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REFLECTIONS ON THE VALUE OF TRUTH

Frederick Schauer*

I

In Philadelphia Newspapers, Inc. v. Hepps, the Supreme Court held that in a "private figure" defamation action governed by Gertz v. Robert Welch, Inc., the plaintiff has the burden of proving falsity. Philadelphia Newspapers generated little attention, largely because its fundamental premise—that falsity is the essence of an action for defamation—appears to have been shared even by the four dissenting Justices. Once Gertz had established that even private figures were required to prove at least negligence in order to recover against media defendants, the issue finally resolved in Philadelphia Newspapers seemed almost a foregone conclusion. Implicit in the concept of negligence (how are we to think about negligent truth?), and a fortiori in the actual malice standard of New York Times Co. v. Sullivan, was the idea that falsity was an essential element of the tort of defamation, at least after that tort was constitutionalized. If falsity was a necessary condition for the lack of constitutional protection, then, conversely, truth seemed to be a sufficient condition for that protection to attach.

It was not always so. Not only did the common law of defamation treat truth as but an affirmative defense, making it possible for a plaintiff to recover without ever establishing that the of-

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3. 475 U.S. at 776.
fending statement was not true, but in actions for criminal libel, truth was not even an absolute defense. In order to maintain a successful defense of truth in a criminal libel action, the defendant was required to show both that the statement was true and that it was published for the public benefit. Consequently, the common law recognized that there could be "injurious truth," a concept that post-New York Times and post-Gertz defamation law appears to treat as virtually oxymoronic.

If contemporary actions for defamation have been transformed into actions for negligent or malicious falsehood, with falsity as an element of the cause of action, then where does that leave the law respecting invasion of privacy? Interestingly, the Supreme Court has never addressed directly the central question of the constitutional contours of an action based on the publication of truth about someone who did not wish that truth to be disclosed. There have been decisions with respect to false light invasion of privacy, but this tort "bears a striking resemblance to libel." The issue of appropriation of a likeness or performance with commercial value, an issue that has just once been before the


8. N. Rosenberg, supra note 7, at 118 (quoting a letter to Josiah Quincy written in Massachusetts in 1823 by Harrison Gray Otis).

9. Malicious falsehood is a cause of action in most civil law jurisdictions, with the elements of that action being (1) the falsity of the words spoken; (2) a dishonest or improper motive; (3) damage; and (4) a causal link between the false statement and the damage. For a discussion of malicious falsehood, see P. Lewis, Gatley on Libel and Slander § 301 (8th ed. 1981).


RIGHT TO PRIVACY

Court, involves a different set of concerns as to which the idea of truth or falsity seems largely immaterial. And although central questions about the constitutional protection of the publication of true private facts were potentially on the agenda in both Cox Broadcasting Corp. v. Cohn and Florida Star v. B.J.F. the decisions actually rendered turned out to be based primarily on the public nature of judicial proceedings and public records.

As a result of the Supreme Court's long-standing avoidance of the issue, actionable publication of truth is an area in which the relevant standards have been developed largely by the lower courts. Piecing together a prevailing view from a combination of cases, commentary, and semi-authoritative sources such as re-statements is always problematic, but the law now appears to be such that a plaintiff must prove three elements in order to recover in an action for invasion of privacy based on the public disclosure of truth: First, the information disclosed must previously have


The tort under discussion is the one that Prosser referred to as "[p]ublic disclosure of embarrassing private facts about the plaintiff." Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960). Prosser's terminology, which persists, is unfortunate because the term "embarrassing" refers to only one type of disclosure, a type central neither to the modern understanding of the tort nor to my analysis of it. Suppose a picture is published showing a person performing an excretory function. The publication, violating a firmly entrenched social convention, see Fried, Privacy, 77 YALE L.J. 475, 489 (1968), would be extremely embarrassing (the word "mortifying" also comes to mind), but can hardly be said to convey to any viewer some previously unknown fact, and thus will change only slightly the way the subject of the photograph is subsequently treated by others. See Neff v. Time, Inc., 406 F. Supp. 858 (W.D. Pa. 1976) (disallowing recovery for photograph of plaintiff with fly open because plaintiff encouraged the photographer, thereby implying consent). But contrast the situation where the disclosure of some fact about a person provides the audience with new information about the subject, information which changes the way the audience subsequently views and treats that subject. For example, when in Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940), the disclosure of information converts a recluse into the object of intrusive attention, or when in Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984), or many other contemporary "outing" incidents, the disclosure of sexual orientation changes the way someone is seen by friends, relatives, colleagues, or constituents, the word "embarrassing,"
been private; second, the disclosure must have been "highly offensive to a reasonable person"; and third, the facts disclosed must not be "of legitimate concern to the public," or, as it is more commonly put, "newsworthy."

Interestingly, this current standard, especially the usually dispositive "newsworthiness" component, bears some resemblance to the now-discredited "public benefit" qualification of the defense of truth in criminal libel actions, for both recognize that the truth of a statement is not a sufficient condition for protecting its public disclosure. This may mean that the tort of invasion of privacy, in this pure sense of disclosure of accurate private information, cannot survive New York Times and Gertz. The Court, however, is although technically correct, hardly captures the core of the concern. To capture that concern there is a shorter and even more common word—"harm." We must be careful to avoid being influenced by the trivializing word "embarrassing" into undervaluing some harms from the perspective of the subject.

This might be the appropriate time to mention the similar use of the word "offense" to trivialize (sometimes properly and other times not) what someone else perceives to be a harm. When we describe as "harm" the effect of a racial epithet on a member of an ethnic minority but as "offense" the effect of flag-burning on a disabled veteran or Robert Mapplethorpe's photographs on a Fundamentalist Christian we express our view about the gravity of someone else's harm. That is often an appropriate thing to do, but it is often not, and it remains useful to recognize the way in which hard questions about that evaluation are often begged by using just this kind of language. More directly related to this symposium is Professor Post's idea of "civility rules." Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 CALIF. L. REV. 957, 962-63 (1989) [hereinafter Post, Social Foundations]; Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 626-46 (1990) [hereinafter Post, Constitutional Concept]. These rules "of deference and demeanor," Post, Social Foundations, supra at 962, which often involve no "actual injury," id. at 963, suffer from much the same distorting use of trivializing rhetoric. There are indeed many civility rules in any organized society, just as there are many harms done by some members to others. But to put invasions of privacy at the outset into the former class rather than the latter begs with language the very question that is under discussion.

