" clubs to restrict membership); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) ("freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights"); *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (constitutional protection for personal affiliations "safeguards the ability independently to define one's identity that is central to any concept of liberty," the hallmark of such affiliations being "seclusion from others"); *id.* at 635-36 (O'Connor, J., concurring) (asserting that an association is "expressive," and thus constitutionally protected, when its activities are "intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

²⁸⁹ *Bellotti v. Baird*, 443 U.S. 622, 655 (1979).

²⁹⁰ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); see also, e.g., *United States v. Rumely*, 345 U.S. 41, 42-48 (1953) (holding that a congressional committee was

herself in the mold of public opinion. Given the function of religious freedom in underwriting private autonomy, it seems unlikely that the Free Exercise Clause would permit publications of the names of church members against their will.²⁹¹ The closer the constitutional exercise comes to the shaping of the self, the less compelling becomes the argument for publicity in a society in which the self is thought to be autonomous from the state.²⁹² The challenge is to define legal doctrines that incorporate these insights.

III. SEEKING SUNLIGHT AND AVOIDING SUNBURN: BALANCING AND ITS ALTERNATIVES

We have seen in Sections I and II that the "scarlet letter" problem has several characteristics:

- predictable impacts on constitutional rights are intensely sensitive to empirical conditions;
- it involves conflicts between high-level values of constitutional

without power to exact certain information regarding the purchase of books of a political nature); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305-07 (1965) (protecting an individual's First Amendment right to receive Communist political propaganda without being listed in government files). *But cf. Osborne v. Ohio*, 110 S. Ct. 1691, 1695-97 (1990) (relying on evils attending production of child pornography to prohibit possession).

²⁹¹ See *Catholic Conference of United States v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-34 (1984) (upholding judicial limitations on the dissemination of information obtained in pretrial discovery).

²⁹² This is the source of the difficulty in analyzing parental notification requirements in the abortion and birth control contexts, as the plurality recognized in *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2942-44 (1990). We accept the notion generally that the formation of juvenile identities is entrusted to their parents. In the absence of a showing that parents will act adversely to their children's interests, or that children are emancipated from parents, it seems to follow as a matter of course that parents should have at least a voice in the choices that define their children's sexual identities. A state intervention to require children to expose their choices to parental supervision is thus consistent with a formation of identity autonomous from the state. See *id.*; *cf. Arnold v. Board of Educ.*, 880 F.2d 305, 312-14 (11th Cir. 1989) (action against school officials who sought to discourage a student from notifying parents of abortion). To the extent that the child's sexual activity suggests that the premise of parental control of identity is dubious, or to the extent that the family itself is divided, the arguments for notice as placing identity choice outside of the state's control begin to decay.

Notification of spouses, however, stands on a quite different ground, unless we are willing to claim for the marriage relationship the same rights to identity-formation that accrue in the parental contexts. See *Planned Parenthood v. Casey*, 1991 U.S. App. LEXIS 24,792, at *75-93 (3d Cir. Oct. 21, 1991) (holding unconstitutional the requirement that a husband be notified of wife's decision to undergo an abortion), *petition for cert. filed*, Nov. 7, 1991.

magnitude;

- it is often theoretically indeterminate; and
- the practical costs of mis-specification are great.

These characteristics suggest why courts have been pressed to employ balancing methodologies when dealing with disclosure problems. Ad hoc balancing, however, at least in the academy, has been stigmatized as the unprincipled last resort of the constitutional lawyer.²⁹³ Before falling back on the strategy, therefore, I explore the other methods that have been deployed to approach the control of government-compelled dissemination of information.

The easiest "principled" response to a claim that a constitutional limitation on government is indeterminate is to dismiss the limitation. The danger of thirsting for clean answers in the arena of judicial review is that the cleanest answer is to deny constitutional protection. In the area of dissemination of information, two analytical constructs have pushed in this direction: the argument that the subjects of dissemination have waived their rights to object to dissemination, and the contention that the effort to limit government dissemination of information would be institutionally inappropriate. As we will see, both of these arguments suggest outer limits on the scope of rights against disseminating information. Both do little, however, to avoid the requirements of incremental choice within those confines.

A second set of strategies focuses on establishing clear categories that will avoid the necessity for incremental choice. They characterize a particular disclosure as legitimate or illegitimate by evaluating the "intent" behind a government's action, or by defining certain types of information as immune from disclosure. Here, too, the constructs are instructive but not determinative. They provide guideposts for incremental adjustment of competing interests, but no a priori way of making the adjustment. Ultimately, balancing in this area is unavoidable and, I will argue, proper.

²⁹³ For recent critiques of balancing as a constitutional methodology, see TUSHNET, *supra* note 269, at 159-60, 183-85; T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulation*, 78 NW. U. L. REV. 937 (1983); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-88 (1989); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592 (1985).

A. *Clean Answers That Abandon the Field*

1. The Doctrine of Waiver

Courts faced with problems of disclosure have regularly relied on prior consensual exposure by the citizen to seal the legality of the government activities at issue. To the extent that a court can rely on choices already made by parties before litigation, it can elide the difficulties raised by the tension between the values of privacy and those of disclosure.

The arguments in favor of waiver are threefold. First, when the subject of disclosure has already disseminated or consented to the dissemination of the information in question, no incremental harm arises from further dissemination.²⁹⁴ Second, when the subject has failed to take precautions against disclosure, her moral claim to nondisclosure is weakened, either because the carelessness manifests the low value she places on privacy, or because she could not reasonably expect others to retain as private what she has broadcast to the world.²⁹⁵ Third, allowing a subject to disclose or claim

²⁹⁴ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 111-12 (1982) (O'Connor, J., dissenting) ("Once an individual has openly shown [support for a political organization] by campaigning . . . disclosure of the receipt of expenditures is unlikely to increase the degree of harassment so significantly as to deter the individual from campaigning for the party."); *Uphaus v. Wyman*, 360 U.S. 72, 80-81 (1959) (rejecting the claim that dissemination of the guest register by a legislative committee investigating "Communists" was outside the state's powers, because visitors at a summer camp were recorded in register open to inspection by law enforcement officers); *Block v. Meese*, 793 F.2d 1303, 1317 (D.C. Cir. 1986) (Scalia, J.) ("[T]here is no contention . . . that any of the appellants seek to maintain their anonymity in exhibition of the films. . . . [T]heir complaint is simply that they do not want already extant public knowledge of their exhibition to be any more widespread than necessary"); cf. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 52-53 (1974) (holding that no seizure of information regarding banking transactions occurs where "a large number of banks voluntarily kept records of this sort before they were required to do so").

²⁹⁵ This approach has tended to characterize discussion in Fourth Amendment cases. See, e.g., *Florida v. Riley*, 488 U.S. 445, 449-52 (1989) (aerial surveillance from public airspace did not constitute a "search"); *California v. Greenwood*, 486 U.S. 35, 40 (1988) (where defendants left garbage by the side of the road for collection, they could not claim reasonable expectation of privacy, because the garbage was exposed to "animals, children, scavengers and snoops"); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (finding that aerial surveillance did not violate "reasonable expectation of privacy" because "[a]ny member of the public flying in [the] airspace who glanced down could have seen" the material observed); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (reasoning that the pen register was not a search because "a person has no legitimate expectation of privacy in information he voluntarily turns over to [the telephone company]"); *United States v. Miller*, 425 U.S. 435, 442 (1976) (no legitimate

privilege at a particular moment opens the door to manipulation.

As with any waiver doctrine, to the extent that the citizen's waiver adversely affects the interests of others, the argument for allowing the first citizen's waiver to control is weakened.²⁹⁶ If, for example, the chilling of First Amendment exercises resulting from broad dissemination of membership lists of political organizations redounds to the detriment of the political system generally, there is reason to regard the waiver by the careless members as less than dispositive. The chill cast upon political association by the red-baiting of the McCarthy era was not lessened by the fact that much of the information came from public petitions or voluntary witnesses.

At first glance, therefore, the arguments for waiver seem stronger in areas of nonpolitical disclosure. The more "private" a decision is, the more appropriate it seems for information regarding that decision to be disposed of by individual choice. Those who choose to expose their intimacies in public are taking advantage of precisely the informational self-control that privacy affords.

At this point, however, memories of the McCarthy era should again give us pause. Even with regard to predominantly self-regarding choices, one person's disclosure may affect the privacy of others. In the 1950s, the willingness of many citizens to publicly avow their anti-communism and reveal their prior associates made it possible to stigmatize silent witnesses as "Fifth Amendment Communists." Similarly, in other contexts, the waiver of anonymity by some citizens may effectively expose the "private" but deviant choices of others. Once the bulk of the conforming population waives their right to privacy, the failure to waive privacy carries an implication of nonconformity. We see a contemporary example of the phenomenon in the urine sample competitions which periodically rage in political campaigns: once one candidate has waived her

expectation of privacy against government in financial records when information was "voluntarily conveyed to banks"); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); cf. JUDITH JARVIS THOMPSON, *The Right to Privacy*, in *RIGHTS, RESTITUTION, AND RISKS: ESSAYS IN MORAL THEORY* 117, 127 (1986) (arguing that the right to privacy is waived where subject "[takes] none of the conventional and easily available steps . . . to prevent listening").

²⁹⁶ I have periodically voiced this concern in other contexts. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387-95 (1984) [hereinafter Kreimer, *Allocational Sanctions*]; Seth F. Kreimer, *Government, Economic Power and Free Speech: Can the State Buy Silence?* 8 TEL AVIV U. STUD. L. 265, 278-79 (1988).

privacy and taken a drug test, the failure of her opponent to do the same is taken to be a prima facie admission of drug use.

Moreover, the initial plausibility of the waiver doctrine is undercut by the tendency of "waiver" arguments to take on a dichotomous quality: courts that adopt a "waiver" theory most often view it as a bursting bubble. Either a piece of information is retained entirely in confidence or its constitutional privilege explodes, and it is subject to universal dissemination.²⁹⁷ The difficulties here are twofold. First, to the extent that the right to control of information is designed to guard against retaliation or harassment, the level of harassment diverges radically depending on the surrounding social conditions. Disclosure in one arena does not entail and is not equivalent to disclosure in others. As the Court noted in *Brown v. Socialist Workers '74 Campaign Committee*,²⁹⁸ even if supporters of a political party are already public to some degree, "[mere] application of a disclosure requirement results in a dramatic increase in public exposure."²⁹⁹ The point was emphasized more

²⁹⁷ This dichotomous view allows even the smallest exposure to be characterized as a complete waiver. See, e.g., *Riley*, 488 U.S. at 449 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") (quoting *Ciraolo*, 476 U.S. at 213 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967))). *Riley* held that the interior of a greenhouse protected from ground level observation, located on a property surrounded by a wire fence, with a "Do not enter" sign, and covered with corrugated roofing, 10% of which was missing, was "exposed to the public," insofar as a police helicopter flying over the greenhouse at 400 feet could observe its interior. *Id.* at 450-51.

This view also manifests itself in the position that expectations of privacy cannot attach to a reliance on rules of conduct or standard operating procedures that limit or render unlikely subsequent disclosures by private parties. See, e.g., *Smith*, 442 U.S. at 743-44 (holding that telephone customers "assumed the risk" that telephone numbers dialed would be discovered by government pen register when they revealed the numbers to the telephone company); *Miller*, 425 U.S. at 443 (holding that bank depositor "takes the risk, in revealing his affairs to another, that the information will be conveyed . . . to the Government"); *United States v. White*, 401 U.S. 745, 752 (1971) (since "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police," no privacy interest is infringed by warrantless wiring of police informants). Similar hair-trigger approaches attend the "waiver" of attorney-client privileges, or the Fifth Amendment privilege.

²⁹⁸ 459 U.S. 87 (1982).

²⁹⁹ *Id.* at 97 n.14. The Court has generally been more willing to acknowledge gradations in disclosure in First Amendment cases than in Fourth Amendment cases. See, e.g., *California Bankers Ass'n*, 416 U.S. at 55-57 (treating ACLU challenge to Bank Secrecy Act as premature because of the absence of pending subpoena, rather than invalid because of absence of expectation of privacy); *Pollard v. Roberts*, 238 F. Supp. 248 (E.D. Ark.) (enjoining subpoena of Arkansas Republican Party's bank records because it violated First Amendment freedom of association), *aff'd per curiam*, 393 U.S. 14 (1968).

recently in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,³⁰⁰ in the context of privacy exemption from the disclosure requirements of the Freedom of Information Act:

In an organized society, there are few facts that are not at one time or another divulged to another. . . . [I]nformation may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." . . . Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files . . . throughout the country and a computerized summary located in a single clearinghouse of information.³⁰¹

The argument for waiver based on the harmlessness of subsequent disclosures, therefore, blinks at the relevant realities when it rests on something other than deliberate public dissemination by the subject.

