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## The Revisability Principle

Andrew Tutt

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## Article

# The Revisability Principle

ANDREW TUTT\*

*This Article has two purposes. The first is to explain the principle rooted in American law and culture that most strongly supports an American right to be forgotten—a deep constitutional commitment to what this Article calls the “revisability principle.” It is the principle that an individual’s identity should always remain, to some significant extent, revisable; that no person should be tied forever to her identity at a particular moment in the distant past, and that to the extent individuals must forever account for who they were long ago, their individual freedom to act and speak as they wish—both in the present and in the future—is powerfully constrained.*

*The second purpose of this Article is to explain how emerging technologies place unprecedented pressures on the revisability principle. Technologies and social practices that result in the permanent storage, ready access, and widespread dissemination of past mistakes or even prior identities that a person in the present hopes to leave behind impinge on the principle of revisability by making it more difficult to disassociate oneself from past choices that no longer reflect one’s self-conception. To the extent individuals must forever account for decisions in the distant past—people they, in some sense, no longer are—their freedom to speak, engage, and participate in democratic society and cultural creation is powerfully constrained.*

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## INTRODUCTION

[M]ust everyone live in fear that every word [s]he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.

—*United States v. White*, 401 U.S. 745, 764–65 (1971) (Douglas, J., dissenting).

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed . . . . Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.

—*Id.* at 787–88 (Harlan, J., dissenting).

Imagine a world in which every person carried a tiny microphone in her pocket that was always switched on, constantly storing, recording, and associating all the sounds and voices around it, putting voices to

names, matching names to faces, and establishing the location and identity of every person within earshot for easy access and retrieval. Imagine a world in which every person wore glasses that recorded everything they observed, identifying who they saw and where they saw them in real time, matching faces to names, and names to identities, permanently storing everything seen for later access and retrieval by anyone. Imagine a world where every decision to share something with one's confidants, by virtue of the nature of the medium in which it was shared, risked its wider dissemination, recordation, and permanent identification with that individual.

That world is nipping at our heels. The technologies are already here. The receiver on a cell phone can record at any time;<sup>1</sup> as can the webcam on a laptop or home computer. Google Glass promises a quiet, passive visual and audio recording device on every face. Any kind of sharing involving computers—from email, to social networks, to files in the cloud—can always be forwarded or shared more widely, and once shared, is shared forever.

Even if an individual were to take countermeasures, the traditional means of avoiding that kind of exposure will prove unavailing in the future. To the extent one can entirely avoid the use of modern technology while attempting to live and work in a world dependent on it, she surely faces unique challenges, risking isolation, even ostracization. Even if an individual does choose to face those challenges, run that risk, and forego the use of those technologies, she has no power to control their use by others. Even if all but one person in the room has opted for the more expensive cell phone plan that doesn't leave the microphone on, it only takes one to record everything that happens.<sup>2</sup> The same will be true of Google Glass—even if only one in one hundred were to wear it,

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1. As Senator Ted Cruz often quips before delivering remarks: "Leave your cell phones on. I want the President to hear this." See Alina Kleinedam, *Sen. Ted Cruz Denounces Obama Administration's Lawlessness*, ABC NEWS (May 7, 2014, 5:21 PM), <http://abcnews.go.com/blogs/politics/2014/05/sen-ted-cruz-denounces-obama-administrations-lawlessness>; Emma Margolin, *Ted Cruz Calls to 'Repeal Every Blessed Word of Obamacare'*, MSNBC (June 6, 2014, 4:58 PM), <http://www.msnbc.com/msnbc/ted-cruz-texas-state-convention-obamacare>.

2. If this sounds far-fetched or futuristic, one need only consider that Facebook is only a step away from making this a reality. See Kashmir Hill, *Facebook Wants to Listen in on What You're Doing*, FORBES (May 22, 2014, 7:35 PM), <http://www.forbes.com/sites/kashmirhill/2014/05/22/facebook-wants-to-listen-in-on-what-youre-doing> ("Facebook is rolling out a new feature for its smartphone app that can turn on users' microphones and listen to what's happening around them to identify songs playing or television being watched."); Ryan Tate, *Why Facebook Spent a Year Learning to Listen in on Your TV Shows*, WIRED (May 22, 2014, 1:23 PM), <http://www.wired.com/2014/05/facebooks-year-tv> ("If you're watching TV or listening to music and you feel like discussing it online, Facebook believes, nothing should stand in the way. Not even a few keystrokes."); Ryan Tate, *Facebook Will Soon Detect What You're Watching and Listening To*, WIRED (May 21, 2014, 6:49 PM), <http://www.wired.com/2014/05/facebook-will-soon-detect-what-youre-watching-and-listening-to> ("Facebook will soon automatically identify the TV shows you're watching and the music you're listening to, making it easier to join online discussions involving your latest bit of entertainment.").

an enormous amount of information about people's lives that once would never have been recorded, will be. It may even be indexed and made searchable. It may already be.

That account of the world that is taking shape is not meant to paint a dystopian portrait. It simply *is* the world that is coming. It is a world where everything that happens will be known. But there is something about this new world that feels frightening. The aim of this Article is to explore the source of this response, and in so doing, shed light on an intuition widely shared but seldom named. What is it about a world where everything that happens can be researched, resurrected, recalled, and recollected that strikes so many as troubling? This Article argues that the source of this discomfort is rooted in our legal and political culture's shared commitment to the revisability principle—the principle that an individual's identity should always remain, to some significant extent, revisable.<sup>3</sup> Whether in insisting on secrecy in deliberations, control over personal information, security in persons, houses, papers, and effects, limits on what data can be collected, or how long it can be stored, we have long recognized the importance of this principle in our society, reflected in the widespread sense that certain things should either remain unknown or fade from memory with the passage of time so that an individual can speak freely now, or change her mind later.

This Article is about the impending conflict between the First Amendment and new laws designed to safeguard revisability in the face of emerging technologies. The revisability principle is deeply embedded in American constitutional law and American culture, but for much of American history it has been a self-enforcing constitutional value, preserved organically by the limits of technology. Revisability has simply been reality's default rule, rarely requiring explicit protection in law, because the technology to easily and cheaply record everything that happened permanently and accessibly simply did not exist.<sup>4</sup> As such, society has not been required to make a deliberate collective commitment to revisability by enacting prohibitions on recording, storing, or access through positive law. Revisability was not a public value we were often required to defend because it was a value that individuals could easily protect on their own. The capacity to engage in significant revision, even within relatively small communities, remained robust because much of

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3. At the outset, it should be noted that there are innumerable situations in which it is widely believed that individuals *should* account for the decisions that they have made—the people that they were—even for the whole duration of their lives. Those who commit sex crimes are perhaps the most powerful examples. Our society forever brands them sex offenders. But in these scenarios it is widely recognized that the limitations society has chosen to place on an individual's capacity to engage in revision are a kind of scarlet letter, an enormous and burdensome restraint on individual freedom.

4. Anita L. Allen, *Dredging up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 61 (2008) (“The limitations of memory combined with practical barriers to efficient dredging once made it rational to predict that much of the past could be kept secret from people who matter.”).

what happened was unrecordable, could be prevented from recordation, was naturally limited in its potential dissemination, or would quickly fade from memory.

For the last hundred years, the Supreme Court has crafted First Amendment jurisprudence in a world in which laws meant to protect revisability were often excessive. Legal protections for revisability offered little marginal value at a time when most individuals could depend on the fallibility of memory to protect their capacity to engage in self-reflection and change. At the same time, laws with illicit motives, designed to stifle speech, were often justified on the basis that they protected values like revisability. That revisability was seen as a solid pretext for censorship reveals just how important the principle has long been thought to be, but it also had the effect of arousing an abiding suspicion of laws designed to protect facts from disclosure in the name of preserving the autonomy of individuals to engage in change. In a world in which laws meant to safeguard revisability offered little marginal benefit and were often a smokescreen for suppression, the Supreme Court responded in sweeping language, explicitly elevating the right receive ideas and debate them over countervailing interests proffered in the name of protecting revisability. Those decisions are now the backbone of America's First Amendment canon, and are rightly celebrated. But at some point, the different context in which they were decided faded from memory. Many scholars and courts today read those cases broadly, understanding them to imply that there simply is no revisability principle, or that it plays no important role in the right to freedom of speech protected by the First Amendment.

There is thus a significant risk that First Amendment rules and doctrines designed for another time and technological world will hinder modern legislative efforts to preserve revisability. The risk that laws ostensibly concerned with revisability are actually thin veneers for censorship remains as strong as it has ever been, but the clamor for laws specifically designed to protect revisability grows greater by the day as new technologies place significant unprecedented pressures on the revisability principle. The combination of pervasive passive information collection, information permanence, and easy access and retrieval, threatens to significantly impinge on the capacity of individuals to revise who they are and what they believe by making it possible to learn an unprecedented amount of information about who they have been over the course of their entire lives. That documentary record also increasingly stands to be built from information gathered by others and collected and organized by powerful private institutions, meaning that the capacity to preserve revisability will no longer be within the power of individuals to reasonably self-regulate. Because technological limitations will no longer serve to safeguard an important constitutional principle, the law will need

to take account of these changes in an effort, at the very least, to preserve constitutional equilibrium.<sup>5</sup> Legislatures will increasingly be called upon in the laws that they pass to expressly articulate revisability's importance, and how those laws preserve it, if they are to survive First Amendment scrutiny.

The debate is already happening in slightly different words and on slightly different terms. Courts and political bodies in Europe are increasingly coming to recognize an individual "right to erasure," or, to use the older and better known phrase, "right to be forgotten."<sup>6</sup> Those courts and bodies are responding to the same dynamic technological pressures as the United States, but unlike in the United States, their efforts are seen as a natural outgrowth of a preexisting traditional concern for individual "privacy."<sup>7</sup> The United States lacks a similar dialectic between freedom of speech and privacy. It is therefore unclear how much of that debate can or should inform the American debate over the right to be forgotten. The relationship between privacy, which necessarily involves things that individuals reasonably expect to keep from public view, and a right to be forgotten—which necessarily involves requiring that facts once exposed to public view be allowed to disappear—is fuzzy. The concept of privacy is frequently nebulous, and the human values it is meant to protect are seldom clear.<sup>8</sup> Individual expectations of privacy are embodied in a multitude of interests and values, only some of which overlap with a right to be forgotten. European courts and policy makers, and many scholars and advocates of privacy, see the concept of privacy and the values it serves as reasonably well-defined, but American courts rarely have. Given their traditional concern for illicitly motivated censorship, American courts are unlikely to accept a concern for privacy as such as sufficient to sustain laws limiting speech. For the right to be forgotten to take root in the United States, if it is to take root, it will need to be planted in firmer soil.

Revisability is more precise than privacy, and the values that it serves are easier to grasp. Revisability is the capacity of an individual to

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5. See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480–81 (2011).

6. See Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 453, 462 (2014).

7. The leading case is a 2014 judgment by the Court of Justice of the European Union finding a right to be forgotten rooted in an individual right to privacy. *Recent Case: Internet Law—Protection of Personal Data—Court of Justice of the European Union Creates Presumption That Google Must Remove Links to Personal Data Upon Request.—Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2014)*, 128 HARV. L. REV. 735, 738 (explaining that "operator's economic interests" are "never sufficient to justify interference with privacy rights").