17. RESTATEMENT (SECOND) OF TORTS § 652D(a) (1976).
18. Id. § 652D(b).
20. However, in light of later constitutional cases, and given the general rationale articulated by the Supreme Court over the years, the state should always recognize that truth is a defense in a defamation or right of privacy action—unless the plaintiff publishes confidential information which he himself has stolen. Even in such cases, the right of action is not really based on defamation but on publishing and attempting to benefit from knowingly stolen materials.
quite unlikely to so hold. If then some reason exists to suppose both that the Court will uphold some of the tort and that the Court will be correct in doing so, then the common law idea of injurious truth retains some plausibility when evaluated in light of the concerns of modern privacy law. Moreover, whether the idea that there are truths whose publication is sufficiently injurious to be actionable is ultimately justified or not, at the very least this idea seems to be reflected in the limiting element of “newsworthiness” in the current legal standard.

This possibility—that the truth of a proposition is not a sufficient condition for the legal protection of its dissemination—not only undergirds the newsworthiness standard of contemporary invasion of privacy doctrine but also explains much of the analogous “matters of public concern” standard that distinguishes Gertz from Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. Although the viability of a media/nonmedia distinction remains technically open after Philadelphia Newspapers, it has been barely breathing since Dun & Bradstreet, supplanted by a standard that asks, in a case involving defamation of a private individual, whether the subject is “on matters of public concern.” Since the entire framework of defamation law after New York Times is based on the strategic protection of falsity in order to maximize the dissemination of truth, a distinction based on “matters of

J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 940 (3d ed. 1986); see Bloustein, Privacy, Tort Law, and the Constitution: Is Warren and Brandeis’ Tort Petty and Unconstitutional as Well?, 46 TEX. L. REV. 611 (1968) (judicial application of first amendment standards may effectively eliminate right to privacy claims). Although hardly expressing normative agreement with the conclusion, Justice White also has noted the existing doctrinal fragility of actionable publication of truth. Florida Star, 491 U.S. at 552-53 (White, J., dissenting).


22. 475 U.S. at 779 n.4; see LeBel, Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework, 66 NEB. L. REV. 249, 280-81 (1987).


24. Gertz, 418 U.S. at 340-42; Ocala Star Banner v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring); see Ingber, Defamation: A Conflict Between Reason and
public concern" necessarily means that there will be less strategic protection of falsity on matters not of public concern. This in turn must presuppose that the dissemination of truths not of public concern is less valuable than the dissemination of truths of public concern. Under this view, contemporary invasion of privacy law is but the more extreme version of a view already built into defamation law, that the truth of a proposition is one thing, and the social value of its propagation is quite another.

II

To distinguish between the truth of a proposition, such as the proposition that John Doe is on welfare\textsuperscript{25} or that Richard Roe owes someone money\textsuperscript{26} or that Jane Smith was long ago convicted of a crime\textsuperscript{27} and the social value of its dissemination requires further exploration of the relationship between truth and social value. Traditionally, it has been assumed that truth is necessarily valuable, and it is that assumption that I want to expose to closer scrutiny.

The proposition that truth is necessarily and always valuable has been implicit in centuries of free speech theory. Specifically, a long tradition has grounded freedom of speech on the argument from truth—the argument that the governmentally unimpeded clash of opposing positions will further the search for truth.\textsuperscript{28} The argument from truth is not without difficulty. At times it collapses

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\textsuperscript{25}See McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888 (1973), appeal dismissed, 415 U.S. 970 (1974) (refusing to grant newspaper access to public assistance rolls maintained by the state and county).

\textsuperscript{26}See Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927), discussed in Post, Social Foundations, supra note 16, at 979-81 (poster advertising customer's debt placed in window could constitute an unwarranted invasion of privacy).

\textsuperscript{27}See Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (publication of plaintiff's involvement in eleven year old truck hijacking could constitute an invasion of privacy).

\textsuperscript{28}See W. BAGEHOT, The Metaphysical Basis of Toleration, in 2 Literary Studies 422, 425 (3d ed. 1884); J. S. MILL, On Liberty 35-36 (2d ed. 1863); J. MILTON, Areopagitica (J. Suffolk ed. 1968); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 881-82 (1963); cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."); International Bhd. of Elec. Workers Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950) (Hand, C.J.) ("truth will be most likely to emerge if no limitations are imposed upon utterances."); aff'd, 341 U.S. 694 (1951).
into a Meiklejohnian argument for self-government, in the sense that some truths, perhaps especially political truths, might be defined in terms of democratic processes, so that an argument for open deliberation as a means to finding truth collapses into an argument for open deliberation as a self-standing good. Even if truth is defined independently of a deliberative process, such that governmental nonintervention is seen primarily as a way of identifying truths not defined in deliberation-dependent terms, then it becomes apparent that the argument from truth presupposes an empirical relationship between the process of open deliberation and the identification of truth, a relationship which is problematic at best. Still, let us put aside these conceptual and empirical...
problems, and accept for the sake of argument that a society will identify more truths under a regime of freedom of speech than under any of the available alternatives.

