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Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism

Richard A. Epstein*

*The coordination of common law and constitutional norms are of pressing importance on matters of freedom of speech. In the Supreme Court and elsewhere, it is possible to discern two sharply inconsistent attitudes toward this question. One view holds that the First Amendment simply prevents any legislative backsliding from the common law rules that protect freedom of speech and of the press, much as they protect freedom of contract and freedom of action generally. On this view, the standard rule governing damages and injunctive relief apply to speech much as they do anywhere else. On the alternative view of what is termed First Amendment exceptionalism, the First Amendment protection is read more broadly to afford speech greater protection than the common law rules that insulate the publication of stolen information from judicial sanction by either damages or injunction. The article then argues that the common law approach affords a better balance between privacy and disclosure with respect to a wide range of confidential information, including the protection of trade secrets. In so doing, it criticizes the results reached in a number of important recent cases including *Desnick v. American Broadcasting Co.*, *Food Lion v. Capital Cities/ABC*, and *Ford Motor Co. v. Lane*.*

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INTRODUCTION: ANYTHING NEW IN CYBERSPACE?

Doctrinal analysis often requires us to reconcile traditional legal principle with modern technological innovation. Nowhere is this task of reconciliation more daunting than with cyberspace, where the speed and spread of information has been ratcheted up to levels that were unimaginable even a generation ago. And nowhere in cyberspace is it more important to tweak doctrine than on the general legal issue of privacy, which is here defined as the ability of individuals to keep private—that is, subject to limited distribution for specific persons—information about themselves that could prove harmful or embarrassing to them if made public or placed in the wrong hands. The speed, for example, with which medical records can be transmitted from one person to another has spawned a wide set of (misguided) federal guidelines on the use and dissemination of this information.¹

That said, however, there is a second danger that is, if anything, greater than the first: endowing the new challenges in cyberspace with such novelty that it becomes too easy to forget that the underlying problems have been with us for a very long time.² Just as with the rise of the camera and the parabolic microphone, the law must resolve a permanent tension between two ideals, each of which seems to be unexceptional until placed in juxtaposition to the other. The first ideal of *privacy* carries with it all the positive connotations of allowing individuals to control information about themselves. The second ideal is *full disclosure* of that same information to allow others to make full and informed decisions. Unfortunately, both ideals cannot be fully honored at the same time, and someone has to choose between them in many different contexts.

This clash of imperatives, moreover, long predates cyberspace: Individuals have always wanted to keep information about themselves private

1. For all the relevant information, see Dep't. of Health & Hum. Serv., *Administrative Simplification* <<http://aspe.hhs.gov/admsimp>>. The most obvious concern about these regulations, their ostensible concern for administrative simplification notwithstanding, is their enormous compliance costs, which will ripple through the system. There has been, of course, an evident concern with the privacy of medical records. But by the same token, there has been a lack of appreciation of the multiple purposes to which these are put and of their need to deal not only with patient treatment, but also with coverage and insurance issues and matters of medical research. The nondisclosure of medical records to the proper source is of equal concern, and HHS has not introduced evidence to suggest any systematic breakdown in the current system that would require the massive intervention of its current detailed regulations. So long as the patient and medical care provider are in privacy with each other (or are connected by intermediates) the case for government regulation rests on a breakdown in current practices that is not demonstrated here. And the heavy criminal sanctions that are imposed under section 1177, allowing for fines up to \$50,000 and imprisonment for a year for a single wrongful disclosure strike me as excessive.

2. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (making the basic case with specific reference to jurisdictional questions). For my own earlier defense of this position, see Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

while finding out everything about others. Information is power, whether it is the information that you possess or that which you can deny to others. That said, the desires for privacy and disclosure cannot be satisfied for all people simultaneously. The challenge therefore is to examine the larger question in more specific contexts to determine the relative values of privacy and full disclosure.

The rise of cyberspace did not create this tension, but it does exacerbate it. A similar set of difficulties arose with the camera and the parabolic microphone.³ Much the same may be said about mass publication, which got its first boost with the Gutenberg printing press. The ability to broadcast online has increased the scope of publication mightily, but it is far less clear that our contemporary problems have altered materially as we have moved beyond traditional print and broadcast media. One recent question of some import concerns the liability of Internet operators for defamatory messages posted on their systems by others. The Communications Decency Act⁴ provides these web page operators with absolute immunity.⁵ The obvious points here are, first, that the plaintiff's preferred defamation action should be directed against the party who posted the message, assuming that she can find him; next, that it becomes virtually impossible to ask the proprietor of the network to maintain a constant surveillance of the content posted on various sites by a wide range of subscribers, some of whom are certain to hold extreme, malevolent, or outlandish views. But that said, how different is the problem here from an attempt to hold a newspaper responsible for the content of personal advertisements, or a lending library responsible for the contents of the books it sends into circulation, or a broadcast station for the defamation of one of its guests?⁶ In each case the question is whether the system of vicarious liability makes sense by pressing into service those individuals who have only an imperfect ability to identify the defamation and to contain the damage it causes, given that they may be in a better position to forestall the harm than the plaintiff.

The same set of conflicts arises with the issue that I wish to examine here, which is the extent to which a plaintiff can recover publication damages for truthful information that has been wrongfully obtained. In some cases the publication in question is made by the broadcast media. In other cases it is

3. Apprehension over the new technology was voiced, for example, in Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"). For an early decision that imposed liability on the use of listening devices, see *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958).

4. Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).

5. See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

6. For the traditional privilege, see RESTATEMENT (SECOND) OF TORTS § 581 (1977).

made over the web. In the former case, we are sure that the publication comes from the press. In the latter case, it is not clear whether that honorific designation should be given to anyone with access to a website—it is unmistakable that the line between media and nonmedia defendants will break down with the advent of desktop publication. But either way the legal issues raised require a close analysis of the interaction between common law and constitutional principles.

The key question is one of deceptive simplicity but enormous impact: May a private plaintiff recover damages from, or obtain an injunction against, a defendant that openly publishes truthful information about the plaintiff, when the defendant has wrongfully acquired that information? The recent cases that have addressed this question have primarily answered it in the negative, citing the First Amendment guarantee of freedom of speech and, with respect to the question of injunctive relief, its general prohibition against prior restraints of publication. I have worked somewhat extensively on this matter as a practicing lawyer, having been involved in both the *Food Lion, Inc. v. Capital Cities/ABC, Inc.* case,⁷ where the broadcast was on *PrimeTime Live*, and the *Ford Motor Co. v. Lane* case,⁸ where publication was on the web. I hope in this paper to navigate the shoals of common law and First Amendment law to explain why, in this context, the latter does not place any constraint on the orderly evolution of the former doctrine, either before or after the advent of cyberspace. On this problem, as with so many others, the advent of cyberspace may raise the stakes, but it hardly follows that it also changes the correct solutions.

To successfully examine this topic, it is necessary to understand the fundamentals of both the common law and First Amendment issues involved. It is also necessary to be aware of the risks that are imposed by what I call “First Amendment exceptionalism,” that is, the belief that the First Amendment weights the scales above and beyond what a sensible theory of freedom of speech, understood as part of a general theory of freedom, would require. Viewed from an ideal perspective, common law and constitutional law ought to mesh so that the routine enforcement of common law obligations does not violate constitutional norms. After all, at its root, the common law remains a largely libertarian system that accords the freedom of speech, like the freedom of contract, presumptive validity so that a plaintiff must offer some good reason why speech should be restrained or sanctioned. It is not as though the two systems differ because they appeal at root to different philosophical principles. The difference comes in the way in which these principles are understood and applied.

7. 194 F.3d 505 (4th Cir. 1999) (concerning broadcast of undercover television investigation of grocery store chain).

8. *Ford Motor Co. v. Lane*, 67 F. Supp.2d 745 (E.D. Mich. 1999) (concerning posting of copyrighted material and misappropriated trade secrets on the web).

Early on in our history, there was little tension between common law and constitutional principles. But with the rise of First Amendment jurisprudence, that tension started to emerge, and it reached fruition with the Supreme Court's decision in *New York Times Co. v. Sullivan*.⁹ Today the conflicts between the treatment of speech at common law and under the First Amendment have become more explicit and acute, so that it is no longer safe to assume any close coincidence between them. Rather, we have a persistent constitutional dualism in which courts first adopt and then reject First Amendment exceptionalism as their interpretative guide.¹⁰ The basic task, then, is to find some general theory to arbitrate which set of free speech principles should hold sway and why. In articulating that theory, it is of course necessary to do more than repeat the truism that constitutional law stands at the top of the legal pecking order, while common law stands at its bottom, with legislation sandwiched somewhere in between. The point here is not that constitutional law rules, especially insofar as they relate to the articulation and defense of individual rights, bear a closer resemblance to common law rules than to the legislation that often supplants them; both are judge-made rules that necessarily lack the administrative backbone and dense texture that only legislation, whether for wise or for ill, can provide. Rather, the nub of the problem is that the two bodies of judge-made law start from different substantive visions about their common subject matter.

In order to approach the relationship between common law and constitutional law more systematically, Part I of this article explores the relationship between the torts of defamation and invasion of privacy, and explains the critical role that the issue of truth—itsself a battlefield of contention—has played in developing the basic rules for publication damages in the two torts. Part II then seeks to explain what corrections, under the rubric of privilege, should be made to the laws governing defamation and invasion of privacy, both by insulating certain false statements from liability and by imposing liability for certain true statements. Part III then examines cases that allow anyone, including media defendants, to publish true information that has been wrongfully obtained. These cases include the following alternative arguments: The publication of this information should not count as a cognizable harm; or if the harm is cognizable, the publication is nonetheless justified; or if the publication is not justified, the publication is too remote from the original wrongful acquisition of the information. Part IV then looks at First Amendment exceptionalism in action, by examining the distinctive

9. 376 U.S. 254 (1964).

10. As examples of First Amendment exceptionalism, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969) (holding that it is a defense to invasion of privacy that published material was of public interest). For the opposite approach, see *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that First Amendment does not protect publisher from damages suit for revealing confidential source).

constitutional justifications for denying legal redress for publication damages. In so doing, it explores the strength and limitations of the effort in *Cohen v. Cowles*¹¹ to insulate any "generally applicable law" from First Amendment scrutiny so long as its effects on speech are only "incidental." Part V examines the tension between the common law practice of affording injunctive relief and the First Amendment prohibition against prior restraints. Finally, Part VI extends the analysis to an important form of privacy interest: trade secrets. Although the particular question—the relief, if any, a plaintiff may recover for publication damages—looks narrow, the principles that must be resolved to answer it correctly are fully applicable to the full range of privacy issues, not only with traditional modes of publication, but also, as was the case in the *Ford* setting, with modern Internet communications. A brief conclusion follows.

I. FROM DEFAMATION TO PRIVACY IN ONE LARGE LEAP

For most of our constitutional history it was difficult to detect any real tension between the common law principle of defamation (and, one may add, privacy) and the First Amendment. The usual reconciliation of the two principles was that the law of defamation was concerned with false speech to the discredit of the plaintiff, which, being wrongful, received no constitutional protection at all. The first apparent confrontation between common and constitutional law took place in *Near v. Minnesota*,¹² where the issue was whether the state could enjoin a libel on the ground that it was a "public nuisance" for which abatement was an appropriate remedy. Here the Court relied explicitly on Blackstone's statement that "[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."¹³ Indeed *Near* was prepared to follow an unbroken history of not attempting to silence the press before speech precisely because "[p]ublic officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."¹⁴ The state need not supplement common law tort actions with statutory remedies because the common law itself provided an adequate damage

11. 501 U.S. 663 (1991).

12. 283 U.S. 697 (1931).

13. *Id.* at 713 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52). The Court continues: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." *Id.* at 713-14 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *152).