8. See, e.g., Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 393 (1978); George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623, 640 (1980) (claiming that "support for the privacy laws remains opaque").

change her beliefs and self-conception on the basis of her best understanding of what they should be without regard to beliefs she once held, in the distant past. Though the two concepts overlap, the belief that individuals should have and be able to maintain a significant degree of revisability is not the same as a belief that individuals should have and be able to maintain a significant degree of privacy. Revisability is both broader and narrower than privacy. It is broader in the sense that many things that impinge on revisability—such as the threatened misuse or misrepresentation of historic facts—do not implicate an individual's privacy; it is narrower in the sense that revisability is only one of many possible justifications for privacy, and, in many instances, not even the most central or compelling justification for it.<sup>9</sup>

The argument that First Amendment doctrine will need to change to preserve an overarching First Amendment value, however—whether that value is respect for revisability, privacy, or something else—depends on establishing that that value is worth preserving, that it forms an important aspect of American law and culture, and that it is located within America's First Amendment tradition. The major aim of this Article is to do all three—to place the revisability principle at its rightful place at the very center of the American debate over the right to be forgotten.

As to its moral worth, revisability has significant value. That fact is not necessarily immediately obvious. Depending on one's intuitions, the notion that individuals should in general be free from accountability for many of their past decisions may strike some as morally repugnant rather than morally worthwhile. As a threshold matter, any argument in favor of the revisability principle must explain that allowing some things to never be discovered, or to quickly be forgotten, leads to morally valuable outcomes. The task is not to establish that revisability is always desirable, because it is not, but rather to establish that in some circumstances it could be important enough to be worth preserving. Perhaps the most important value revisability serves is that it allows individuals to retain the capacity to control, to some significant degree, their own destinies by fashioning a conception of themselves through successive deliberate choices that they make. In this way, a commitment to revisability reflects a commitment to preserving autonomy.<sup>10</sup> One important consequence of this connection is that the same powerful arguments that can be marshalled in favor of preserving a significant degree of individual autonomy also support revisability.

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9. For views critical of privacy without some more compelling justification than a desire to consciously conceal facts an individual would prefer not be disclosed, see, for example, Posner, *supra* note 8, and Stigler, *supra* note 8 (claiming that “support for the privacy laws remains opaque”).

10. By autonomy I mean positive autonomy, reflecting not merely a lack of restraints on individual action but also the freedom to select among valuable alternatives free from manipulation and coercion, and in doing so, create a conception of oneself and one's aims by oneself.

As to its place in American culture, one need look no further than literature to see that the belief that people should have freedom to revise is deeply felt. From *The Scarlet Letter*—where Hester Prynne struggles to create a new life of repentance and dignity after conceiving a daughter through an adulterous affair—to *Les Misérables*—where the broken Jean Valjean, convicted of stealing a loaf of bread, transforms himself into a man of virtue and a devoted substitute father to a girl who loses her mother—American art has long reflected our national devotion to the promise of redemption.<sup>11</sup>

As to its place in American law and the First Amendment, as this Article will show, the revisability principle occupies an important station.<sup>12</sup> The opportunity to revise one's beliefs and identity is at the very core of the reason we protect the freedom of expression. The prominent apparent counterexamples at the heart of First Amendment jurisprudence are not, as some scholars seem to suggest, a rejection of the notion that laws passed in the name of preserving revisability have no important role to play in American society. Rather, those decisions represent a balancing of values appropriate to their time and technological context, between the important need to preserve a space for public debate that is robust, uninhibited, and wide open, and the need to preserve a space for individuals to reflect on their conceptions of themselves, and revise what they believe. That the First Amendment, and American law more generally, strongly embodies both values, is more easily seen in a spectrum of other doctrines that have grown up to protect revisability in a variety of areas, from property to privacy.

The final aim of this Article is to suggest the kinds of changes that will need to occur in judicial doctrines concerning privacy and freedom of expression to take account of the increasing strains that new technologies and practices place on the revisability principle. This Article's ultimate aim is to explain the centrality of the right to revise to the liberty and freedom protected by the Constitution. For the judge confronting a legal regulation meant to safeguard revisability, a critical aspect of any proper First Amendment analysis must be consideration of the degree to which the regulation achieves these aims.

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11. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Luciana Piréa ed., Giunti Press 2010) (1850); VICTOR HUGO, *LES MISÉRABLES* (Isabel F. Hapgood trans., Thomas Y. Crowell Co. 1877) (1862). On the other hand, authors from Herman Melville to Mark Twain have also presented the converse of America's great faith in the capacity of individuals to leave behind their pasts. Melville's *The Confidence-Man* and Twain's story of The Duke and The King (who travel from town to riverside town defrauding as they go) in *The Adventures of Huckleberry Finn*, are both efforts to come to grips with the unique problems that arise when one can shed her identity too freely.

12. Jack Balkin has argued U.S. constitutional history itself is crucially founded on a forward-looking redemptive commitment. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 25–26 (2011).

The Article proceeds in five parts. Part I introduces the general notion of the revisability principle, and explains why it is morally valuable. Part II provides a range of examples of the revisability principle in American law. Part III defends the legitimacy of the revisability principle in the face of key First Amendment decisions that have been thought by many to hold that there simply is not one, or that it is not important to First Amendment analysis. Part IV explains how new technologies place significant pressures on the revisability principle as a self-executing constitutional principle. Part V builds on these insights in discussing how the revisability principle might be protected in a world where it will be possible for third parties to record, store, organize, and retrieve everything that happens all of the time.

### I. THE REVISABILITY PRINCIPLE

The revisability principle is the notion that individuals should remain free to engage in significant revision of their identities throughout their lives, a principle instantiated in large measure by the fact that, for much of human history, much of what individuals did remained unknown or went unrecorded.<sup>13</sup> Though revisability has long been something individuals outside of totalitarian regimes have enjoyed, it is not necessarily clear why that was so. The cost of recording and storing information about individuals was much higher in the past, and efforts to do so with older technologies were often considered unacceptably intrusive. There is a risk that treating the revisability principle as something our society values because we had a lot of it in the past confuses what was with what ought to be. If, going forward, affirmative collective measures are going to be taken to preserve revisability, its value will have to be explicitly defended, rather than implicitly derived. That task is not as easy as it might appear to some. The burden of establishing that revisability is morally valuable, as opposed to morally objectionable, is a heavy one. Across a wide range of human endeavors, we demand accountability.<sup>14</sup>

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13. Everything from daily, routine activities to more important things, like work and life milestones, were not shared widely, and even when shared widely, were not shared for long. Tracking down an old wedding or birth announcement took effort in the past; today it takes nothing more than a two-second internet search.

14. See, e.g., David A. Anderson, *The Failure of American Privacy Law*, in PROTECTING PRIVACY 139, 140 (Basil S. Markesinis ed., 1999) (“[P]rivacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities, and public officials. We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter. Most of all, we expect the media to uncover the truth and report it—not merely the truth about government and public affairs, but the truth about people. The law protects these expectations too—and when they collide with expectations of privacy, privacy almost always loses.”); H. J. McCloskey, *The Political Ideal of Privacy*, 21 PHIL Q. 303, 308–09 (1971) (arguing that many relationships create obligations of accountability); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 152 (2000) (“Throughout history, people have generally

The revisability principle places two freedoms into direct conflict—the right of individuals to change who they are by having things about them remain unknown or unknowable, be forgotten, or be limited in dissemination, and the right of other individuals to hold them accountable for who they once were, by knowing about or remembering what they have done. As Professor Jane Bambauer has explained, efforts “to preserve the information status quo . . . clash with the First Amendment” by “deliberately interfer[ing] with an individual’s effort to learn something new.”<sup>15</sup> As Professor Eugene Volokh has described, “our right to use speech to pressure others into not speaking is a fundamental aspect of the First Amendment; recall that a recurring (and correct) argument of those who fight against advocacy of evil ideas . . . is that such speech should be deterred by social ostracism and condemnation.”<sup>16</sup> Efforts to limit how much can be known about an individual’s prior beliefs or past associations risks weakening the capacity of individuals to learn new and useful things (perhaps by discovering what shared or formative experiences others have had), or hold them accountable for their actions, or question their motives in taking actions in the present on the basis of their questionable beliefs and decisions in the past. Those are powerful rejoinders to any argument in favor of protecting revisability. The task of this Part is to confront those arguments, and carry out the difficult task of setting forth the threshold case for the moral value of revisability.

Allowing individuals to engage in revision leads to a variety of morally valuable outcomes. First, it encourages individuals to share authentic versions of themselves. Second, it encourages intellectual innovation and experimentation. Third, it encourages individuals to engage sincerely with one another, and in that way promotes uninhibited, robust, and wide-open private speech. Fourth, it significantly reduces the price of persuasion. Fifth, it radically expands the realm of perceived and actual available choices an individual has. Sixth, it is essential to allowing individuals to retain autonomy. Seventh, in the aggregate, it has a significant positive impact on deliberative democracy.

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been free to learn about one another in the course of business transactions and other day-to-day contacts. Restrictions that alter this default rule sweep a potentially enormous pool of facts and ideas out of the shared domain.”).

15. Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014).

16. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1109 (2000).

A. REVISABILITY'S MORALLY VALUABLE CONSEQUENCES<sup>17</sup>

First, a commitment to revisability encourages individuals to share authentic versions of themselves with others because they need not fear that they will be held accountable for their authentic opinions, ideas, tastes, or preferences in the future.<sup>18</sup> Many people consider authenticity morally valuable. From the perspective of the individual who is free to behave authentically, that individual is freer than an individual who must carefully guard who it is they really are. From the perspective of the individual who interacts with authentic individuals, it can be argued that that she can form deeper and more meaningful connections with them, and rely more freely on their representations about what they actually think and believe. Authenticity, flowing from revisability, thus promotes a variety of goods traditionally linked to the First Amendment—helping individuals to find those of like and different minds to join with or persuade, and facilitating authentic relationships.<sup>19</sup>

Second, a commitment to revisability encourages innumerable forms of expressively valuable innovation and experimentation.<sup>20</sup> Most individuals live their lives simply as best they can, with only provisional beliefs about what should be done. They are uncertain and conflicted, but given all that they know, they make decisions, judgments or recommendations that, to the best of their knowledge, are good ones. Most individual lives consist of a constellation of these deliberate but imperfect acts. Experiments. Risks. Choices for which individuals could be, but would rather not be,

17. It must be remembered, however, that each of these morally valuable consequences might be met with a counter-consequence—one that is also morally valuable. Limitations on revisability might lead to decisions that are even *more* authentic because they must be made accountably. See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 102 (1991) (“It is only by publicly avowing a position that we are able to make it our own.”). However, the task of this Part is to make a prima facie or affirmative case for revisability as morally valuable, and so counterarguments will not be addressed as fulsomely as perhaps they could be.

18. Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906–07 (2013) (“All seem to agree, however, that the self possesses ‘an autonomous core—an essential self identifiable after the residue of influence has been subtracted.’” (quoting JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 113 (2012))).