So what? Why is it good for a society to have more truth? Traditionally, the answer to this question has been taken to be self-evident, such that any policy that produces more truth is eo ipso a policy worth pursuing. This view, however, emanates in large part from the assumption in almost all of the free speech literature that the opposite of truth is falsity. If the pursuit of truth is the alternative to the pursuit of falsity, then it has appeared that the former must necessarily be preferred. Even this is open to question. If truth is an ultimate, irreducible, and noninstrumental value, then of course it is preferable to falsity by stipulation and nothing more need or can be said. However, if truth is instrumental to some deeper good, such as happiness, utility, dignity, stability, human well-being, the general welfare, or whatever, then the instrumental relation between truth and that to which it is instrumental is empirical and not definitional, and therefore capable of being false in some or many cases. Given the deep-seeded racism in the United States, I would consider it an open-question whether 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. I am not convinced that the country would be, on balance, hurt if American men believed (falsely) that cigarettes and alcohol cause baldness. I am also willing to entertain the possibility that the (false) belief of most Americans that their banks have well in excess of fifty percent of deposits available for immediate withdrawal is an essential condition for the successful operation of the banking system in the United States, which is in turn (possibly) instrumental to economic stability, which is in turn (possibly) instrumental to the general welfare of the people of the United States.31 At the very least, therefore, it appears that if

31. 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, the bene-

much that we think about markets is more applicable to the marketplace of ideas than is often acknowledged. See C. Mackinnon, The Sexual Politics of the First Amendment, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 206 (1987); Coase, The Market for Goods and the Market for Ideas, 64 AM. ECON. REV. 384, 389 (1974) ("There is no fundamental difference between [the market for goods and the market for ideas] and, in deciding on public policy with regard to them, we need to take into account the same considerations.").
truth is instrumental, then more truth, or even less falsity, is not in every case instrumental to what it is that truth is instrumental to.

As with most instrumental goods, however, it is still possible to recognize the instrumental value of truth to something deeper without maintaining that that relationship holds in every instance. The posited relationship between truth and some foundational value might thus be probabilistic rather than universal, just like the relationship between exercise and good health. But even assuming that claims about the value of truth are claims of empirical tendency rather than logical inexorability, and thus assuming that truth is generally (if not necessarily) better than falsity, the abstract preferability of truth to falsity is somewhat beside the point, for the object of our attention is not so much truth as it is knowledge. That is, the argument from truth is essentially an argument from knowledge. The value asserted by the argument from truth is the value of having people believe things that are in fact true. Truth, after all, is a property of a proposition and has little to do with human action or belief. The argument from truth is best recast as an argument from knowledge in order to focus on

fits of falsity might be overwhelmed by the harms consequent upon establishing some institution to determine which falsehoods are socially desirable, see Rawls, Two Concepts of Rules, 64 J. Phil. 3 (1955), but this does not defeat the point in the text that falsity is not necessarily bad, and truth is 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 law.

Thus, my concern, not just here but in general, is that the lawyer's typical "Who's to decide?" challenge is a rhetorical device that conflates two distinct questions. The first question is whether some distinction can be drawn between alternatives, at least within the discursive context in which the distinction is offered. That is, do you, the reader, and I, the writer, agree that there is a distinction between x and y? In some cases we may not, or we may agree that there is no distinction. But, if we agree that there is a distinction, then the next but distinct question is about the circumstances, if any, under which some institution might be empowered to draw x/y distinctions. It is a mistake to conclude from the inadvisability or impossibility of creating such institutions that there is no drawable distinction. Similarly, it is equally inappropriate to infer from the putative undesirability of a governmental institution established to determine truth, or to determine the value of truth, that distinguishing truth from falsity or determining the value of truth is impossible.

32. In saying that truth is not necessarily good, I make a logical claim that is, of course, not rebutted by the citation of instances finding truth good and falsity bad. In saying that truth is not necessarily foundationally valuable, I do not deny that truth may be, and frequently is, valuable when measured according to the values that truth is instrumental to; it is thus a simple logical mistake to rebuff my "some truths are not valuable" claim by observing that some truths are. Rather, the "some truths are not valuable" claim can be defeated only by establishing the proposition that "all truths are valuable," and this proposition is not established by showing that some truths are valuable.
the way in which the argument is directed towards human action rather than propositions in the abstract.

If instead of considering truth we are considering knowledge—justified true belief—then the opposite or failing case is no longer limited to falsity. A person or a population can fail to have justified true belief in three different ways: one’s belief can be unjustified; one’s belief can be false; and one can have no belief at all. This last is of particular interest here, because it can now be seen that although the opposite of truth is falsity, one of the opposites of knowledge is simply ignorance, or the lack of belief. Although one way to fail to know is to believe something that is wrong, another way is to know nothing at all. Understanding this distinction allows the question about truth as an instrumental value to be rephrased in terms of knowledge: Is it necessarily or generally the case that knowledge is better than ignorance?33

When the question is so rephrased, it then appears that what is at issue is not whether it is better (for you? for me?) that you believe (correctly) that I am an academic rather than (falsely) that I am a professional wrestler, but whether it is better that you believe (correctly) that I am an academic than that you have no beliefs at all about me. And what if I were in fact a professional wrestler? Or a religious fundamentalist? In these cases I might be better off if you had no knowledge at all. And maybe so would you, and so would society. Think of what it means to say, “I wish I hadn’t known that.” It is possible that in most cases it is better to have a true belief than a false one. It is also possible, however, that in a nontrivial number of cases it is no better to have a true belief as opposed to no belief whatsoever.

At this point it may be useful to take a slight Bayesian digression. Perhaps my assumption that the opposite of knowledge can be ignorance is excessively simple. In some instances, what appears at first to be no knowledge at all is in fact a set of prior probabilities based on previous experience. For example, when I meet someone at a party I tend to believe, at some level of consciousness, that they are not carrying a weapon, that they have not recently been convicted of a felony, that they cheat but only

33. The term “ignorance” is a bit pejorative for my purposes (although Rawls’s “veil of ignorance” helps in some circles to ameliorate the negative connotation), but the less pejorative synonyms provided by my thesaurus—“unknowingness,” “unacquaintance,” “unfamiliarity,” “unawareness,” and “incognizance”—are far too infelicitous to be used anywhere other than in this footnote.
slightly on their income taxes, and, in the circles in which I travel, that they prefer hiking to bowling and Liszt to Liberace. From this perspective, all subsequent information I receive does not so much fill an epistemological void as provide new information with which I then adjust my previous beliefs. Thus, the good Bayesian may challenge at least the frequency of cases in which my assertion of an epistemological void is sound.