14. *Near*, 283 U.S. at 718-19.

remedy after the fact. At that point, it was acceptable to give the writer or speaker the choice whether to publish and risk the libel, to alter the message, or to remain silent. The system in effect imposed a damage filter whose incentive effect was to prevent defamatory speech, at the cost (since there is always a cost) of deterring speech that could be mistakenly branded as libel. *Near* read the Constitution to track the common law on the choice of remedies insofar as it blocked any anticipatory restraints on speech, even restraints that were only imposed after the speaker is given the opportunity to demonstrate the truth of his remarks.¹⁵

The initial cleavage between the common law and the First Amendment grew both broader and became more permanent in *New York Times*, whose intimate connection with the civil rights turmoil in the segregated South is in danger of being forgotten today. In *New York Times*, none of the Justices of the Supreme Court were prepared to allow the state judges to impose whatever damages they chose for ordinary defamation of public officials. At this juncture, the difference between the idealized common law and the common law of any particular state becomes critical, for the entire system of constitutional guarantees of freedom of speech could easily be undone by judges who were gunning for a particular defendant, as was surely the case in the Alabama courts. It did not follow, of course, that the Court had to hold that all state remedies for defamation of public officials (later extended to public figures)¹⁶ were precluded by the First Amendment's guarantee of freedom of speech, even though that absolutist position was championed by Justices Black and Douglas. Defamation necessarily involves false statements of fact to the discredit of other individuals.¹⁷ Where these statements were made deliberately, or, in what has long been treated in the same fashion, with reckless disregard of their truth or falsity,¹⁸ then the defamation in question rises, to be blunt, to a lie that falls within the core libertarian prohibition against the use of force or fraud. Such lies would be the source of remedies to those parties who rely on them to their detriment, as by an ordinary action of deceit.

Unless the Supreme Court wants to sanction wholesale fraud, it becomes hard to explain why deliberate false statements should be treated as legally

15. See *id.* at 720-21.

16. See *Associated Press v. Walker*, 388 U.S. 130 (1967).

17. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). The point of this definition is two-fold. The general reference to lowered estimation in the community sets up the case for general damages; the reference to deterring specific individuals from associating or dealing with the plaintiff sets up the case for showing special damages, as in the loss of a particular job. We know that the statements must be false because truth is an absolute defense in defamation cases. For discussion, see RICHARD A. EPSTEIN, TORTS, Ch. 18 (1999).

18. See *Derry v. Peek*, 14 App. Cas. 337 (H.L. 1889).

benign when made *about* the plaintiff instead of being made *to* her. Indeed, communications about the plaintiff may prove more dangerous than those made to her. In the latter setting, the plaintiff can engage in self-defense by questioning the speaker or by refusing to deal with him. But the plaintiff is frequently stripped of the ability to engage in self-protection when the defendant makes the communications to third persons who may rationally respond to bad information by refusing to deal with the plaintiff on the prudential ground, "better safe than sorry." This reason—the vulnerability to the blind-side—helps explain why the common law rules on defamation tended to adopt strict liability in cases involving false statements about the plaintiff.¹⁹

The question then arises as to whether the law should still cut the defendant some slack in these defamation cases, as did *New York Times* by creating a constitutional privilege for false statements of fact about public officials by making the statements actionable only if they met the common law standard for fraud, that is, they were known to be false or were uttered with reckless disregard for whether they were true or false. Although that rule did have some common law support,²⁰ most courts applied the strict liability principle applied to false statements of fact,²¹ even if the defendant received an absolute privilege to publish his opinions about the defendant's activities. Here the division of authority at common law shows one latent difficulty in resolving any differences between the common law rule and the constitutional law norm. The common law does not speak with a uniform voice. Yet here I would again take the position, implicit in *Near* and adopted strongly by Justice White,²² that the Constitution does not displace any common law rule that has stood the test of time. The defense is largely the pragmatic one that the press in the United States and other common law countries had flourished under the general rules in force prior to the advent of *New York Times*. While the reversal of the Alabama court could easily be justified on the ground that Alabama played fast and loose with two elements of the common law account of the wrong—what it means for statements to

19. See, e.g., *E. Hulton & Co. v. Jones*, [1910] App. Cas. 20 (1909) (holding that defendant is liable whether or not he intended to defame plaintiff). The other reason is that in most cases the harmful nature of the defendant's statement is apparent from the words themselves or from the context in which they were uttered, so that it is not too much to ask the defendant to investigate the truth of a statement when on notice of its potential for harm. Note that this rationale does not apply to the few cases of innocent defamation where the harmful context is unknown to the defendant, such as the announcement of the marriage of a person who is, unbeknownst to the defendant, already married.

20. See, e.g., *Coleman v. MacLennan*, 98 P.2d 281 (Kan. 1908) (holding that a publisher may be immune from libel action if it acts in good faith about matters of public concern within the areas in which it publishes).

21. See, e.g., *Post Publ'g Co. v. Hallam*, 59 F. 530 (6th Cir. 1893) (holding that false statements about public figures are actionable).

22. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (White, J., dissenting) (taking the strong position that what worked at common law should not be displaced by constitutional edict, no matter how carefully crafted).

be "of and concerning the plaintiff," and what is needed to prove hefty awards of general damages—the Supreme Court had little reason to fashion a broad "actual malice" privilege out of whole cloth that would become applicable to all sorts of defamation cases that had none of the tragic overtones of the civil rights struggle in the South.²³

The confluence between common law and constitutional law did, however, make a partial comeback in *Gertz*,²⁴ where Justice Powell resuscitated the common law distinction between fact and opinion, holding the latter to be absolutely protected, even as the former was seen to have—and this point will become critical for what follows—no intrinsic value.²⁵ Once again his basic point has strong analytical antecedents. Return again for a moment to the two-party situation where the distinction between truth and falsity organizes this entire branch of law. It is one thing to offer a vial of poison to someone who knows its contents, and it is quite another to offer it to someone who does not. The user's knowledge in the first case severs causal connection; her ignorance in the second case preserves it.²⁶ Just as it is more difficult to develop theories that hold the supplier of poison responsible for the death of the party who assumes the risk, so it is more difficult to construct theories that hold people responsible for true speech, which in general improves public debate, than for false speech, which degrades it. False information leads members of the public to make wrong decisions in both their personal lives and in their public activities. It therefore becomes highly problematic, to say the least, to afford false statements any constitutional protection at all: Should false statements by insiders about traded stocks be protected even if they degrade the public market in corporate shares? In those cases, the common law rule of strict liability for false statements of fact continues to make good sense.²⁷

The strongest counterargument to the true/false distinction lies in the difficulty of placing various statements on one side of the line or the other.

23. For my defense of this position, see Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 792-94 (1986).

24. See *Gertz*, 418 U.S. at 339-40 (noting that "[u]nder the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact.").

25. See, e.g., *Post Publ'g Co.*, 59 F. 530; *Coleman*, 98 P. 281 (taking minority view protecting false statements of fact); *Carr v. Hood*, 170 Eng. Rep. 981 (K.B. 1808). For the early law, see generally Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949).

26. Just this line of argument was developed early on in the *Lex Aquilia*, see *Justinian's Digest*, Book IX, title 2, in F.H. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* (1950), where the progression runs as follows: It is surely a wrong for the defendant to kill (*occidere*) by forcing poison down the plaintiff's throat. It is likewise a wrong for the defendant to furnish the plaintiff (*causam mortis praestare*) a cause of death. But that condition only applies when the plaintiff takes in ignorance of the true qualities of the potion. In line with Aristotle, the classical theory of causation finds that force and mistake negate intervention. For discussion, see EPSTEIN, *TORTS*, *supra* note 17, § 10.10.

27. See *Gertz*, 418 U.S. at 369 (White, J., dissenting); Epstein, *supra* note 23.

Even so, it hardly follows that the appropriate adjustment is to require plaintiffs to prove defendants' negligence, as *Gertz* demanded in suits by private plaintiffs against media defendants. The better strategy seems to be to require plaintiffs to prove falsity—where the common law should have placed the burden in the first place.²⁸

It is on just this point that the law of privacy becomes difficult where (at least in principle) the common law of defamation should be easy. The critical question with privacy concerns the publication of information about the plaintiff that, while wrongfully obtained, is also *true*. At this point, the nature of the inquiry shifts in the paradigmatic case. It is easy to defend a regime that imposes substantial damages on statements that both *harm* the individual plaintiff *and* have *negative* effects on third persons. However, it is much more difficult to decide what remedy, if any, to offer when the defendant's statements harm the plaintiff but have *positive* effects on third parties. The proper legal rule is one that seeks to net all benefits and costs over all individuals, and to make suitable adjustments when the direct measurement of the full set of costs and benefits is not possible.

With defamation, the elements of plaintiff and third party harm move in the same direction. A legal system that compensates the plaintiff for her loss alone will in effect *understate* the level of compensation required from a social perspective by ignoring the *net* harm that defamation imposes on third persons. This last qualification for net harm is needed to make the argument work, because ordinarily there is no reason to believe that all third persons are harmed uniformly by the false information spread by the defendant. To take a simple illustration, if the defendant disparages the plaintiff's product, the third party harm is sustained by plaintiff's customers who look elsewhere; however, the plaintiff's *competitors* probably gain. It is only by virtue of our belief that the system is in equilibrium prior to the defamation that we assume that the net gains from the current match of customers and suppliers is optimal, so that the deviation brought on by the defendant's defamation causes some social loss. Due to the shifting composition of this third party pool, it is usually difficult to measure the indirect effects of the defamation. But that informational shortfall is of little consequence so long as the legal system opts to accept the underdeterrence to avoid the high administrative costs of calculating third party damage and determining to whom the award should be paid. Indeed, so long as this judgment is made at a highly general level of abstraction, the practical veil of ignorance protects us from any sustained distributional challenge to the overall rule. No one in the veiled state knows whether she is the defamer, the defamed, or a third party that gains or loses from the defamation. All that is known is the centralizing

28. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (holding that plaintiff had burden of proving falsity of statements in newspaper that were a matter of public concern).

tendency of the rule, so that the best the individual can do is to advance her own interest by advancing the group as a whole, which is what a sensible law of defamation tries to do.

The calculus of costs and benefits operates in quite a different fashion in privacy cases, where what is said is true. Now if the law compensates the plaintiff for her losses when the net external effects are positive, it could easily deter disclosures that, on balance, should be made. This tension is, in a sense, easily resolved when the defendant makes *true* statements from information that has been *lawfully* obtained. In those cases, the plaintiff is not able to show any tort at all, so that her losses do not enter into the social calculus. At this point, all that is left standing are the positive social gains that come from the truthful revelations.²⁹

Here of course there is some equivocation about what counts as a wrong, given that defamation is ruled out of bounds. It seems that here, as a first approximation, the answer can be found by returning to standard common law rules of tort and contract. Information is obtained wrongfully at common law if it is obtained by tortious means or by breach of contract, especially breach of that subclass of contracts known as confidential relations. The most obvious precedent for this move comes from the early cases of interference with trade; a defendant who shot at pupils who intended to attend an "antient" school run by the plaintiff³⁰ and a defendant who shot across the bow of the native boats that were intent on trading with the plaintiff³¹ were each held liable. Likewise the tort of inducement of *breach* of contract was addressed to wrongs within the general force and fraud framework.³² Only when the conduct turns out *not* to be wrongful in either of the tort or breach of contract sense will the plaintiff face a strong uphill battle to make the defendant's conduct actionable. The situation becomes far more vexed in principle when the actions in question are wrongful in the common law sense,

29. Here, of course, we have the same ambiguities as before with defamation. Some truthful revelations will hurt, say, the suppliers of a firm now shown to have inferior products, but these losses are offset by the gains that come from the suppliers of superior products, so that once again we rely on the assumption that fully informed markets outperform uninformed markets to reach the conclusion found in the text. Indeed, if the general rule is announced early enough in the process, no individual will know her place in the overall social order, so that each person, making her most informed guess as to her own self-interest, will think herself a gainer by the rule of no liability. Move far enough back in the mists of time, and the distributional issues shrink in importance relative to the overall output consequences. With common law rules, it is generally possible to adopt that intellectual stance even if the parties to the case have strong positions of their own.

30. See the account found in *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1128 (K.B. 1809):

One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.

31. See *Tarleton v. M'Gawley*, 170 Eng. Rep. 153 (N.P. 1793).

32. See, e.g., *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853).

such that force, fraud, breach of contract, or the inducement of breach of contract, is used to obtain the information that leads to the publication of true information. For here it is necessary to net out private losses against public gains. The power of this framework is well revealed in the analysis of the common law cases on the matter.