Second, if we view the strictures against disclosure as guarding self-definition, the decision to define the self in confrontation with a limited circle is quite different from the decision to define the self in confrontation with the world at large. Privacy in this regard should not be viewed as a bursting bubble, but as an umbrella. Particularly as government's opportunity to cross-reference varied bits of data increases, disclosure for one purpose should not be tantamount to disclosure for an indiscriminate variety of others.

Once a court moves beyond the "bursting bubble" approach, however, it confronts precisely the normative questions from which the waiver approach sought to extract analysis. The existence *vel non* of some disclosure is a relatively cleanly answered empirical question. The question of the level of disclosure acquiesced in by a particular "waiver" on the part of the citizen in question is less clear-cut. The definition of the level of acquiescence can hardly be a subjective one, for the judicial protection of privacy cannot vary with the naivete, credulity, or paranoia of the citizen. On the other hand, a definition of the scope of waiver based on the expectations that "society is prepared to recognize as reasonable," (that is, an individual must expect, because society does, that action x will result in y level of disclosure and, therefore, by taking action x the individual has consented to disclosure y), undercuts the initial claim

³⁰⁰ 489 U.S. 749 (1989).

³⁰¹ *Id.* at 763-64 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1976)).

that there has been an actual, voluntary consent to the disclosure of the information.

Equally important, relying on what "society is prepared to recognize" brings us full circle to the requirement that the courts define the realms of public and private, for society's expectations are conditioned by the legal regime. In a setting where banks are legally forbidden to convey information on depositors to the government, opening a checking account is not a waiver of financial privacy. In a regime in which the law allows such disclosure, opening a checking account is a waiver. The conclusion that a deposit in a checking account "waives" financial privacy is thus itself an adjudication of the proper scope of expectations regarding the public and the private. The waiver doctrine, therefore, cannot avoid confronting the tension; it can only bury it.

Finally, as with any area of individual choice, there may be reasons for paternalist intervention. Initially, the waiver doctrine confronts the problem of market power. The government has no competitors, so it is likely to be able to extract waivers illegitimately. In one sense, a registration of one's fingerprints as a condition of obtaining a drivers license is a free exchange of information for a benefit. In another sense, it is simple compliance with bureaucratic fiat, since there is nowhere else to go for the license.³⁰²

³⁰² Admittedly, the prices demanded by the subjects of disclosure even in a competitive market are often quite low. Consumers seem to be perfectly willing to provide vast quantities of personal information to credit grantors and insurance companies as a condition of obtaining services without any substantial guarantees of confidentiality. See, e.g., Rothfelder, *supra* note 2, at 74 (Robert H. Courtney Jr., a manager at IBM, sent researchers out to a New York street to ask passersby if they thought modern technology was invading privacy. Nearly 90% said yes, according to Courtney. The next day, on the same street, his group offered a credit card with a favorable interest rate. The application asked for a Social Security number, information about other credit cards, and bank-account numbers and balances. About 90% of the people filled it out without hesitating, leaving no spaces blank.); *Implanted Sensors to Measure Our Likes and Dislikes?*, PRIVACY J., Jan. 1987, at 3 (In 1987, two out of three American families offered \$20 per month by a market research company to log in every thirty minutes while watching television, and have all purchases scanned for product codes, accepted the offer.)

This promiscuity of personal disclosure might be taken to indicate that contemporary Americans simply have no particular interest in retaining information about themselves as private, but this does not seem to be the teaching of public opinion surveys on the subject. See, e.g., LOUIS HARRIS ET AL., *THE EQUIFAX REPORT ON CONSUMERS IN THE INFORMATION AGE 2* (1990) (46% of Americans were very concerned about threats to privacy in 1990, while 31% were very concerned in 1978; 33% were "somewhat" concerned in both surveys; 52% of women very concerned in 1990 survey; 64% of blacks very concerned in 1990 survey); see also *id.* at 14 (30% had refused to apply for a service or benefit because of excessive demands for informa-

Second, even in the case of information revealed without unconscionable inducements, our intuitions have not caught up with our technology; we do not understand the scope of a disclosure into an electronic environment. The vast ability of computerized systems to communicate and synthesize data is not yet a part of public consciousness. Thus, disclosure of a discrete piece of information, such as a telephone number to a merchant, may seem innocuous, and the implicit assurances of confidentiality are often accepted.³⁰³ Reliance on waivers to sanction broad disclosure in such situations is inappropriate.

Third, citizens often do not fully grasp the distributional consequences of disclosure. Nondisclosure is insurance against the future. Although today I may not care who knows about my ACLU membership, I may dearly wish in twenty years that it be confidential. None of us knows what the value of an ability to start over will be in twenty years. For most of us, it will be irrelevant, but for the few who find themselves stigmatized by their past, it will be crucial. As a society, we benefit from social insurance in this area.

2. "Words Aren't Laws"

Granting the existence and magnitude of the potential impact of government disclosures, courts have nonetheless been tempted to avoid the tension between the virtues of disclosure and those of privacy by adopting the proposition that disclosure is not a matter for judicial remedy under the Constitution. These analyses draw a distinction between government disclosures and "sovereign" government actions; disclosures on this view do not raise justiciable issues without other exertions of state power.³⁰⁴

tion); *id* at 18 (57% regarded demands for excessively personal information as a major problem); James E. Katz & Annette R. Tassone, *Public Opinion Trends: Privacy and Information Technology*, 54 PUB. OPINION Q. 125 (1990) (summarizing results of a survey on public concern over privacy).

³⁰³ "Confidentiality" may not be all that it appears:

Every mass surveillance agency which I have ever encountered insists that its files are "confidential," that its personal data are held "in confidence." All this means is that the information is used for some purposes but not for others Consumer credit reporting agencies in the United States are committed to the principle of confidentiality, for example. But their reports are available to any agency or individual who appears to be a grantor of credit.

JAMES B. RULE, *PRIVATE LIVES AND PUBLIC SURVEILLANCE: SOCIAL CONTROL IN THE COMPUTER AGE* 333 (1974).

³⁰⁴ This argument differs from the "state action" contention canvassed above, *see*

Justice Reed, speaking for three dissenters in *Joint Anti-Fascists Refugee Committee v. McGrath*,³⁰⁵ sounded this theme in the McCarthy era. He maintained that members of organizations listed by the Attorney General as subversive "are in the position of every exponent of unpopular views. . . . 'A mere abstract declaration' by an administrator regarding the character of an organization, without the effect of forbidding or compelling conduct on the part of the complainant, ought not to be subject to judicial interference."³⁰⁶ A distinction between "legal" actions and mere "declarations" has recurred regularly in Supreme Court opinions.³⁰⁷

In the McCarthy era and its immediate aftermath, the Court had few occasions to deal definitively with the justiciability of unadorned dissemination of information. Despite the prevalence of information obtained by surveillance or "naming names," most of the cases that reached the Court involved efforts to extract information through the threat of sovereign force or attempts to attach the stigma of disloyalty in the context of employment decisions. In several other cases, the Court avoided the question of governmental disclosures by adopting immunity doctrines rooted in separation of powers concerns.³⁰⁸ It was not until 1963 that the Court rejected

supra notes 149-72 and accompanying text, in two dimensions. First, it does not deny that the disclosures are "state action" in the relevant sense, and hence subject to constitutional norms. Second, it does not claim that the "private" consequences of disclosure are irrelevant to constitutional analysis; once a "change in legal status" is linked to the disclosure, private reaction is an appropriate part of constitutional analysis. Compare *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (rejecting an argument based upon "a claim that the State may not publicize a record of an official act such as an arrest") with *Owen v. City of Independence*, 445 U.S. 622, 646-50 (1980) (denying municipality immunity from liability for good-faith constitutional violations resulting from harm to reputation associated with employment dismissal).

³⁰⁵ 341 U.S. 123, 200-03 (1951) (Reed, J., dissenting).

³⁰⁶ *Id.* at 203 (citation omitted).

³⁰⁷ The approach did not originate with Justice Reed. See, e.g., *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 577 (1919) (holding that "specifications" for weights and measures, issued by a state official, do not constitute a law or regulation and are thus exempt from constitutional prohibitions). Judge Easterbrook is a current proponent. See *United States v. Bush*, 888 F.2d 1145, 1150 (7th Cir. 1989) ("Trying to distinguish 'mere' reputational injury from the kind Bush is suffering will be difficult and unilluminating business . . . to call on judges to draw this line may be to send them on a fool's errand."); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (Easterbrook, J., dissenting) (government endorsement of religion not prohibited unless "coercive," but admitting that endorsement to captive audience or children is coercive).

³⁰⁸ See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (holding that Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by investigations of a committee exercising legislative power); cf.

the proposition that a final decision to invoke force or terminate employment was a prerequisite to judicial review.³⁰⁹

The most recent turn of doctrine, however, seems to return to the hesitations of earlier years. In *Paul v. Davis*,³¹⁰ Justice Rehn-

Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729, 731-32 (D.D.C. 1956) (holding that a public statement of agency policy with respect to matters of wide public interest is in the line of duty). See generally Comment, *Court Refuses to Enjoin Publication of Pamphlet Containing Defamatory Material*, 70 HARV. L. REV. 723, 726 (1957) (discussing the scope and purpose of immunity for members of Congress).

For more recent invocations of separation of powers claims, see, for example, *Doe v. McMillan*, 412 U.S. 306, 343-45 (1973) (Rehnquist, J., dissenting) (censorship of publications of parallel branch raises separation of powers concerns); *Laird v. Tatum*, 408 U.S. 1, 10-12 (1972) (no standing to challenge Army collection of political intelligence where complainants were not "presently or prospectively subject to regulations, prescriptions, or compulsions").

³⁰⁹ In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Court reviewed the practice of the Rhode Island Commission to Encourage Morality in Youth of notifying distributors of designated books and magazines that those items had been reviewed by the Commission and declared objectionable for sale or display to youths under 18 years of age. See *id.* at 59-72. The notice was regularly accompanied by an assertion that the Commission's decision had been forwarded to the Chief of Police of the relevant municipality. See *id.* at 62 n.5. In striking down the practice as improper administrative censorship, the majority observed:

It is not as if this were not regulation by the State of Rhode Island. The acts and practices of the members . . . of the Commission . . . were performed under color of state law and so constituted acts of the State within the meaning of the Fourteenth Amendment These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island The Commission's notices, phrased virtually as orders . . . invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore* [T]hese blacklists . . . plainly serve as instruments of regulation independent of the laws against obscenity.

Id. at 68-69; see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (striking down a state statute providing for the public designation of "excessive drinkers" by state agents); *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969) (applying due process constraints to a commission, whose purpose allegedly was "to find persons guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings," although no actual sanctions had been enforced against the appellant).

Justice Harlan's dissent in *Bantam Books* took the position that the Commission should be free to "express its views on the character of any published reading or other material . . . and to notify publishers, distributors, and members of the public with respect to its activities in these regards . . . [so long as] dissemination of a challenged publication is not physically or legally impeded." *Bantam Books*, 372 U.S. at 77-80 (Harlan, J., dissenting); see also *Hannah v. Larche*, 363 U.S. 420, 441 (1960) (defending the Civil Rights Commission against a due process challenge to its investigations with the observation that "its function is purely investigative and fact-finding. . . . [It] does not and cannot take any affirmative action which will affect an individual's legal rights.").