This Bayesian perspective is undeniably partially correct, and I certainly do not want to deny the extent to which much of our interaction with the world takes place against a background of prior probabilistic epistemological assumptions. Still, not every topic about which I receive knowledge is a topic as to which I had prior beliefs, at any level of consciousness. Thus, the Bayesian perspective does not capture the entirety of human interaction, or, more accurately, human noninteraction. When, at the supermarket checkout counter, I glance at a publication informing me that some person has lost 200 pounds by faithfully adhering to a diet of bat guano, this knowledge does not replace a previous belief so much as add to my stock of beliefs. The new knowledge merely replaces what had previously been epistemological empty space. In learning this information I have not modified a previous belief (except possibly the belief that no one had ever lost 200 pounds on a bat guano diet), but have simply added a new piece of information to my informational repertoire. Even acknowledging the Bayesian's point, it remains the case that frequently the gain in knowledge is simply an addition rather than the substitution of the true for the false. In such cases, the argument that this addition of knowledge is only sometimes and only contingently valuable must be taken seriously.

III

From a perspective that recognizes that some gains in knowledge might not be gains simpliciter, the argument from truth as an argument for freedom of speech and freedom of the press is parasitic on a theory of value or a theory of the good as to which knowledge is instrumental. Moreover, it appears highly likely that this instrumental relationship between knowledge and some ultimate good is contingent rather than necessary. When Mill in his

34. The logical point made supra note 32 applies throughout all that follows, and not only to the particular issue of truth in which it is first introduced.
argument against censorship assumed that true belief is valuable, he was either making the contingent utilitarian claim that more true belief will produce more utility (or happiness, or whatever) or he was showing himself as a nonutilitarian consequentialist who believes that possession of true belief is a consequence, the increase of which is a good in itself. My purpose here is not to engage in exegesis or interpretation of Mill, so I will not pursue this further. But the former interpretation seems more empirically contingent than Mill appears to admit, and the latter is not only in tension with some of Mill's other views, but also requires the kind of demonstration that few consequentialists have ever attempted.

The view that knowledge is instrumental to, say, utility or the general welfare or dignity could be taken as making an empirical but (contingently) universal claim. It could be, for example, that every increase in knowledge represents an increase in utility or general welfare or dignity. But this seems plainly false. As a number of the examples above were designed to suggest, it is clear that many increases in someone's knowledge come at the expense of

35. See J.S. Mill, supra note 28, at 38-44.
37. Interestingly, one of the most prominent consequentialists to address the issue concluded to the contrary. "[K]nowledge, though having little or no value by itself, is an absolutely essential constituent in the highest goods [such as aesthetic beauty], and contributes immensely to their value." G.E. Moore, Principia Ethica 199 (1965). It is unclear what kind of claim Moore was making in describing the relation between knowledge and ultimate good as "absolutely essential." It is a spectacular understatement to suppose that in a footnote I can offer a theory of the good. Let me, therefore, be satisfied with the claim that any consequentialist theory of morality or rationality must have some designation of what ultimate consequences count in evaluating the desirability of an action. If those consequences do not, as with utilitarianism, include knowledge, then knowledge is valuable only insofar as it increases utility, a relationship I would describe in terms of a tendency rather than a unity. Alternatively, there could be a consequentialism that treated knowledge as the single ultimate value, but I know of no such theory. Another possible theory is one that treats knowledge as one of a plurality of ultimate values, the increase of any of which is a good in itself. It is this last theory that looks most promising, but, like Moore, I remain skeptical. Therefore, I do not, as Professor Marshall suggests I might, move from the view that knowledge is instrumental to x to the view that x is instrumental to something else, which in turn may be instrumental to knowledge. Comment of Professor William P. Marshall, Case Western Reserve Law Review Symposium: The Right to Privacy One Hundred Years Later (Nov. 17, 1990). I maintain instead that the array of irreducible goods most likely does not include knowledge, and that the very irreducibility of irreducible goods precludes an instrumental account of why those goods are good.
someone else's well-being or dignity. I find it wildly implausible to suppose that in every case the well-being of the recipient of the new information is increased by more than the well-being of the subject is decreased as a result of the disclosure. Here, however, it is important to distinguish those activities that are, on balance, undesirable from those that have no value at all. Under one view, all increases in knowledge are valuable, but some may also cause disvalues outweighing the value produced. Yet under another view, some increases in knowledge simply have no value at all. Resolving this issue is not crucial here, for the difference is of consequence only under a simple hedonistic consequentialism pursuant to which one person's increase in knowledge at someone else's expense is analogous to the value in happiness someone achieves by punching someone else in the face. My claim is only that increases in knowledge that admittedly increase the pleasure of the knower are necessarily valuable only under a theory that treats pleasurable punchings of others as valuable, and that under any nonhedonistic theory of the good it is implausible to maintain that increases in knowledge are necessarily valuable.

If we look at the more plausible view that these issues should be considered not on the basis of the universal characteristics of individual items or events, but rather in terms of the tendencies of types or classes, then it seems reasonable (but still needing some demonstration) to suppose that more knowledge, as a class, will benefit the well-being or happiness or utility or dignity of the recipients of that knowledge, as a class, more than it will detract from the well-being or happiness or utility or dignity of the subjects of that knowledge, as a class. But even supposing this to be true, difficult questions remain about the definition of the relevant class. Defining the classes in terms of all subjects of knowledge, all knowledge, and all recipients of knowledge, the beneficial tendencies of more knowledge seem clear. If, however, we subdivide the class, and that is exactly what privacy law seeks to do, then it now becomes much more plausible that we could identify sub-classes within which the tendencies will go in the opposite direction. Once we acknowledge that not every increase in knowledge

38. It is important to distinguish here the theoretical possibility of an empirically justifiable sub-class, see D. Lyons, Forms and Limits of Utilitarianism (1965); M. Singer, Generalization in Ethics: An Essay in the Logic of Ethics, with the Rudiments of a System of Moral Philosophy (1961), from the possibility that some theoretically and empirically distinct sub-class might still not be usable in practice. See
is for the good (however good is defined), we must be open to the possibility that the instances in which knowledge is not for the good might be collected into a usable and internally coherent class. Moreover, such a class could be based on tendency rather than universality, in the sense that the tendency of more knowledge within the class might be for the worse even if some items of increased knowledge within the class would be beneficial.