19. See, e.g., *United States v. White*, 401 U.S. 745, 763 (1971) (Douglas, J., dissenting) (“‘To be alone and be let alone, to be with chosen company, to say what you think, or don’t think, but to say what you will, is to be yourself. . . . Few conversations would be what they are if the speakers thought others were listening. Silly, secret, thoughtless and thoughtful statements would all be affected. The sheer numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good.’” (quoting R. CLARK, *CRIME IN AMERICA* 287 (1970))).

20. Cf. Cohen, *supra* note 18, at 1918 (“Conditions of diminished privacy also impair the capacity to innovate.”); George Plimpton, *The Art of Fiction No. 21: Ernest Hemingway*, PARIS REV., Spring 1958, available at <http://www.theparisreview.org/interviews/4825/the-art-of-fiction-no-21-ernest-hemingway> (“The fun of talk is to explore, but much of it and all that is irresponsible should not be written. Once written you have to stand by it. You may have said it to see whether you believed it or not.”).

held to account. Much of this private expressive action is safeguarded by a commitment to revisability. These experiments may be merely small or petite freedoms: the expression of a present sense impression, an excited utterance, the telling of a joke, attendance at a party, swimming in a reservoir, asking someone to dance, but in the aggregate they constitute a sphere of risky action of significant value. Expressively valuable experiments may also be far more substantial than these, bearing significant physical or emotional risk, for example, or relating more plainly to scientific innovation. In any event, however, a commitment to revisability enhances the volume of this sphere. The cost of undertaking a significant assessment of the risks and benefits related to making an imperfect decision, recommendation, or judgment are significantly diminished where it is known or sincerely believed that it will not be remembered.

Third, a commitment to revisability encourages uninhibited, robust, and wide-open private dialogue.<sup>21</sup> The revisability principle, in its concern with the capacity to shield some conversations or interactions from being long remembered or forever tied to an individual's identity, lays bare the distinction between free speech and speaking freely. A commitment to revisability allows individuals to speak freely.<sup>22</sup> In everyday life this commitment manifests in myriad situations: those in which individuals attempt to engage with others anonymously or without disclosing their identities, speak under special House Rules or deliberate behind closed doors,<sup>23</sup> confer over the telephone or discuss in hushed voices or whispers, or send messages to the world through signposts, billboards, bulletin boards, or bumper stickers. Beyond its capacity to encourage authenticity, a

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21. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 537 (2001) (Breyer, J., concurring) ("The statutory restrictions before us directly enhance private speech . . . . The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.").

22. *Cf. White*, 401 U.S. at 762–63 (Douglas, J., dissenting) ("Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning [her] thoughts within a small zone of people. At the same time [s]he must be free to pour out [her] woes or inspirations or dreams to others. [She] remains the sole judge as to what must be said and what must remain unspoken.").

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

commitment to revisability promotes candor and exchange. This value is independent of the value of authenticity: it is the distinct and equally important value of *honesty*. In many ways the two overlap, but in many ways they do not. Being true to thyself does not always mean that one feels able to tell others what is true. A commitment to revisability promotes both authenticity and an arguably even more important First Amendment value: sincerity.

Fourth, a commitment to revisability significantly reduces the price of persuasion—the cost of joining or contributing to a cause or persuading another person to join or contribute to a cause. In many ways the values at the heart of the First Amendment depend on the notion that minds can be changed because of an idea’s *merit*, irrespective of extraneous considerations (such as threatened consequences of adopting that idea).<sup>24</sup> The two most prominent judicial theories of speech—that ideas trade on a “market” (Justice Oliver Wendell Holmes)<sup>25</sup> and that the remedy for speech that tends to lead us into error is “more speech” (Justice Louis Brandeis)<sup>26</sup>—presuppose that individuals remain free to adopt or reject ideas on the merits of those ideas themselves.<sup>27</sup> To the extent individuals are pressured to remain committed to ideas they once had because it is remembered or can easily be discovered that they once held them, this freedom to weigh and adopt ideas on their merits is diminished. When the price of persuasion rises too high, both of the most prominent justifications for robust protection of the freedom of speech come under significant threat.

Fifth, a commitment to revisability radically expands the range of actual and apparent choices an individual might have about who she will be and what she will believe. This has significant eudemonic consequences. Individuals have been shown to place significant value on even the appearance that they have choices.<sup>28</sup> “Research has shown that autonomy, agency and the freedom of choice enhance Americans’ intrinsic motivation and mental health, generate greater persistence, increase performance, and lead to higher satisfaction.”<sup>29</sup> The feeling one is choosing or exercising

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24. Cf. RONALD BEINER, *POLITICAL JUDGMENT* 56–58 (1983) (explaining that “[t]he autonomy of judgment requires that it exclude accommodation to the judgment of the public”).

25. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

26. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

27. Cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) (“The government may not suppress speech on the ground that it is too persuasive.”).

28. Barry Schwartz, *Choice, Freedom, and Autonomy*, in *MEANING, MORTALITY, AND CHOICE: THE SOCIAL PSYCHOLOGY OF EXISTENTIAL CONCERNS* 271, 272, 281 (Phillip R. Shaver & Mario Mikulincer eds., 2012) (“[T]here is no denying that ‘choice is good.’”).

29. Sheena S. Iyengar and Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. Personality & Soc. Psychol. 995, 995 (2000) (“[D]ecades of psychological theory and research . . . [have] repeatedly demonstrated, across many domains, a link between the provision of choice and increases in intrinsic motivation, perceived control, task performance, and life

choice, moreover, has expressive value all its own: every choice a person makes is an opportunity to affirm a set of commitments and to tell the world what she cares about. Thus, to the extent we think that choices are good—even boring, uninteresting choices like which brand of jam we like to purchase—a commitment to revisability militates in favor of allowing them to go unrecorded or be forgotten.

The foregoing arguments are not meant to establish that revisability is a universal solvent, good in every situation. There are innumerable reasons to care about what individuals have done in the past as well. Past decisions are clues to present intentions. We are all constantly interested in knowing more about the people with whom we interact—so we can know whether to trust them, or whether we agree with them across a range of beliefs that they might otherwise wish to hide. Individuals themselves also sometimes want a record, so they can prove their consistent good character, or just prove that something did in fact happen in the past. But until recently, and to a remarkable degree, our society accepted and thought it valuable that we could only know relatively little about the pasts of those with whom we associated. The purpose of this Subpart is to show that that was not a mistake. Just as there are strong reasons to want to know whether the person you are talking to once held beliefs with which you disagree, there are also strong reasons not to want to know. Allowing people to hide everything about themselves would make human interaction impossible, but preventing people from hiding anything about themselves would have the same effect.

#### B. REVISABILITY'S LINK TO SIGNIFICANT AUTONOMY<sup>30</sup>

Among the most important values the revisability principle preserves is the capacity to exercise “significant autonomy,” by which is meant not only the freedom to make choices, but also choices of a particularly profound and personal kind. “(Significantly) autonomous persons are

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satisfaction.”); Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 *LAW & SOC'Y REV.* 557, 558 (2012).

30. Professor Julie E. Cohen has argued that it is a mistake to link privacy (one means by which revisability is safeguarded) to liberal political theory because “conceptualiz[ing] privacy as a form of protection for the liberal self” contributes to the perception that “privacy is antiquated and socially retrograde.” See Cohen, *supra* note 18, at 1905. The idea seems to be that since no one in fact possesses significant autonomy, but is rather shaped only by what happens to them, privacy’s goal, “simply put, is to ensure that the development of subjectivity and the development of communal values do not proceed in lockstep.” *Id.* at 1911 (quoting JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 150 (2012)). Even if this is so—and I hesitate to assign any single point or purpose to privacy—it is difficult to understand why privacy’s unpopularity has to do with its rootedness in a belief that individuals can exercise significant autonomy or not, and even if in reality they cannot, why that makes a difference. See Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 *S. CAL. L. REV.* 1097, 1113–14 (1989) [hereinafter Waldron, *Autonomy and Perfectionism*] (criticizing the emptiness of this critique of autonomy); Jeremy Waldron, *Particular Values and Critical Morality*, 77 *CALIF. L. REV.* 561, 563–65 (1989) (same).

those who can shape their life and determine its course.”<sup>31</sup> An individual who possesses significant personal autonomy not only retains the freedom to make choices but also the ability to exercise that freedom to “adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete.”<sup>32</sup>

Every society understands a notion of significant autonomy. As anthropologist Donald E. Brown explained in his seminal work *Human Universals*, every culture sees individuals as more than “wholly passive recipient[s] of external action . . . . They know that people have a private inner life, have memories, make plans, choose between alternatives, and otherwise make decisions (not without ambivalent feeling sometimes).”<sup>33</sup> And indeed, in our own experience, every person can recall some point in her life where she fundamentally reassessed her beliefs. Whether this reflection resulted in an emphatic reaffirmation of her past choices, or instead resulted in an a conscious and deliberate decision to take on new beliefs and new causes, to sever connections with past associations, or to form new relationships and become, in some sense, a new person, it is widely recognized that this sort of freedom is worthwhile and worth preserving.<sup>34</sup>

A commitment to revisability is, in many senses, profoundly intertwined with the capacity to live with significant autonomy. Significant autonomy requires that individuals possess not merely choice in the sense of the opportunity to rationally weigh outcomes, but that individuals possess choices that are meaningful.<sup>35</sup> These choices must reflect a “choice of goods.”<sup>36</sup> Prisoners have many choices, but no one would think they possess significant autonomy. Nor do individuals whose choices are limited to black and white choices between good and evil.<sup>37</sup> Rather,

[a] person is autonomous only if [s]he had a variety of acceptable options available to [her] to choose from, and [her] life became as it is through [her] choice of some of these options. A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.<sup>38</sup>

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31. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 154 (1986).

32. *Id.*

33. DONALD E. BROWN, *HUMAN UNIVERSALS* 135 (1991).

34. Waldron, *Autonomy and Perfectionism*, *supra* note 30, at 1122 (implicitly endorsing the view that one could “say simply that autonomy is unequivocally good and that the growth of the social circumstances that make it both possible and important is to be celebrated unconditionally as one of the advances of modern life”).

35. RAZ, *supra* note 31, at 300.

36. *Id.* at 379.

37. *Id.*

38. *Id.* at 204. While I am using Professor Joseph Raz’s explanation of autonomy, both Professor Robert Nozick and Professor John Rawls endorsed similar conceptions. See ROBERT NOZICK, *ANARCHY*,

To deprive an individual of the capacity to engage in revision is to impinge significantly on her capacity to decide whether a goal, plan, project, relationship, or commitment that she once pursued should be abandoned or reaffirmed.

The most frequent manner in which an individual is deprived of significant autonomy is through manipulation and coercion, two conscious means of “distort[ing] normal processes of decision and the formation of preferences.”<sup>39</sup> Coercion and manipulation, however, require conscious action, and while vulnerability to these harms are both increased when everything is known and remembered, the revisability principle concerns itself with more than these harms alone. After all, revisability is impinged where the choices that individuals have about who they can be in the present are restricted because of who they have been in the past, even if those choices are not being consciously used against them by anyone at any particular moment. As such, one might contend that not everything that impinges on revisability impinges on significant autonomy.