³¹⁰ 424 U.S. 693 (1976).

quist wrote for a majority that the dissemination by police of an inaccurate allegation that a citizen was a "known shoplifter" implicated no due process rights, because it was accompanied by no "alteration of legal status."³¹¹ Justice Stevens, in *Meese v. Keene*,³¹² upheld the government's effort to label films as "foreign propaganda," in part because the Act "does not pose any obstacle to appellee's access to the materials he wishes to exhibit. Congress did not prohibit, . . . or restrain the distribution of advocacy materials."³¹³

The argument seems to be that government dissemination of information unaccompanied by sovereign force is an inappropriate basis for judicial intervention. But the theoretical case for a blanket exemption from judicial scrutiny of government dissemination of information is weak. As we have seen, and as the courts have regularly recognized, words can be as devastating as material sanctions. Even in the absence of directly coercive effects, the government's efforts to convey information are not generally

³¹¹ *Id.* at 708-09; see *Siebert v. Gilley*, 111 S. Ct. 1789, 1794 (1991) (reaffirming *Paul v. Davis*); see also *Laird*, 408 U.S. at 11 (plaintiffs subject to military surveillance program had no standing to challenge program because they were not subject to "exercise of government power [that] was regulatory, proscriptive, or compulsory in nature"). Note, however, that the Court in *Paul* dealt substantively with the challenged disclosures, and that it rejected on the merits a claim that the disclosures breached a constitutionally protected "privacy" interest. See *Paul*, 424 U.S. at 713.

The "legal status" test in *Paul* has created some distinctions that are intuitively odd as methods of assuring interinstitutional comity. While unadorned publicly announced accusation of discreditable characteristics will not make out a "deprivation of liberty," when coincident with a firing, arrest, seizure of property, or dismissal of criminal charges, such an accusation has been held constitutionally cognizable. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (firing); *Gobel v. Maricopa County*, 867 F.2d 1201, 1205 (9th Cir. 1989) (arrest); *Marx v. Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988) (dismissal of charges); *Marrero v. City of Hialeah*, 625 F.2d 499, 506 (5th Cir. 1980) (seizure of property). The federal courts have thus been provided with a steady supply of litigation regarding government injuries to reputation.

Some state courts have retained the earlier concern that the exposure to public opprobrium is a trigger for due process protections under their state constitutions. See *In re Bagley*, 513 A.2d 331, 338 (N.H. 1986). At least one court has suggested that opprobrium which has an impact on other protected rights is outside of the scope of *Paul*. See *Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985).

³¹² 481 U.S. 465 (1987).

³¹³ *Id.* at 480; see also *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) (The "line of permissibility . . . falls . . . between the disparagement of ideas . . . and the suppression of ideas through the exercise . . . of state power. If the latter is rigorously proscribed . . . the former can hold no terror."); cf. *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (method of listing in internal government records cannot be cognizable infringement of free exercise of religion).

exempt from constitutional constraint.³¹⁴ Moreover, responding to dissemination of information is not a task for which the judiciary is inherently unsuited; courts regularly adjudicate claims based on governmental publicity.³¹⁵

The best defense of the "sovereign force" requirement for reviewing government disclosures rests on institutional considerations.³¹⁶ From SEC reports to Centers for Disease Control bulletins to press conferences, dissemination of information is a large part of contemporary government practice. Clearly, government cannot be barred by the First Amendment from commenting adversely on its critics.³¹⁷ Nor can it be responsible for providing

³¹⁴ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 598-602 (1989) (enjoining display of creche which could be "fairly understood" as an endorsement of Christianity); *Stone v. Graham*, 449 U.S. 39, 42-43 (1980) (striking down display of copy of Ten Commandments in classroom as violative of the Establishment Clause); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (striking down practice of listing race of candidates on ballot as violative of the equal protection clause).

If the sole function of constitutional prohibitions was to constrain the government's monopoly on coercive violence, informational sanctions might stand on a different ground from material sanctions. Consider, for example, the claims of Justice Kennedy: "without exception, we have invalidated [only] actions that further the interests of religion through the coercive power of government." *County of Allegheny*, 492 U.S. at 660 (Kennedy, J., dissenting). Constitutional constraints, however, also embody mechanisms for self-governance and aspirations for the good society, which can be effectively undercut by dissemination of information.

³¹⁵ For example, *Doe v. McMillan*, 412 U.S. 306 (1973), decided "in the shadow of *Constantineau*," declined to confer civil immunity upon the public printer for the dissemination of congressional documents which named individual school children as examples of inadequate education in alleged violation of common law and constitutional rights to privacy. See *id.* at 324; cf. *Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979) (no absolute immunity for allegedly libelous statements of senator outside of speech and debate clause). Similarly, under administrative law doctrines, unauthorized adverse federal agency publicity can be enjoined upon a showing of irreparable injury. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-316 (1979); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1432-35 (1973); Robinson B. Lacy, *Adverse Publicity and SEC Enforcement Procedure*, 46 FORDHAM L. REVIEW 435, 441-46 (1977); see also *infra* notes 328-30 and accompanying text.

³¹⁶ See YUDOF, *supra* note 218, at 303-06; Ted Finaman & Stewart Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632, 688-92; cf. EMERSON, *supra* note 167, at 699-708 ("judicial restriction can hardly be considered a viable device for the protection of private expression against abridgement by government expression," unless government expression can be considered "action").

³¹⁷ See *Keller v. State Bar*, 110 S. Ct. 2228, 2235 (1990) ("Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. . . . [I]t would be ironic if those charged with making governmental decisions were not free to speak for themselves in the [policymaking] process.").

notice and hearing before any functionary utters a harsh word about a citizen. And, at the federal level, concerns of interbranch comity raise hurdles to unilateral judicial efforts to censor executive and legislative messages.³¹⁸

These concerns, even at their strongest, suggest a judicial role significantly less constrained than the total abdication suggested by Justice Reed. To begin with, the government does not have free access to all information. During the McCarthy era, subpoenas were necessary to obtain much of the information that became fodder for red-baiting. Today, despite an increasingly transparent environment, private control over information often necessitates the threat of legal sanctions for the government to obtain information it later seeks to disclose.

Intervention in these circumstances falls within a classic judicial role grounded in the Fourth and Fifth Amendments. Efforts to subpoena materials for dissemination, to require reports, to obtain a search warrant, or to compel a witness to answer objectionable questions on pain of contempt or dismissal from government service are each clearly "sovereign," and subject to judicial review. When information is in protective private hands, a challenge that seeks either to prevent government access to the information or to impose a constitutional nondisclosure obligation as a condition of access to the information raises no institutional difficulties.

Thus, in *Whalen v. Roe*,³¹⁹ a case reviewing New York's requirement that physicians report prescriptions of controlled drugs to a central state data bank, the Court upheld the regulation, while recognizing an "individual interest in avoiding disclosure of personal matters."³²⁰ Lower courts recognize that this interest

³¹⁸ See *McMillan*, 412 U.S. at 343-45 (Rehnquist, J., dissenting) (arguing that separation of powers forbids the granting of injunctive relief for government libel); *Block v. Meese*, 793 F.2d 1303, 1313-14 (D.C. Cir. 1986) (Scalia, J.) (suggesting practical and constitutional difficulties in judicial efforts to limit statements by executive or legislative branches); *Methodist Fed'n for Social Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956) (noting that nothing in the Constitution authorizes anyone to prevent Congress from publishing any statement).

During the McCarthy era, similar concerns had impelled the Supreme Court to read an absolute immunity for state legislative investigations into § 1983. See *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951). More recent cases have characterized legislative immunity in terms of the intent of the framers of § 1983, but *Spallone v. United States*, 493 U.S. 265 (1990), intimates a return to the earlier conceptions. See *id.* at 633-34.

³¹⁹ 429 U.S. 589 (1977).

³²⁰ *Id.* at 599-600, 605-06 (concern for privacy met by precautions against disclosure); see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59 (1977)

applies with different force to different varieties of information.³²¹ In recent cases where courts have approved a particular governmental effort to obtain intimate information by compulsion, approval is predicated upon the existence of "effective provisions for [the] security of the information against subsequent unauthorized disclosure."³²² So, too, when the information in question is the product of unconstitutional sovereign action, courts regularly order its destruction or sealing.³²³

("[A]t least when government intervention is at stake, public officials, including the President are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.").

³²¹ Compare *Trade Waste Management Ass'n v. Hughey*, 780 F.2d 221, 231 (3d Cir. 1985) (criminal records information not protected by constitutional privacy right) with *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577, 581 (3d Cir. 1980) (medical records generally entitled to protection; "highly sensitive" records entitled to still greater protection). See also *Fraternal Order of Police v. City of Phila.*, 812 F.2d 105, 110 (3d Cir. 1987) ("Most circuits appear to apply an 'intermediate standard of review' for the majority of confidentiality violations, with a compelling interest analysis reserved for 'severe intrusions' on confidentiality.").

³²² *Westinghouse Elec. Corp.*, 638 F.2d at 579 (locked cabinets, data destruction, regulatory prohibition of disclosure); see also *Fraternal Order of Police*, 812 F.2d at 118 ("It would be incompatible with the concept of privacy to permit protected information and material to be publicly disclosed."); *In re Search Warrant (Sealed)*, 810 F.2d 67, 72 (3d Cir. 1987) (District Court protective order and grand jury secrecy); cf. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 n.7 (1989) ("While this procedure permits the Government to learn certain private medical facts . . . there is no indication that the Government does not treat this information as confidential Under the circumstances, we do not view this procedure as a significant invasion of privacy."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 80-81 (1976) ("The added requirements for confidentiality, with the sole exception for public health officers . . . assist and persuade us in our determination" that record-keeping and reporting requirements applied to abortion providers are constitutionally valid.).

³²³ Indeed, even during the McCarthy period, federal courts granted the expunction of federal personnel records regarding improper loyalty decisions. See, e.g., *Service v. Dulles*, 354 U.S. 363, 370-71 (1957) (finding that expunction of records is a permissible remedy); *Peters v. Hobby*, 349 U.S. 331, 348-49 (1955) (allowing expunction of federal personnel records).

For more recent examples of required destruction, see, for example, *Patterson v. FBI*, 893 F.2d 595, 103-04 (3d Cir. 1990) (FBI's offer to expunge allegedly illegal surveillance records effectively met constitutional challenges); *Haase v. Sessions*, 893 F.2d 370, 374 (D.C. Cir. 1990) (after grant of TRO prohibiting distribution, the FBI and other agencies agree to return journalists' notes illegally seized by the Immigration and Naturalization Service at border, and to destroy all records regarding them); *Smith v. Nixon*, 807 F.2d 197, 203-04 (D.C. Cir. 1986) (ordering destruction of logs of illegal wiretaps); *Committee in Solidarity with the People of El Sal. v. Sessions*, 705 F. Supp. 25 (D.D.C. 1989) (effort to seal FBI records of surveillance of political opponents of U.S. policy in Central America), *aff'd*, 929 F.2d 742 (D.C. Cir. 1991).

For arrest records expunction, see, for example, *United States v. Friesen*, 853

Much disclosure, however, falls outside of the area in which the government is acting in a clearly "sovereign" fashion. Information often makes its way into government custody by direct observation, analysis, or inquiries directed to acquiescent third parties.³²⁴ If disclosures of information obtained without "sovereign" exertion are immune from judicial interference, an agency which disseminates records of its own observations acts under no constitutional constraint. Under such a regime, the price of dealing with a governmental or nongovernmental bureaucracy as a consumer, (rather than as a trading partner who can insist on assurances of confidentiality), is naked vulnerability to dissemination.³²⁵ Moreover, as the Fourth Amendment constraints on direct observation by government are relaxed, even those who have no direct dealings with the government become increasingly subject to unlimited surveillance and disclosure. The range of observation techniques free from judicial supervision has increased regularly in recent years, leaving ever more limited opportunities to assert constitutional concerns.³²⁶

F.2d 816, 818 (10th Cir. 1988) (expunction is within power of the court upon proper showing); *Reyes v. Supervisor of Drug Enforcement Admin.*, 834 F.2d 1093, 1098 (1st Cir. 1987) (upholding the expunction of arrest record); *Tatum v. Morton*, 562 F.2d 1279, 1282-83 (D.C. Cir. 1977) (expunction of arrest of attendants at peaceful Quaker prayer vigil outside White House violates First Amendment); *Sullivan v. Murphy*, 478 F.2d 938, 966-67 (D.C. Cir. 1973) (expunction of mass arrest of "May Day" protesters of U.S. military involvement in Southeast Asia violates Fourth Amendment).

³²⁴ See, e.g., *Bankers Ass'n v. Schultz*, 416 U.S. 21, 96-97 (1974) (Marshall, J., dissenting) (availability of bank records to law enforcement on informal basis); *In re Request of Rosier*, 717 P.2d 1353, 1355 (Wash. 1986) (availability of names, addresses, and electronic usage of customers on request); *People v. Chapman*, 679 P.2d 62, 65 (Cal. 1984) (availability of name and address of unlisted telephone subscriber to police on request); *David Burnham, IRS Buys Company's List of Names, Incomes to Track Tax Evaders*, INT'L HERALD TRIB., Dec. 27, 1983, at 3 (purchase of mailing lists by IRS). An ironic version of this problem occurred in *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), in which Congress sought AT&T's records of the FBI's previous requests for assistance in wiretapping. See *id.* at 123.