These complications are avoided if knowledge is viewed simply as a good in itself. Returning to this possibility in light of some of the privacy issues we are now discussing, the view that knowledge is a good in itself seems little more plausible than the view that knowledge is universally instrumentally good. Consider again in this regard the public disclosure of a private person's status as a welfare recipient, or as a recovering alcoholic, or as someone with seven toes on one foot, or as someone who attended two meetings of the Communist Party in New York in 1934. The first reaction might be that these disclosures are simply not valuable, and therefore that more knowledge is not an intrinsic and ultimate good. But one response to this reaction would be to distinguish between the mere existence of some value and value of all things considered. This distinction allows the conclusion that such disclosures, with their consequent increase in someone’s knowledge, are in fact valuable, but that the harm of the disclosure outweighs the value, so that, on balance, it is better if there is no disclosure. Under this view every increase in knowledge is valuable, but that value is only one component of a complete calculus of value—or of harms and benefits—pursuant to which all of the relevant values and disvalues must be aggregated to produce a final determination of value.

This approach may be appealing, but the examples suggest that some increases in knowledge simply have no intrinsic value. (Remember, we are not now discussing knowledge as instrumentally valuable and thus not now discussing an increase in knowledge as instrumentally increasing, say, happiness.) Therefore, examples such as the unwanted disclosure of unexposed physical deformities demonstrate the implausibility of treating the increase of knowledge as an ultimate good worth pursuing in its own

Schauer, Slippery Slopes, 99 Harv. L. Rev. 361 (1985); Trianosky, Rule-Utilitarianism and the Slippery Slope, 75 J. Phil. 414 (1978); see also supra note 31 and accompanying text.
These examples demonstrate precisely that it is not necessarily or ultimately the case that an increase in knowledge by some agent is good either for that agent or for society.

Thus, it appears that the value of knowledge is first of all agent-relative in the sense that what is valuable for one agent may not be valuable for another, or that the value of one agent’s knowledge may be offset by the negative value for the second agent because the first agent has that knowledge. In addition, knowledge is now seen to be only contingently valuable. It is empirically related to some deeper value by a relationship that is probabilistic and not universal, and thus possibly nonexistent either in some cases or in some class of cases.

IV

This discussion might be put quite differently by restating the common slogan that “knowledge is power.” That phrase, however, is most plausible if it is contended only that one of the things that knowledge is instrumental to is power, and that power, while itself instrumental, may at times be more directly related to irreducible goods than is knowledge.

In thinking about this claim, let us define “power” as including the ability in fact to control one’s environment, including but not limited to controlling other agents. To say that knowledge is instrumental to power, therefore, is to say that knowledge of that environment, including knowledge about other agents, is likely to (the “is” in “knowledge is power” seems plainly to be an empirical claim) increase the ability of the possessor of that knowledge to see both the obstacles and the opportunities in a potentially

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39. In thinking of this example, I would not rule out the possibility that if we are thinking instrumentally and not ultimately, then some unwanted disclosures might contribute to the general welfare by helping to remove unjustified negative reactions to certain traits or activities. One of the arguments for involuntary disclosure of someone’s sexual orientation or status as a rape victim, for example, is that negative reactions to someone on the basis of sexual orientation or status as a rape victim are simply wrong. Thus, involuntary disclosure contributes to producing a world in which the stigma is eliminated. Thinking instrumentally, however, requires weighing the extent of the involuntary sacrifice with the likelihood and extent of the benefit, a calculus that needs a bit more than mere assertion. That is, although it is clear that it would be better if one’s sexual orientation or status as a rape victim were nonstigmatizing, it is less clear that involuntary disclosure will get us there, and less clear how long it will take us to get there.

power-stifling environment. Having a map and a weather forecast increases my control over the physical environment, and, in the same way, having knowledge about what motivates, annoys, embarrasses, or angers someone else increases my control over them. To consider privacy of a quite different form, think about the loss of control that comes when someone has a data bank including my physical profile, my spending habits, and the details of my life and my family.

The slogan "knowledge is power" is commonly employed by those who want some item of knowledge or want more knowledge in general. From this perspective, knowledge, which we have seen is instrumental rather than ultimate, is one of the weapons desired by those who desire more power. If we step back from the slogan as manifesto, however, we can see the message of knowledge as power as a strong recapitulation of the position that possessing information tends to empower the possessor at the expense of someone else. Although it may be a mistake to think of power as a zero-sum game, in the sense that some agent’s possessing more power means that some other agent possesses less, it is still the case that this is the necessary implication for power relations between or among people. Insofar as I have more power over you, you have less over me, and insofar as some factor changes the power relationship between $A$ and $B$ to $A$’s benefit, then it is necessarily the case that the power relationship is changed to $B$’s detriment.\footnote{There is interesting and important literature on power, and my failure to discuss it in detail here should not indicate that I think it irrelevant to further consideration of the relationship between speech, knowledge, social power, and political power. Among the more important recent works are C. Friedrich, Man and His Government: An Empirical Theory of Politics (1963); C. Friedrich, Constitutional Government and Democracy (1950); H. Lasswell & A. Kaplan, Power and Society: A Framework for Political Inquiry (1950); A. McFarland, Power and Leadership in Pluralist Systems (1969); N. Polsby, Community Power and Political Theory (1980); Partridge, Politics and Power, 38 Phil. 117 (1963). For a discussion of some of the classic theories of power, see J. Plamenatz, Man and Society (1963). Note also that the Hohfledian power, a power which allows one person to alter another’s legal position, W. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (W. Cook ed. 1923), comes quite close to capturing the view of knowledge as power. That is, someone with knowledge about me is likely, because of that knowledge, to have a greater ability to alter my position in some way. Hohfeld, however, was discussing legal power, and it is possible that a legal power might or might not produce power in fact, and that power in fact might come from many factors other than the exercise of a legal power.}