But restraints on who an individual can be today because of who she has been in the past are inconsistent with having significant autonomy over one’s self, because “[t]o be autonomous, one must identify with one’s choices, and one must be loyal to them.”<sup>40</sup> Fear of coercion and manipulation can be just as powerful as actual coercion and manipulation, and this is the key link between revisability and significant autonomy. Where an individual cannot engage in revision, she becomes increasingly alienated from and disloyal to her own life plans, goals, and projects, even as she continues to pursue them. This is a weighty restraint on freedom. “A person who feels driven by forces which [s]he disowns but cannot control, who hates or detests the desires which motivate [her] or the aims that [she] is pursuing, does not lead an autonomous life.”<sup>41</sup>

Preserving a broad place for revisability, therefore, provides space for the exercise of significant personal autonomy by preserving the possibility of a life lived according to one’s best understanding of how it should be lived, given all the facts that an individual has in the present.<sup>42</sup> For “the

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STATE AND UTOPIA 49–50 (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971) (“[A] person may be regarded as a human life lived according to a plan . . . [and that] an individual says who [s]he is by describing [her] purposes and causes, what [s]he intends to do in [her] life.”); *id.* at 92–93 (“We are to suppose, then, that each individual has a rational plan of life drawn up subject to the conditions that confront [her]. This plan is designed to permit the harmonious satisfaction of [her] interests. It schedules activities so that various desires can be fulfilled without interference. It is arrived at by rejecting other plans that are either less likely to succeed or do not provide for such an inclusive attainment of aims.”).

39. RAZ, *supra* note 31, at 378.

40. *Id.* at 382.

41. *Id.*

42. This is, in some sense, the dream of “empiricism without the Dogmas” explained by philosopher W.V.O. Quine, who argued that all notions must always remain, in principle, revisable, because “[t]he totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even pure mathematics and logic,

ideal of personal autonomy is not to be identified with the ideal of giving one's life a unity"; the "autonomous life may consist of diverse and heterogeneous pursuits. And a person who frequently changes [her] tastes can be as autonomous as one who never shakes off [her] adolescent preferences."<sup>43</sup> The key is that a life lived with significant autonomy is a life of "choices"; a "life freely chosen."<sup>44</sup>

But to the extent that social practices and technologies significantly curtail an individual's ability to engage in reflection and revision, because she must give an account of decisions she has made in the distant past that have been recorded permanently and accessibly, this capacity to form and pursue plans in the present might be meaningfully diminished. The capacity for autonomy is therefore, to some potentially significant extent, lost.

Counterarguments against revisability are similar in kind to conventional counterarguments against autonomy. Restraints on individual autonomy are a critical component of a functioning society, in spheres from education, to work, to family life, to law enforcement. Those restraints are undeniably good and necessary. But across that vast spectrum, what remains remarkable is the degree to which American law and social institutions have carved a space for individual autonomy, recognizing its worth, even at potentially significant cost.<sup>45</sup>

### C. REVISABILITY'S LINK TO DEMOCRACY

Without belaboring the point, it is worth noting that democracy itself depends in no small measure on the revisability principle, on the idea that people's minds can be changed, that they can be convinced to join and embrace a cause with which they once disagreed. Whole societies have been paralyzed by an unwillingness or inability to move beyond events in the distant past. In Northern Ireland's pubs, "discussions of the 1690 Battle of Boyne can still be heard 'like it was last week's hurling match,' with flags representing each side continuing to decorate and demarcate the different neighborhoods."<sup>46</sup> "Abkhaz and Georgians both view Abkhazia as their homeland, just as Serbs and Albanians see parts of Kosovo as

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is a man-made fabric which impinges on experience only along the edges." Willard Van Orman Quine, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 39 (3d rev. ed. 1980).

43. RAZ, *supra* note 31, at 370–71.

44. *Id.* at 371.

45. For examples of some decisions to preserve autonomy embedded in the American legal tradition, even at significant cost, see *infra* Part II.

46. Dominic D.P. Johnson & Monica Duffy Toft, *Grounds for War: The Evolution of Territorial Conflict*, 38 *INT'L SECURITY* 7, 7 (2014) (quoting Dennis Pringle, *Separation and Integration: The Case of Ireland*, in *SHARED SPACE, DIVIDED SPACE: ESSAYS ON CONFLICT AND TERRITORIAL ORGANIZATION*, xxv (Michael Chisholm & David M. Smith, eds., 1990)).

theirs.”<sup>47</sup> These and other stories of persistent intergenerational ethnic and territorial conflict are stories of revision’s failure.

Nearly every statement about the value of speech as a means of trading in ideas quietly assumes the premise that these ideas trade in a society strongly devoted to the revisability principle. As has already been noted, both Justice Holmes’ “marketplace” theory and Justice Brandeis’ “more speech” theory, are founded, at root, on the premise that men can realize that “time has upset many fighting faiths” and so “believe even more than they believe the very foundations of their own conduct” that their faith too, could be mistaken.<sup>48</sup> As one critic accurately described philosopher John Stuart Mill’s theory of the power of unfettered trade in ideas, that marketplace’s power depends on our willingness to believe that “repeated effort to defend one’s convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism.”<sup>49</sup> But an individual can only revise what she believes if she is free to do so. As such, it is essential to democracy that individuals remain free to revise their ideas.

It could be argued that recordation should have little impact on whether people feel free to change their views, because even if everything is recorded in the future, individuals will adapt to that circumstance, and simply feel more free to more frequently change their beliefs and positions despite there being recorded evidence of their earlier beliefs. As such, a society in which more is known about what anyone and everyone has done and has previously believed should not greatly concern us. But that argument suffers from several flaws. First, it blinks reality to suggest that individuals will not suffer if they are forced to forever account for their past beliefs and associations, no matter how provisional or misguided. If what an individual previously believed had no bearing on how people viewed them in the present, people would already happily disclose all of their past mistakes rather than downplay them. Instead, individuals who have changed their minds are regularly punished and coerced when beliefs, ideas, and associations they once had come to light.<sup>50</sup> Because it is not the case that individuals freely disclose the mistaken beliefs they have held, it is apparent that people value being allowed to consider issues anew, without being forced to answer for changing their perspectives. Additionally, the argument that society will “adapt” and magically become more tolerant

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47. *Id.* (citing MONICA DUFFY TOFT, *THE GEOGRAPHY OF ETHNIC VIOLENCE: IDENTITY, INTERESTS, AND THE INDIVISIBILITY OF TERRITORY* (2003)).

48. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

49. ROBERT PAUL WOLFF, *THE POVERTY OF LIBERALISM II* (1968).

50. For example, recently, the former CEO of Mozilla, Brendan Eich was fired from Mozilla for having once held the view that same-sex couples should not have the right to marry, though by the time of his ouster his views had changed. Stephen Shankland, *Mozilla Under Fire: Inside the 9-Day Reign of Fallen CEO Brendan Eich*, CNET (June 13, 2014, 4:14 AM), <http://www.cnet.com/news/mozilla-under-fire-inside-the-9-day-reign-of-fallen-ceo-brendan-eich/>.

of individuals' changing their beliefs has an accordion-like quality—it can be stretched or narrowed to fit any argument that new technologies or social practices should not concern us. The tolerance argument is both unproven and unlikely, especially in light of the fact that there will always remain some people, who, due to superior wealth or careful planning, will manage to avoid taking a recorded view on any subject. A society that encourages individuals not to commit to a view out of a fear of consequences is as bad as a society that pressures them to commit to a view and then never change it. Because permanent recordation takes the decision to disclose away from the speaker, and places the power to judge whether a past belief or association should be held against someone in the hands of others, it is difficult to believe that individuals will remain as free to update and revise their beliefs in a future of pervasive, permanent, and easily accessible recordation as they are now.

## II. EXAMPLES OF THE REVISABILITY PRINCIPLE IN LAW

Below the surface of American law are many tacit but nonetheless crucial and identifiable values and commitments. One might think of these values and commitments as America's "deep constitution," the nine-tenths that float just beneath the surface. For example, the Constitution's commitment to "aesthetic neutrality" could be thought of as among these commitments—rarely explicitly stated, it is the widely shared belief that each person should remain, to some significant degree, free to develop and express her own idea of beauty.<sup>51</sup>

The revisability principle has long played a similarly quiet but foundational role across a range of legal doctrines, especially those governing privacy—of the reasonable expectations, propertarian, and personhood kinds—but also doctrines as diverse as those governing individual liberty and freedom of expression, evidence, property, criminal law, civil and criminal procedure, and contracts. Like many deep constitutional principles, it does not frequently appear as the holding of the case, but instead surfaces briefly, as the justification for the holding, or the insistent theme, ornament, or leitmotif lurking behind it. The goal of this Part is to highlight the revisability principle's many forms and guises in American law.

### A. REVISABILITY AS A GENERAL LEGAL PRINCIPLE

A commitment to revisability—to the fundamental notion that the best decision *now* should trump whatever seemed to be the best decision *then*—permeates American law. Everywhere one looks there is a general

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51. Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. 1807 (2014).

tendency to disfavor inalterable commitments, and instead to favor revisability. Consider the following examples:

The writ of habeas corpus is always theoretically available, no matter how much time has passed or how many prior petitions have been brought.<sup>52</sup> The Constitution requires that every prisoner have “a meaningful opportunity to demonstrate that [s]he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,”<sup>53</sup> in theory no matter who or where she is.

Contracts may not prohibit future amendments, no matter what the parties might attempt to agree to, and even if the parties want to tie their hands today. The reason courts have given is that “parties would not change their minds regarding the deal’s substance [at a later date] without good reasons, so parties can have no good reason to prevent themselves from changing their minds regarding the deal’s substance [at the outset].”<sup>54</sup>

The very notion of bankruptcy “reveals our acceptance of the fact that beyond a certain point, the sheer magnitude of a person’s debt may be demoralizing”—unbearably so—and thus, “[o]ne reason for giving the debtor a fresh start is to counteract the self-hatred [s]he may feel, having mortgaged [her] entire future in a series of past decisions [s]he now regrets.”<sup>55</sup>

The right of individuals to pursue their chosen professions and occupations is deeply rooted in the common law, which is why noncompete agreements are so often held to be unenforceable or narrowly construed. “Even in states that allow such clauses, they are ‘looked upon with disfavor, cautiously considered, and carefully scrutinized’ by courts,”<sup>56</sup> for “courts are aware these restrictions place a heavy burden upon the ability of agents to pursue their careers and practice their skills.”<sup>57</sup>

In property, restraints on alienability are highly disfavored: “[o]ften, statutes prohibit and courts invalidate outright restraints on alienability; when faced with more moderate restraints, courts may impose time limits

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52. See, e.g., *Antiterrorism and Effective Death Penalty Act of 1996—Actual Innocence Gateway—McQuiggin v. Perkins*, 127 HARV. L. REV. 318, 318 (2013) (“Last Term, in *McQuiggin v. Perkins*, the Supreme Court created an exception to a statutory barrier—a statute of limitations—for the actually innocent. Though the purpose of habeas relief is to correct constitutionally significant procedural defects, the Court properly allowed concerns for substantive justice to guide its decision.”).

53. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 542–43 (2010) (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

54. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 611 (2003).

55. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785 (1983).

56. David Lincicum, *Inevitable Conflict?: California’s Policy of Worker Mobility and the Doctrine of “Inevitable Disclosure,”* 75 S. CAL. L. REV. 1257, 1269 (2002) (quoting *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 898 (Minn. 1965)).