³²⁵ With regard to third-party disclosure, the larger an entity is, the more possible it becomes to maintain records on the premises, where government snooping can be resisted. But the larger the entity, the larger the informational footprint that the government can pick up from other sources. The savings and loan is more vulnerable than the corner loan-shark, or the welfare recipient.

³²⁶ Aerial monitoring, amplification, data matching, beepers, and mail covers provide information to the government without, under current doctrine, constituting "searches" subject to initial judicial authorization. See *supra* notes 295, 297 (discussing situations where privacy is held to be "waived" and an individual is vulnerable to disclosure); see also *United States v. Knotts*, 460 U.S. 276, 285-86 (1983) (allowing beepers because beepers are not "searches").

The prospect of dissemination that adversely affects constitutional rights, or the

Although some of the material disseminated by the McCarthyites was a product of government compulsion, much more was obtained by government informers or friendly witnesses. Therefore, the absence of sovereign force does not imply the absence of a power to pillory, which, left uncontrolled, imperils our liberties. Concerns of institutional comity, however, suggest that judicial intervention must also be constrained. The challenge is to craft an appropriate doctrine, not to abandon the field.

Implicit in this analysis is an argument that courts should rely on nonconstitutional doctrines to protect against broad disclosures. At the federal level, a variety of statutes,³²⁷ most notably the Privacy Act of 1974,³²⁸ place limitations on promiscuous disclosure of

absence of adequate safeguards against dissemination, may allow a subject to enjoin the collection of information as a means of guarding against disclosure. Even if an injunction is legally available, practical difficulties limit the effectiveness of efforts to prevent dissemination, for such efforts require knowledge of the acquisition or accumulation of the data in question.

Once accumulation is acknowledged, a plaintiff may be able to require the destruction of records as a means of preventing dissemination. If a citizen does not know that files are being prepared about her, however, she can neither enjoin their compilation nor mandate their destruction. The importance of limiting dissemination from the outset is suggested by the situation of the plaintiffs in *Committee in Solidarity with the People of El Salvador v. Sessions*. Although the FBI agreed to seal the records of its illegal investigation of the Committee, plaintiffs were unsuccessful in obtaining relief preventing secondary and tertiary dissemination of records about them through third parties and information networks who obtained the information before its sealing. See *Sessions*, 738 F. Supp. at 546-47.

³²⁷ See, e.g., 13 U.S.C. §§ 8, 9 (1988) (census and survey data); 18 U.S.C. § 1905 (1988) (income tax return, trade secrets, confidential information); 18 U.S.C. § 2511(1)(c) (1988) (prohibiting disclosure of contents of intercepted wire, oral or electronic communication, except to investigative or law enforcement officers); 18 U.S.C. § 3578 (1988) (criminal conviction records); 26 U.S.C. § 6103 (1988) (tax return information); 28 U.S.C. § 534 (1988) (criminal identification information); 28 U.S.C. § 534(b) (1988) (FBI agreement to share rap sheets subject to cancellation if "dissemination is made outside the receiving departments or related agencies"); 39 U.S.C. § 410 (1988) (disclosure by Post Office); 42 U.S.C. §§ 2000e-5, 2000e-8(e) (1988) (EEOC investigative data); 42 U.S.C. § 1306 (1988) (restricting the disclosure of information in the possession of the Department of Health and Human Services).

³²⁸ Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a(a)-(q) (1988)). Specifically, see 5 U.S.C. § 552a(b) (prohibiting disclosure by federal agencies of identifiable "records" about "individuals" without written consent); § 552a(e)(7) (prohibiting federal agencies from maintaining records "describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute, or . . . within the scope of an authorized law enforcement activity").

The Privacy Act contains an exception for disclosures pursuant to the Freedom of Information Act (FOIA), but FOIA in turn provides exceptions for protection of privacy. See 5 U.S.C. § 552(b)(7)(c) (exempting law enforcement records from FOIA disclosure "to the extent that production of such materials . . . could reasonably be

information about citizens.³²⁹ Courts construing such statutes should view themselves as implementing constitutional as well as statutory concerns for privacy in broadly construing statutes against disclosure.³³⁰ This role satisfies the general canon that statutes be construed in accord with constitutional concerns,³³¹ while alleviating difficulties of institutional competence.³³² So, too, where disclosures are shadowed by constitutional concerns, courts should narrowly construe statutory authorizations for disclosures.³³³

expected to constitute an unwarranted invasion of privacy"); § 552(b)(6) (exempting from FOIA "personnel and medical and similar files disclosure of which would constitute a clearly unwarranted invasion of privacy").

³²⁹ For a survey of state statutes, see Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1243-77 (1975).

³³⁰ See, e.g., *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989) (construing the FOIA privacy exemption broadly in light of constitutional concern with "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks"); *Perkey v. Department of Motor Vehicles* 721 P.2d 50, 55-56 (Cal. 1986) (construing California's Information Practices Act, in light of California constitutional protection of privacy, to prohibit public inspection of fingerprints required for drivers licenses).

³³¹ See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574, 592-93 (1983); *United States v. Clark*, 445 U.S. 23, 27 (1980); *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961); WILLIAM N. ESKRIDGE & PHILLIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 676-89 (1988); William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020-22 (1989); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561-64 (1990); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2111-14 (1990).

The Supreme Court's recent flamboyant disregard of this norm in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), in all probability reflects less a weakening of the norm than a weakening of the commitment to *Roe v. Wade*, 410 U.S. 113 (1973).

³³² The statutes provide authority for intervention, and also allow Congress to overrule the Court's intervention if it encroaches too extensively on the interests of other institutions.

³³³ See, e.g., *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 545 (3d Cir. 1989) (construing "routine use" exception to Privacy Act protections narrowly; disclosure for employment purposes not compatible with collection for purposes of criminal investigation by different agency); *Covert v. Harrington*, 876 F.2d 751, 756 (9th Cir. 1989) (collection of information for security clearance purposes is incompatible under Privacy Act with disclosure for criminal investigation of subsequent actions); *Mazaleski v. Treusdell*, 562 F.2d 701, 713 n.31 (D.C. Cir. 1977) (derogatory information concerning a federal employee's dismissal not compatible with disclosure to prospective employer); *Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971) (enjoining dissemination of FBI records, on the basis of narrow construction of statute

If the sticking point is inter-branch comity, the option of crafting common law protections should not be ignored, since the common law also offers opportunity for legislative modification. Although the Supreme Court has suggested that the First Amendment may cast doubt on the authority of courts and legislatures to impose liability on private individuals and media defendants for harmful disclosures,³³⁴ no similar limitation applies to the liability of public employees for their official actions.³³⁵ Thus, for example, in *Doe v. McMillan*,³³⁶ the Court entertained a suit against the Public Printer and the Superintendent of Documents, under a common law privacy theory, to prevent the dissemination of derogatory information about children in the schools of the District of Columbia. Rejecting a claim of official immunity, the Court held that the federal officials "enjoy[ed] no special immunity from local laws protecting the good name or the reputation of the ordinary citizen."³³⁷ Similarly, a number of courts have relied on the Federal Tort Claims Act³³⁸ to incorporate state law obligations of nondisclosure rooted in statute and common law.³³⁹

authorizing dissemination).

The same principle should apply to narrow construction of statutes authorizing government agencies to gather sensitive information for which there is no protection against dissemination. Cf. *United States v. Rumely*, 345 U.S. 41, 46 (1953) (narrowly construing investigative charter of House Select Committee on Lobbying Activities); *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) (Holmes, J.) (narrowly construing investigative authority of agency in light of constitutional doubts concerning the power to require witnesses to disclose private facts); *Harriman v. ICC*, 211 U.S. 407, 419-22 (1908) (Holmes, J.) (same). But cf. *United States v. Morton Salt Co.*, 338 U.S. 632, 647-54 (1950) (broadly construing the FTC's investigative power).

³³⁴ See, e.g., *Butterworth v. Smith*, 494 U.S. 624, 643 (1990) (holding that Florida's prohibition of grand jury witnesses from disclosing their own testimony is unconstitutional); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (striking down a damage judgment against a newspaper for publishing the lawfully obtained, though illegally released, name of a rape victim).

³³⁵ See *Florida Star*, 491 U.S. at 534 ("To the extent sensitive information is in the government's custody, [the government] has even greater power to forestall . . . the injury caused by its release. The government may . . . extend a damages remedy against [itself] or its officials where the government's mishandling of sensitive information leads to its dissemination.").

³³⁶ 412 U.S. 306 (1973).

³³⁷ *Id.* at 324; see also *McSurely v. McClellan*, 753 F.2d 88, 112 (D.C. Cir. 1985) (finding a common law cause of action against congressional investigators for invasion of privacy), *cert. denied*, 474 U.S. 1005 (1985).

³³⁸ Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

³³⁹ See, e.g., *O'Donnell v. United States*, 891 F.2d 1079, 1086 (3d Cir. 1989) (relying on Pennsylvania's statutory obligations of psychiatric confidentiality in deciding whether the disclosure of the plaintiff's psychiatric records constituted

Still, the net woven by such statutory and common law protection is more strainer than bulwark. In the end, faced with the censorial efforts of the Meese Commission, the Rhode Island Commission, or HUAC, courts will be driven to evaluate the impact of disclosures and their justifications. Where the information is obtained without coercion, judges may balance with a heavy thumb on the government's side of the scales. Nonetheless, where plaintiffs can prove an impact on constitutionally protected rights, or a disclosure of intimate information without legitimate justifications, courts should steel themselves to intervene.³⁴⁰

C. *Clean Answers That Set Boundaries*

If courts cannot legitimately abandon constitutional scrutiny of government dissemination of information, principles might be developed that identify a more limited field of inquiry. Courts can seek a set of theoretically determined categories that place disclosures clearly inside or outside of the constitutional pale. The two

negligent conduct under the Federal Tort Claims Act); *Doe v. DiGenova* 779 F.2d 74, 88 (D.C. Cir. 1985) (noting that an action may lie under the Federal Tort Claims Act for the disclosure of psychiatric records based on District of Columbia statutory and tort law theories).

³⁴⁰ See, e.g., *Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (concluding that the prospect of uncontrolled dissemination of information gathered through political surveillance gives plaintiffs standing to challenge surveillance). But see *Wade v. Goodwin*, 843 F.2d 1150, 1152 (8th Cir. 1988) (holding that plaintiff who alleged he was erroneously included in publicly disclosed list of "survivalists" had no standing to challenge program compiling such lists), *cert. denied*, 488 U.S. 854 (1988).

Although *Laird v. Tatum*, 408 U.S. 1 (1972), suggests that plaintiffs have no standing to challenge the mere accumulation of information gathered through noncoercive means, see *id.* at 6, 13-14, *Meese v. Keene*, 481 U.S. 465 (1987), held that dissemination of information shown to have a concrete effect confers justiciability. See *id.* at 472; cf. *Riggs v. City of Albuquerque*, 916 F.2d 582, 583-84 (10th Cir. 1990) (holding that lawyers and political activists who had been targeted for allegedly unconstitutional surveillance had standing to challenge surveillance program which released files to the press), *cert. denied*, 111 S. Ct. 1623 (1991); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521 (9th Cir. 1989) (holding that church had standing to challenge program of surreptitiously recording church services); *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1051, 1057 (N.D. Ill. 1985) (granting damages to plaintiff for surveillance coupled with dissemination), *vacated without opinion*, 840 F.2d 920 (7th Cir. 1988).

So, too, *Paul v. Davis*, 424 U.S. 693 (1976), leaves open the possibility of particular challenges, by treating on its merits the possibility of a prohibition on dissemination of peculiarly intimate information, even if not coercively obtained. See *id.* at 713 (considering, and rejecting, a claim that the right of privacy prohibited dissemination of record of arrest).

prominent efforts in this field are boundaries based on the government's intent in disclosure and boundaries based on the nature of the information disclosed. Ultimately, neither effort proves clear enough to avoid incremental evaluation in the bulk of cases.