II. REFINING THE BASIC MODEL

Much of the difficulty in the law of privacy stems, then, from the clear perception that the line between truth and falsity matters in the law of speech as much as the line between aggression and other forms of physical behavior in the law regulating ordinary forms of human actions. This formulation, however, provides only a first approximation of an ultimately sound set of results. The key questions are what refinements should be made from that initial position. At this point, the basic logic is one which asks whether or not some systematic deviations from the simple truth-falsity baseline work systematically to improve the long-run average position of all individuals. The basic model is one that treats every limitation on the common law rights as a taking of private property, itself a presumptive wrong, and then asks whether the benefit from the limitation, to the same individuals, leaves them better off than they were before.³³

A. *Privileges for Defamation*

Within the law of defamation, a class of privileges (of which the "justification" of truth is not one) is introduced to protect, absolutely or conditionally, false statements from becoming the source of liability. Within the private sphere, one common privilege, qualified in nature, protects individuals who make false statements of fact on matters of common interest with some third party.³⁴ The most usual contexts are employment references and advice about common business connections. Here the party who seeks the information normally has strong incentives to filter it for his own self-protection. Executive level searches frequently involve contacts with multiple references, such that effective institutional safeguards are usually in place to counter false statements. This privilege, moreover, is typically limited to those statements made in good faith, so that malicious persons can still be

33. For a general statement of this position, see RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995) [hereinafter EPSTEIN, *SIMPLE RULES*]; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). For its application to privacy generally, see Richard A. Epstein, *Deconstructing Privacy and Putting it Back Together Again*, 17 (No. 2) SOC. PHIL. & POL. 1 (2000).

34. See RESTATEMENT (SECOND) OF TORTS §§ 594-96 (1977).

held liable if their cleverly worded accusations escape detection.³⁵ The common law provides a set of absolute privileges when the false statements are made, for example, by judges, prosecutors, lawyers and witnesses as part of a legal proceeding.³⁶ Here the ability to respond is guaranteed by the judicial process, and it makes little or no sense to allow the statements made in the context of one case to be challenged in yet another. It is not that anyone prizes false statements inside judicial proceedings; indeed, the statements can be sharply punished by cross-examination, disciplinary actions, or criminal prosecution for perjury. It is simply that defamation suits do little to improve the performance of already charged proceedings and are best left to one side.

B. *Liability for True Statements*

The process of correction also takes place in the other direction, as attempts are often made to impose liability for a limited class of true statements, a prominent illustration of which is embarrassing disclosures of past facts.³⁷ The usual situation involves a publication of evidence that the plaintiff has engaged in criminal activities,³⁸ has been the previous object of scandal,³⁹ or more recently, has concealed a gay identity.⁴⁰ The imposition of liability in these cases has always enjoyed, at most, a cramped existence in the law. In line with the basic presumption, the value of these statements to third parties must be regarded as positive, so that the social dislocations from defamation do not arise. A broad newsworthiness privilege,⁴¹ which, as of late, has been accorded a constitutional dimension,⁴² seems to dominate in these cases.

35. The rules on malice are set out in *Clark v. Molyneux*, [1877] 3 Q.B. 237 (1877). For a further illustration, see 1 ROBERT D. SACK, *SACK ON DEFAMATION* § 9.3 (3d ed. 1995).

36. See RESTATEMENT (SECOND) OF TORTS §§ 585-87 (1977).

37. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

38. See, e.g., *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 40 (Cal. 1971) (finding cause of action for invasion of privacy when defendant published an account of his conviction 11 years earlier).

39. See, e.g., *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931) (holding that plaintiff had cause of action for invasion of privacy when defendant filmmakers made a movie about her past as a prostitute and a murder defendant).

40. See, e.g., *Supple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (finding no cause of action when newspaper revealed sexual orientation of plaintiff who thwarted an assassination attempt on President Ford, due to the newsworthiness of the item).

41. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (finding that the individual conduct of an unknown plaintiff was newsworthy in light of the subject of defendant's book); *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940) (holding that the press may violate the privacy of anyone who is voluntarily or involuntarily a public figure).

42. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128-29 (9th Cir. 1975):

The privilege to publicize newsworthy matters is included in the definition of the tort set out in Restatement (Second) of Torts § 652D (Tentative Draft No. 21, 1975). Liability may be imposed for an invasion of privacy only if "the matter publicized is of a kind which . . . is not of legitimate concern to the public." While the Restatement does not so emphasize, we are satis-

Individuals who refuse to do business with someone are exercising, within the common law tradition, their rights of freedom of association. Any decision to sanction the publication of this truthful information must find some special justification in keeping private the information that other individuals value in making their associational decisions. Within the traditional tort framework, one explanation is the importance of the rehabilitative ideal, which creates a kind of social statute of limitations on youthful misdeeds. This policy is expressed in the common practice of expunging youthful criminal offenses from state records, such that false information is, quite literally, distributed to prospective employers.⁴³ The basic claim is that all of us (well, nearly all of us) would regard ourselves as better off if we could keep certain classes of information about ourselves private, such as our youthful indiscretions, even if we were forced to renounce access to the same kind of true information about other individuals.

"Let sleeping dogs lie" becomes the dominant theme, but the constitutional uneasiness about this claim stems in large measure from lingering doubts about the asserted social consensus on this issue. Stated in its most general form, the trade-off hardly has the same dimensions for all types of information, and for the particular members of the public to whom it is disclosed. After all, the individual who marries or obtains a job by concealing past actions has committed a fraud against those people who would refuse to deal with her if they had known the truth. The rest of the world may well not care about the past, but the spouse or employer cares a great deal. That person feels betrayed and duped, not solely because of the past actions, but because of the continuing, present efforts at concealment: It is not beyond the pale of reason to say, "I could have forgiven the youthful misconduct, but I cannot forgive the cover-up of today."

Yet the topic resists any form of universalization, because of a strong if inchoate social sense that the prohibition against some disclosures *do* fit nicely into the model of mutual renunciation after all. *Cox Broadcasting Corp. v. Cohn*,⁴⁴ which held that the press had a First Amendment right to publish the name of a seventeen-year-old rape victim, draws an uneasy response because the claim of a rape victim (who has done nothing wrong) to keep that matter private resonates well with most of the public (those who understand her reluctance to relive that event daily when it is examined in great detail in the newspapers). Today newspapers commonly respect the

fied that this provision is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law.

43. See, e.g., 705 ILL. COMP. STAT. ANN. 405/5-915 (West, WESTLAW through 1999 Sess.) (Illinois statute governing the expungement of law enforcement and juvenile court records). For an article criticizing the practice, see T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287 (1988).

44. 420 U.S. 469 (1975).

victim's right to keep her identity private unless she waives it, even if the matter itself is one of public record.⁴⁵ The public that wants to receive certain kinds of information is actually offended once it is provided. But one might not have the same view about former criminals, for whom the added disclosure about past wrongs amounts to an effective additional social deterrent against wrongdoing that incurs none of the heavy costs of running the criminal justice system. Therefore, in dealing with the publication of information, everyone is sensitive to the different types of private information that people seek to protect. It is no sign of weakness that it is necessary to disaggregate the class of truthful communications in order to sift out those left better unsaid. It is the sense of variation within this class that makes Justice White's inflexible First Amendment analysis in *Cox* so uncomfortable. The added complexity resulting from a social rule that keeps the names of rape victims out of the paper without their consent seems very small. The class is sharply defined and the prohibition detracts little from any larger social discussion of the issue, which is why most newspapers, rightly fearing a reader backlash, refuse to publish this information until (or perhaps even when) it becomes common knowledge.

III. COMMON LAW JUSTIFICATIONS FOR PUBLISHING WRONGLY OBTAINED INFORMATION

The case for publication damages, related to the publication of true speech, becomes much more persuasive when the information was obtained by illegal means. Here the basic patterns are easy enough to state. One class of cases, including *Food Lion*, arises when the defendant sends its employees to obtain true information about the plaintiff. Rifling through the confidential files of other organizations usually involves a number of actions that fall, alone or in combination, squarely under the libertarian prohibitions against force or fraud. Sometimes the transaction involves trespass to land and to chattels; other times it involves the torts of fraud and conversion. This is to be expected when the defendant or its agent sneaks onto the premises of another in the dead of night, or assumes false identities and roles, in order to gain access to the papers and materials that the defendant later broadcasts. Alternatively, a defendant may breach a personal obligation by disclosing to the public sensitive information that he received in confidence. No longer is it necessary to imagine, as in cases involving the disclosure of embarrassing past events, some hypothetical bargain in which all people mutually re-

45. See Deborah W. Denno, *Symposium: The Privacy Rights of Rape Victims in the Media and the Law: Perspectives on Disclosing Rape Victims' Names*, 61 *FORDHAM L. REV.* 1113 (1993) (noting the dominant practice not to disclose names). See also Michelle Johnson, *Of Public Interest: How Courts Handle Rape Victims' Privacy Suits*, 4 *COMM. L. & POL'Y* 201 (1999) (noting that some newspapers continue to publish victims' names).

nounce their rights to receive true information about others in exchange for increased personal privacy. Here the illegal actions of the defendant are established under the oldest and least controversial principles of deliberate fraud, deliberate trespass, and deliberate breach of confidence, or with the publication of information received *with notice* of its illegal acquisition. The question then arises: What kinds of justifications for these actions can the defendant put forward, either at common law or under the Constitution, to excuse this behavior?

A. Cognizable Harm

The first line of defense speaks to the question of cognizable harm, by holding that the common law of trespass is not really designed to protect against future publication damages, but only against the usual forms of physical destruction and personal unease brought about by defendant's trespass. This point was stressed by Chief Judge Posner in *Desnick v. American Broadcasting Cos., Inc.*,⁴⁶ a case involving an exposé by ABC's *PrimeTime Live* covering the shoddy medical practices of the plaintiff's eye clinics. But the point seems odd because the tort of trespass is designed to protect the owner's interest in the exclusive possession of his own land. One reason to exclude an individual from property is to preserve the sense of privacy from prying eyes that most individuals want. The use of a hidden camera by a guest would be regarded as a serious offense even if the candid photographer only showed the pictures to a close circle of friends. Publication to the world makes the situation only worse. Both sets of damages should be seen as parasitic on the original tort.⁴⁷ It seems therefore wholly unsatisfactory to exclude publication damages from the ordinary tort of trespass if it could be established without question that the plaintiff would exclude the defendant from entering the property if she had known the purpose of his visit.

Perhaps the ideas in this section can gain some coherence by an appeal to the slippery ideal of reasonable expectations that continues to play so large a role in the law of privacy. In the ordinary context of employment, it is com-

46. 44 F.3d 1345, 1352 (7th Cir. 1995). "There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves)." The offices were not open to anyone expressing a desire for ophthalmic services while concealing their intention to broadcast scandal if they could find it.

47. See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 466-70 (1906). The use of parasitic damages has been applied to allow for emotional distress that follows from a trespass. See generally *Bouillon v. Laclede Gaslight Co.*, 129 S.W. 401, 402 (Mo. App. 1910) (holding that employee of gas company was liable for damages resulting from plaintiff's miscarriage after he frightened her by trespassing on her premises).

monplace for individuals to talk about their boss and each other within the workplace and beyond it. But it is equally clear that the same social norms that tolerate this extensive chit-chat frown mightily on the possibility that workers would use surreptitious means to videotape the activities of their fellow workers. It is, therefore, not surprising, that *Desnick* has been attacked for taking the uncompromising (and untenable) line that holds that the common law of trespass is not meant to offer any protection against invasions of privacy, as these invasions are commonly understood.

Sanders v. American Broadcasting Co., Inc.,⁴⁸ involved yet another *PrimeTime Live* Broadcast in which an ABC employee used false pretense to obtain work as an employee of a telepsychic company, allowing her to secretly videotape her conversations with plaintiff, a co-employee also working as a telepsychic. Judge Werdegarr was prepared to protect the privacy interest by drawing a line on how plaintiff's behavior was covered. Routine comments and observation were allowable, as they have always been. But from that humdrum premise, it hardly follows that videotaping and broadcast could be undertaken as of right. Rather, Judge Werdegarr explicitly rejected the notion that privacy had a binary, all-or-nothing characteristic, and concluded that "in the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion." Accordingly, "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation."⁴⁹ Given that sensible partition of the social space, *Desnick* was first frowned on and then distinguished on the ground that *Sanders* was concerned "with interactions between coworkers rather than between a proprietor and a customer."⁵⁰ But that line is thin. If the ordinary patient videotaped her session with her physician and broadcast it live on television, there would be hell to pay, even if the broadcast disclosed no physician wrongdoing. The means of invasion matter in ways that the nature of the relationship do not. The short and simple truth is that the ordinary sense of right and wrong sees a hard and fast line between what is seen and reported and what is seen and recorded. The law should follow that instinct. The hard question here is not whether the plaintiff has an interest that the law of trespass or privacy should protect.