57. Phillip J. Closius Henry, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 540 (1984).

or otherwise protect an individual's right to exit."<sup>58</sup> This limitation on the capacity of individuals to tie up property forever is most famously captured by the rule against perpetuities, "one of the oldest and most important social policies embraced by Anglo-American law."<sup>59</sup>

The right of individuals to fundamentally change the character of the use of her property has long been a cherished right, giving rise to a variety of other rights against regulations that would circumscribe the capacity of an individual to demolish, alter, repair, or revise her property.<sup>60</sup> As Professor Margaret Jane Radin explained, one reason why certain regulatory takings involving merely pecuniary losses do not require compensation, but physical occupations no matter how minor do, is that "exclusion may correspond to the picture, at the core of liberal ideology, of the individual's right to use property to express her individual liberty, which means using property to fend off intruders into her space."<sup>61</sup>

On the other hand, once one dies, it is an equally cherished American tradition for those still living to challenge the reasonableness of the decedent's wishes regarding the disposition of the estate: "When the control exerted by a testator reaches too far and seeks to influence or proscribe choices in a beneficiary's life as personal and intimate as whom [s]he should marry, principles of 'public policy' often come to the rescue and invalidate many such dispositions."<sup>62</sup>

In criminal law, the model penal code provides that a coconspirator can come into the light, give up on the conspiracy, and absolve herself of guilt: "[R]epudiation of criminal purpose is said to indicate lack of firm antisocial intent, and hence the absence of any real public danger . . . [moreover] 'the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken.'"<sup>63</sup> In

58. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 569 (2001).

59. Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439, 440 n.8 (1982); see also *id.* at 440–46 (describing the sixteenth century movement toward "the use of future interests to control the devolution of wealth, usually in an attempt to keep it within the family indefinitely").

60. See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794 (2005) ("The right to destroy is also an extreme version of the right to use; by destroying a piece of jewelry, I do not merely use it—I use it up").

61. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1678 (1988); see Charles Reich, *The New Property*, 73 YALE L.J. 733, 774 (1964) (arguing property provides "a small but sovereign island of [one's] own").

62. Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1317 (2011). As John Stuart Mill explained, while "bequest is one of the attributes of property," it "might be limited or varied, according to views of expediency." JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 226–27 (W.J. Ashley ed., Longmans, Green, & Co. 1909) (1848). As Thomas Jefferson wrote to James Madison, "the earth belongs in usufruct to the living. . . . [T]he dead have neither powers nor rights over it." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON 3, 3–4 (Paul Leicester Ford ed., G. P. Putnam's Sons 1904).

63. Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1168 (1975).

the law of attempts, moreover, even at its harshest, one must at the very least take a “*substantial step* in a course of conduct planned to culminate in commission of the crime”—which is probably more of a nod to the needs of police than it is consistent with the preferred standard, which would look to the defendant’s proximity to the commission of the crime as a proxy for her probability of actually committing it.<sup>64</sup>

In evidence law, the fact that an individual took measures to repair whatever defect gave rise to the tort injury cannot be introduced against her<sup>65</sup>—because, as the notes to the rule explain, we should favor and encourage safety improvements, and the idea that repairing a defect might be used against an individual at trial would deter her from pursuing this aim.<sup>66</sup> More generally, and powerfully, the limitation the law places on the introduction of character evidence is perhaps the most profound explicit commitment to revisability in American legal culture.<sup>67</sup> As Wigmore explains, among the reasons character evidence is excluded is that such evidence “violates a social commitment to the thesis that each person remains mentally free and autonomous at every point in [her] life.”<sup>68</sup>

In criminal sentencing, remorse and acceptance of responsibility weigh in a criminal defendant’s favor: “Many state courts have found remorse to be an appropriate mitigating factor to consider when assigning criminal punishment” and “many states have found the absence of remorse to be an appropriate aggravating factor when calculating an appropriate criminal punishment.”<sup>69</sup> A similar principle persists under the federal sentencing guidelines, where “a downward adjustment is made if the defendant accepts responsibility for his or her offense.”<sup>70</sup> Moreover, “surveying state parole release decisions demonstrates that a prisoner’s willingness to ‘own up’ to [her] misdeeds—to acknowledge culpability and express remorse for the crime for which [s]he is currently incarcerated—is a vital part of the parole decision-making calculus.”<sup>71</sup>

64. Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 14–16 (1989).

65. Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1141–42 (1995).

66. FED. R. EVID. 407 advisory committee’s note (“The other, and more impressive, ground for exclusion [of evidence of subsequent remedial measures] rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”).

67. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (explaining the doctrine).

68. 1A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 54.1, at 1150–51 (Peter Tillers rev. ed. 1983).

69. Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131 (2006).

70. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines*, 7 PSYCHOL. PUB. POL’Y & L. 739, 747 (2001); see Laura Waters, *A Power and A Duty: Prosecutorial Discretion and Obligation in United States Sentencing Guideline § 3E1.1(b)*, 34 CARDOZO L. REV. 813, 815 (2012); see also U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012) (“If the defendant clearly demonstrates acceptance of responsibility for [her] offense, decrease the offense level by 2 levels.”).

71. Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008).

Our law, in other words, has always favored takebacks. Do overs. Road to Damascus conversions. Changes of heart. Turnabouts. Our law is a reflection of us, and what, fundamentally, we believe. The foregoing are only some of the many manifestations of this principle. One could just as easily point to the statute of limitations (where the Supreme Court has explained: “even wrongdoers are entitled to assume that their sins may be forgotten”<sup>72</sup>), the routine protection from disclosure of juvenile records (where Professor David Pozen has explained: “many would agree that it is good for democracy to keep certain juvenile records under seal so that low-level offenders have a chance to enter adulthood without social taint”<sup>73</sup>), or literally innumerable statutory entitlements to privacy (in medical records, in educational records, etc.) designed fundamentally to safeguard revisability—as examples of the ways in which our law subtly, but importantly, favors the idea that there must be freedom to revise.

#### B. REVISION AND PRIVACY

Revisability and privacy are not identical, but the two concepts overlap substantially. Privacy encompasses an enormous amalgamation of values through a particular device, namely, investing an entitlement to control what others may know about an individual in some manner or to some degree. Revisability, on the other hand, is just a principle, that is, a particular kind of aim—the aim of protecting the capacity of people to change their commitments over time. Though one could, and some privacy scholars have, described concern for revisability as akin to concern for “privacy over time,”<sup>74</sup> a more nuanced understanding is that concern for revisability is an *argument* in favor of privacy in some situations, and an argument for the right to have information protected, deleted, or forgotten, in others.<sup>75</sup>

Because it is a compelling reason to favor privacy, exposition of an explicit commitment to revisability forcefully appears and reappears in the law of privacy, as the following Subpart endeavors to show. The law of privacy could be thought of as one unified whole or as many tiles in a greater mosaic, but for purposes of this Subpart, it will be broken up

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72. *Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1221 (2013) (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

73. David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 287 (2010).

74. Credit for this phrase is owed to Neil Richards, Danielle Citron, and others who offered feedback at the 2014 Freedom of Expression Scholars Conference workshop presentation of an earlier draft.

75. Just to be absolutely clear, there are many reasons to favor privacy that do not depend or even touch upon revisability concerns. Arguments in favor of privacy range from Brandeis’ “right to be left alone,” implicitly concerned with the way that investing individuals with privacy prevents their physical harassment by making intruding on them unlawful (and thereby reducing the incentive to do so), to fostering pluralism by allowing individuals to maintain certain beliefs or engage in certain practices that are otherwise widely condemned—even though those individuals have no desire to change those beliefs or cease engaging in those practices. Even another reason to invest individuals with privacy is to prevent oppression by the State. Those are just three of the many arguments in favor of privacy that do not have anything to do with revisability.

loosely into three categories: reasonable expectations privacy, propertarian privacy, and personhood privacy. Each discrete area of constitutional privacy law seems to repeatedly invoke the notion that revisability is a central constitutional value.

### I. Reasonable Expectations Privacy

An official notion of reasonable expectations privacy divorced from a propertarian conception of privacy began with *Katz v. United States*, where the Court determined that the “[t]ime-honored rules of trespass need[ed] to be supplemented to deal with new technology like wiretapping.”<sup>76</sup> The test in *Katz* has become the Fourth Amendment’s trigger, and thus marks the beginning of the era of a unique conception of Fourth Amendment privacy where the Amendment comes into play whenever government action implicates an individual’s “reasonable expectation of privacy.”<sup>77</sup>

“Reasonable expectations of privacy” privacy has always been subtly concerned with revisability, for one of the most critical measures of whether someone has a reasonable expectation of privacy is whether *what* that individual seeks to protect is something whose dissemination would significantly impinge upon her capacity to revise.<sup>78</sup> Often this notion has been enmeshed with the question of whether an individual took appropriate steps to actually safeguard those expectations. But whether an individual reasonably has certain expectations turns on shared notions of what we fundamentally think should not be revealed because it might tell the world too much about us, or tie us too closely to something with which we would rather not forever be associated.

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76. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 798 (1994). This era was foreshadowed in a series of cases criticizing the purely propertarian conception of privacy which had before prevailed. See, e.g., *Silverman v. United States*, 365 U.S. 505, 513 (1961) (Douglas, J., concurring) (“The concept of ‘an unauthorized physical penetration into the premises,’ on which the present decision rests seems to me beside the point. Was not the wrong . . . done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury”); *Goldman v. United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting) (“[T]he search of one’s home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person’s privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment”); *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting) (noting it was “immaterial where the physical connection with the telephone wires was made” what the Fourth Amendment prohibits is “every unjustifiable intrusion by the government upon the privacy of the individual”).

77. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the phrase comes from Justice Marshall Harlan II’s concurring opinion, later Court opinions have taken it to distill the essence of the *Katz* majority. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

78. See discussion of *Maryland v. King*, see *infra* text accompanying notes 80–88. The special protection afforded to houses under the Fourth Amendment is also a special case. Even if an individual left the door to her home wide open police officers would still need a warrant to walk through it. Leaving garbage on the street in sealed opaque trash bags on the other hand, is entitled to no Fourth Amendment protection, because what an individual is seeking to protect is literally garbage.

The difference between whether an individual took appropriate measures to safeguard a thing's privacy and whether an individual actually has an expectation of privacy in a thing because *the thing itself* is in its nature private,<sup>79</sup> has now been clearly disentangled in two recent lines of Fourth Amendment cases, both involving the dangers posed by significant data collection and retention: *United States v. Jones* and *Maryland v. King*. These cases reveal that the Supreme Court is apt to conclude something—be it information about someone, a particular place, or a particular object—is in its nature private where that thing implicates revisability.

The first case, *United States v. Jones*,<sup>80</sup> and in particular Justice Sonia Sotomayor's separate opinion in that case, reveal the Court's increasing comprehension of the interplay between individuals' concerns with maintaining revisability and individuals' expectations of privacy. *Jones* involved the fixing of a small GPS device on an individual's vehicle without a warrant, allowing the police to track its whereabouts every moment of every day for weeks.<sup>81</sup> Four Justices joined by Justice Sotomayor ultimately held that a warrant was required because the police had trespassed to affix the GPS device on the vehicle.<sup>82</sup> Four other Justices would have held that it was a combination of the duration of the surveillance and the amount and nature of the data acquired that would have called for a warrant.<sup>83</sup> Justice Sotomayor joined both opinions, but also wrote for herself.

