

IN DEFENSE OF TRUTH

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AS SOMEONE WHO often defends controversial and unpopular positions, it is a special pleasure to write in support of truth and knowledge. Professor Schauer argues that truth and knowledge are not intrinsically desirable and are, at times, instrumentally undesirable.¹ Furthermore, he maintains that constitutional analysis must recognize that the dissemination of information conveys and diminishes power.² He suggests that the effects on such power should be an explicit part of judicial balancing.³

I contend, however, that Professor Schauer's approach is misguided and dangerous. The critical concern is the relationship between particular information and individual privacy. The truth of the information or its relationship to an amorphous concept of power is irrelevant in deciding whether to allow recovery for public disclosure of private facts. Ultimately, the central analysis must compare the effect of publicizing information concerning an individual with the public's gain from dissemination of that information. Moreover, it is undesirable to denigrate the value of truth in society, for such an approach ultimately licenses deception by government and business.

Thus, in responding to Professor Schauer, I want to make three points. First, it is possible to enhance the legal protection for privacy without lessening the importance of truth as a value. Second, Professor Schauer gives too little weight to the values of truth and knowledge and almost completely ignores the question of who will decide when society is better off with falsehoods or ignorance. Finally, Professor Schauer focuses on the wrong issues by addressing truth and power as crucial aspects of privacy cases.

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1. See Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991).

2. *Id.* at 713-15.

3. *Id.* at 718.

He thereby ignores the central difficult issues: how is a court to decide what is newsworthy and how much weight should be given to the importance of public dissemination of the contents of government records.

I. PROTECTING PRIVACY WITHOUT DENIGRATING TRUTH

The implicit message of Professor Schauer's paper is that it would be desirable to provide more protection for privacy than current first amendment law likely would tolerate. As Professor Schauer acknowledges, the Supreme Court has not yet considered the constitutionality of tort liability for the public disclosure of private facts obtained from sources other than government records. For example, in *Cox Broadcasting Corp. v Cohn*⁴ and *Florida Star v B.J.F.*,⁵ the Supreme Court rejected allowing liability for the dissemination of rape victims' identities that were lawfully obtained from government records. Similarly, in *Smuth v Daily Mail Publishing Co.*⁶ and *Oklahoma Publishing Co. v District Court*,⁷ the Court extended constitutional protection to the publication of information lawfully obtained in open court and from court records relating to juvenile offenders.

Thus, no indication of how the Court will protect privacy when the information is obtained from nongovernment sources exists. As described more fully in Part III, there is a unique public interest in assuring access to government records and the dissemination of their content. When this interest is not present, such as in tort suits for public disclosure of private facts obtained from nongovernment sources,⁸ the balance could be quite different.

Even in the realm of information obtained from public records, increasing the protection of privacy without demigrating

4. 420 U.S. 469 (1975).

5. 491 U.S. 524 (1989).

6. 443 U.S. 97 (1979).

7. 430 U.S. 308 (1977).

8. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (invasion of privacy suit based on magazine's description of a person's eccentric habits), *cert. denied*, 425 U.S. 998 (1976); *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir.) (invasion of privacy suit for a story about a former child prodigy), *cert. denied*, 311 U.S. 711 (1940); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (invasion of privacy suit for a story about a woman with a unique medical condition that required her to eat huge quantities of food). For a discussion of the rationale for protecting privacy rights over first amendment interests and suggesting the need for a test for "public interest," see Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385 (1976).

the value of truth is possible. The emphasis should be on the reasons that the disclosure of certain information is harmful to the individual and that those injuries outweigh the public benefits from disclosure. In other words, more analytical weight should be placed on the privacy side of the equation; there is no need to diminish the importance of truth or knowledge.

Under the Constitution, no value—not the sanctity of human life, not freedom of speech, not equality, not truth—is absolute. The Supreme Court long has recognized that in limited circumstances individuals can be punished for disseminating true information. In *Near v Minnesota*,⁹ the Court observed that “[n]o one would question but that a government might prevent the publication of the sailing dates of transports or the number and location of troops.”¹⁰ I have no doubt that a court would allow liability if a person published, in violation of federal law, the names and locations of American secret agents in Iraq. Even though the information concerning troop ships or secret agents is true, first amendment protection does not extend to publication of this information because protecting national security and human lives would be regarded as overriding interests. Recently, the Supreme Court upheld a federal district court’s prior restraint against the Cable News Network’s broadcast of taped conversations between Manuel Noriega and his attorneys.¹¹ The issue, of course, was not the truthfulness of the tapes, but rather the potential effect of their broadcast on Noriega’s right to a fair trial.