48. 978 P.2d 67 (Cal. 1999).

49. *Id.* at 77.

50. *Id.*

She does. The hard question is what interest can be placed on the other side of the balance.

B. *Justification of Publication Damages*

Closely allied with the cognizable harm defense is the notion that the fraud could fall into the class of justified trespass or fraud. That class is not empty and probably includes certain situations, for example, where the defendant does not reveal that he plans to build a manufacturing plant on the farmland that he purchases.⁵¹ Posner uses different examples to make the point in *Desnick*:

Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent—the restaurant critic for example might point by way of analogy to the use of the “fair use” defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.⁵²

Yet all of these examples are surely distinguishable from the issue of publication damages that they are meant to bolster. The restaurant critic operates with a very different game plan than the investigative reporter. Only the latter is consumed by selection bias. He enters multiple premises under false pretenses, but the only information he will publish is that known to be harmful to the plaintiff. That information, moreover, will be published in a form calculated to score a knockout blow. Any story that vindicates the plaintiff's practices ends up on the cutting room floor. The plaintiff, therefore, wants to exclude this party because her expected utility from his entry is always negative.

Not so with the restaurant critic. If the critic's entry were made with the knowing consent of the owner, a favorable story could be perceived by the

51. See *Guaranty Safe Deposit & Trust Co. v. Liebold*, 56 A. 951 (Pa. 1904). For a discussion of justified fraud, see EPSTEIN, *TORTS*, *supra* note 17, at 558.

52. *Desnick v. American Broad. Cos., Inc.*, 44 F.3d 1345, 1351 (7th Cir. 1995).

public as though the two parties were in cahoots, thereby diminishing its value to the restaurant and the readers of the published review. The artificial separation between parties is necessary to ensure impartiality, and the restaurant is protected in part because the reviewer knows that his readers want an accurate account. Favorable accounts do not get left systematically on the cutting room floor; therefore, the anticipated return to a well-run operation is positive. Of course mistakes, sometimes deliberate, will be made, but once again countermeasures are available. Multiple reviews are typically written so that the extremes are buffered. Reviewers are typically identified by code names so that the readers can correct for implicit biases. Protests to the magazine or newspaper could lead to a second anonymous review. This redundancy operates in a fashion similar to that found with qualified privileges in defamation. They protect both restaurants and their customers against undeserved outliers in either direction. Bad restaurants could still suffer from candid reviews but they should be allowed to post conspicuous signs saying "no reviewers allowed." However, that fact alone, which could be reported, is enough to condemn all but the most well-established of restaurants. The restaurant critic and the investigative reporter generate such different payoffs as to fall into different worlds. The former promises an expectation of joint gain, the latter does not.

The case of white lies is even easier to distinguish. These are practiced by all against all, and help ease ordinary interactions. Their motive, moreover, is generally defensive: to avoid confrontation. It is not exploitative, for its practitioner has no hope of benefiting financially from his own deliberate misinformation. The practice functions as social glue on a live-and-let-live basis that again works to the long-term advantage of all persons, which is why it attracts so little moral condemnation.

Finally, the case of hard bargaining with false statements again involves the usual conventions of social life. Each side can practice this deception against the other, and it is known to be part of bargaining, in the same way that bluffing is part of poker. The mere fact that stratagems of this sort are practiced everyday, while only the hearty engage in the elaborate frauds of *PrimeTime Live*, shows just how far apart these worlds are. *PrimeTime Live* will resort to a big league fraud to secure entry because of what it hopes to gain, not by taking money out of the plaintiff's pocket, but by pocketing the advertisement revenues generated off the backs of its victims. Hardball, yes; hard bargaining, no.

C. *Remoteness of Damages*

Another line of defense at common law invokes the doctrine of remoteness of damages to insulate the defendant from liability. Just this approach was taken by the District Court in *Food Lion*, where Judge Tilley wrote as follows:

Food Lion's lost sales and profits were the direct result of diminished consumer confidence in the store. While these losses occurred after the *Prime Time Live* broadcast, the broadcast merely provided a forum for the public to learn of activities which had taken place in Food Lion stores. Stated another way, tortious activities may have enabled access to store areas in which the public was not allowed and the consequent opportunity to film people, equipment and events from a perspective not available to the ordinary shopper, but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence.⁵³

This statement flies in the face of every single theory of proximate cause in the history of tort law. The earliest and narrowest theory of proximate cause is the "last wrongdoer" theory in which liability attaches to the last wrongful act in the chain of events that created and produced the harm.⁵⁴ In this case, two possible candidates vie for that honor: The first is the improper food handling practices of Food Lion, and the second is the publication of that information after it has been obtained by deception and deliberate trespass. By the last wrongdoer theory, the earlier conduct of Food Lion drops out of the equation and the full harm is attributable to the publication of information deceptively acquired.

This last wrongdoer theory has been universally rejected in modern cases, all of which recognize that successive wrongful acts which in combination bring about some harm each count as a proximate cause of the injury in question, so long as each counts as a "substantial factor" in bringing about the harm.⁵⁵ ABC's conduct counts as a proximate cause of the harm precisely because its conduct "enabled" the public to gain access to the private areas in Food Lion's business. On the orthodox theory, both Food Lion and ABC have sufficient causal connections to the harm in question, so that the unresolved issue goes to the apportionment of harm between them. On this score, the standard theory gives substantial weight to the deliberate wrongs

53. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 962-63 (M.D.N.C. 1997).

54. For the last wrongdoer test, see THOMAS BEVEN, *NEGLIGENCE IN LAW* 44-50 (3d ed. 1908).

55. RESTATEMENT (SECOND) OF TORTS § 431 (1977). To give but one example, in *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991), it was held clear error to find for the defendant who slept on the beach while children in his charge misbehaved on a raft, ultimately leading to the death of plaintiff's son. The misconduct of the boys on the raft did not sever the causal connection to the prior negligence.

of both parties. In this case, that might not prove decisive because, while ABC's fraud was systematic and contrived, Food Lion's practices could be treated as deliberate as well. But even here there is a further difference that might be of some consequence. No evidence presented indicates that a higher-up in Food Lion authorized any improper food handling practices. The producers of *PrimeTime Live* themselves authorized the incursion. The apportionment issues, as always, remain murky. That said, no causal doctrine could possibly treat the collection of the information and its subsequent publication as causally unrelated to Food Lion's loss. Given this background, it is perhaps not surprising that the Fourth Circuit, in upholding ABC's position, did not discuss the tort question but exclusively relied on the First Amendment doctrines of freedom of speech to bar the recovery of publication damages.

IV. FIRST AMENDMENT EXCEPTIONALISM IN ACTION

In order to assess the soundness of the constitutional issues, it is necessary to review the two rival accounts of the First Amendment outlined above. The first of these, it will be recalled, does not offer the press any special immunization from tort liability, but only insists that special rules could not be applied to the prejudice of speech. The second view is that the First Amendment requires courts to craft special doctrines for publication damages. The former view applies to the press laws of general applicability, both by statute and common law, just as they apply to nonmedia defendants. The second view creates a First Amendment enclave for the benefit of the press.

The most important Supreme Court case to speak to this issue is *Cohen v. Cowles Media Co.*⁵⁶ The plaintiff, Cohen, worked for the Republican gubernatorial candidate in the 1982 Minnesota election. He supplied to the *Minneapolis Star and Tribune* information to the effect that the Democratic gubernatorial candidate had previously faced criminal charges on two separate occasions. In exchange for the information, the *Star and Tribune* promised him source confidentiality. In violation of its confidentiality agreement, the editorial board of the paper subsequently decided to reveal the plaintiff as the source of its stories. On publication of the information, Cohen was fired by his employer. He thereupon sued the defendant on a promissory estoppel theory, which was treated as valid as a matter of state law. The question before the Supreme Court was whether the First Amendment protected the defendant from the liability associated with its breach of contract and the plaintiff's dismissal. The argument in favor of that position is that the in-

56. 501 U.S. 663 (1991).

formation revealed was true and its publication contributed to the public debate. Nonetheless that contention was explicitly rejected by Justice White, who adhered to his basic orientation in *Gertz*, when he previously opposed refashioning the common law of libel to meet ostensible constitutional law concerns.

In reaching that position, Justice White first rejected the contention that this breach of contract situation was governed by earlier cases that countenanced the publication of truthful information *lawfully obtained*. Rather, he held that the present case was governed "by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."⁵⁷ He then mentioned a wide range of other restrictions on the press that stemmed from the application of the privacy law itself,⁵⁸ the National Labor Relations Act,⁵⁹ and the Fair Labor Standards Act.⁶⁰ He also noted that the press enjoyed no exemption from the antitrust laws,⁶¹ nor from the payment of nondiscriminatory taxes.⁶² The clear implication of this position was that the press could not wiggle its way out of the general law of contract either.

Cohen is unsatisfactory insofar as it depends on the unanalyzed term "incidental" to discriminate between permissible and impermissible burdens on speech. Justice White found the list of incidental restrictions coherent, given that they had all passed muster in the modern regulatory state. His basic intellectual orientation thus brings together strange bedfellows in the class of generally applicable laws. But his approach does not jell as a matter of general constitutional theory because the rationales behind the National Labor Relations Act⁶³ and the Fair Labor Standards Act⁶⁴ are flatly antithetical to those behind the privacy laws, the antitrust laws, or the basic norms of taxation. The two labor statutes are designed consciously to override the common law rules that allow for freedom of contract between employer and employee in competitive labor markets, first by preventing the choice of contracting partners and then by limiting the terms on which these contracts

57. *Id.* at 669.

58. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). This opinion, also written by Justice White, concerned the breach of privacy that now goes on in the name of "right of publicity."

59. See *Associated Press v. NLRB*, 301 U.S. 103 (1937).

60. See *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946).

61. See *Associated Press v. United States*, 326 U.S. 1 (1945).

62. Discriminatory taxes, however, may violate the First Amendment. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

63. 29 U.S.C. §§ 151-69 (1935).

64. 29 U.S.C. §§ 201-19 (1938).

can be made. As an unreconstructed defender of *Lochner v. New York*,⁶⁵ I have no question that this limitation on employer choice constitutes a taking of private property, a limitation on freedom of contract, or both combined, which only passes constitutional muster today because of the Court's dubious but systematic embrace of the rational basis test.⁶⁶

A far higher standard of scrutiny is needed under current law, however, to justify restrictions on freedom of speech than is needed to justify restraints on freedom of contract. A statute that limits management's control over its workforce will invite union organizations whose state-sanctioned economic power can impair the press's flexibility to publish what it wants when it wants to. For example, strikes disrupt publication and union opposition can delay technical innovation that promises better publication at lower cost. The net impact of the statutory restriction imposes a substantial inhibition on speech without any showing that the inhibition serves any legitimate public end.

The use of the word "incidental" thus imports something close to a rational basis test into those regulations that lie at the intersection of speech and economic regulation. That approach is blocked by applying a unified standard of review to both forms of regulation. Once that barrier is erased, it then becomes child's play to declare these labor laws unconstitutional as applied to the press, given that they are (in theory) unconstitutional to all industrial enterprises. But lest one lapse into constitutional sentimentalism, rules of this sort, as applied to the press, should be unconstitutional under *current* First Amendment standards, which impose a higher level of scrutiny on the narrower category of speech-related cases. It seems quite idle to say that restrictions on the labor inputs toward speech do not matter when direct restrictions on publication do.

The application of this revitalized standard of protection for property and contract plays out quite differently for the antitrust laws and nondiscriminatory (i.e., flat) taxes. To be sure, neither set of rules can be justified on the strength of the basic common law prohibition against force and fraud. But both can be defended as deviations from the common law rules that work to the long-run advantage of all persons taken together, the former by eliminating the dangers of monopoly and the latter for the funding of core governmental functions.⁶⁷ It should not be forgotten that the same Supreme

65. 198 U.S. 45 (1905) (striking down a maximum hours law on freedom of contract grounds). Its progeny include *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal law which made it a crime to discharge an employee because of his union membership), and *Coppage v. Kansas*, 236 U.S. 1 (1915).