\footnote{By talking of benefit and detriment I assume here that having more power over someone else is good for the holder of the power. In fact I believe that to be false, but why I believe that, and the implications of that position, have very little to do with the main
Consequently, it is often the case that by possessing information about B that B does not want known, A will have greater power over B and, concomitantly, B will have less power over A. Consider in this regard the knowledge by an employee that her employer has overcharged some government agency, or the knowledge by an employer that an employee has tested the job market and come up with nothing. Consider also a negotiation in which one party has discovered the best offer that the other party is ultimately willing to make. In other contexts the relevant power relationship is not between A and B, but between A and C, some third party, although information about B is at issue. A newspaper that prints a story about someone without that person’s consent rarely does it to increase their power over the subject. Still, insofar as the newspaper has the ability to conscript someone into being an instrument of their relations with others (including their readers and other newspapers), much the same issues are present. A’s ability to conscript B against B’s will into A’s fight with C is every bit as much power over B as is the more direct situation in which C is not part of the scenario.

This perspective sheds quite a different light on New York Times Co. v. Sullivan. Seeing the case as involving the relation between knowledge and power conforms it more closely to the views of Alexander Meiklejohn, on which the decision is commonly thought to be based. In developing his account of the theoretical underpinnings of freedom of speech and press, Meiklejohn stressed the notion of popular sovereignty and saw restrictions on free speech as anomalously representing the power of the servant (the official) to determine what information the master (the people) was to have. If this is correct, then what is wrong with sedi-

themes of this article.


A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27, 75 (1960). Meiklejohn’s position, especially as respects popularly inspired restrictions on speech, is not without difficulty, but those difficulties are not central to my argument here. See Schauer, The Role of the People in First Amendment Theory, 74 Calif. L. Rev. 761 (1986).
tious libel laws or their equivalents is not so much that the laws constrict information in some abstract sense, or even that they interfere with the process of public deliberation, but rather that they represent a particularly extreme manifestation of one party's (the government's) control over the information available to another (the population), and thus represent, to the extent that knowledge increases power, an instance of governmental power over the sovereign population. *New York Times,* therefore, can be seen as a case not about increasing the availability of politically relevant information to the public so that public deliberations can approach some supposed ideal, but rather as primarily about (1) the availability of politically relevant information to the public so that they can exercise more power vis-a-vis their governors, and (2) the impermissibility of the governors exerting power over the governed by restricting the information available to the governed.

Upon viewing *New York Times* in this Meiklejohnian light, Meiklejohn's own town meeting model becomes slightly distracting. Although public deliberation may have independent value, as the current legal academic articulation of the civic republican tradition emphasizes, a popular sovereignty view of *New York Times* sees the essence of the case as involving the increase in public knowledge of their governors in order that the public might exercise more control over those governors, or at least be less subject to control by those governors. And this shift of perspective puts into a different light some of the post-*New York Times* doctrinal developments. When, in *Rosenbloom v. Metromedia, Inc*., a plurality of the Supreme Court attempted to treat the status (as

46. See M. Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 10-12 (1988) (describing civic republicanism as a tradition based on people jointly creating and understanding society based on participation with others, hence the emphasis on town meetings as an institution that instilled civic virtue in citizens); Michelman, Law's Republic, 97 Yale L.J. 1493, 1503-04 (1988) (arguing that participation in public deliberation is a primary personal interest as a means of defining norms and principles); Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986) (arguing that feminist jurisprudence embraces and adapts civic republicanism); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 85 (1985) (expanding on classical republicanism by studying the cynical attitude of Madison and the Federalists who adopted certain pluralistic defenses against excesses from republican participation). Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988) (discussing the basic republican commitment to political equality, deliberation, universalism, and citizenship and arguing for integration of these concepts into modern republicanism and legal reform).

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public or not) of a defamed individual as irrelevant for defamation purposes, it adopted a model that focused on the amount of information available for a deliberative body—the town-meeting perspective. But when in Gertz the Court rejected Rosenbloom and thereby shifted the focus to the identity of the defamed individual, it adopted a view pursuant to which legal strategies designed to increase the amount of information that one party has about another become part and parcel of deeper views about the actual and ideal power relations between those parties.

V

Having begun with the tort of invasion of privacy by the publication of accurate information and moved to increasingly abstract questions about free speech theory and the philosophical value of truth, I have partially returned to earth by looking a bit at defamation law in this light. Now I will return to the beginning and look once more at invasion of privacy.

Assuming that legal doctrine has some effect on behavior, an assumption probably justified with respect to mass media behavior in light of legal doctrine concerning privacy and defamation, we can think about the relationship between privacy law and what kind of information is being disseminated by whom, to whom, and with what effect. Thus, part of my claim is that if the law facilitates A having more knowledge about B, then the law necessarily embodies a position about A’s power vis-a-vis B (including A’s power to use B in a fight with C). To create or expand tort actions for invasion of privacy by virtue of publication of true factual propositions is to empower those to whom we grant the cause of action and proportionately disempower those whom we thus deter.