Likewise, courts can decide to increase the protection of privacy without denying the significance of truth and knowledge to society. The courts simply need to explain the grounds on which assuring privacy is more important than the public dissemination of true information in those particular instances. For example, the Supreme Court might have decided *Cox Broadcasting* and *Florida Star* differently by explaining that disclosing the name of the particular victim provides the public with little useful information, while disclosure often makes the victim’s life more difficult. Public disclosure of the victim’s identity obviously entails exposure to possible danger from an unapprehended rapist, and even well-intentioned questions and comments from friends and colleagues

9. 283 U.S. 697 (1931).

10. *Id.* at 716.

11. *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451, *aff’g* *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990).

might be an intrusion that the rape victim does not want to endure. Moreover, the Court could have recognized that protecting a victim's privacy might further the socially desirable goal of increasing the number of rapes reported since the victims will not have to fear public disclosure of their identity¹²

Similarly, courts might allow liability for the practice of "outing"—publicly disclosing a person's previously undisclosed gay or lesbian sexual orientation. The courts can emphasize that sexual identity is private and that a person should be able to choose whether to disclose his or her sexual orientation.¹³

If privacy should be better protected, this should be accomplished by exalting the value of privacy and by describing the harms to dignity and reputation from specific disclosures. There is no need to denigrate the value of truth or knowledge.

II. THE IMPORTANCE OF TRUTH AND KNOWLEDGE

Professor Schauer asks: "Why is it good for a society to have more truth?"¹⁴ He then provides a useful distinction of truth as the opposite of falsehood as compared with truth as the opposite of ignorance.¹⁵ He argues that there are instances where false information might be better for society than truth and instances where ignorance is preferable to knowledge.¹⁶

Professor Schauer's analysis, however, tremendously undervalues the importance of truth and knowledge. For example, Professor Schauer attempts to argue that falsehoods might be preferable to truths by offering examples of lies that might advance the underlying values that truth serves, "such as happiness, utility, dignity, stability, human well-being, [or] the general welfare."¹⁷

12. Analysis cannot focus solely on the harms to a rape victim from the dissemination of his or her identity and the contrasting benefits to the public from disclosure of that information. See *infra* text accompanying notes 24-35. The judicial balancing must also consider that the information was lawfully obtained from government records and the value of having open records.

13. Difficult questions arise if the sexual identity of a government official or a public figure were disclosed involuntarily. The issue would then become the newsworthiness of the information. See *infra* text accompanying notes 32-35.

14. Schauer, *supra* note 1, at 706.

15. *Id.*

16. *Id.* at 706-07.

17. *Id.* at 706. It is tempting to respond to Professor Schauer by arguing the intrinsic value of truth and knowledge. See S. Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 49-50 (1978). The difficulty with this, as with all arguments of intrinsic value, is that it offers little opportunity for dialogue or persuasion. Those who believe that there is intrin-

He writes that perhaps "the United States would be better off if everyone in the country believed (falsely) that George Washington, Abraham Lincoln, Franklin Roosevelt, and Elizabeth Cady Stanton were African-Americans."¹⁸ In the same vein, he suggests that it would be good if people believed that cigarettes and alcohol cause male baldness and that perhaps it is good that people falsely believe that banks have more than fifty percent of deposits on reserve.¹⁹

But in presenting these examples Professor Schauer assumes the existence and importance of other truths. Normatively, the examples assume the greater goods of racial justice, of limiting cigarette and alcohol consumption, and of preserving bank stability. Empirically, he assumes that false perceptions of racial identity would have a positive effect on racial attitudes, that false beliefs about cigarettes and alcohol use relative to baldness will decrease their consumption, and that accurate perceptions about bank reserves would cause financial panic. In other words, Professor Schauer assumes that there are truths and that these truths are worth protecting and argues that these greater truths justify lies.