66. See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

67. See EPSTEIN, SIMPLE RULES, *supra* note 33, at 123-24, 138-39.

Court that struck down maximum-hours legislation applied the antitrust laws to territorial market divisions.⁶⁸ Indeed Justice White should have gone further to note that the decision in *Minneapolis Star & Tribune* not only validated the flat use tax on inputs into newspapers, but it also *invalidated* a use tax on the cost of paper and ink products consumed in the production of a publication, here with an exemption for purchases below an annual \$100,000 figure.⁶⁹ The argument against the selective tax on the inputs for newspapers is for reasons that are equally valid for taxes of general applicability.⁷⁰ Any revenue target can be reached through a flat tax, so there is no sensible justification for skewing the burden on one class of activities relative to another.⁷¹ Matters only became worse for the exemption that favored small newspapers over large ones.⁷² Differential taxation subsidizes some speakers at the expense of others. Why take that risk at all? Overall improvements through regulation are permissible under the First Amendment. Hence the press should be required to pay the same real estate taxes for public services as everyone else. But skewed outcomes from disproportionate taxes fall into the wholly different class of suspect regulation.

The upshot is that *Cohen* is incorrect insofar as it treats all laws of general application as though they were cut from a common cloth, when both in theory and practice they are not. But the revised version of the *Cohen* test upholds against First Amendment challenge all laws of general applicability that comply with the common law rules of property, contract, and tort. It also upholds all rules, whether at common law or by statute, that bring about some general social improvement from the common law baselines.⁷³ Who could ask for more? That revised standard removes the unfortunate need to rely on the term "incidental" to determine which general rules apply and which do not. But for these purposes, it is sufficient to note that any rules that result in the enforcement of basic contractual obligations fall clearly on

68. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228-229 (1899) (writing for the Court, Justice Peckham noted that the idea of "liberty" did not reach these contracts in restraint of trade). Peckham, of course, wrote *Lochner*.

69. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

70. "When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.* at 585.

71. The raising of revenue "cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." *Id.* at 586 (citing *United States v. Lee*, 455 U.S. 252 (1982)).

72. See *Minneapolis Star*, 460 U.S. at 591.

73. For development of this theme, see EPSTEIN, *SIMPLE RULES*, *supra* note 33, at 128-48.

the common law side of the line, so that *Cohen* is covered by a class of allowable, generally applicable laws that is narrower than *Cohen* itself contemplates.

All this, however, is not to say that the plaintiff's cause of action in *Cohen* is well conceived. But is it? Most obviously, the plaintiff acted in breach of his duty of loyalty to his own employer by bringing the information about his employer's opponent to the attention of the press. Even if the plaintiff had negotiated a term contract with his employer and the story was never published, it seems likely that he still could have been dismissed for cause. At this point, it looks as though the plaintiff and defendant were in cahoots in some illegal, or at least improper, arrangement. If that is the case, then perhaps the plaintiff's suit should be dismissed under the familiar rule that no person has a cause of action when he participates on even terms in an illegal transaction. But in at least some situations, a plaintiff similar to *Cohen* could have delivered information to the press that did not violate his own prior obligations. If the publication of his name could result in the loss of employment or other forms of harm for wholly independent reasons, then the media should be held responsible. So if we put the particulars of this case aside, *Cohen*, rightly understood, now stands for the proposition that so long as a plaintiff has a valid cause of action for breach of contract, then the First Amendment does not bar his action for damages.

The early case law contains some statements that point in this direction. In *Dietemann v. Time, Inc.*,⁷⁴ the defendants were two reporters who, in conjunction with the district attorney, hatched a scheme whereby they would go to the plaintiff's home office, armed with secret cameras and microphones, to pose as patients seeking the plaintiff's odd treatments. When the pictures and verbal accounts were published in *Life* magazine, plaintiff recovered \$1,000 in damages. The Court's decision was brief and to the point: "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."⁷⁵

74. 449 F.2d 245 (9th Cir. 1971). For other cases pointing the same way, see *Le Mistral, Inc. v. Columbia Broad. Sys.*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978) (rejecting First Amendment defense to publication damages). The case is arguably distinguishable on the ground that this was a physical trespass, entering with "cameras rolling," and thus not a case of entry by fraud. See also *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (allowing publication damages that flowed from reporter's trespass); *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832 (Kan. App. 2d 1979) (recognizing the claim in principle, but not allowed in fact).

75. *Dietemann*, 449 F.2d at 249.

Dietemann was ignored in *Food Lion*, even though it foreshadowed the contours of the First Amendment law under *Cohen*. In *Food Lion*, Judge Michael was prepared to allow Food Lion to recover its \$2 in damages for the nominal trespass and fraud.⁷⁶ The key question then is whether the *Cohen* principle (even when suitably limited, as noted above) required the recognition of publication damages of the sort that were allowed on a far smaller scale in *Dietemann*.

Under *Cohen*, so long as the published information was unlawfully obtained, an action should lie for the full extent of Food Lion's economic loss. Nonetheless, Judge Michael sidestepped *Cohen* by invoking the exceptionalist view of the First Amendment embodied in *New York Times*. His basic contention was that Food Lion did not sue for defamation and thus conceded the truth of the information that was published in the particular case. He then concluded that its suit was an effort to bypass *New York Times* and "to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*."⁷⁷ *Hustler* involved a suit in which the defendant portrayed the plaintiff engaged in fornication with his mother in an outhouse, a

76. Judge Michael also struck down the punitive damage award against ABC on the ground that it rested on a claim for fraud that was invalid under state law. His position was that so long as the two individual ABC employees, Dale and Barnett, were employed by Food Lion under a contract at will, no action for fraud would lie because Food Lion could always dismiss them. "[U]nder the at-will doctrine it is unreasonable for either the employer or the employee to rely on any assumptions about the duration of employment." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 513 (4th Cir. 1999). His position completely misunderstands the operation of the at-will contract, which only holds that an employer is free to fire a worker for good reason, bad reason, or no reason at all, and which gives the employee the same right to quit. But so long as there is a risk of interim harm while the employment lasts, then the employer should be entitled to have true information before making the initial decision on whether to fire or hire, given the costs of entering into any losing contract. See *id.* at 525-56 (Niemeyer, J., dissenting). The point gained salience because Food Lion claimed damages for the costs of training the two ABC workers for jobs that they did not intend to keep. Judge Michael held that these costs were not true losses because other workers may quit at will even when they originally intended to stay. In so holding he confused the odds *ex ante* with the results *ex post*. No employer would hire a worker who is certain to quit, even though he would hire one (treachery to one side) who might quit. In the first case, the expected value of the contract to the employer is always negative, so he will always reject it. In the second case, the decision to hire depends on the cost of training, the probability of worker retention once training is given, and the gains from employment for the duration of the employment contract. Clearly, it makes sense to hire some workers under this scenario, even under a contract at will. Judge Michael's blunder proved important in the case because the punitive damages attached to the wrongful hiring, not the wrongful publication. When the fraud count disappeared, the punitive damages disappeared as well. As a general theory, the correct result would have been to ignore the training costs, and the ridiculous multiple for punitive damages, while recognizing publication damages, for which punitive damages seem appropriate.

77. *Food Lion*, 194 F.3d at 522 (discussing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)).

portrayal that it, and everyone else, knew to be false.⁷⁸ The Court refused (incorrectly, in my view) to treat this as a defamation case because no one was deceived by the falsity. The correct test under defamation, however, is only whether the false statement exposes the plaintiff to hatred, contempt, and ridicule, which this one surely does.⁷⁹ It then held that the failed action for defamation could not be rehabilitated as an action for intentional infliction of emotional distress in order to bypass the actual malice requirement of *New York Times*. It relied heavily on the dubious slippery slope argument that a successful suit against *Hustler* would invite similar suits against political cartoonists such as Thomas Nast.

The difficulties with both *New York Times* and *Hustler* are beside the point here, for in neither case could the plaintiff show the illegal collection of the information that was subsequently published. Nonetheless, Judge Michael held that *Cohen* did not apply because Cohen was:

not seeking damages for injury to his reputation or his state of mind. He sought damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler* . . . where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.⁸⁰

It is just at this juncture that the internal confusions in the *Cohen* decision burst out. First, the damages sought in *Cohen* were in fact publication damages, even if they were not publication damages that resulted from a libel. To see why this is the case, note that all damages in defamation cases necessarily result from publication and that these are classified as either general or special damages.⁸¹ In the former, the plaintiff does not specify the individuals who were deterred from doing business with her in consequence of the defendant's libel, but instead relies on sensible inferences that unfavorable information about the plaintiff will in fact deter unidentified individuals from doing business with her.⁸² The case resembles one for the loss

78. See *Hustler*, 485 U.S. at 46. Instead, it treated the case as though it were one for intentional infliction of emotional distress, which was then subject to a broad First Amendment privilege that swallowed the tort with respect to cruel caricatures of public officials and public figures. Yet this diversion does not explain why *Hustler* was *not* treated as a defamation case.

79. See *Burton v. Crowell Publ'g Co.*, 82 F.2d 154 (2d Cir. 1936), where Judge Learned Hand allowed a defamation action for an inadvertent caricature of plaintiff that its audience knew to be false.

80. *Food Lion*, 194 F.3d at 523 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)).

81. For a discussion of general and special damages, see EPSTEIN, TORTS, *supra* note 17, § 18.10.

82. For an excellent example, see *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*, 280 N.W. 879 (N.D. 1938) (holding that plaintiff had a cause of action for defamation when defendant's rating system harmed plaintiff by causing him to lose business from unidentified nonrepeat customers).

of goodwill (itself a form of reputation) where the specific customer contacts are not identified. In many cases, the plaintiff in defamation actions is reduced to relying on these general damages because she cannot locate the individual third parties whose course of conduct has changed in response to the adverse statements about her. But the entire chain of causation does not depend on the false nature of the statement—only on the fact that its publication is harmful to the plaintiff by inducing third parties to go elsewhere. The same set of inferences on causation could also be raised in an invasion of privacy case such as *Dietemann* or *Food Lion*. It is not important to identify which persons stop being patrons of the plaintiff. It is enough to know that some persons were so put off.

Nonetheless a plaintiff's right to collect general damages for reputational harms does not preclude her from establishing special damages if she can show the linkage between the defendant's defamatory statement to its intended target and the plaintiff.⁸³ The simplest illustration is where the defamatory statement of the defendant causes a husband to abandon his wife. The more specific line of proof does not, however, convert these publication damages into something else, for clearly the loss of a specific association (such as Cohen's loss of his job) was the direct result of the influence of the publication on a single person. It is therefore wrong to say that Cohen did not seek damages for loss of reputation that flowed from defendant's breach of contract. The breach of contract was the publication of his name, which led his employer to dismiss him. *Cohen* therefore is not distinguishable from *New York Times* on the ground that the latter involves publication damages while the former does not. It is distinguishable only for the reasons that make the publication wrongful. The falsity of the statement triggers the action in defamation; the trespass or the breach of contract triggers it in *Cohen*, *Dietemann*, and *Food Lion*. Of these two types of cases, the action for defamation is the easier to allow because the publication of false information does nothing to advance the overall level of public debate. The action for the publication of truthful information, wrongfully obtained, is more confused because the social gain from publication has to be offset against the private wrong. The question in cases like *Food Lion* is how is that offset best done.

83. The proof of causation can rely on a combination of general presumptions that lost volume is attributable to defendant's conduct or specific evidence of lost gains. See *Bishop v. New York Times Co.*, 135 N.E. 845 (N.Y. 1922). All forms of general evidence are of course subject to rebuttal by showing how other causes could account for the loss in profits. See, e.g., *Jones v. Western & S. Life Ins. Co.*, 91 F.3d 1032, 1036 (7th Cir. 1996) (rejecting lost income claim based on plaintiff's testimony that he could have had a high paying job); *Touma v. St. Mary's Bank*, 712 A.2d 619, 622 (N.H. 1998) (rejecting award of special damages where decline in sales preceded defendant's erroneous foreclosure notice).