1. Intent As a Boundary

As a rule today, government actions aimed at the suppression of constitutionally protected activities are infirm.³⁴¹ At an early point in its review of McCarthy era investigations, the Supreme Court seemed ready to invoke a general principle forbidding disclosures designed to suppress constitutionally protected activities. There was, the Court asserted, "no congressional power to expose for the sake of exposure."³⁴²

Efforts to utilize this principle to shield free speech and association during the McCarthy era, however, ran aground on the Court's unwillingness to look behind benign purposes professed for

³⁴¹ See, e.g., *United States v. Kokinda*, 110 S. Ct. 3115, 3118-22 (1990); *United States v. Eichman*, 110 S. Ct. 2404, 2408-10 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-87 (1977); *United States v. O'Brien*, 391 U.S. 367, 376-82 (1968).

³⁴² *Watkins v. United States*, 354 U.S. 178, 200 (1956). The *Watkins* opinion cited with approval Judge Edgerton's dissent in *Barsky v. United States*, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948), which condemned the investigations of HUAC for attempting "purposely to burden forms of expression [which] it [cannot] punish." *Id.* at 256 (Edgerton, J., dissenting), cited with approval in *Watkins*, 354 U.S. at 203 n.40. *Watkins* also asserted, however, that "a solution to our problem is not to be found in testing the motives of committee members Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose [were] being served." *Id.* at 200. Ultimately, the Court relied on the asserted vagueness of the congressional authorization for HUAC inquiries to strike the subpoena at issue. See *id.* at 201-02.

Earlier efforts to rely on invidious purposes to attack legislative investigations had fallen afoul of the contemporaneous doctrine that "it was not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Today's fashion allows courts to inquire extensively into governmental "purposes" in evaluating constitutional challenges. See, e.g., *supra* note 341 and accompanying text; see also *Wallace v. Jaffree*, 472 U.S. 38, 56-60 (1985) (conducting an inquiry into the legislative purpose of statute providing for a one minute period of silence in all public schools); *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (conducting an inquiry into the historical circumstances surrounding disenfranchisement of persons convicted of certain crimes); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

investigations manifestly directed toward punishing First Amendment activities.³⁴³ This result is not merely the artifact of judicial reticence of a particular era. As our exploration of the virtues of sunlight above suggests, those who seek to expose actions to public view can almost always claim facially benign motives.³⁴⁴ In its more clear-sighted moments, however, the Court has accorded protection against exposure in the absence of findings,³⁴⁵ or even allegations,³⁴⁶ of invidious intent on the part of the govern-

³⁴³ See *Barenblatt v. United States*, 360 U.S. 109, 133 & n.33 (1959) (upholding conviction of graduate student for failing to answer questions regarding his membership in the Haldove Club or the Communist Party, while declining to "inquire into the motives of committee members" despite committee statement that the purpose of the hearings was to "demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success"); *Uphaus v. Wyman*, 360 U.S. 72, 78-81 (1959) (upholding requirement that summer camp disclose list of attendees, since it was deemed relevant to determining the number of subversives in the state); see also HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 509 (Jamie Kalvin ed. 1988) ("After *Uphaus* it is indelibly clear that any challenge keyed to the absence of a genuine legislative purpose will lose.").

³⁴⁴ This is the burden of Dean Stone's critique of Judge Posner's analysis in *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984). See Geoffrey R. Stone, *The Reagan Administration, The First Amendment, and FBI Domestic Security Investigations*, in *FREEDOM AT RISK: SECRECY, CENSORSHIP AND REPRESSION IN THE 1980s*, 272, 286 (Richard O. Curry ed., 1988) ("The FBI's investigations of the Communist party, the Socialist Workers party and the NAACP were not motivated by an 'improper' desire to suppress legitimate dissent. . . . The real 'evil' of the FBI investigations was . . . that they were the product of exaggerated fears, bad judgment, and insensitivity to . . . constitutional rights.").

³⁴⁵ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767-68 (1986) (striking down requirement that physicians make available for public inspection personal information relating to their female patients who chose to abort their pregnancy); *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 546, 551 (1963) (refusing to compel disclosure of membership records of NAACP, since there was no showing of a "substantial relationship to overriding and compelling state interest," which is an "essential prerequisite to the validity of an investigation which intrudes into the area or constitutionally protected rights of speech, press, association and petition"); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960) (striking down a statute requiring all teachers to submit a list of organizational affiliations to the school board); *Bates v. City of Little Rock*, 361 U.S. 516, 524-25 (1960) (invalidating an ordinance requiring disclosure of membership lists because a "significant encroachment upon personal liberty" requires a "subordinating interest which is compelling"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-63 (1958) (invalidating court order requiring disclosure of membership lists in light of "practical [if unintended] effect" of disclosure).

³⁴⁶ See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1983) (refusing to apply requirement to identify campaign contributors and disbursements to the Socialist Workers party); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (striking down a prohibition against distributing anonymous leaflets).

ment.³⁴⁷

This practical under-inclusiveness of an intent-based focus is matched by its theoretical defects. One difficulty, always present when "intent" is a constitutional variable,³⁴⁸ is the identity of the party that must harbor the "intent" in question. If the avowed motives of a single decision-maker are at issue, the "intent" approach may allow courts to avoid policy-laden case-by-case decision-making. Similarly, the announcement by the Meese Commission that it sought to catalyze antipornography protests left little doubt regarding the "intent" behind its proposed identification of wayward chain stores.³⁴⁹ In most cases, however, unconstitutional motives will not be clearly avowed by the single relevant decision-maker. Divining the "intent" of a corporate body will require courts to compare the government body's actions with those that would be taken by a "pure" agency untainted by invidious intent. The "intent" in question is not an individual motive but a corporate metaphor. Courts must infer invidious corporate "intent" from divergences between the actions actually taken and those in which a "pure" body would have engaged.

This intent analysis articulates no more of boundary than does a balancing approach, and lacks the signal advantage of the latter. In a court balancing interests, plaintiffs may address two issues: the credibility and weight of the government's justifications and the magnitude of the harm to their own constitutionally protected interests. For a metaphorical corporate intent inquiry, the discussion focuses only on the first of the two: whether the purported justification should be treated as sufficiently weighty or rational to count as the "real" purpose. In this analysis, almost any disclosure has potentially plausible justifications. The temptation to defer to the government's always-plausible analysis of public need will often be overwhelming.

A second defect of using intent as a boundary is the difficulty of discerning the nature of the proscribed "intent." Even when it was clear that the government could not prohibit abortions, seeking to

³⁴⁷ My review of the cases in this area constrains me to differ from the conclusion of my colleague, C. Edwin Baker. Professor Baker believes that the principle that "the first amendment [outlaws] government action undertaken for the purpose of penalizing . . . speech" explains the results in the above cases. See BAKER, *supra* note 167, at 245-46.

³⁴⁸ See, e.g., Kreimer, *Allocational Sanctions*, *supra* note 296, at 1333-40 (discussing the problems inherent in discerning the motives of multi-member legislatures).

³⁴⁹ See *Playboy Enters. v. Meese*, 639 F. Supp. 581, 582 (D.D.C. 1986).

persuade women to choose childbirth over abortion was held to embody a legitimate intent.³⁵⁰ So, too, although the government is not entitled to directly suppress "adult entertainment," the intent to preserve a community from objectionable adult theaters or to uphold public morality against nude dancing, is legitimate.³⁵¹

Seeking to harm one's political opponents by disseminating information is a time-honored tradition, made even more respectable if the information purveyed is accurate. The "intent" behind an effort to expose a congressional candidate's membership in a whites-only lodge does not differ from the "intent" behind similar efforts regarding a grocery store manager. And the intent to highlight the candidate's sexual practices within marriage may not differ materially from the goals of the two other disclosures. Yet the perception that official inquiries and disclosures in each area should be treated alike seems grossly misguided.

This observation suggests that protection be limited to "non-public figures" or "nonpublic information."³⁵² Once the court has identified a constitutionally mandated private sphere of information, however, the question arises why an innocent violation of that sphere is constitutionally defensible. If women are protected against public dissemination of their reproductive choices because those choices are peculiarly private,³⁵³ analysis of the "intent" of the government in compelling that disclosure seems superfluous.

2. Boundaries Based on Character of Information

This last defect in the "intent" approach suggests a final basis on which to draw boundaries in this area: the attempt to characterize specific types of information as privileged against government disclosure. If certain varieties of information are per se inappropriate for public dissemination by the government, the Court need not be drawn into a fine calibration of practical effects and government justifications. Courts can, moreover, minimize interference with the

³⁵⁰ See *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

³⁵¹ See *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2471 (1991); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986).

³⁵² See *infra* notes 368-91 and accompanying text. Indeed, arguably the *Watkins* formulation was parasitic on a definition of a private sphere that the government could not seek to "expose for the sake of exposure." *Watkins v. United States*, 354 U.S. 178, 200 (1956).

³⁵³ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766-67 (1986).

functioning of government by leaving the great bulk of governmental communications untouched and limiting examination to disclosures that deal with the protected sphere.

a. *Constitutionally Shielded Activities*

i. Deterrent Effects

Certain types of activities, as an incident of their substantive constitutional protection, may claim privilege against exposure. All factions on the Court acknowledge that disclosure of information can carry judicially cognizable adverse consequences. A constitutional prohibition against state interference with an activity—whether worship, reproduction, or speech—entails a prohibition on government disclosures that eventuate such interference. Thus, the courts have predicated the legitimacy of government inquiries into the identities of persons who engage in activities protected by the First Amendment on an undertaking or requirement of nondissemination by the government that would guard against adverse consequences.³⁵⁴ Courts have similarly recognized possible adverse consequences as a ground for striking down requirements of public disclosure of participants in constitutionally privileged activities.³⁵⁵ As a first approximation, one might draw a boundary between government disclosures regarding constitutionally protect-

³⁵⁴ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 695, 700 (1972) (noting the "characteristic secrecy of grand jury proceedings"); *Konigsberg v. State Bar*, 366 U.S. 36, 52-53 (1961) (noting that bar answers will not be made public); cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984) (requiring nondisclosure of identity of religious sect's members as condition of discovery); *Shelton v. Tucker*, 364 U.S. 479, 491 (1960) (Frankfurter, J., dissenting) (arguing that there were no indications that the school board would disclose organizational affiliations); *Marshall v. Bramer*, 828 F.2d 355, 360 (6th Cir. 1987) (requiring nondisclosure of KKK membership list as a condition of discovery); *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1540, 1542 (11th Cir. 1985) (noting that disclosure of identity of anti-KKK activists who made showings of harassment and assault by KKK would be "constitutionally excessive," but disclosure of dates and states of meetings three years earlier was permitted in light of improbable future retaliation).

³⁵⁵ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (exempting minor political party from contributor disclosure requirements); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (finding that requiring NAACP to disclose membership lists would abridge freedom of association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (providing immunity from state scrutiny of civil rights group's membership list). See generally *Black Panther Party v. Smith*, 661 F.2d 1243, 1265-68 (D.C. Cir. 1981) (cataloging cases concerning political privacy), *vacated*, 458 U.S. 1118 (1982).

ed activities and all other disclosures, on the ground that there can be no constitutional objection to disclosures that have no impact on the exercise of constitutionally protected rights.

Even if scrutiny is limited to information with a nexus to independent constitutionally protected rights, approaches relying on deterrent effects must still confront the problem of balancing. As we have seen, the probable impact of disclosure is dependent on a variety of contextual factors, including market structure, social climate, geography, and the particular rights at issue. On the other side of the scale, the persuasiveness of the government justifications for disclosures vary as well. Requirements that marriage licenses be publicly recorded, or voter registration roles be publicly available, for example, seem amply justified, even if they will deter some constitutionally protected marriages or voters.

Protection based simply on deterrent effects neither requires nor provides clean boundaries between the public and the private. This is not a reason to abandon examination of the concrete impact of government disclosures on constitutional rights. It does, however, suggest that balancing is not avoided by a focus on the deterrent impact of disclosures. Courts that face claims for strategic protection of confidentiality based on deterrence have and must examine the magnitude of the harms and benefits of disclosures.³⁵⁶

ii. Privacy as an Element of the Right

A related analysis would derive the realm of the private from the logic behind the particular constitutional rights at issue. Rather than provide strategic protection as a way of avoiding deterrent effects, a right of privacy would be rooted in the constitutional framework itself. Courts would distinguish certain aspects of intimate activity, thought, and association that are, as a part of their constitutional essence, immune from inquiry and dissemination by the government, wholly apart from any tangible impact of their disclosure.