But where does this take us? It suggests at the outset that it

48. Implicit in the foregoing phrase is my belief that legal doctrine often has less effect on behavior than is commonly supposed. Were one to read only Abington School Dist. v. Schempp, 374 U.S. 203 (1963), one might get a distorted view of the amount of prayer actually taking place in the schools. See K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 29-33 (1971) (focusing on the degree of noncompliance with the Court’s decision in Engel v. Vitale in regions with strong traditions of religious observance in public schools, but the effect of changes in doctrine on changes in media behavior appears to be a somewhat closer relationship); Renas, Hartmann & Walker, An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 41 (E. Dennis & E. Noam eds. 1989) (survey findings that demonstrate evidence of a chilling effect on newspaper editors concerned with adhering to the New York Times actual malice rule).
is useful to think of privacy, like power, in terms of control.\textsuperscript{49} We can go further though and ask about the role of this factor in the design of legal doctrine. Accordingly, we should examine privacy law by looking at the class of individuals or institutions empowered by an increase in information brought by a relaxation of the current standard and at whose expense this occurs. Conversely, we should examine the class comparatively empowered, and at whose expense, when information transfer is constricted by making invasion of privacy actions more available.

Even if we conclude, as I would, that questions about power relations among people and institutions are necessarily implicated in the design of legal doctrine (which is not to take the reductionist position that they are the only questions implicated in the design of legal doctrine) and thus ought to be considered explicitly in the design of doctrine, we must still consider the size of the category with respect to which we will consider these questions. Thus, placing power on the agenda remains agnostic as to whether this question should be considered at the level of rule-making or rule-application or both.

Consider in this regard Justice White's dissenting opinion in \textit{Lakewood v. Plain Dealer Publishing Co.}\textsuperscript{50} In that case the majority concluded that Lakewood's restrictions on newspaper vending racks restricted the Cleveland Plain Dealer's first amendment rights. Joined by Justices Stevens and O'Connor, Justice White chided the majority, stating:

\begin{quote}
The Court mentions the risk of censorship, the ever-present danger of self-censorship, and the power of prior restraint to justify the result. Yet these fears and concerns have little to do with this case, which involves the efforts of Ohio's largest newspaper to place a handful of newsboxes in a few locations in a small suburban community. . . .

It is hard to see how the Court's concerns have any applicability here. And it is harder still to see how the Court's image of the unbridled local censor, seeking to control and direct the content of speech, fits this case. In the case before us, the City of
\end{quote}


\textsuperscript{50} \textit{486 U.S. 750} (1988).
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Lakewood declined to appeal an adverse ruling against its ban on newsracks, and instead amended its local laws to permit appellee to place its newsboxes on city property. When the nature of this ordinance was not to the Plain Dealer's liking, Lakewood again amended its local laws to meet the newspaper's concerns. Finally, when the newspaper, still disgruntled, won a judgment against Lakewood from the Court of Appeals, the city once again amended its ordinance to address the constitutional issues. The Court's David and Goliath imagery concerning the balance of power between the regulated and the regulator in this case is wholly inapt—except, possibly, in reverse.51

Undergirding Justice White's intriguing opinion, and partially explaining the fact that Justices Stevens and O'Connor joined the opinion, is his view that not only are actual power relations relevant, but that those power relations ought to be examined in a particular context.52 By contrast, one could conclude that Justice White had identified the correct issue but questions concerning these power relations should be considered at the wholesale rather than retail level. By taking this approach, which I believe is necessarily presupposed by the first amendment itself,53 one could conclude that Justice White had identified the correct issue but had evaluated its significance at too low a level of abstraction. Suppose the level of abstraction is raised. The balance of power between governmental regulatory authorities (including but not limited to the City Council of the City of Lakewood) and newspapers (including but not limited to the Cleveland Plain Dealer) might then be seen as sufficiently on the side of the government so that governmental restrictions such as those in Lakewood would be constitutionally impermissible even if the application of that view, like the application of any rule, was likely in some cases to be either under- or over-inclusive.

With respect to actions for invasion of privacy, we can thus ask, in gross, about the power relationships between possessors of

51. 486 U.S. at 792-93 (White, J., dissenting) (citations and footnote omitted).
information (about themselves) and the class of potential users of that information. Now that we see the issue as more one of power than of truth, with even *New York Times* being much less about increasing the amount of information than about adjusting the power relationships between government officials and the population or the media, we can understand the plausibility of a focus on classes of individuals rather than topics. By focusing on actual relations between actual segments of the population, we can draw more sensible distinctions among, say, public figures, public officials, and private individuals, and avoid distinctions that collapse social roles and focus on different categories of utterance.\(^{54}\)

Thus, to recognize a right to privacy with respect to true and previously nondisclosed information is to make a statement about some number of power relations. Most obvious are those between public officials and the mass media, between public figures and the mass media, between private individuals and the mass media, between public figures and the public at large, and between public officials and the public at large. But most interesting to me is that, especially with respect to the disclosure to the public of previously undisclosed accurate information about individual members of that public, the dimensions of the right to privacy will, or ought to be, reflective of a view about the relationship between private individuals and the communities of which they are constituent members.\(^{55}\) A newsworthiness standard, as a limitation on that right, also reflects a view about these questions, as perhaps Oliver Sipple's case\(^{56}\) makes most clear, that as members of a community we may at times be called upon to make sacrifices for that community. If neither Sipple nor Sidis\(^{57}\) nor most other privacy liti-

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54. I intend for this to be somewhat suggestive with respect to defamation, not only with respect to questions about public figures and the like, see Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984), but also questions about the distinction between media and nonmedia litigants. On the latter, see generally Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978) (the Supreme Court uses a balancing approach when determining whether first amendment protection enjoyed by media litigants should be extended to nonmedia litigants).


57. Sidis had been a child prodigy. Twenty years later, the *New Yorker* published a report of Sidis's decline and obscurity. The Second Circuit affirmed the dismissal of Sidis's complaint. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S.
gants wanted to provide information for a public debate, even one that by hypothesis assisted the process of public deliberation, then they can be seen as examples of a decision to treat those who happen to be involved in public events as being required to make some involuntary sacrifice to and for the larger community.