But Professor Schauer's position is short-sighted and incredibly dangerous. It is short-sighted because his theory assumes that it is possible to permanently suppress the truth. Yet, in all likelihood the truth he wants to hide eventually will become public and then cause far more harm than the initial disclosure of the accurate information. If people falsely are encouraged to believe that the bank has their money on hand in reserves, there is a real risk of a bank run when depositors learn that they have been deceived. Similarly, there is a potential for serious backlash if people learn that they have been misled regarding the race of prominent Americans. Indeed, people will come to distrust anything said by those attempting to advance racial equality. If people learn that they were deceived concerning the effects with regard to baldness of smoking and drinking, they might then distrust all information concerning the adverse health effects of these practices. Spreading falsehoods to serve greater truths risks undermining those truths once the falsehoods are uncovered.

sic value to truth reject Professor Schauer's position; those who deny such intrinsic value cannot be persuaded that it exists. There is no apparent way to demonstrate the existence of intrinsic value.

18. Schauer, *supra* note 1, at 706.

19. *Id.*

More importantly, Professor Schauer's analysis ignores the values of autonomy and choice. Truthful information allows individuals to make their own decisions about what to believe and how to act. A person should be able to decide whether to admire George Washington, Abraham Lincoln, Franklin Roosevelt, and Elizabeth Cady Stanton based on accurate portrayals. Similarly, people should be able to decide whether to smoke or drink based on correct information concerning the health effects and where to place their money based on truths about the stability of banks.

Professor Schauer also argues that information yields power.²⁰ False information disempowers; it denies individuals the ability to make choices about the decisions in their lives. Professor Schauer simply ignores the importance of truth for individual autonomy. Honest, open public dialogue, dialogue that might help individuals and society discover their best interests, is prevented by the falsehoods.²¹

There is a tremendous paternalism to this argument: believing he knows what the greater truths are, Professor Schauer decides that others would benefit by believing falsehoods. This view, that deception is permissible to serve a greater good, is frightening. There are no standards to guide the implementation of this utilitarian analysis or the determination of which falsehoods are justified. Professor Schauer seems to say little more than that falsehoods are permissible whenever they might make people better off in some way. His argument provides no stopping point for these lies and fails to recognize the dangers of deception.

The same arguments can be made against Professor Schauer's contention that ignorance is often better than knowledge. Although at times ignorance may be bliss, Professor Schauer gives no weight to the right of the people to know about government and other matters of public concern. Professor Schauer also fails to recognize the importance of knowledge to people who wish to exercise their autonomy by making informed choices about their lives. For example, it might be better if the government did not acknowledge that airport metal detectors cannot identify plastic explosives. In fact, terrorists might be best deterred if the Federal Aviation Administration falsely publicized

20. *Id.* at 713.

21. *See, e.g.,* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (free speech insures a marketplace of ideas in which the competition of freely expressed ideas will aid people in determining what is true).

the technical ability to detect such weapons. This, however, would deny the right of people to decide whether to fly based on an accurate appraisal of the risks. As argued earlier, the ultimate exposure of the truth might undermine the credibility of all government declarations concerning airplane safety

Thus far my point has been that Professor Schauer undervalues truth and knowledge. An equally serious problem is that Professor Schauer virtually ignores the question of *who* will decide when falsehoods or ignorance are better than truths. Assume that Professor Schauer is correct and that falsehoods and ignorance are preferable to truth in the instances he describes. Who in society should be entrusted with the power to decide that the people are better off with lies or ignorance? Professor Schauer relegates this question to a footnote where he declares:

Nothing in the foregoing examples is designed to take a position about the consequences of establishing some institution to determine truth and falsity. Of course it is the case that the benefits of falsity might be overwhelmed by the harms consequent upon establishing some institution to determine which falsehoods were socially desirable, but this does not defeat the point in the text that falsity is not necessarily bad, and truth not necessarily good. As to the latter, consider whether to disabuse a dying person of her false belief, which now brings her great happiness, that her son has never been in trouble with the law²²

Professor Schauer cannot so easily avoid the question of who shall decide when falsehoods or ignorance are preferable to truth or knowledge. His paper is not about situations where individuals come to false beliefs through self-study or self-reflection. He is not discussing situations where individuals having the opportunity to learn the truth choose to remain ignorant. His examples focus on the conscious dissemination of inaccurate information or the intentional hiding of information from another person. Even the hypothetical questioning whether to tell the dying woman the truth about her son involves one person deceiving another.