The inquiries of HUAC and the loyalty boards into personal beliefs, and the publication of private associations, offended the freedom of conscience at the root of the First Amendment quite

³⁵⁶ See *Brown*, 459 U.S. at 96-98 (considering harm to contributors); *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976) (noting potential impact on minor parties); cf. *Branzburg*, 408 U.S. at 693-94 (comparing the benefits derived from forcing reporters to reveal the identity of their sources in criminal investigations with concerns about impeding the "flow of news" about crime).

apart from any demonstrable impacts on political activities. The failure of the courts to recognize this fact constituted a major tragedy of the McCarthy era. More recently, the Court has held that the right to reproductive autonomy protected under *Roe v. Wade*,³⁵⁷ which is rooted in a concept of privacy, is constitutionally protected from government exposure.³⁵⁸ The Court has properly entertained these challenges to required disclosures even in the absence of concrete showings of deterrence. Similarly, there have been intimations that the free exercise of religion is intrinsically entitled to a cloak of anonymity,³⁵⁹ and suggestions that government inquiries into the contents of one's library,³⁶⁰ or the character of one's vote,³⁶¹ are constitutionally illegitimate. The "freedom to engage in association for the advancement of beliefs and ideas" has been held to encompass "protection of privacy of association."³⁶² It is reasonable to infer that government publication of family intimacies would interfere with the protection of

³⁵⁷ 410 U.S. 113 (1973).

³⁵⁸ See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986); see also *Bellotti v. Baird*, 428 U.S. 132, 144-45 (1976) (reviewing a statute in which judicial bypass for parental consent for minor's abortion must assure anonymity); *Planned Parenthood v. Danforth*, 428 U.S. 52, 79-81 (1976) (requirement of statistical reports on abortion permissible where held in confidence); cf. *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2979 (1990) (holding that the confidentiality of minors' identity met constitutional standards).

³⁵⁹ See *Seattle Times Co.*, 467 U.S. at 38 (approving a protective order in the interest of freedom of religion); cf. *People v. Phillips*, (Court of General Sessions, City of New York (1813)), discussed in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410-11, 1504-06 (1990) (arguing that there is a constitutionally compelled privilege against disclosing Catholic confession).

³⁶⁰ See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (noting that the First Amendment means that "a State has no business telling a man . . . what books he may read"); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306-07 (1965) (striking down requirement that post office be notified of addressees requesting to be delivered "communist political propaganda"); *United States v. Rumely*, 345 U.S. 41, 46 (1953) (holding that Congress cannot demand list of people purchasing political books).

³⁶¹ See *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring) ("In the political realm . . . thought and action are presumptively immune from inquisition by political authority."); *American Communications Ass'n v. Douds*, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring) ("I do not suppose it is even arguable that Congress could ask for disclosure how union officers cast their ballots at the last presidential election . . .").

³⁶² *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); see also *DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966) (an "overriding and compelling state interest" is required for "intrusion into the realm of political and associational privacy protected by the First Amendment" (quoting *Gibson*, 372 U.S. at 546)).

"those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life,'" which have been held to be protected by the First Amendment.³⁶³

The difficult task is identifying those activities that qualify for the shield. Our earlier discussion of the secret ballot suggests two dimensions of distinction. First, it is important to discern whether the acts in question have direct and tangible consequences outside of the personality of the right-holder. To the extent that an act is largely self-regarding, the arguments in favor of publicity are weakened substantially. A self-regarding act cannot be said to require publicity to allow others to protect their interests. An act that constitutes a personal privilege rather than a public trust cannot be subordinated to a Millian requirement of publicity as a guarantor of good judgment.³⁶⁴ Second, within the sphere of self-regarding activities, the closer the nexus between a constitutional right and the definition of the self, the greater the argument in favor of constitutional protection of anonymity.

Under a liberal view of the Constitution, in which individual liberty is the end of constitutional protection, the argument is straightforward. Self-regarding activities crucial to personal identity call forth no social justifications for disclosure, since there is no need for our fellow citizens to protect themselves from those activities. At the same time, such activities implicate a right to choose the selves we wish to be, a crucial element of the autonomy

³⁶³ Board of Directors of Rotary Int'l. v. Rotary Club, 481 U.S. 537, 545 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984)); see also *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989) (noting that the right of association protects "intimate human relationships"); *Roberts*, 468 U.S. at 619 ("[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

³⁶⁴ The conclusion could follow either from a belief that no rights are held as matters of public trust, rejecting Mill's claim regarding voting and associated public acts, or from a conclusion that the particular right in question carries with it no obligation of public trust. It seems to me that, for a wide range of constitutionally protected activities, it is simply implausible to characterize them as matters of public trust. It is inconceivable, for example that the right to attend religious services must be exercised in a "responsible" fashion, or that there is a legitimate public interest in guaranteeing the exercise of good judgment in the selection of the contents of a citizen's library.

constitutional protections safeguard.

Even on a more communal or "republican" conception of the Constitution, compelled disclosure of many self-defining activities is problematic as long as we take seriously the republican ideal of the citizen. The right to attend religious services, the right to procreative autonomy, and the right to one's own thoughts in reading and discourse are crucial to forming the free citizens who interact in the public arena. One can easily imagine autonomous citizens who submit their votes to public scrutiny and debate. It is more difficult to characterize as citizens those who subject their personal libraries or bedrooms to public review.³⁶⁵

On these dimensions, rights of association occupy a middle ground. Although association, by definition, cannot be wholly self-regarding, participation in many groups is self-constituting. We define ourselves as much by our friends, families, and fellow congregants as we do by our libraries. Involvements of this sort seem eminently immune from compelled public scrutiny on both liberal and republican premises.

Many constitutionally protected associations are directed outward.³⁶⁶ Political parties, social movements, and publishing partnerships all seek to affect lives of those outside of their membership. When such groups claim constitutional protection from disclosure, the question is whether disclosure is consistent with their constitutionally protected functions. The more seriously we take the importance of providing sanctuaries that nurture political identities that swim against the majoritarian tide, the more powerful will be the claims to associational privacy. On the other hand, the more we conceive of associational rights as simply facilitating the exercise of personal rights to public participation, the less protection such groups can claim from compulsory public scrutiny.³⁶⁷

³⁶⁵ The same arguments, however, cannot be made with respect to those who facilitate constitutionally protected activities for profit (publishers, doctors, etc.). Although a citizen can realize her personality through her work, the basis for constitutional protection is not the intrinsic quality of the work, but its connection to other constitutionally protected rights. There is no constitutional right to be a doctor or a printer. Their claims must arise from the deterrent effects of publicity.

³⁶⁶ There are associations that cannot, under current constitutional law, claim constitutional protection. See, e.g., *Scales v. United States*, 367 U.S. 203, 224-28 (1961) (criminal conspiracies); *Garcia v. Texas State Bd. of Medical Examiners*, 384 F. Supp. 434, 437-40 (W.D. Tex. 1974) (health maintenance organizations), *aff'd mem.*, 421 U.S. 995 (1975). Since they are not constitutionally protected, they cannot claim derivative protection against disclosure.

³⁶⁷ Thus, it seems to me that cases like *Gibson v. Florida Legislative Investigation*

b. *Intimate Information*

The protection of anonymity for those participating in activities claiming constitutional protection does not exhaust the set of constitutional boundaries. A second informational category, the intimate character of the information revealed, relies on a separate constitutionally protected expectation of nondisclosure. Although there is no constitutional right to engage in gay or lesbian sexual activity, official publication of the fact of sexual activity is constitutionally problematic.³⁶⁸ And although the status of testing positive for the HIV virus does not itself reveal any protected activities, official dissemination of a list of AIDS carriers to the carriers' neighbors raises constitutional concerns.³⁶⁹

Comm., 372 U.S. 539, 557-58 (1962), (and dicta in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)), point appropriately toward protection from disclosure as a matter of constitutional right.

The decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), to allow required disclosure can be explained on the ground that monetary political contributions are unlikely to form a political identity. A requirement that political canvassers or office workers register for public scrutiny should be treated quite differently. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-23 (1976) (holding that an ordinance requiring that advance notice to be given to the police by any person desiring to canvass or solicit door to door was unconstitutionally vague); *Thomas v. Collins*, 323 U.S. 516, 538-43 (1945) (holding unconstitutional a statute requiring labor organizations to register before soliciting membership).

So, too, requiring disclosure of ownership for publishers seems to impact on commercial activities that are not related to the formation of a dissident's identity. See *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 313-16 (1913) (upholding the requirement that ownership be disclosed to Postmaster General under penalty of exclusion from mail services). Compare *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (holding the Federal Election Campaign Act unconstitutional as applied to nonprofit corporation urging readers to vote "pro-life") with *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 681 (1990) (upholding the constitutionality of a statute prohibiting a nonprofit corporation from using corporate funds to endorse or oppose candidates for state office).

³⁶⁸ Note that the characterization is "problematic," not forbidden. If gay or lesbian sex is criminalized, a prosecution will necessarily entail public notice of the corpus delicti. On the other hand, where the state has not in fact made the act illegal, posting a list of the sex practices of private citizens would seem dubious even if the information was obtained without illegal searches.

³⁶⁹ See, e.g., *Inmates v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488, at *8 (N.D.N.Y. 1991) (entering protective order regarding identity of HIV positive inmates); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 384-85 (D.N.J. 1990) (holding that the sensitive nature of medical information about AIDS requires compelling state interest before disclosing information about AIDS infection of citizen); *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 650 (D.S.C. 1989) (permitting veiled deposition regarding source of AIDS-infected blood); *Rodríguez v. Coughlin*, No. Civ-87-1557E, 1989 U.S. Dist. LEXIS 15,898, at *2 (W.D.N.Y. 1989)

Here again, the experience of the McCarthy era provides guidance. The rhetorical question that embodied Senator McCarthy's moral failure was uttered in an exchange with Joseph Welch, counsel for the Army, on national television. After McCarthy had gratuitously disclosed the long-buried membership in the National Lawyers Guild of an associate at Welch's law firm, Welch responded: "Little did I dream you could be so reckless and so cruel as to do an injury to that lad. . . . I fear he shall always bear a scar, needlessly inflicted by you. . . . Have you no sense of decency, sir? At long last, have you left no sense of decency?"³⁷⁰ The boundary of intimate information is predicated on the proposition that the Constitution requires the government, in disseminating information, to maintain a sense of decency.

This approach is not foreign to the courts. Even as Justice Rehnquist, in *Paul v. Davis*,³⁷¹ forged a new line of precedent to reject the claim that disclosures adversely affecting reputation automatically constituted deprivations of liberty, he tacitly acknowledged limits on government disclosure in "sphere[s] contended to be 'private.'"³⁷² The next year, in *Whalen v. Roe*,³⁷³ a unani-

(suggesting that the requirement that HIV positive inmate wear distinctive clothing may violate right to privacy); *Doe v. Coughlin*, 697 F. Supp. 1234, 1235-43 (N.D.N.Y. 1988) (stating that segregation of inmates with AIDS may violate right to privacy); *Woods v. White*, 689 F. Supp. 874, 875-77 (W.D. Wis. 1988) (holding that disclosure of prisoner's HIV positive status to nonmedical prison personnel and prison population presented a triable issue of violation of constitutional rights), *aff'd mem.*, 899 F.2d 17 (7th Cir. 1990); *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 535 (Fla. 1987) (denying discovery of identity of blood donor in AIDS liability case); *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954, 957-60 (Pa. Super. Ct. 1989) (finding that protective order limiting newspaper access to discovery material in case involving an AIDS patient to be constitutional); *cf.* *St. Hilaire v. Arizona Dep't of Corrections*, No. 90-15344, 1991 U.S. App. LEXIS 11,620, at *7 (9th Cir. 1991) (disclosure of HIV positive status of inmate to prison population would violate constitutional rights) (dictum).

³⁷⁰ COOK, *supra* note 41, at 517-18; *see also* DAVID H. BENNETT, *THE PARTY OF FEAR*, 308-10 (1988) (recounting the exchange); FRIED, *NIGHTMARE*, *supra* note 36, at 139 (same).

Another aspect of the McCarthy era points in the same direction: the offensiveness of HUAC's demand that former Communists publicly name their friends who had been associated with Communist activities. The requirement is today widely thought to be objectionable not because friendship is constitutionally protected, but because the government forced dishonorable and polluting behavior on its citizens.

³⁷¹ 424 U.S. 693 (1976).