As noted earlier, within the law, truth and falsity create a fundamental divide similar to that between aggression and consent. But the clarity of the line in polar cases does nothing to eliminate the possibility of individual cases falling close to the line. In the area of aggression, the defense of consent is often highly contested, most notably in cases of date or acquaintance rape. An analogous difficulty arises in cases like *Food Lion*. As noted earlier, the investigative reporter will kill any story that reflects well on its target. It should therefore come as no surprise that this reporter will select and cull information in a way that places its target in the most unfavorable light. The photographs chosen to be published can catch the target with jowls sagging in mid-sentence; they can be shot at odd angles; they can be cropped so as to show only parts of the face. Bits of dialogue can be taken out of context. Single instances that are not representative of the whole can be given undue prominence in the overall setting.

This selective use of evidence is something that is rightly frowned on in serious social science research. Suppose that an investigator who wants to establish that rent control raises (or lowers) local rents runs twenty different regressions, of which only one supports the desired conclusion. The publication of that one regression counts as a true statement, but accepted social science procedures require, at a minimum, a disclosure of the number of the regressions run that failed to establish the desired correlation. To state the point in its most obvious form, the question of truth is not simply a matter of whether certain isolated statements are true. The question is whether the truth counts as a fair and accurate abridgment of the entire record. The law of defamation has long been sensitive to this position, for the privilege of record libel is not granted to persons who publish snippets of the truth. The privilege is allowed only "if the report is accurate and complete or a fair abridgement of the occurrence reported."⁸⁴ The same concern arises in this context and thus serves to distinguish *Food Lion* from *Dietemann* in ways that make the former a more compelling case for relief. In the latter case, there was no reason to think that the individual photographs and dialogues of the plaintiff were not representative of his standard practices. But in *Food Lion*, the bits of footage, represented as true depictions of the events that they recorded, were not shown in any way to be representative of the practices of Food Lion as a whole. The reporters may have goaded the employees into participating in these practices. There was no effort to indicate the frequency

84. RESTATEMENT (SECOND) OF TORTS § 611 (1977) (concerning publication of a defamatory matter in an official report or public meeting). Note that the privilege does not attach to reports of closed meetings even if these are fair and accurate. The basic logic is that here the public is not entitled to a report of what is going on in the first place, which thus precludes the publication of an accurate report of information that the defendant knows to be false.

of these occurrences at other Food Lion outlets, or to ask the question of whether the same rate of failure took place at the stores of any of its competitors. Yet the entire social justification for the exposé is to provide information that would allow consumers to make better-informed decisions about the relative costs and benefits of shopping at different stores. Clearly this publication fails that particular purpose.

At this point, the question arises whether the literal truth of any single episode should count as "true" for purposes of the law of defamation and privacy. If not, then in an important sense the exaggerated forms of reporting are more false than true, so that the boundary between defamation and invasion of privacy is shifted in the wrong direction. As that is the case, one could argue that all investigative reporting should be regarded as presumptively false (given the biased approach to its collection and dissemination) so that, whatever the initial burden of production,⁸⁵ the statements should be treated as though they were false unless the defendant can show, by analogy to the record libel privilege, that they constituted a fair and accurate abridgment of the true state of affairs.

It seems a virtual certainty that First Amendment exceptionalism will be sufficient to block the courts from adopting this more expansive reading of defamation. The change in position would bring within the net of defamation many slanted stories that were collected by *lawful* means as well (although these will, on average, prove far less potent). But for these purposes, it is instructive to note how the downgrading of the truth requirement plays into the larger debate over the recovery of publication damages for true statements tortiously obtained. In light of the evident selection bias, truth is no longer a unitary concept. If the most that the defendant can claim for the statements published is a literal but consciously nonrepresentative truth, then the size of the public benefit from the publication of "truthful" statements shrinks or becomes negative. Stated otherwise, the great source of difficulty with publication damages was whether the benefit to the public justified or excused the large private harms inflicted on the plaintiff. But if the public benefits shrink or evaporate, then that tension is no longer there. What is so distressing about the current literalist view of truth is that it compounds the difficulties in this area, so that the question of representativeness, which is critical to the public value of the information published, is securely hidden from public view. Too many cases of what should be called defamation are now improperly reclassified as cases of invasion of privacy.

85. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (placing the burden of proving falsehood on the plaintiff).

V. INJUNCTIVE RELIEF AND PRIOR RESTRAINT

Thus far I have examined the question of whether or not publication damages should be recovered for the publication of truthful information (of all sorts) that was illegally obtained. But it is equally important to decide what other remedies are available to the injured plaintiff to deal with information that has been illegally obtained. Here again we apply the basic insight of *Cohen*, that the press does not receive any special immunity with regard to its own tortious conduct, to the question of what remedies should be allowed to plaintiffs for admitted wrongs. The choice of remedies was not on the table in *Cohen* because the publication of the confidential information had already taken place, precluding injunctive relief. But would injunctive relief be appropriate if *Cohen* had gotten wind, before publication, of the *Star and Tribune's* willingness to spill the beans? Here again the best analytical approach is to ignore the First Amendment entirely and to ask whether injunctive relief is appropriate for breach of contract. The case looks strong. The defendant's breach is surely deliberate, and its consequences hold out serious danger to the plaintiff.⁸⁶ Not only is his position with his current employer compromised, but his ability to obtain another position is placed in jeopardy as well. The difficulty in calculating these damages should count as a reason to allow the stronger form of equitable relief.

Finally, one could argue that injunctive relief actually strengthens the ability of the press to acquire information in the long-run because it makes its promises of source confidentiality credible. That credibility cannot be presumed if the press can break its promises with impunity.⁸⁷ Therefore, the release of source information works against the systematic collection and dissemination of information in the long-run. By this analysis, a prior restraint on speech *by contract* seems to make good sense at common law, and is sharply distinguishable from the case of prior restraint referred to by Blackstone—to wit, state censorship, *without* prior consent by the media defendant. On this point of view, at least a respectable case can be made for the proposition that the consistency between the common law and the First Amendment covers not only the basic delineation of rights, but also the selection of remedy. Clearly the source of constraint should matter in any overall analysis of the case; why then should it be ignored when the case is considered on constitutional grounds? The basic theory that treats the First

86. Here I put aside the question, broached above, about whether all relief should be denied because the plaintiff himself was in breach of loyalty to his own employer.

87. By way of comparison, see *Branzburg v. Hayes*, 408 U.S. 665 (1972), where Justice White, in an opinion that surely anticipates *Cohen*, takes the position that the First Amendment does not shield a reporter from giving grand jury testimony about information that he has acquired in confidence. So long as the Constitution does not protect "the average citizen" from testifying before the grand jury about evidence received in confidence, then it does not protect the press either. This position seems to make eminently good sense.

Amendment as a bulwark against the incursions of the New Deal state is the same theory that allows injunctive relief against the prospective publication of information in breach of contract.

The next question is the extent to which the refurbished logic of *Cohen* carries over to cases where the plaintiff seeks either damages or injunction for the publication of information acquired not under contract, but by trespass. As a matter of common law theory, the case for injunctive relief seems strong: The plaintiff was entitled to keep the defendant off his property in the first place. There is no doubt that the press could not obtain an order that allowed it to enter the plaintiff's premises, conditional on its willingness to pay some damages for its incursion. It could be kept out, and the information accordingly suppressed. Why does the situation now change when a defendant has acquired the information by wrongful means? In the case of evidence that the government seizes unlawfully and without a warrant, the exclusionary rule under the Fourth Amendment amounts to an injunction against the use of the information.⁸⁸ It is not the case that the government can use the evidence to convict the defendant so long as it is prepared to pay nominal damages for the trespass that it causes. The need to keep the state in line supplies the justification for giving the windfall to the guilty as well as the innocent plaintiff. Unless we wish to allow the defendant to gain some advantage by virtue of his prior trespass, then the only proper response is to allow the same injunctive relief after the information was seized as was available before its seizure. So if the plaintiff can keep the investigative reporters off its premises, then it can demand back, as it were, the fruits of the defendant's illegal search.

The ability to suppress the use of speech thus has the salutary effect of reducing the number of violations that take place in the first place. But it does not stop other forms of action needed to deter unlawful practices by plaintiffs. For example, the investigators can still interview people who have been on the plaintiff's premises so long as they are not subject to any obligation of confidentiality. Most importantly, the investigative reporters can turn over incriminating evidence to public authorities, who can then obtain search warrants on proof of probable cause to investigate the premises in question.⁸⁹ It is perhaps notable, therefore, that the exposé in *Food Lion* was not fol-

88. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (allowing suppression of evidence under the Fourth Amendment guarantee against unreasonable searches and seizures).

89. Nor should it be assumed that the presence of investigative reporters to some degree insulates public officials from ordinary liability. Just recently, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Supreme Court held that United States Marshals, although entitled to a qualified immunity, could be held responsible for violating the Fourth Amendment guarantees against unreasonable searches and seizures if they entered private premises with ride-along investigative reporters. None of the ostensible First Amendment-like privileges diminished the potential liability, including the need for good public relations and the need for accurate public reporting. Note that the reporters themselves could not be sued under the Fourth Amendment since they were private parties.

lowed by any public enforcement action against the company. This is evidence of the real magnitude of the harms (small) relative to those trumpeted by the press. And finally, it has to be known that the alleged wrongs of the company were really self-limiting: The sale of spoiled food could easily result in illness, whose publication then falls into the public domain. What gain is there to any firm from selling produce that reeks when opened? There is little to fear that the suppression of information illegally obtained will lead to widespread evasions of elementary health and safety standards.

VI. TRADE SECRETS

The issues of publication damages and injunctive relief also arise in connection with the defendant's broadcast of the plaintiff's trade secrets, such as happened most recently in the *Ford* case. Given all that has gone before, it appears that this issue is perfectly straightforward. Plaintiffs are not allowed to enjoin the publication of harmful statements when they are false: *A fortiori*, they should not be allowed to enjoin their publication when true. The proposition, if taken literally, is one of tremendous breadth, for it would allow the publication not only of wrongfully obtained business trade secrets, but also such sensitive personnel information as that contained in individual medical records. Under the broad definitions of newsworthiness, these records could easily count as matters of public concern. Although the discussion that follows is directed primarily towards industrial secrets, its implications cover these other areas with equal force. It would be a tragedy if the lawless action of isolated individuals could, on First Amendment grounds, be allowed to run roughshod over the complex contractual and statutory accommodations that are needed in this area.

A moment's reflection on this point reveals the stark contrast between the remedies sought in the trade secret cases and those sought in cases where the plaintiff seeks to enjoin the publication of disparaging information about its products or practices.⁹⁰ The basic logic of the common law of trade secrets recognizes that private parties invest extensive sums of money in certain information that loses its value when published to the world at large.⁹¹

90. The point was indeed noted by Judge Posner in *Desnick v. American Broad. Cos., Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995) ("And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets." (citing *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 178 (7th Cir. 1991))). Posner noted in *Rockwell* that "trade secret protection is an important part of intellectual property, a form of property that is of growing importance to the competitiveness of American industry. . . . The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property." *Id.* at 180.

91. For the general rationale for the protection of trade secrets, see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a (1993).

The protection of this form of intellectual property cannot take place through the patent system, which requires publication of the invention, making it known to all competitors. The inventors seek patent protection to preclude others from making or marketing the same product. Without the patent, their investment is at risk, for it is often child's play for a rival firm to discover the chemical composition of a potent drug, or to reverse engineer some valuable device. Since the value of these inventions lies in their sale to the public, no system of trade secrets could ever work to keep this information private. The patent system thus fills the gap and allows simultaneously for the public dissemination and the private production of the patented invention.