Thus, the question has to be faced as to who should decide when others are better served by lies or ignorance. Professor Schauer attempts to avoid this question by recognizing the dangers in creating an institution that would determine this for society²³ Even if no such institution is established, the question still

22. Schauer, *supra* note 1, at 706-07 n.31 (citation omitted).

23. *Id.*

has to be faced as to who shall decide when deception is acceptable. Should the government be able to decide when the people are better off with lies about its activities? History shows that government officials often will lie or suppress information to serve their own self-interest and rationalize their behavior by saying it serves the public's good. Should corporations or professionals be able to decide when we are better off being deceived? Again, history and experience teach that we are better off insisting on truth than trusting others to protect our interests through lies.

I do not contend that truth is never harmful or that instances do not arise where falsehoods and ignorance are preferable. Rather, my point is that Professor Schauer greatly undervalues truth. Moreover, given the importance of truth for autonomy and the dangers in permitting deception, there should be a very strong presumption in favor of truth and knowledge and a condemnation of those who would deceive us.

I do not suggest that the value of truth should not be questioned. The dangers I attribute to Professor Schauer's position come not from his challenging the desirability of truth, but rather from the arguments he makes in doing so. Once it is suggested that lies are justified to serve a greater good, then license is given to deception. The solution must be to strongly reaffirm the value of truth and the almost irrebuttable presumption that we do not want anyone to lie to us out of a belief that we will be better off deceived.

III. ASKING THE RIGHT QUESTIONS ABOUT PRIVACY AND THE FIRST AMENDMENT

In discussing the constitutional protection of privacy relative to freedom of speech, Professor Schauer focuses primarily on two concepts: truth and power.²⁴ Neither of these is helpful in deciding the constitutional issues. Indeed, I think that focusing on them obscures the difficult questions concerning the value of public disclosure of government records and the definition of newsworthiness.

The tort of public disclosure of private facts is different from liability for defamation in that the former concerns true information and the latter falsehoods. Indeed, truth long has been a com-

24. *Id. passim.*

plete defense to a suit for defamation.²⁵ Accordingly, there is the instinctive reaction that truth should be a defense to other tort liability, such as for public disclosure of private facts. At the same time, it initially seems inconsistent with the first amendment to allow liability for publishing true information.

But on reflection, these perceptions are based on a failure to adequately distinguish defamation from public disclosure of private facts as well as an insufficient appreciation of the importance of privacy. Although both defamation and the public disclosure tort are concerned with protecting individual dignity and reputation, their concern is different. Because defamation concerns harms resulting from the dissemination of false information, publication of true information is a possible remedy. But when true private information is publicized, the harm is done; additional publicity can only compound the injury, never remedy it. Thus, truth obviously is a defense to defamation since the tort exists to remedy falsehoods; but truth is not a defense to the public disclosure tort which exists to deter and remedy invasions to privacy from the publication of true information.

It is not inherently inconsistent with the first amendment to create liability for disseminating truth. As explained in Part I, the Court long has recognized instances where publishing truths can be punished, such as to protect national security.²⁶ Likewise, courts can recognize the importance of privacy for individuals and allow liability in instances where privacy is more important than disseminating the information. In other words, the focus should be on what privacy interests justify interfering with first amendment freedoms, not on the value, or lack thereof, of truth.

Second, Professor Schauer suggests that the privacy cases should be analyzed in terms of "power." He explains that possessing knowledge conveys power and that those who have information about another possess power over that other person. Although this is an important and interesting insight, it is not very useful in analyzing privacy issues.

Professor Schauer never defines what he means by "power." I assume that it means the ability to make decisions affecting another person. In this sense, I have the power to grade my students,

25. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 307-08 (1983) ("[T]ruth was recognized as an absolute defense to defamation long before the right of privacy was recognized.").

26. See *supra* text accompanying notes 9-11.

and I have the power to determine where my young children will go to school. But the privacy cases are not at all about power in this sense. A rape victim's concern is not that those who know of her rape will make decisions affecting her or exercise power over her in an undesirable way. In all likelihood, she wants secrecy because she does not want to discuss the matter even with well-intentioned friends and colleagues. A person with a medical condition, such as AIDS or cancer, may want to keep it secret to prevent discrimination. In that sense, Professor Schauer is correct that privacy is related to power. But often the person may want to keep the condition secret to avoid questions and paternalistic treatment from others.