³⁷² *Id.* at 713 (rejecting challenge based on a claim that "the State may not publicize a record of an official act such as an arrest").

³⁷³ 429 U.S. 589 (1977).

mous Court seemed to recognize a constitutional interest in "avoiding disclosure of personal matters,"³⁷⁴ and in *Nixon v. Administrator of General Services*,³⁷⁵ a majority of the court reiterated *Whalen's* allusion, commenting that "at least when Government intervention is at stake, public officials including the President are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."³⁷⁶ Although the Supreme Court has not revisited the subject, the consensus in lower courts seems to be that constitutional hurdles, albeit modest ones in many cases, stand in the way of promiscuous government disclosure of "intimate" information.³⁷⁷

³⁷⁴ *Id.* at 599. The Court found that in light of New York's stringent controls on dissemination of information, requiring reports regarding prescription drug usage does not "pose a sufficiently grievous threat to . . . establish a constitutional violation." *Id.* at 600; *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down birth control ban, in part because of need to protect the "sacred precincts of marital bedrooms" from government intrusion). As Justice Stewart's concurrence noted, the opinion in *Whalen* stopped short of formally announcing the dimensions of any constitutional privilege against disclosure, and indeed pretermitted the issue of the constitutional status of the New York program in the absence of internal limits on disclosure. See *Whalen*, 429 U.S. at 607-08.

The limits on general disclosure and the protections provided to the confidentiality of information obtained by the government figured prominently in a number of lower court cases that upheld the acquisition of information over privacy claims. See *e.g.*, *Walls v. City of Petersburg*, 895 F.2d 188, 193-95 (4th Cir. 1990) (upholding the constitutionality of questionnaire to city police department employee regarding personal details where questionnaire kept in locked filing cabinet with only four persons having access and indicating that wider distribution of information would alter analysis); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 118 (3d Cir. 1987) (enjoining questionnaire of police officers pending establishment of appropriate safeguards of confidentiality); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (noting that privacy interest was weakened by prison psychologist's promise of confidentiality); *Barry v. City of New York*, 712 F.2d 1554, 1562-63 (2d Cir. 1983) (holding that financial disclosure law allowing public inspection of certain public employees' files did not impair their constitutional rights where mechanism was available to assert privacy rights), *cert. denied*, 464 U.S. 1017 (1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (finding adequate safeguards to maintain confidentiality of employee medical records).

³⁷⁵ 433 U.S. 425 (1977).

³⁷⁶ *Id.* at 457; see *id.* at 529 (Burger, J., dissenting) (arguing that government inspection of private papers implicated "interests . . . of the highest order, with perhaps some primacy for family papers"). As in *Whalen*, the Court emphasized the precautions against disclosure that attended congressional designation of former President Nixon's records for custody and inspection by government archivists, who would prevent "undue dissemination of private materials." *Id.* at 458.

³⁷⁷ See, *e.g.*, *ACLU v. Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990) (allegations of "homosexuality, child molestation, illegitimate births, and sexual promiscuity, . . . financial improprieties, drug abuse, and extreme political and religious views"

The constitutional underpinnings of this protection of intimate

collected to harass civil rights activists); *Igneri v. Moore*, 898 F.2d 870, 873-78 (2d Cir. 1990) (financial disclosure by political party chairpersons); *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) (protection against disclosure available for "highly personal or sensitive" information in personal files); *Shields v. Burge*, 874 F.2d 1201, 1210 (7th Cir. 1989) (noting that confidentiality strand of right to privacy might protect personal records); *Davis v. Bucher*, 853 F.2d 718, 720 (9th Cir. 1988) (holding that privacy right against disclosure of intimate details exists, but plaintiff prisoner has reduced claim); *Eisenbud v. Suffolk County*, 841 F.2d 42, 44-47 (2d Cir. 1988) (upholding state statute requiring financial disclosure by appointed county employees); *Klein Indep. School Dist. v. Mattox*, 830 F.2d 576, 580-81 (5th Cir. 1987) (privacy interest in college transcript outweighed by public interest in qualifications of school teachers), *cert. denied*, 485 U.S. 1008 (1988); *Pesce v. J. Sterling Morton High Sch. Dist.*, 830 F.2d 789, 795-98 (7th Cir. 1987) (right to confidentiality in counseling relationship outweighed by necessity of reporting child abuse); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 109 (3d Cir. 1980) (requiring safeguards of medical records); *Mangels v. Pena*, 789 F.2d 836, 838-40 (10th Cir. 1986) (disclosure of drug use by fire fighters did not implicate aspect of personal identity, hence did not state a claim); *Grummett v. Rushen*, 779 F.2d 491, 493-96 (9th Cir. 1985) (privacy interest against disclosure of intimate details overcome by prison staffing requirements, including cross-sex surveillance); *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984) (police exhibition of "highly sensitive, personal, and private" photos of plaintiff violated privacy rights); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) (finding inquiry into sex life of applicant for police force unconstitutional), *cert. denied*, 469 U.S. 979 (1984); *Barry v. City of New York*, 712 F.2d 1554, 1561-63 (2d Cir.) (finding public employees' privacy interests in their filed financial records not violated by city disclosure law), *cert. denied*, 464 U.S. 1017 (1983); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981) (allowing discovery of police investigative files, including statements understood to have been confidential); *Zerilli v. Smith*, 656 F.2d 705, 714-15 (D.C. Cir. 1981) (disclosure of logs of illegal wiretaps); *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981) (dissemination of material discovered in police investigation); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (medical records); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (disclosure of financial information about public officials raises constitutional privacy claim but privacy interests are overcome by interest in deterring corruption), *cert. denied*, 439 U.S. 1129 (1979); *Shirshekan v. Hurst*, 669 F. Supp. 238, 242 (C.D. Ill. 1987) (finding allegation of malicious dissemination of "background investigation" makes out privacy claim); *B.J.R.L. v. Utah*, 655 F. Supp. 692, 699-700 (D. Utah 1987) (challenge to disclosure of fact that plaintiffs were the mothers of illegitimate children, that mothers had received welfare, and that child plaintiffs were born out of wedlock); *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 478-80 (Alaska 1977) (disclosure of lists of patients of doctor who holds public office raises no privacy claims, but recognition of particular claims of intimacy and embarrassment must be provided for in statutory scheme, e.g., contraceptives, venereal disease, psychiatry); *see also supra* note 369 (AIDS cases); *cf. Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1019-23 (D.C. Cir. 1984) (corporate privacy rights), *vacated and remanded*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc). *But see Borucki v. Ryan*, 827 F.2d 836, 839-49 (1st Cir. 1987) (contours of confidentiality right not clearly enough established to overcome good faith immunity of prosecutor who disclosed plaintiff's psychiatric record); *J. P. v. DeSanti*, 653 F.2d 1080, 1087-91 (6th Cir. 1981) (doubting the existence of privacy right against disclosure).

information are not entirely clear. Both the Fourth and Fifth Amendments seem, at least in their modern incarnations,³⁷⁸ to govern the acquisition, not dissemination, of information, in their references to "searches," "seizures," and compulsory "self-incrimination." One Fourth Amendment approach, hinted at in some cases, would judge a "search" to be "unreasonable" where insufficient precautions were taken to prevent the subsequent dissemination of information deemed to be within a "reasonable expectation of privacy."³⁷⁹ A second approach would analyze each subsequent disclosure of information outside the normal course of law enforcement as a separate search.³⁸⁰ But even if either reading were to be accepted, it would not deal with the dissemination of information generated by the government without constitutionally defined "searches."³⁸¹

The only plausible basis for protection against such disclosures seems to be in the substantive protection of "liberty" under the due process clauses.³⁸² Protection is based on a recognition that

³⁷⁸ There was a time when it was thought that the Fourth and Fifth Amendments combined to preserve a "private sphere" of protected items and information against government intrusion and dissemination. See *Boyd v. United States*, 116 U.S. 616, 622-28 (1886). This approach has since been eroded. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 964-85 (1977).

³⁷⁹ See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 n.7 (1989) (in Fourth Amendment challenge, while drug testing procedure "permits the Government to learn certain private medical facts . . . there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purpose. Under the circumstances, we do not view this procedure as a significant invasion of privacy."). But see *Western States Cattle Co. v. Edwards*, 895 F.2d 438, 442 (8th Cir. 1990) (in the case of commercial information, reasonableness of search is considered at the time it is conducted—subsequent disclosures are irrelevant).

³⁸⁰ See *Oziel v. Superior Court*, 273 Cal. Rptr. 196, 207 (Ct. App. 1990) (dissemination of videotape of search of appellant's home to news media implicated protections against searches and seizures—"each separate examination of the videotapes . . . would constitute a search of Oziel's home.").

³⁸¹ A variety of coercive means of obtaining information are outside of the Fourth Amendment (for example, subpoenas and record-keeping requirements) and government generates vast quantities of information without any coercion (for example, government health records and welfare records).

³⁸² Whatever the fate of *Roe v. Wade*, 410 U.S. 113 (1973), the Court seems inclined to retain the practice of recognizing nontextual rights. The rules for recognition of substantive due process rights seem to be developing a strongly historical component. See, e.g., *Burnham v. Superior Court*, 110 S. Ct. 2105, 2115 (1990) (plurality opinion) (jurisdiction based upon physical presence comports with traditional notions of fair play and substantial justice); *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2852-53 (1990) (liberty interest in refusing life-sustaining

being subjected to observation in certain intimate details can be painful, and a conviction that acknowledgement of certain informational preserves is necessary for human dignity.

As a boundary, however, the protection of intimate information against disclosure suffers from a number of defects. First, there is fuzziness regarding subjects (or environs) that call forth constitutional protection. It is easy enough to say that certain types of bodily functions, certain personal communications, and certain aspects of personal psyche, physiology, and physique are not, without the consent of the subject, topics of public conversation in polite society. This judgment is the burden of the common law privacy tort, which relies heavily on "reasonable expectations of privacy" and "offensiveness" to "reasonable persons" of the disclosure of particular information.³⁸³ It is less clear how these concededly fluid societal norms could be embodied cleanly in constitutional law.³⁸⁴

Fourth Amendment doctrine has at times adopted the proposition that there are particular "intimate activities that the Amendment is intended to shelter from government interference or surveillance."³⁸⁵ These intimations have been freely mixed with historical inquiries about "expectations of privacy that society has long recognized as reasonable"³⁸⁶ and quasi-sociological analysis

medical treatment based on common law tradition); *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (unitary family protected by tradition).

In terms of tradition, a protection for personal intimacies is firmly rooted. The traditional definitions of "life, liberty, and property" included "reputation," see *Ingraham v. Wright*, 430 U.S. 651, 672-83 (1977), and there are strong traditions of protection for intimate details of personal life. Cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting) (the right of bodily privacy is deeply rooted in Anglo-American tradition); *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 252 (1891) (Holmes, J.) ("The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body . . . is an indignity, an assault and a trespass . . .").

³⁸³ See, e.g., RESTATEMENT (SECOND) OF TORTS § 652A (1965); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 978-1008 (1989) (discussing the tort of public exposure).

³⁸⁴ For a discussion of privacy norms in different periods of American history, see DAVID H. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 18-21 (1972); DAVID SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* 101-15 (1978).

³⁸⁵ *Oliver v. United States*, 466 U.S. 170, 179 (1984); see also *Florida v. Riley*, 488 U.S. 445, 452 (1989) (aerial surveillance not a "search" where "no intimate details connected with the use of the home or curtilage were observed"); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (aerial photography "not so revealing of intimate details as to raise constitutional concerns" under Fourth Amendment); cf. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Fourth Amendment protects "sanctity of a man's home and the privacies of life").

³⁸⁶ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); see also

regarding the "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"³⁸⁷ If Fourth Amendment experience is any indication, courts seeking to protect intimate information from disclosure must derive constitutional protection from social expectations neither dichotomous nor stable.³⁸⁸

After such derivation, the expectation of confidentiality looks less like a sharp cliff than a series of gradual slopes, based on the social expectations, functions of identity formation, and history surrounding particular types of information. The intimate character of cholesterol test records seems greater than those of eye color, but less than those of psychiatric treatment. Interests that might warrant disclosure of a college transcript would be clearly insufficient to justify release of nude pictures. Courts that adopted the confidentiality norm as a matter of constitutional law, therefore, adopted a casuistic "we know it when we see it" approach to distinguishing among nude photographs, psychiatrists reports, arrest records, college transcripts, and reports of financial assets.³⁸⁹

Needed constitutional distinctions are not limited to identifying protected types of information. For any given type of information, not all modes of disclosure are equal. Conveying information to a single government official clearly differs from broadcasting it to the public at large. Informing a relatively wide audience of a particular

Oliver, 466 U.S. at 178 n.8 ("Fourth Amendment's protection . . . [is] based upon societal expectations that have deep roots in the history of the Amendment."); *United States v. Knotts*, 460 U.S. 276, 280-85 (1983) (discussing the "traditional expectation of privacy within a dwelling and the reduced expectation of privacy in an automobile").