No one, however, is obliged to seek a patent; and for certain kinds of information (e.g., process patents), patenting carries serious risk to the patent holder, who may not be able to discover whether other firms have used its invention without authorization. A standard product may be made by any number of different processes; the defendant that publishes a process patent for a standard good would be hard-pressed to tell whether it has been used by a rival. Better, therefore, to keep the information private so that rivals will have to discover the same secrets in order to gain competitive parity. Trade secrets thus offer no protection against independent invention. But by keeping the information private in the first place, they allow a firm to profit from its investment when it is possible to market goods without disseminating information about the processes that allowed for their convenient, cheap, and safe manufacture. Trade secrets, moreover, are not confined to manufacturing processes, but cover any other sort of information (e.g., marketing strategies, customers lists) that give a firm a competitive edge on its rival.⁹²

In most cases the protection of trade secrets does not run a collision course with the First Amendment. The usual case of industrial espionage is *not* followed by widespread publication of the information so obtained. Rather, the thief usually wishes to keep its theft private so as to avoid detection by the owner of the trade secret and to prevent the dissemination of that trade secret to any *other* firms in the industry that have not developed or acquired it. Hence the widespread publication of a trade secret is, or at least has been, a relatively uncommon event. For example, The Restatement (Third) of Unfair Competition does not address the conflict between the protection of trade secrets by injunction and the First Amendment prohibition against prior restraints.⁹³

92. The standard definition of a trade secret is found in *id.* § 39 (1993): "A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."

93. See *id.* § 44 (detailing the elements, without explicit reference to the First Amendment).

Nonetheless that conflict is squarely raised in such cases as *Ford*,⁹⁴ in which the defendant published information over his website about undeniable trade secrets received from (what were claimed to be) anonymous sources. These trade secrets of Ford related to the quality of its engines, its strategies relating to fuel economy and emissions control, its powertrain advances, and its agenda for confidential meetings—all of which landed in the laps of its suppliers, dealers, and competitors. In some of these cases, the trade secrets related to matters subject to the regulatory supervision of EPA and other government agencies, and in other cases it related only to the business plans of the company. With respect to all these secrets, Ford's employment contracts flatly forbade the unauthorized dissemination of trade secrets, and Lane was well aware of the restrictions that bound his anonymous sources. He decided to publish the trade secrets on his website to retaliate against Ford after a dispute about Lane's right to attend certain Ford trade shows and to use either the Ford trade name or its Blue Oval trademark on his website. Lane's defense against an injunction rests on the strong First Amendment presumption against prior restraints, which runs headlong into the standard injunctive remedy available for trade secret violations.⁹⁵

The question is how best to think about these issues. Once again, the correct analytical approach does not attach special weight to First Amendment claims in the effort to establish the optimal adjustment between the competing interests. As between the two immediate parties to the dispute, the full set of efficiency arguments opts strongly for the protection of trade secrets, given their essential role in modern industry.⁹⁶ The protection of trade secrets goes back to the ancient insight that a system of property is necessary to make sure that those who sow shall also reap, lest there be no sowing at all.⁹⁷ With respect to tangible items, the exclusive possession of the thing is secured by the ordinary rules of trespass. But information has the distinctive attribute that it can be both retained and transferred at the same time (which is why the thief who takes trade secrets restores the documents containing them to their original place). The strong property-like protection given to these trade secrets—trade secrets count as private property protected under the Takings Clause⁹⁸—reflects the obvious judgment that these secrets

94. 67 F. Supp.2d 745 (E.D. Mich. 1999).

95. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 (1993).

96. See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that federal patent laws did not preempt state laws pertaining to trade secrets).

97. For judicial recognition of this point, see *International News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918) (observing that one who takes the fruits of another's labor endeavors to "reap where it has not sown . . . appropriating to itself the harvest of those who have sown").

98. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984). The decision represents the antithesis of constitutional exceptionalism because it starts from the premise that the Con-

will not be created, or if created, will not be as widely disseminated under an obligation of confidence,⁹⁹ if they can be taken by others for their private use. The economic logic of the rule is thus clear: The transmission of the trade secret under conditions of confidentiality allows for the more efficient deployment of the resource without putting it into the hands of its competitors.

As a matter of common law, trade secrets are protected by both damage actions and injunctions for all the conventional reasons.¹⁰⁰ Injunctions themselves are not sufficient because they do not compensate the holder of a trade secret for losses that result from its public disclosure. Damages are not sufficient for the usual reasons. Although it is known that trade secrets have great value to the firm, it is highly difficult to calculate the losses attributable to disclosure. The award of injunctive relief reduces the risk of undercompensation given the necessarily speculative nature of the damages. Likewise, a defendant (as in *Ford*) does not have the financial resources to answer for his losses. The combination of remedies reflects the legal policy that all available guns should be turned on a potential defendant. The weakness of these legal remedies, however, means that firms use immense amounts of care to regulate the distribution of trade secrets within the firm, lest they be lost by inadvertent publication or simple theft. No one claims that this system is perfect; but no one seriously thinks that the regime can work as well if damages, injunctive relief, or self-help are removed from the mix of measures available to secure trade secrets.

The policies outlined above do not only represent common law attitudes on the subject; they also represent legislative policy at both the state and na-

stitution does not create property rights, but protects those which are created under state law. *See id.* at 1001. It then promptly relies on the definition of trade secrets used in the RESTATEMENT OF TORTS § 757 (1934) to define the scope of the property right protected under the Fifth Amendment. *See Ruckelshaus*, 467 U.S. at 1001-03. The one weakness in the decision is that it never quite makes clear whether the property protection for trade secrets is lost if the government gives its owner notice that the trade secret (here a chemical formula) must be registered in order for it to be sold. *See id.* at 1006. In such a case the protection is largely illusory, since notice can be so easily given, or, in what seems the right view of the case, that the trade secret can be registered and disclosed because the scheme in question offers just compensation for the loss of the relevant property right.

99. The holder of a trade secret does not lose his property right because he shares it with employees or other persons in confidence. *See Kewanee Oil*, 416 U.S. at 475 ("The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business. This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another 'in confidence, and under an implied obligation not to use or disclose it.'" (citations omitted)).

100. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 44, 45 (1993) (outlining injunctions and monetary relief, respectively).

tional level. The Uniform Trade Secrets Act¹⁰¹ takes a hard line against the "misappropriation" of any trade secret, which is defined to cover any acquisition of that trade secret by improper means, including "theft, bribery, misrepresentation, breach, or inducement of breach of a duty to maintain secrecy or espionage through electronic or any other means."¹⁰² The duty to respect trade secrets is imposed not only on the person who takes the secret, but on any person who acquires the secret with knowledge that his transferor had improperly acquired it.¹⁰³

These provisions key their operation to the rules governing the receipt of stolen or misappropriated land or chattels. Neither the thief, nor the subsequent purchaser with notice, could prevail in a contest with the original owner of the goods. Good faith purchasers might be entitled to protection, but bad faith purchasers—that is those with notice—were not.¹⁰⁴ That position had already been adopted with respect to service contracts in the tort of inducement of breach of contract, such that the inducer *with notice* of the prior contract could be enjoined from enforcing his contract with a person already under obligation to the plaintiff.¹⁰⁵ Once trade secrets are accorded the protection of property, they receive the same level of protection as tangible objects and service contracts.

This same attitude toward protection is found in the Economic Espionage Act of 1996,¹⁰⁶ which in many particulars tracks the Uniform Trade Secret Act by covering all cases of trade secret misappropriation: theft, copying, and receiving or purchasing information with notice of its prior misappropriation.

101. As contained in the Michigan Uniform Trade Secrets Act, MICH. COMP. LAWS ANN. §§ 445.1901-1910 (West, WESTLAW through 1999 Sess.).

102. *Id.* § 445.1902(a)-(b).

103. *Id.* § 445.1902(b)(ii) applies to one who discloses or uses a trade secret of another without consent if he or she:

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

104. For a discussion of the problem, see JAMES E. DUKEMINIER & JAMES E. KRIER, PROPERTY 615-717 (4th ed. 1998) (land and recordation). For chattels, see U.C.C. § 2-403 (1989).

105. See, e.g., *Lumley v. Gye*, 118 Eng. Rep. 749 (Q.B. 1853). For development of the notice theme in the case, see Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 4 (1987). For the dominance of injunctive relief, see Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 169-70 (1999). For a general overview of the tort, see EPSTEIN, TORTS, *supra* note 17, §§ 21.2-21.5.

106. 18 U.S.C. §§ 1831-32 (1996). Section 1831 deals with Economic Espionage to foreign governments and their instrumentalities. Section 1832 deals with the theft of trade secrets generally.

priation.¹⁰⁷ In addition to the heavy criminal penalties authorized under the Act, the Attorney General is entitled to use civil proceedings to obtain injunctive relief.¹⁰⁸

It is quite clear that the political climate is far more favorable to the protection of trade secrets than it is toward the suppression of unfavorable stories published about firms through unlawful methods, and for good reason. To revert back to our earlier paradigm, no one thinks that the systematic misappropriation of trade secrets makes sense as between the two immediate parties to a dispute. The gains to the appropriator of the trade secret are similar to the gains to the thief of ordinary property. Although these should be taken into account in the social calculus, they are more than offset by the losses to the original owner, and their negative system-wide effect: the reduction of the willingness to invest in trade secrets in the first place. The question, then, is whether the net losses as between the immediate parties are offset by some new source of gain—that is, gain to the public from the publication of the information. Here the basic claim seems vanishingly weak because the public loses when the goods and services that it purchases are made less efficient by the systematic misappropriation of trade secrets. As in the case of private appropriation, the short-term gain from learning the information is more than offset by the realization that future supplies of information will not be created precisely because the publication of that information quickly converts private into common property.

107. *See id.* § 1832(a):

(a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly—

- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
- (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
- (3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
- (4) attempts to commit any offense described in paragraphs (1) through (3); or
- (5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

(b) Any organization that commits any offense described in subsection (a) shall be fined not more than \$5,000,000.

108. *See id.* § 1836(a).

The question then arises, should all trade secrets be treated alike? One possible way to break down this question is to argue that the possession and use of some trade secrets is harmful in nature because it allows their holders to circumvent environmental regulations or to commit other forms of illegal actions. Stage one of the argument is that some trade secrets are no different from the sloppy practices disclosed in *Dietemann*, *Desnick*, and *Food Lion*. Stage two of the argument says that it is impossible to decide in advance which trade secrets fall into this category, so that the only safe route is to allow for the routine public disclosure of trade secrets. Injunctive relief and perhaps damages would be inappropriate in cases of public disclosure, even if they remain proper in the traditional cases of commercial espionage.

Yet here again the same counterarguments apply, only more so, to this case. The private harms that are suffered under this approach remain enormous, while other means are available to be sure that environmental and other interests are fully protected. Thus the EPA has the ability to examine the finished products put out by automotive manufacturers, and a raft of public health agencies could examine the various flavorings and additives to cigarettes to determine if they contain harmful materials. In dealing with the trade secrets of regulated firms, the Trade Secrets Act¹⁰⁹ imposes stiff penalties on any government employee who discloses, in a manner not authorized by law, any information that he acquires in the course of his official duties—a prohibition that covers both informal “leaks” by government employees, and releases by formal agency action.¹¹⁰ The administrative state is thus well-equipped to seek out the negative spillovers from certain trade secrets because across-the-board disclosure of these secrets generates enormous social costs for few social benefits. The common law rules on trade secrets, the Uniform Trade Secrets Act, and the Economic Espionage Act all make good sense and good social policy.

The same point can be seen if one compares the treatment of trade secrets to other forms of property and conduct that might fall under the First Amendment. The copyright law is an artifact of congressional action, yet it is routinely held that injunctions will issue against the publication of copyrighted material which is not protected under the fair use exception.¹¹¹ Likewise, the plaintiff obtained injunctive relief against the misappropriation of its stories in the fabled case of *International News Service v. Associated*

109. *Id.* § 1905.

110. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008 (1984); *Chrysler Corp. v. Brown*, 441 U.S. 281, 298-301 (1979) (holding that § 1905 does not address formal agency action).

111. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (holding that the First Amendment does not create an exception to the “fair use” copyright doctrine when a public figure’s manuscript is at issue).