In writing her separate opinion in *Jones*, Justice Sotomayor touched on issues deeply enmeshed with the notion of revisability. She explained that individuals do not “reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”<sup>84</sup> She explained that the capacity to know or readily

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79. The distinction appears overtly in the cases. Compare *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (no reasonable expectation of privacy in trash because someone who has put something in the trash has not acted in a manner reasonably calculated to keep it private), and *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (no reasonable expectation of privacy in items in a friend's purse because someone who puts something in a friend's purse has not acted in a manner reasonably calculated to keep it private), with *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (no reasonable expectation of privacy in phone number dialed because this information is not in its nature private), and *Oliver v. United States*, 466 U.S. 170, 178–79 (1984) (open fields beyond the curtilage are not protected by the Fourth Amendment because open fields are not in their nature private). Many cases straddle this distinction, weighing the nature of the information that might be disclosed against the nature of the measures taken to shield it from view. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (no reasonable expectation of privacy against canine sniff of exterior of vehicle because such a sniff does not affect an individual's reasonable expectation of privacy in the contents detectable by a dog sniff that could conceivably be within a car's interior); *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001) (thermal imaging directed at a home is a search because a home is by its nature shielded from visual inspection).

80. 132 S. Ct. 945 (2012).

81. *Id.* at 954 (Sotomayor, J., concurring).

82. *Id.* at 949 (majority opinion).

83. *Id.* at 964 (Alito, J., concurring).

84. *Id.* at 956 (Sotomayor, J., concurring).

ascertain so much about a person, would “chill[] associational and expressive freedoms” and even “alter the relationship between citizen and government in a way that is inimical to democratic society.”<sup>85</sup>

The omitted link between the “chill” on “associational and expressive freedoms” Justice Sotomayor identified in *Jones* and the information the government can infer about an individual by simply recording, storing, and cross-referencing a great deal about them, is that knowing so much about a person impinges on an individual’s capacity to revise who they are. It makes that person vulnerable, and exposes her to the possibility of manipulation and coercion. Even if she is never manipulated or coerced, she may fear that one day she will be. In this way, Justice Sotomayor’s explicit link between expression and expectations of privacy is bridged by an unspoken commitment to revisability. Although Sotomayor’s concurrence in *Jones* framed these concerns against the potential for abuse by the government, the rationale she relied on—that it would chill associational and expressive freedoms—would as readily apply to disclosure of such detailed and personal information to any powerful institution, or to the world at large.

In the same spiritual line of cases as *Jones*—those that express concern about expectations of privacy because some things are private by their very nature—is the recently decided *Maryland v. King*, where the Supreme Court held that police may take and cross-reference the DNA of arrestees for certain crimes against a DNA database, without a warrant, upon arrest.<sup>86</sup> While neither the majority nor dissenting opinions in *King*, which was decided five to four, tapped into the case’s deeper revisability stakes, at least one court, the Ninth Circuit, has done so in a case possessing similar facts. In *United States v. Kincade*, a case involving an individual who refused to submit to compulsory DNA profiling in the absence of individual suspicion,<sup>87</sup> two dissenting judges—Stephen Reinhardt and Alex Kozinski—invoked revisability concerns. Judge Kozinski wrote: “The difficult question is whether the government may exploit Kincade’s diminished Fourth Amendment rights while he is still a probationer to obtain his DNA signature, so it can use it in investigating thousands of crimes nationwide, past and future, for the rest of Kincade’s life.”<sup>88</sup> The core of Judge Kozinski’s objection was that once Kincade’s DNA was on file, he would never really be free again. As Judge Reinhardt wrote in his own dissent:

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85. *Id.* (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

86. 133 S. Ct. 1958, 1965–66 (2013).

87. 379 F.3d 813, 816 (9th Cir. 2004) (en banc).

88. *Id.* at 872 (Kozinski, J., dissenting).

The problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information “is poorly regulated and susceptible to abuse. This [ ] has profound social effects because it alters the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives.”<sup>89</sup>

Judge Reinhardt identified the crucial connection between the loss of intensely intimate unalterable information about oneself and the fear that another’s exploitation of that information will forever diminish her capacity for change. As Professor Daniel Solove, from whose article Judge Reinhardt quoted, explained, pervasive surveillance impinges on “aspects of our lives and social practices where people feel vulnerable, uneasy, and fragile” where “the norms of social judgment are particularly abrasive and oppressive” often relating to “our most basic needs and desires: finances, employment, entertainment, political activity, sexuality, and family.”<sup>90</sup> Those seem to be issues bound up with revisability—concerns that some fact or facts about an individual might be exposed, leaving that individual to account for those facts forever.

The foregoing are not the only cases one could cite for the proposition that Fourth Amendment privacy is concerned with intrusions that impinge on the revisability principle.<sup>91</sup> As Justice Brandeis wrote in 1928, dissenting in *Olmstead v. United States*: “The makers of our Constitution . . . recognized the significance of man’s spiritual nature, of his feelings and of his intellect,” and so, through the Fourth Amendment, “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”<sup>92</sup> These sentiments reflect a profound desire to allow individuals to create conceptions of themselves through decisions they consciously make about who they would like to be—decisions that depend significantly on the capacity to engage in revision and change. As the Court begins to confront the impacts of pervasive data collection, storage, and access by the government, it will soon be required to meet the same challenges in the private sphere.

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89. *Id.* at 843–44 (Reinhardt, J., dissenting) (quoting Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1105 (2002)).

90. Solove, *supra* note 89, at 1122.

91. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 605–06 (1977) (“We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution . . .”).

92. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

## 2. *Propertarian Privacy*

Propertarian privacy, as the name suggests, turns on the privacy people fashion for themselves, through legal entitlements combined with objects such as homes, curtilages, bedrooms, automobiles, open fields, and so on.<sup>93</sup> Propertarian privacy, probably the most familiar brand of privacy, involves actual concealment from view by use of objects, occlusions, walls, and barriers. Propertarian privacy has always shown an implicit concern for revisability. Even as far back as the seminal article by Professor Samuel Warren and Justice Brandeis on *The Right to Privacy*, the two commented that “[t]he right of property in its widest sense . . . affords alone that broad basis upon which the protection which the individual demands can be rested.”<sup>94</sup> Unlike “mere” expectation of privacy, which trades on extralegal norms and often depends on how one expects others to act, individuals have legal entitlement to control their property, and so possess a special additional sovereign power over it. The propertarian notion of privacy will not be overstressed, except to note that possession and ownership of traditional property only becomes *more* important in a world where almost anything that happens in a public place can be recorded and shared precisely and permanently.

Those who can afford to obtain privacy through property can do so often because they can withdraw from the sphere of public life. One who may retreat into private property obtains a measure of control over revisability immeasurably greater than one who cannot. Where one need not go to the public pool (because she can swim in a private lake), can attend a private school (where cell phones and Google Glass are forbidden), can live in a comfortable home, or need not make frequent trips to the market or the park, that individual can obtain a measure of property-based privacy unavailable to most.

To the extent that it is believed that wealth should not dictate the degree to which one possesses the privilege to engage in revision, the fact that costly methods of preventing the collection and storage of information about oneself may become the principal means available for doing so may enhance or cement inequality.

## 3. *Personhood Privacy*

The final sphere of privacy law, the one most intensely bound up in identity and, not coincidentally, the area replete with statements closely reflecting a commitment to revisability, involves privacy conceived as a

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93. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (home); *Wilson v. Layne*, 526 U.S. 603, 610, 609–10 (1999) (home); *United States v. Dunn*, 480 U.S. 294, 300 (1987) (curtilage of a home); *Oliver v. United States*, 466 U.S. 170 (1984) (open fields); *Hester v. United States*, 265 U.S. 57, 59 (1924) (same).

94. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890).

right to personhood.<sup>95</sup> Those cases—*Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*, to name perhaps the biggest three—largely concern sexual, reproductive, familial, and relationship autonomy.<sup>96</sup> But in so doing, all express an overriding concern with revisability through their preoccupations with the development of an individual’s unique personhood, conception of herself, or self-definition—what Brandeis and Warren termed an individual’s “inviolable personality.”<sup>97</sup>

As Justice William O. Douglas wrote, concurring in *Roe*, the right to privacy grants to each person “autonomous control over the development and expression of . . . [her] intellect, interests, tastes, and personality.”<sup>98</sup> His comments built upon his prior statement in *Griswold*, that the “penumbra” of the First Amendment demands “not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.”<sup>99</sup> As Justice Douglas explained, concurring in *Eisenstadt*, “[o]ur system of government requires that we have faith in the ability of the individual to decide wisely, if only [s]he is fully apprised of the merits of a controversy.”<sup>100</sup>

These sentiments are not limited to Justice Douglas. Relying on the personhood privacy cases, Justice William J. Brennan in *Roberts v. U.S. Jaycees* wrote, “the constitutional shelter afforded” certain especially meaningful relationships “reflects the realization that individuals draw much of their emotional enrichment from close ties with others” and that “[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”<sup>101</sup> As Justice Harry Blackmun wrote, dissenting in *Bowers v. Hardwick*, those things protected by the right to privacy are protected “not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.”<sup>102</sup> And as Justice Anthony Kennedy explained in *Lawrence v. Texas*, overruling *Bowers* decades later,

95. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752 & n.93 (1989) (“Whatever its genesis, ‘personhood’ has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself.”); *contra id.* at 739 (arguing that conceiving of the privacy cases as about personhood “has invariably missed the real point”).

96. *Id.* at 744 (“The great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality.”).

97. Warren & Brandeis, *supra* note 94, at 205 (“The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolable personality.”).

98. *Roe v. Wade*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

99. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

100. *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

101. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

102. *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

“[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>103</sup>

Without wading deeply into the specifics of these cases—and too far afield of the thrust of this Article—they seem to reflect a concern for the capacity of individuals to exercise a kind of profound and deeply personal choice, the kind of choice reflected in a notion of significant autonomy. In this way, they also reflect a concern for revisability, as revisability is an essential aspect of significant autonomy, for it is the capacity of individuals to choose one life and then, if necessary, another.

The principle of revisability is a more expansive reconceptualization of the “principle of the right to privacy” explained by Professor Jed Rubenfeld in his article *The Right of Privacy*. In Professor Rubenfeld’s view, “[t]he principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens,” but rather “is the fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state.”<sup>104</sup> Professor Rubenfeld could be describing the principle of revisability, except where Professor Rubenfeld would require that the state do the “normalizing,” the revisability principle rests on the idea that it does not matter where the “normalizing” comes from. Where technology and social practices become too determinative of who an individual may be or who they may become, the state may even have an affirmative role to play in protecting an individual’s capacity to exercise significant autonomy.

The privacy cases seem to stand for the proposition that individuals must remain free to revise who they are, to create a new conception of themselves and pursue new commitments, goals, plans and projects that have meaning to them.