Pursuing this theme of the relationship between privacy and community somewhat further, we can recall Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.* In that opinion he justified eliminating a distinction between private individuals and public figures by observing that "we are all 'public' men to some degree." He then went on to note that "[t]he individual's interest in privacy . . . is not involved in this case, . . . since, by hypothesis, the individual is involved in matters of public or general concern." Under this view, even an individual who involuntarily or semivoluntarily becomes part of an event of public concern is no longer entitled to privacy rights with respect to that event.

It now appears that the relevant comparison for individuals about whose lives private facts are reported is with individuals who are the involuntary targets of the speech of Nazis and members of the Ku Klux Klan, individuals whose athletic efforts were thwarted by the 1980 Olympic boycott, and individuals who are conscripted into military service. In each of these examples, the individual's power over his or her own life is conscripted into a larger community service. Each of these examples also demon-
strates that the individual’s choice to avoid community service, whether that service be in a war or as an instrument of foreign policy or as a subject of public deliberation, is treated as less important than or subservient to the larger community interest.

I do not necessarily oppose this phenomenon and on occasion have exposed moderately strong communitarian sympathies.\(^{63}\) Hence, the view that power over the facts of one’s life, just like power over one’s body or over one’s career or over one’s income, might have to be sacrificed to the public good is one I can well understand.\(^{64}\) Yet as with conscription into military service, especially as most recently practiced, we ought to be most wary of any system of conscription that disproportionately selects the weak and those who are already socially or politically powerless.\(^{65}\)

In dealing with defamation, the Supreme Court has at times defended its distinction between public and private figures by reference to “access to the channels of effective communication,” the ability of public but not private figures to attract or commandeer sufficient media attention to be able to reply to a defamatory statement.\(^{66}\) However, as the *Gertz* Court itself acknowledged, the argument from victim access to the channels of communication, although relevant, can hardly be taken to be sufficient, since the opportunity to reply, even where actually available, will rarely have equivalent force to the original defamation.\(^{67}\) One might rather look at the “access to the channels of communication” argument in a different light, viewing that factor as a surrogate for


\(^{64}\) The relationship between community and the rules of public discourse is highlighted in Post, *Constitutional Concept*, supra note 15. By focusing on the question of “matters of public concern,” *id.* at 667-79, Post demonstrates a concern with these same tensions that preoccupy me here, although it is clear that there is also some tension between his focus on events and deliberation and my focus on the classes of people whose power must be diminished in order to enrich public deliberation. By focusing on Jerry Falwell and Larry Flynt, two parties many people consider to be in approximate moral equipoise, see LeBel, *Emotional Distress, the First Amendment, and ‘This Kind of Speech’: A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. Colo. L. Rev. 315, 319 n.17 (1989), Post may have chosen a particularly unsuitable vehicle for conveying the message of sacrifices (other than just of civility) to be made in the service of public deliberation.


\(^{67}\) *Id.* at 344 n.9.
the amount of political and social power that public figures wield. In other words, distinguishing the public from the private figure may be a way of acknowledging that if one necessary implication of defamation law, and the first amendment generally, is the conscription of individuals into the service of public first amendment values, then there is something to be said for structuring the doctrine so that the burden is placed on those most able to carry it. 

The same considerations could explain a difference between the public and the private figure with respect to privacy law. Given that every privacy case presupposes that the actual facts disclosed were previously private, the question then is whether the facts disclosed are about someone who was otherwise or previously public or otherwise or previously private. Under this approach, disclosure of Oliver Sipple's sexual orientation would be subject to an evaluation different from that applicable to the unwanted disclosure of the sexual orientation of, say, a United States Senator or a prominent televangelist. I offer this rough distinction between public and private, however, only as a first cut, and only because it tracks a distinction already extant in defamation doctrine. It is possible, however, that the public figure/private figure distinction is too crude, failing to draw some attainable and useful distinctions within these classes. Yet even if these are not exactly the optimal categories or lines to draw, they are at least examples of categories that recognize that focusing only on "newsworthiness" or its equivalent comprehends only one side of the equation. Even if an equivalent amount of public good results from the involuntary disclosure of some private fact about a private individual and about a public figure, the degree of harm may be different, and the nature of the power transfer occasioned by that involuntary disclosure may differ. When we thus recognize that the new-

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68. Surprisingly little attention has been paid, either in the cases or in the commentary, to the incidence of the costs of the first amendment. Part of this is due to the tendency in far too much first amendment scholarship to denigrate or ignore the consequences of speech, thinking that we can ignore the problems of justifying rights to engage in other-regarding and potentially harm-producing activities by supposing those activities to be self-regarding. Yet once we recognize that speech can cause harm, that we protect it not because it is harmless but despite the harm it causes, and that protecting free speech is thus not a cost-free enterprise, it seems hardly irrelevant in a nonabsolutist world to focus on the identity of the individuals or classes who bear those costs. These issues are raised by some number of cases involving the location of speech and suggest that the law ought to be sensitive, see, e.g., Frisby v. Schultz, 487 U.S. 474 (1988), to questions about whether an all-too-common means of accommodating the costs of free speech to the mandates of the first amendment is to move that speech to someone else's neighborhood.
sworthiness principle stands equally willing to conscript the powerful and the powerless into the service of first amendment values, we are left to wonder whether this indiscriminate design, and disproportionate impact, is appropriate.

Once we understand, therefore, that the issue is often power rather than truth, and that the value of truth (or knowledge) often lies in its being instrumental to some deeper value such as (but not limited to) power, we can better confront a range of issues often obscured by existing first amendment doctrines and understandings. We have made a considerable advance by recognizing (sometimes) that we can evaluate privacy and defamation cases in ways other than on the basis of whether the result was a victory or a defeat for the media.69 We make more progress when we attempt to be as sensitive in the design of doctrine to the costs of public deliberation as to the possibility of its constriction. We will make even further progress when we recognize that the ability of legal rules dealing with information and knowledge, whether those rules come under the heading of first amendment, tort, copyright, patent, or whatever, to generate more knowledge is also but an intermediate step on the way to considering who will have that knowledge, at whose expense that knowledge it is gained, and what, if any, are the social benefits or costs of that shift in power.