Press,¹¹² even though the restrictions were directed to media defendants in an era, of course, when the First Amendment did not intrude much into disputes regulated by the private law. The same result is adhered to when injunctive relief is routinely granted against the publication of the plaintiff's use or likeness, whether by media or non-media defendants.¹¹³ In each of these cases the basic position is the same: The injunction is granted insofar as it is needed to secure the creation of the valuable information in the first instance. But it is not granted with respect to speech that passes into the ordinary discourse of the land. Thus the injunctive relief afforded in *INS* lasts at most a single day, until the next news cycle. The protection of a name or likeness typically runs only to commercial use. It does not prevent political or social commentary that refers, however critically, to those individuals who retain the exclusive right of publicity over their own names.¹¹⁴

This equilibrium seems perfectly stable—stable, that is, until First Amendment exceptionalism rears its head. Thus in dealing with the plaintiff's request for injunctive relief in *Ford*, Judge Edmunds concluded that in the "clash" between the First Amendment and the conventional law of trade secrets, "the battle is won by the First Amendment."¹¹⁵ This result is achieved by starting with the general First Amendment prohibition against prior restraint and carrying it over to an area where it should have no application at all. The origin of this presumption goes back to the early cases of libel, such as *Near v. Minnesota*,¹¹⁶ which is read to state the basic rule that prior restraints are allowed only in "exceptional cases,"¹¹⁷ with the result that they are allowed only in the "most compelling circumstances."¹¹⁸ The usual explanation is that the use of prior restraint will necessarily invite a system of censorship, with all the dangers to current debate that this involves.

As noted earlier, the common law also declined to issue injunctions in libel cases, and for good reason. In that context, the line between libel and harsh criticism is hard to discern, so that injunctive relief would prevent a speaker from advancing to the public his views on the matter at hand. The point has especial power when the audience has access to information from

112. 248 U.S. 215, 232, 246 (1918) (upholding the circuit court's award of "an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away").

113. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1909). Section 51 authorizes the injunctive relief.

114. For a discussion of the limits of such protection, see *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

115. *Ford Motor Co. v. Lane*, 67 F. Supp.2d 745, 746 (1999).

116. 283 U.S. 697 (1931).

117. *Id.* at 716.

118. *In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986).

other sources about the target of the defamation, which is why this form of defamation is rightly held not to be actionable at all.¹¹⁹ In addition, in heated political contests, the partial remedy of counter-speech is available to those parties who are, or think themselves, defamed.¹²⁰ The speaker, therefore, has to pay a price for entering into the lists knowing that he will be unable to enjoin or even sue his critics for their attacks on him.

Whatever the merits of these arguments, they simply do not carry the same weight for trade secrets. Most obviously, counterspeech has no role whatsoever to play in trade secret cases: Once the information is made public, then all competitors will have access to it. The denunciation of the source of the leak may sully the source's reputation, but it will do nothing to restore the trade secret in question. Nor will it allow the holder of that secret to discover which rivals have taken advantage of his trade secrets once the information is publicly released, much less obtain damages for the loss. The lack of self-help remedies in trade secret cases requires that far greater stress be placed on securing legal remedies, including, most critically, injunctive relief.

Looking at the matter from the public's side, suppression of the publication of trade secrets can only with great difficulty be described as censorship of political debate. The suppression of the publication of stolen information does nothing to hamper the critic from denouncing any firm that chooses to preserve its trade secrets, or to chide any government agency for its lackluster enforcement of the general law. It is something of a mystery as to how free and open debate is frustrated by offering property protection to trade secrets. Perhaps in some extreme case the publication of this information could be regarded as essential to the health and security of the nation, but, if so, then some particularized showing should be made before the injunction is denied—the reverse of the current legal regime. Yet in the one case that addresses this matter, *CBS Inc. v. Davis*,¹²¹ Justice Blackmun, on circuit, mechanically applied the earlier precedents to deny an injunction against the broadcast of trade secrets, without requiring any particular showing of public

119. See, e.g., RESTATEMENT (SECOND) OF TORTS § 564A (1977) (noting limited liability to members of large groups). For a general discussion, see EPSTEIN, TORTS, *supra* note 17, at § 18.6 (explaining that one rationale for exempting statements about large groups from libel injunctions is the broad availability of accurate information about that group).

120. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (defending the application of the *New York Times* actual malice rule to public figures and noting: "surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities").

121. 510 U.S. 1315 (1994).

need.¹²² It hardly makes sense to rely on the presumption imported from the defamation cases to matters in which the basic considerations are so different. Here the private interests against disclosure seem manifestly to outweigh the public interest for disclosure.

Yet the courts seem to be oblivious to these differences in making the transition from defamation to trade secret cases. One key stage in the movement is the so-called *Pentagon Papers* case,¹²³ where the Supreme Court refused to enjoin the publication of a classified study, "History of U.S. Decision-Making Process on Vietnam Policy," which had been illegally leaked to the press by Daniel Ellsberg, then a Pentagon official. The refusal to issue the injunction rested on the broad judicial presumption against prior restraint.¹²⁴ To Justices Black and Douglas, the only question was whether an injunction should issue against the publication of "news," a formulation of the problem that effectively conceals the illegal source of the leak on the one hand or the sensitivity of the published information on the other.¹²⁵ Justice Brennan's somewhat more cautious opinion noted that "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden."¹²⁶ When "at war," "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."¹²⁷ From my point of view, that concession is too narrow for the reasons developed above. The government has the same right as private parties to classify information. If the material that it wishes to keep secret qualifies under the general trade secret laws, then like any private party it has the right to injunctive relief to prevent that information from slipping into hostile hands.

What sense is there to a regime that allows the imposition of criminal sanctions on those who leak the information, but does not allow the plaintiff to keep the information quiet? Under the current regime, government opera-

122. See *id.* at 1317. Note that the trade secrets involved in this case, the daily operation of a plant charged with having unsanitary practices throughout the meat industry, raises the kind of health issues that were present in *Food Lion* but absent in *Ford*. Note also that Justice Blackmun was reluctant to award injunctive relief for speculative harms. See *Davis*, 510 U.S. at 1318. Yet ironically, it is precisely the difficulty in estimating damages after the fact that makes injunctive relief attractive to the private lawyer.

123. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

124. See *id.* at 714.

125. See *id.* at 715 (Black, J., concurring).

126. *Id.* at 726 (Brennan, J., concurring).

127. *Id.* (quoting from *Near*, 283 U.S. at 716). Something less than this might suffice today after *Snepp v. United States*, 444 U.S. 507 (1980), which did allow the restraint pursuant to contract on matters that pertained to national security. But again the analysis was limited to classified materials relating to national security only.

tions take the form of a kind of Hobbesian struggle where the government's ability to keep its own secrets depends on the happenstance of whether it can snuff out the illegal release of information by threatening government employees with dismissal, fines, and punishment beforehand. Perhaps some official procedure should be created to check whether government classifications meet the requirements of trade secret law. However that question is resolved, it seems indefensible that the *New York Times*, or any other publication that knows it is in receipt of stolen information should be able to publish it with impunity.

Yet let us suppose that the decision in the *Pentagon Papers* case is correct: It hardly seems to lead to the result that the holder of any trade secret is powerless to enjoin their publication either by its employees or by a third party to whom they were transferred. One possible justification for the outcome in the *Pentagon Papers* case is that the government could not be trusted to look after itself, so that leaks should be encouraged to facilitate public scrutiny of government by the press. This point seems dubious given the intensive criticism of the Vietnam War inside and outside the government, virtually all of which fell within the core protection of the First Amendment under any interpretation. The national security claims, on the other hand, especially as they relate to sensitive information about troop movements and the like, seem to cut in the opposite direction. Be this as it may, judged by the heady stakes in the *Pentagon Papers* case, the interests on both sides of the trade secret issue count for less. The national security claims are gone and this should reduce the size of the conflict. In addition, the clear sense that orderly government procedures can review trade secrets without compromising confidentiality suggests that the misguided *Pentagon Papers* case should not be extended beyond its national security toehold into the ordinary operations of the legal system.

The *Pentagon Papers* case, however, represents only one landmark in this area. Several other cases should be briefly mentioned. In *Landmark Communications, Inc. v. Virginia*,¹²⁸ the Court refused to impose the obligations of confidentiality on a newspaper that had obtained information about proceedings on judicial disability and misconduct, noting the First Amendment issues at stake. In the earlier case of *Pearson v. Dodd*,¹²⁹ the D.C. Circuit held that the two defendant columnists were entitled to publish information that they knew had been improperly leaked to them by members of Senator Dodd's staff. The defendants had not procured the copying of the documents, but had only received the information with the knowledge that it

128. 435 U.S. 829 (1978).

129. 410 F.2d. 701 (D.C. Cir. 1969).

was stolen—a point that impressed itself on the court.¹³⁰ Once again, it seems like a distinction without a difference. As both the Uniform Trade Secrets Act and the Economic Espionage Act held, *knowing receipt* of stolen information is sufficient to subject the defendant to liability.¹³¹ As before, the publication of the information should not be treated as a wrong separate and apart from the collection of the information. The entire edifice of property protection is wholly undermined if the transferee is allowed to obtain rights against the original owner that were not possessed by the transferor. *Nemo dat quod non habet*—one is not able to convey what he does not have—is a conventional maxim of property law that applies, undiminished, to transferees with notice of the prior wrong. *Landmark Communications* and *Pearson* represent a form of First Amendment exceptionalism that is better rejected than imitated.

The last class of cases that requires brief mention includes those in which a party receives information pursuant to litigation that it publishes in violation of the conditions of confidentiality under which it was obtained. Thus in *Seattle Times Co. v. Rhinehart*,¹³² the Supreme Court held that the petitioner newspaper could not publish information that it had received in discovery which had been made subject to a protective order, with an exception for information that was otherwise obtainable.¹³³ Once again the logic seems unassailable; the sharing of information for discovery would be heavily burdened if the disclosures could not be limited to the purposes of litigation. And given the risk of *Pearson*, it hardly seems sensible that a party that obtains information under a protective order should be able to slip out from under the restriction by its selective transfer to a third party.¹³⁴

130. See *id.* at 705.

131. See Michigan Uniform Trade Secrets Act, MICH. COMP. LAWS ANN. § 445.1902(b)(ii) (West, WESTLAW through 1999 Sess.). See also Economic Espionage Act of 1996, 18 U.S.C. § 1832 (a) (1996).

132. 467 U.S. 20 (1984).

133. See *id.* at 31-32.

134. On which see, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 966 n.6 (1988). “[I]t may well be that government must also be conceded the authority to punish those who *illegally* obtain access—although perhaps not those third parties who *innocently* obtain such illegally acquired information and thereafter disseminate it.” Note that earlier in the same footnote, Tribe engages in First Amendment exceptionalism by arguing that the distinction between “lawfully” and “unlawfully obtained” information may function as a “talisman” that “may in part beg the access issue . . . since the question of ‘what is lawful?’ cannot be answered without reference to the first amendment.” But the opposite approach seems better. In order to understand the scope of the First Amendment, it is necessary to have a general theory, consistent with the basic norms of freedom, that explains what activities are lawful and what are not.

CONCLUSION

It is one of the great ironies of any legal system that disclosure of information is regarded, and rightly so, as both one of the highest goods and greatest evils. In so many contexts, it is rightly said that full disclosure is needed in order to expose dangerous conflicts of interests or to allow individuals to make full and informed decisions on matters of great importance to both them and the nation at large. Yet by the same token, we also recognize that the success of both personal and business endeavors depends on our ability to respect confidences and to keep private information private. In most cases the two imperatives operate at opposite ends of the legal spectrum so that their inconsistent commands do not come into evident tension with each other. But legal principles also follow the usual territorial imperatives, and, at the hands of skilled advocates, are aggressively pressed into service across the board. It should, therefore, surprise no one that the disclosure norm and the privacy norm often run on a collision course with respect to information that has value to some if it is kept secret, and to others if it is disclosed. There is no way to paper over these conflicts in order to pretend that either one interest or the other should have full sway.

In this paper, I have sought to take into account the full range of interests, pro and con, that follow from the disclosure of information to the detriment of those who wish to keep it private. The simplest line here seems to offer the best resolution of that conflict: Where true information is lawfully obtained, it can be circulated regardless of the consequences to those who wish to keep it private. Where true information is obtained illegally—whether by trespass, fraud, or breach of confidence or contract—the presumption should shift sharply in the other direction, so that both damages and injunctive relief are made available to the party with the right to keep that information confidential. The arguments made here are perfectly consistent with a view of the First Amendment that finds that the freedom of speech, while entitled to full constitutional protection, is subject to the same limitations as any other freedom, whether freedom of action or of contract. But they will not survive the dominant form of First Amendment exceptionalism by which courts take it upon themselves to set out novel rules for the protection of speech that deviate sharply and consciously from common law rules, and do so to the detriment of us all.

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