³⁸⁷ *Katz v. United States*, 389 U.S. 347, 361 (1967); see also *Skinner*, 489 U.S. at 616-18 (holding that society recognizes reasonable expectation of privacy from bodily intrusions, including blood and urine testing); *California v. Greenwood*, 486 U.S. 35, 39-43 (1988) (holding that society does not recognize as reasonable an expectation of privacy in trash left for collection in a public area); *United States v. White*, 401 U.S. 745, 748-54 (1971) (discussing *Katz* and "justifiable" expectations of privacy).

³⁸⁸ Cf. *Riley*, 488 U.S. at 452-69 (1989) (O'Connor, J., concurring; Brennan, Marshall, Stevens, Blackmun, JJ., dissenting) (noting that whether aerial surveillance at 400 feet is an invasion of reasonable expectations of privacy is a function of whether members of the public travel with sufficient regularity at that altitude, and that a change in travel patterns would change nature of privacy right).

In the FOIA context, the Court seeks to avoid the necessity of deriving particular privacy norms by treating any information which is "personal in character" in the sense of referring to identifiable individuals and not being freely available, as subject to the privacy exemption. See *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776-80 (1989); *Department of State v. Washington Post Co.*, 456 U.S. 595, 600-02 (1982).

³⁸⁹ See *supra* note 377.

intimate detail may be less harmful to the subject of the disclosure than informing a particular sensitive individual.³⁹⁰ Functional evaluation of the "importance" of a particular claim of privacy, therefore, requires more than abstract categorization.

Finally, the importance of government interests is not constant for a given class of information. Informing neighbors of a citizen's diagnosis as an AIDS carrier differs from informing her spouse. A medical prognosis may be relevant to an employer and not relevant to the general public.

The intimacy of the particular information and the nature of the disclosure are relevant variables in an incremental evaluation of the interests favoring and opposing dissemination of information. The prospect of defining abstractly a zone of private information constitutionally privileged seems dim,³⁹¹ while the importance of protecting against dissemination remains imperative.

CONCLUSION: BACK TO BALANCING

In reviewing government disclosures of information, courts need not engage in ad hoc constitutional balancing in every case. In some definable classes of cases, constitutional review is unnecessary. When the subject of disclosure has already disseminated the information to the same audience, with the same degree of salience that the government seeks to achieve, no balance is required, since any right to anonymity has been waived. If the government receives information voluntarily from private sources, claims for anonymity are often better made at a sub-constitutional level, either as

³⁹⁰ Cf. *McSurely v. McClellan*, 753 F.2d 88, 113 (D.C. Cir. 1985) (disclosure to husband of premarital affairs of wife); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 382-91 (D.N.J. 1990) (disclosure to neighbors of AIDS infection, of which spouse already knew); *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 668-70 (Ct. App. 1984) (denying recovery for the publication of sexual orientation of prominent member of San Francisco gay community alleged to cause harm as a result of conveyance to subject's mother, brothers, and sisters).

³⁹¹ A strategy not examined here is to use procedural rather than substantive limitations to constrain government disclosures. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 135-42 (1951) (holding that the Attorney General's arbitrary designation of plaintiff as a "Communist" exceeded the authority derived from an Executive Order). Under current doctrine, *Paul v. Davis*, 424 U.S. 693 (1976), limits the availability of this route to situations involving a disclosure accompanying a change in "legal status." *Id.* at 699-712. But cf. *In re Bagley*, 513 A.2d 331, 338 (N.H. 1986) (construing "change in legal status" broadly). An effort to extend the protection to "harmful" disclosures throws the courts back on the same necessity for distinguishing among the types of disclosure canvassed above.

statutory interpretation or as invocations of more generally applicable common law principles.

Conversely, the topic of disclosure can sometimes provide shortcuts that establish a constitutional claim. Certain constitutional protections should carry with them a protection against compulsory public exposure of their exercise. Both liberal and republican analyses suggest that the right to join political groups, the right to privacy of beliefs, the right to religious exercise, the right to intimate association, and the freedom of reproductive autonomy should be protected by constitutional bulwarks that do not depend on the concrete proof of the particular deterrents associated with compelled disclosure.

Although these theoretical boundaries constrain the necessity for balancing, they do not eliminate it. In one class of cases, epitomized by the question of anonymous participation in public debate, disclosures impact upon constitutionally protected activities, yet claims of an absolute right to anonymity are theoretically unpersuasive. For that class, an evaluation of the practical impact and proposed justifications may settle an otherwise intractable theoretical debate.

A second class of cases concern those activities that may not claim a right to nondisclosure because of their intrinsic importance, yet facilitate the exercise of constitutional rights, and are particularly vulnerable to the deterrent impact of publicity. Deterrence is especially important when the exercise of a constitutional right by one citizen depends on the cooperation of third parties. For example, in *Brown v. Socialist Workers '74 Campaign Committee*,³⁹² the majority recognized that, although the exercise of renting a hall to political parties is not an enterprise that commands intrinsic constitutional protection, the ability to perpetuate a party is, and compelled disclosure of the recipients of funds from a stigmatized party could eliminate the party's ability to purchase the necessities of political existence. Similarly, doctors who perform abortions cannot invoke independently a fundamental constitutional right, but compelling their public identification substantially interferes with the rights of their patients.³⁹³ Such arguments cannot be sensibly

³⁹² 459 U.S. 87, 95 (1983).

³⁹³ See *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 670-72 (E.D. Pa. 1985); *Doe v. Casey*, 464 F. Supp. 487, 499-500 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980); *cf. Acorn Invs. Inc., v. City of Seattle*, 887 F.2d 219, 224-26 (9th Cir. 1989) (striking down compelled disclosure of shareholders

evaluated in the abstract; the level of expected harassment is crucial, and that level is intimately dependent on context. The circumstances of disclosure must be closely examined.

In a third group of cases, disclosures concern intimate information not related to constitutionally protected activities. Promiscuous disclosure of such information constitutes a powerful governmental sanction that assaults the dignity and undermines the independence of the population. Memories of the impact of McCarthyite exposures suggest that such power should not be left unconstrained. Still, the nature of the impact on the individual is likely to differ incrementally depending on the precise data in question, and the importance of legitimate interests in disclosure varies contextually. If we are to limit dissemination, there is no alternative to comparing the actual harm done with the level of government justification.

The inescapability of residual ad hoc balancing should not trouble us unduly. At the same time that many academics have come to view balancing as a sign of intellectual flabbiness, courts have retained shameless allegiance to the method. Perhaps this an example of a cultural lag between the era when many judges were trained, when balancing was regarded as a hallmark of an admirable realism, and the present. It seems equally probable, however, that the gap is attributable to a difference between the academic and the judicial enterprise. In a classroom, the response "you balance" effectively ends the Socratic dialogue on the plane of theory. As one recent graduate perceives the matter: "There is nothing like a good balancing test for avoiding rigorous argument."³⁹⁴ But courts are not in the business of rigorous argument for its own sake; they are in the business of deciding cases justly, of embodying their vision of justice.³⁹⁵

In that enterprise, there is much to be said for balancing in the

in adult entertainment emporium); *Genusa v. City of Peoria*, 619 F.2d 1203, 1215 (7th Cir. 1980) (striking down compelled disclosure of shareholders in adult bookstore).

³⁹⁴ Rubinfeld, *supra* note 283, at 761. A balancing test also limits the impact that traditional or theoretical legal scholarship may have on judicial decisions. If everything turns on the facts, it is trial lawyers, not traditional legal academics, who will determine the outcome of cases. Academics who focus on data, on the other hand, may have substantially greater power when the courts confront the particulars of each case.

³⁹⁵ See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 133 (1990) ("[I]t is a mistake to suppose that the best judge is the judge who most resembles the best law professor, or that the best judicial opinion is the one that most closely resembles an excellent law-review article."). Judges also may be less concerned with justifying a counter-majoritarian position than with using it wisely.

area of disclosure. Even in times of sober reflection, when a court is confronted with a call for principled and clear responses, the easiest bright-line test is one which closes the door on the plaintiff. When a court is confronted with the choice of "all or nothing," counter-examples pile high quickly; the choice will often be "nothing." The history of the "scarlet letter" problem is littered with such gambits.³⁹⁶ Only when courts keep open a line of escape have they been willing to address the tensions between privacy and disclosure on their merits.

Conversely, although some scholars have argued in favor of a constitutional architecture of clean and predictable principles, on the ground that such principles are likely to be stronger protections in times of intolerance,³⁹⁷ such principles tend to break, rather than bend, under political pressure. A balancing test that allows the court to bow to popular winds at least leaves in place the possibility of springing back when the winds abate. A "principled" accommodation to popular pressure would have to be overruled.³⁹⁸

Balancing is resilient in another dimension: under a balancing regime, lower courts are not tightly bound by "principled" rejection of claims by the Supreme Court. They are free to hear and vindicate claims closely analogous to those recently rejected by emphasizing factual differences in the case at hand. Nor are they bound to a "principled" adoption of claims, for everything turns on the facts.

Assertions of rights thus begin rather than end the dialogue.

³⁹⁶ For a discussion of the door-closing doctrines, see *supra* notes 294-315 and accompanying text.

³⁹⁷ See Blasi, *supra* note 29, at 466-506.

³⁹⁸ Thus, if one suspects that the outcome in *Korematsu v. United States*, 323 U.S. 214 (1944), was tragically foreordained by the unwillingness of the Court in time of war to confront executive military authority on a massive scale, one might prefer the approach of Justice Black, who acceded to claims of overriding military justification while emphasizing both the magnitude of those claims and the civil rights they overrode, to that of Justice Jackson, who would have refused, on a "principled" basis, to review the constitutional objections to the Japanese-American relocation. Justice Black's opinion left in place a strong objection to racial classification, which was regularly invoked in later years when claims of "pressing public necessity" were absent. See *id.* at 215-24 (Black, J.). Justice Jackson's opinion would have left the court voiceless, both on the case before it and in the future. See *id.* at 242-48 (Jackson, J., dissenting).

Similarly, however little benefit McCarthy era Communists may have garnered from the requirement of overriding justification, the recognition of their claims as calling for government justification left in place a structure that could be invoked by the civil rights movement in the American South.

The official faced with a claim that a proposed action violates a citizen's rights will not feel constrained absolutely by "principle" derived from apodictic judicial pronouncement. But neither is she free to ignore the claims of "right," for a court is always available to hear, not simply dismiss, the citizen's claims that her rights are not outweighed by the force of governmental necessity.

This final characteristic provides perhaps the greatest appeal of balancing, for it means that in every case the citizen will have an opportunity to tell her story. Faced with a doctrine requiring her to explore the situation at hand, the judge will not be able to dismiss the case at the stage of abstract pleadings. The litigants will have the opportunity to explore and explain their concrete situation with the judge, as well as an obligation to address one another. This opportunity to have their voices heard is of greater relevance to private individuals than to academics. We can publish; they perish silently.

Even if privacy claims predictably lose in most cases after litigation, the shadow of the claim remains. Officials who take seriously the rights enunciated by the courts, (or pressure groups who can invoke those rights), will take into account the citizen's interests in privacy when constructing government operating procedures. When confronting a government demand for information under a balancing regime, a citizen retains the negotiating ability to raise a privacy claim, and ultimately to go to court. A claim that is too weak to prevail may be sufficient to induce a pre-litigation dialogue, resulting in more protection than the government was initially inclined to grant.

This argument may appear to be premised on a naive optimism. Still, in the end, this essay is about a reasonably well-ordered society. If Big Brother were truly imminent, the puny bulwarks of balancing would not matter much. But in that society, the scarlet letter likely would be accompanied by the less genteel sanctions of forcible repression. The charm of the tactic of exposure during the McCarthy Era was that it purported to defer to democracy's ideals. It is by invoking those ideals to judges and officials that we can best call that tactic to account.