Ultimately, I believe that privacy is about protecting individual dignity and allowing individuals to choose how to handle sensitive information about themselves. Sometimes disseminating the information has power consequences, but that is not the central focus of privacy protection. Putting power at the center of analysis obscures the important values that privacy serves, such as dignity, reputation, and repose, which are completely unrelated to power.

Finally, by focusing on truth and power, Professor Schauer slights the difficult questions that must be faced in deciding when the first amendment should tolerate liability for privacy invasions. One such question concerns the importance of public access to government records and dissemination of information from them. As mentioned earlier, in all of the Supreme Court cases dealing with privacy and the first amendment, the issue concerned the publication of information lawfully obtained from government documents.²⁷ Therefore, in considering *Cox Broadcasting Corp. v Cohn*²⁸ or *Florida Star v B.J.F.*,²⁹ the analysis cannot simply focus on the importance of the privacy interest in a rape victim's identity as opposed to the public gain from the disclosure. The balance also must accommodate the need for public access to government records and the right of the public to learn their content. Perhaps the most important function of the first amendment is to further self-government and to check government at all levels.³⁰

27. See *supra* text accompanying notes 4-7.

28. 420 U.S. 469 (1975).

29. 491 U.S. 524 (1989).

30. See, e.g., A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15-16, 24-27 (1948); Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521.

Access to government records is imperative to monitor the activities of the government. Moreover, once society has a right of access to government documents, it is difficult to justify punishing individuals for publicizing their content. The Supreme Court reiterated the importance of such access to government documents when they held that liability for the truthful reporting of information lawfully obtained from government records can only exist if there is an "interest of the highest order."³¹

There may, nevertheless, be instances where protecting privacy is more important than assuring access to government records. The question is when, and under what circumstances, such liability should exist. Focusing on concepts such as truth and power provides no answers.

Also, there is the fundamental unresolved question of how to define "newsworthiness." The *Restatement (Second) of Torts* provides that liability for public disclosure of private facts may exist only if the information is offensive to the reasonable person and if the information is not newsworthy.³² In fact, the first amendment likely would not permit liability for publishing newsworthy information. Courts, however, have engaged in an ad hoc determination of what is newsworthy and have not provided any useful criteria.³³

Enormous problems exist in defining newsworthiness. One approach is to define newsworthiness in terms of public interest and media judgment. Professor Kalven noted:

[W]hat is at issue [is] whether the claim of privilege is not so overpowering as virtually to swallow the tort.

[S]urely there is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness.³⁴

However, by this approach virtually anything the media prints would be deemed newsworthy and protected from liability. The privilege truly would swallow the tort.

Thus, an alternative approach is for courts to decide what is

31. *Florida Star*, 491 U.S. at 533 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

32. RESTATEMENT (SECOND) OF TORTS § 652D (1976).

33. See Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 944-50 (1983).

34. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966).

of legitimate interest to the public. Professor Bloustein argued that “[p]ublic interest,’ taken to mean curiosity, must be distinguished from ‘public interest,’ taken to mean value to the public of receiving information of governing importance. There is [a first amendment] right to satisfy public curiosity and publish lurid gossip about private lives.”³⁵ Still, there are great dangers in allowing the courts to decide the legitimate interests of the people. In part, the difficulties concern notice to the press and the danger of chilling editorial judgment. The news media probably cannot know in advance how a court will evaluate the newsworthiness of the publication. On a more basic level, there are inherent problems in having judges decide what newspapers should find newsworthy

I have no solution to either the problem of access to government records or defining newsworthiness. I am, however, convinced that these are the difficult issues that must be faced in defining the constitutionally permissible scope of the public disclosure tort. By focusing on truth and privacy, Professor Schauer slights these central questions.

CONCLUSION

The hardest constitutional issues involve conflicts between two important social values. The tension between privacy and first amendment freedoms is exactly such a conflict. Useful analysis must focus on the right questions. Although Professor Schauer’s paper is an important contribution to the literature, ultimately he asks the wrong questions by focusing on the social value of truth and the power effects of disseminating information. Instead, analysis must center on the privacy effects of particular disclosures, the importance of allowing publication of information obtained from government records, and the definition of “newsworthy” These are profoundly difficult issues, but the ones that will ultimately determine the scope of privacy torts under the first amendment.

35. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 56-57 (1974).