### C. REVISION AND EXPRESSION

The final jurisprudential field in which revisability has been strongly and explicitly endorsed is within the First Amendment itself. The Supreme Court has noted, and at times endorsed, within a First Amendment framework, a concern for notions rooted in the capacity of individuals to engage in revision—by thinking as they wish, by severing or forming associations of their choosing, and by reaching conclusions on the merits of the arguments presented without concern for extraneous considerations.<sup>105</sup>

The first broad category where a concept implicitly rooted in revisability appears and reappears is in the innumerable judicial statements

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103. *Lawrence*, 539 U.S. at 562.

104. Rubenfeld, *supra* note 95, at 784.

105. *See, e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

that the most cherished of all First Amendment freedoms is freedom of thought. The number of juridical statements proclaiming freedom of thought to be a paramount—even *the* paramount—constitutional value is truly astonishing.<sup>106</sup> So powerful and ingrained is the right to freedom of thought that scholars have attempted to claim it for privacy. As Professor Neil Richards has explained, “[t]he core of intellectual privacy is the freedom of thought and belief.”<sup>107</sup>

But freedom of thought is not really about privacy. Linking freedom of thought to privacy connotes the strange supposition that individuals have freedom of thought to the extent they keep their thoughts private. But that cannot be right. Individuals have more than merely a right to have whatever thoughts they wish so long as they keep those thoughts within a carefully cultivated private sphere. A more Pickwickian understanding of what it means to possess freedom of thought might be that it means one has the freedom to think and consider in a tangible and meaningful manner: to exchange and debate others in a variety of public forums in which what is expressed cannot be recorded publicly or accessibly, or where what is said can be segregated from the identity of the individual who says it.

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106. See, e.g., *Lawrence*, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as [s]he will . . . .”); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“individual freedom of mind”); *United States v. Reidel*, 402 U.S. 351, 356 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes . . . freedom of inquiry [and] freedom of thought . . . .”); *Mapp v. Ohio*, 367 U.S. 643, 672–74 (1961) (Harlan, J., dissenting); *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) (“The Constitution guarantees freedom of thought and expression to everyone in our society.”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.”); *Schneiderman v. United States*, 320 U.S. 118, 158 (1943) (“[F]reedom of thought . . . is a fundamental feature of our political institutions.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”); *id.* at 645 (Murphy, J., concurring) (“The right of freedom of thought and of religion as guaranteed by the Constitution against state action includes both the right to speak freely and the right to refrain from speaking at all . . . .”); *Jones v. City of Opelika*, 316 U.S. 584, 594 (1942) (“[T]he mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that the freedoms of conscience and belief are absolute); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (“[Freedom of thought] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.”); *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 727 (Carolina Academic Press 1987) (1833) (“The rights of conscience are, indeed, beyond the just reach of any human power.”).

107. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408 (2008).

The second broad category where a concept implicitly rooted in revisability appears in the First Amendment is in the concept of freedom of association. Courts have long, though fitfully, held that implicit in the right to associate is to have some associations shielded from scrutiny. In *NAACP v. State of Alabama*, the Supreme Court protected both “freedom to associate and privacy in one’s associations,” explaining that the NAACP could not be compelled to disclose its membership lists where doing so “entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner’s members of their right to freedom of association.”<sup>108</sup>

And in a series of cases, the Supreme Court has affirmed and reaffirmed the right of individuals to form and sever ties with organizations and causes of varying degrees of intimacy.<sup>109</sup> In *Schwartz v. Board of Bar Examiners*, for example, the Supreme Court held that a lawyer could not be barred from the practice of law because he had once been a member of the Communist party, expressing as he had mere “political faith” in its cause.<sup>110</sup> Even in *Scales v. United States*, a case upholding a conviction for membership in an organization that advocated the overthrow of the government by force and violence, the Court held that the First Amendment required more than mere knowledge of the organization’s aims and moral support for its cause.<sup>111</sup> The Court required “specific[] inten[t] to accomplish (the aims of the organization) by resort to violence,”<sup>112</sup> explaining that “guilt is personal,” and thus the “relationship [between the member and the group] must be sufficiently substantial to satisfy the concept of personal guilt”<sup>113</sup> The cases concerning association seem to flow from a recognition that association’s value stems from a personal interest each individual has in the development of a concept of themselves—one that is shaped by the relationships they choose to form and to forego.

The third broad category where a concept implicitly rooted in revisability appears in the First Amendment is in the repeated judicial sentiments, sometimes explicit, sometimes implicit, that speech is valuable to the extent it attempts to have its ideas adopted solely on their merits. Whether it is in regulating falsehoods and deception,<sup>114</sup> commercial advertising,<sup>115</sup> profanity,<sup>116</sup> secondary effects,<sup>117</sup> the time, place and

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108. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

109. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1400–09 (2d ed. 1988) (describing the “dual character of associational rights,” which include both the right to associate and to dissociate).

110. *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 244–45 (1957).

111. *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

112. *Id.* at 229.

113. *Id.* at 224–25.

114. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).

115. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other

manner of speech,<sup>118</sup> symbolic speech or expressive conduct,<sup>119</sup> the Court has long subtly preferred speech that conveys its message in a certain manner—reserving the highest pantheon of protection to appeals to logic founded on evidence. This concern with the idea that the most valuable speech is speech that persuades on the strength of its ideas depends on an assumption that there already exists a certain kind of freedom among individuals—namely freedom to adopt those ideas. It depends on the capacity to engage in revision.

### III. OVERCOMING THE CASE AGAINST THE REVISABILITY PRINCIPLE IN FIRST AMENDMENT JURISPRUDENCE

A number of scholars see regulations aimed at preserving revisability as inconsistent with the Supreme Court’s case law governing the freedom of speech.<sup>120</sup> As Professor Volokh has explained:

[I]s it constitutional for the government to suppress certain kinds of speech in order to protect dignity, prevent disrespectful behavior, prevent emotional distress, or to protect a supposed civil right not to be talked about? Under current constitutional doctrine, the answer seems to be no . . . . Even offensive, outrageous, disrespectful, and dignity-assaulting speech is constitutionally protected.<sup>121</sup>

Thus, “[w]hile privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under

constitutionally guaranteed expression.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–70 (1976). At one point in time, commercial advertising was not entitled to First Amendment protection at all. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”).

116. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747–51 (1978) (allowing greater regulation of “vulgar,” “offensive,” and “shocking” speech than other kinds of speech).

117. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (applying a lower standard of scrutiny where it can be established the “predominate concern” of a content-based zoning regulation is with the harmful secondary effects produced by the existence of the establishments, not the content produced by the establishments themselves).

118. *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (allowing restrictions on pamphleteering to help maintain the orderly movement of the crowd at a fairground); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–303 (1974) (permitting regulation of political advertising on buses where intrusive advertising could interfere with the city’s goal of making its buses “rapid, convenient, pleasant, and inexpensive”); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (permitting regulation of sound trucks); *Schneider v. State*, 308 U.S. 147, 160–61 (1939) (holding that states may limit when, where, and how pamphleteering may be undertaken on public streets).

119. *United States v. O’Brien*, 391 U.S. 367, 376, (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

120. *See, e.g., Julie E. Cohen, Examined Lives: Informational Privacy and the Subject As Object*, 52 *STAN. L. REV.* 1373, 1409 (2000) (“The First Amendment argument against data privacy protection begins by assuming that the collection, processing, and exchange of personally-identified data are ‘speech,’ and then asserts that regulation of these activities cannot survive the requisite scrutiny.”).

121. Volokh, *supra* note 16, at 1113.

existing free speech law.”<sup>122</sup> Similarly, Professor Bambauer has argued, “the freedom of speech carries an implicit right to create knowledge” and, as such, “[w]hen the government deliberately interferes with an individual’s effort to learn something new, that suppression of disfavored knowledge is presumptively illegitimate and must withstand judicial scrutiny.”<sup>123</sup>

These arguments are not insubstantial. While the law in this area is still evolving, there are several seminal First Amendment cases that lend substantial support to the contention that most data gathering, indexing, storage, and sharing cannot be constitutionally regulated, even if, in the aggregate, it results in potentially substantial harms to revisability. Indeed, it is not at all implausible to think that under the law as it is, nearly all efforts to restrict the collection and free alienation of information are unconstitutional.

The leading case is a 2011 decision, *Sorrell v. IMS Health*, involving a Vermont law that “restrict[ed] the sale, disclosure, and use of pharmacy records that reveal[ed] the prescribing practices of individual doctors.”<sup>124</sup> The Supreme Court struck down the law as imposing content- and speaker-based restrictions on speech because it limited who could obtain prescriber identifying information largely on the grounds of what that entity would choose to do with it.<sup>125</sup> In reaching its conclusion, in a holding of breathtaking scope, the Court held that “the creation and dissemination of information are speech” for purposes of the First Amendment, indeed that “information is speech” for purposes of the First Amendment,<sup>126</sup> as “[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”<sup>127</sup> Thus, that the Vermont legislature sought to choose which entities could have access to information, in the Court’s view, struck at the First Amendment’s core concern with content neutrality, favoring some entities over others because of what they wished to say.

*Sorrell* is not some jurisprudential pariah. Some of the most celebrated cases in First Amendment law endorse sweeping principles nigh indistinguishable from those embraced by the *Sorrell* Court—most of all, that public debate should remain “uninhibited, robust, and wide-open”<sup>128</sup> even at substantial cost to the dignitary or revisability of

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122. *Id.* at 1112.

123. Bambauer, *supra* note 15, at 60.

124. 131 S. Ct. 2653, 2659 (2011).

125. *Id.* at 2663.

126. *Id.* at 2667; *see also* Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73, 74 (2012) (“[A] holding so broad and potentially far-reaching that the Court could not possibly have literally meant what it said.”).

127. *Sorrell*, 131 S. Ct. at 2667.

128. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be

interests of those singled out for scrutiny.<sup>129</sup> Those cases warrant serious attention—they give rightful pause to anyone too quick to embrace a world where the government might impose limits on what information can be captured, stored, or shared. Even prominent privacy scholars take this view. As Professor Richards has written, “[t]o the extent that it has considered privacy at all, traditional First Amendment theory has assumed it to be a conflicting and inferior value that has little place in free speech theory.”<sup>130</sup>

But to understand why those claims are overstated, and how revisability figures into the First Amendment, one must understand that most of First Amendment law depends, to a remarkable degree, on framing.

Consider the First Amendment’s first principles. The First Amendment is designed to preserve the right of individuals to seek and spread ideas that the government wants to obliterate. That is its fundamental role. The government might have many motives for attempting to curtail the free exchange of ideas<sup>131</sup>—protecting those in power from public scrutiny or accountability;<sup>132</sup> ensuring the adoption of a particular political, social or cultural orthodoxy;<sup>133</sup> rewarding a favored constituency or punishing a disfavored constituency;<sup>134</sup> preventing the spread of information

uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”)

129. *Id.* at 279–80 (creating the “actual malice” standard for defamation of a “public official”).

130. Richards, *supra* note 107, at 392.

131. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (explaining the relevance of motive in First Amendment law).

132. See, e.g., Seditio Act ch. 74, 1 Stat. 596 (1798) (imposing a punishment of up to two years imprisonment for libeling the government); see also Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 722 n.25 (1999) (reviewing DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997)) (“In years following the expiration of the Seditio Act almost all Americans came to accept that the law was wrong and unconstitutional. As the Supreme Court noted in *New York Times v. Sullivan*, the Seditio Act has been overruled by ‘the court of history.’”)

133. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (“[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out.”); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (explaining that speech may not be restricted “merely because public officials disapprove the speaker’s views”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

134. See, e.g., *Dennis v. United States*, 341 U.S. 494, 517 (1951) (upholding convictions of members of the Communist Party on the grounds of the “evil” they posed); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (developing and applying a “clear and present danger” test to uphold the convictions of socialist who opposed World War I); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (same); *Debs v. United States*, 249 U.S. 211, 212 (1919) (finding Eugene V. Debs, a five time Socialist party presidential candidate, guilty under the Espionage Act of attempting to obstruct the recruiting and enlistment service of the United States). Under the *Debs* test, speech was unprotected if “one purpose of the speech, whether incidental or not does not matter, was to oppose [this] war . . . and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting.” *Id.* at 214–15.

that might cause alarm, anger, or panic;<sup>135</sup> preserving existing hierarchies or power structures in society;<sup>136</sup> or reinforcing certain taboos, norms, and expectations about how people should live their lives.<sup>137</sup>

Yet all of the impermissible motives described above can be flipped, counterbalanced, and often overcome by an enormous range of public-spirited motives—regulating the time, place, and manner of speech;<sup>138</sup> ensuring promotion of certain ideals, beliefs, or causes thought to be consistent with the nation’s core commitments or national ideals;<sup>139</sup> prohibiting conduct that incites violence or causes public disturbance;<sup>140</sup> prohibiting the desecration or destruction of certain property or symbols;<sup>141</sup> prohibiting attacks on individuals that are harmful to their dignity, emotional well-being, or reputations;<sup>142</sup> prohibiting manipulation, coercion,

135. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that the government could not withhold release of the Pentagon Papers on the basis of harms to national security flowing from disclosure).

136. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010) (“The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (explaining that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

137. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that the government cannot restrict pornography for adults); *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscenity laws must “be limited to works . . . which portray sexual conduct in a patently offensive way”).

138. *Compare, e.g.*, *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–83 (1992) (upholding regulations that banned the solicitation of funds inside airport terminals because of the dangers inherent in solicitation and the inconvenience to passengers of the activity), *with Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987) (striking down a regulation prohibiting any person “to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport” because if read to mean what it actually said, the regulation “prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing”).

139. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy . . . .”); *In re Anastaplo*, 366 U.S. 82, 95 (1961) (finding it constitutional for a State to refuse to admit an individual to practice law who refused to affirm or deny whether he had ever been a member of the Communist Party).

140. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (limiting prohibitions on speech advocating use of force or violation of law to situations “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Cohen v. California*, 403 U.S. 15, 18 (1971) (holding that a disturbing the peace conviction cannot be founded on hostility to constitutionally protected speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

141. *Virginia v. Black*, 538 U.S. 343 (2003) (upholding a ban on cross burning). *But see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down prohibition on flag burning).

142. *See, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (“States [can, consistent with the First Amendment] . . . base [tort] awards on elements other than injury to reputation,” such as “personal humiliation, and mental anguish and suffering.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”);

fraud, and deception;<sup>143</sup> prohibiting speech that can cause significant harm, by, for instance, facilitating crime,<sup>144</sup> or endangering the welfare of the nation;<sup>145</sup> limiting the disclosure of facts that occur during sensitive official proceedings or deliberation;<sup>146</sup> and, most important for present purposes, limiting the disclosure of private facts and information about an individual.<sup>147</sup>

When a First Amendment question is asked, the very values that a law seeks to vindicate can often also be the strongest reasons to strike it down. Thus the framing problem—the question in many First Amendment cases is whether the values the law seeks to protect are legitimate and likely to be achieved. Does a law subsidizing patriotic curriculum materials impermissibly attempt to force individuals to accept a particular social and cultural orthodoxy or does it permissibly promote certain national ideals and causes? Does a law against whistleblowing unconstitutionally prevent public speech and debate about a national public issue or prevent speech that would endanger the welfare of the nation? Does a campaign finance regulation preserve existing hierarchies or power structures in society or help to ensure equal access to them? Does a law requiring that internet platforms honor user requests to delete information they have posted

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New York v. Ferber, 458 U.S. 747, 764 (1982) (holding State may criminalize possession and dissemination of child pornography because of its harm to victims).

143. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).

144. *See, e.g., United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

145. *See, e.g., Haig v. Agee*, 453 U.S. 280 (1981) (sustaining passport revocation based on disclosures of intelligence operations and names of intelligence personnel); *Snepp v. United States*, 444 U.S. 507 (1980) (sustaining requirement that past and present CIA employees submit anything they write about intelligence activities to the agency for review).

146. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (sustaining power of courts to restrain litigants from disclosing the contents of pretrial discovery); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (exclusion of press and public from courtroom during testimony of minor victim of sex offense violates First Amendment); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (denial of access to pretrial hearing did not violate First Amendment); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978) (no right of access to Nixon tapes).

147. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (strongly implying that federal wiretap act is constitutional in the classic case of a eavesdropping on a private call). *But see Smith v. Daily Mail Publ’g*, 443 U.S. 97, 103–04 (1979) (holding that a newspaper could not be criminally punished for publishing the name of a fourteen-year-old girl accused of murdering a classmate); *Okla. Publ’g Corp. v. Okla. Cnty. Dist. Court*, 430 U.S. 308, 311–12 (1977) (striking down a state court injunction prohibiting the news media from publishing the name or photograph of an eleven-year-old boy who was being tried before a juvenile court); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) (holding that damages could not be recovered against a newspaper for publishing the name of a rape victim); *Time, Inc. v. Hill*, 385 U.S. 374, 394 (1967) (rejecting privacy-based challenges to the publication of personal information on First Amendment grounds).

impermissibly limit what those platforms can say and how they can say it, or does it help to ensure individual autonomy?

Not every First Amendment question is like those listed above—because not every First Amendment case is hard. From even a glance at the foregoing list of points and counterpoints, permissible and impermissible purposes, it is apparent why certain First Amendment questions are treated as easy. In some cases there are no equally weighty values falling on the positive side of the ledger. That fact explains why the lower federal courts have been unanimous in determining that police officers may be recorded while undertaking their official duties in a public place.<sup>148</sup> None of the permissible public values line up in favor of restrictions on such recordings, while several of the impermissible motives for restricting speech freedom are easily found in such restrictions.<sup>149</sup>

It is precisely because no clearly articulable public values support restricting the rights of individuals to record police that the First Circuit was able to surefootedly explain in the 2011 case *Glik v. Cunniffe* that “[b]asic First Amendment principles, along with case law from this and other circuits” “unambiguously” dictate holding that there is “a constitutionally protected right to videotape police carrying out their duties in public.”<sup>150</sup> And for the same reason, in 2012, the Seventh Circuit announced confidently in *ACLU v. Alvarez*:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected, as the State’s Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.<sup>151</sup>

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148. See Andrew Rosado Shaw, *Our Duty in Light of the Law’s Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. & POL’Y 161, 175 (2012) (“The Federal Courts of Appeals have uniformly resolved this discrepancy in favor of First Amendment rights, holding that such applications of state wiretapping laws are unconstitutional.”); see also *Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014) (finding that an individual’s right to film “police carrying out their duties in public” is a clearly established First Amendment right). Cases holding that there is an almost absolute unqualified right to film police officers have begun to blossom across the federal courts.

149. See Will Baude, *Is There Any Good Argument Against the Right to Record the Cops?*, VOLOKH CONSPIRACY (Aug. 18, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/18/is-there-any-good-argument-against-the-right-to-record-the-cops> (explaining that Professor Will Baude had been able to come up with four arguments against a right to record police, all of which were “pretty weak”).

150. 655 F.3d 78, 82 (1st Cir. 2011).

151. 679 F.3d 583, 595–96 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651, (2012).

Of course, the language in these decisions, sweeping and self-assured as it is, might make it seem as though the case against privacy in any public place is an open and shut one—that is, there simply isn't any. One could hardly fault Professors Volokh and Bambauer for so concluding. The justifications in these cases for allowing police officers to be videotaped are expounded so sweepingly they could be used to justify striking down restrictions on recording nearly anything that happens, anywhere it can be recorded.

But First Amendment cases tend to invite a special sort of bombast and embroidery, a romanticism inconsistent with what the cases actually *do* when the chips fall. One need only recall Justice Robert H. Jackson's line from *West Virginia v. Barnette* that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,”<sup>152</sup> or Justice Harlan's comment in *Cohen v. California* that “one man's vulgarity is another's lyric,”<sup>153</sup> or Justice Hugo Black's assertion that “no law means no law”<sup>154</sup> (even when Justice Black joined Justice Blackmun's dissent in *Cohen*)<sup>155</sup>—to see that not everything that is said in a First Amendment case can be taken to mean what it says.

Indeed, as the dueling list of permissible and impermissible motives reveals, all that can really be concluded with confidence from the Court's intertwined and enmeshed concerns with public values, on one side, and protection of uninhibited, robust, and wide-open debate on the other, is that things are murkier than any individual decision portends them to be. The real concern going forward—for those who care deeply about retaining a space for revisability going forward—is context.

Revisability, as a distinct and important value, only arises in cases where it forms a component of the compelling government interest underlying a law; but where it does form such a component, those cases often come out in favor of revisability, or at least often balance it strongly against the countervailing interest in the dissemination of truthful information. These cases, which range across a constellation of areas—some of which were already discussed in preceding Parts—include cases concerning government secrets, restrictions on disclosing sensitive deliberations to the public, restrictions on child pornography, regulating what may occur within particular “forums,” and protecting against defamation and harassment.

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152. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

153. 403 U.S. 15, 25 (1971).

154. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717–18 (1971) (Black, J., concurring) (“The Solicitor General has carefully and emphatically stated: ‘Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law’ . . .”).

155. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

Professor Volokh has argued that the problem with recognizing countervailing constitutional values to be set against uninhibited, robust, and wide-open public debate, is that the list of such values could be limitless and pretextual. The government could conjure rights out of the blue, and just “declare it to be my ‘civil right;’ to prohibit others from saying the truth about me behind my back.”<sup>156</sup>

But that danger appears overblown, especially when the constitutional value identified—the revisability principle—is *in* the cases. It does not appear out of thin air. The Court has affirmed and reaffirmed it, treating it as a compelling counterargument to the notion that anything can be said about anyone, at any time.<sup>157</sup> When it can be observed over and over that a coherent discernable constitutional value exists—a concern with preserving the capacity of individuals to engage in revision of their identities throughout their lives by not having certain information about them kept, recorded, or made accessible—it is difficult to agree with Professor Volokh’s conclusion that scholars, lawyers, and courts will be able to just make them up as they go.

The same counterargument can be made to Professor Volokh’s contention that recognizing and enforcing a countervailing principle in opposition to unfettered speech freedom will lead to a slippery slope problem by making it easier to accept illegitimate restrictions on speech. After all, the principle of revisability has already functioned as a discrete justification for placing limits on individuals’ capacities to engage in unfettered information gathering throughout American history.<sup>158</sup> Thus, the argument that recognizing limits on the ability of individuals to record anything they choose whenever they choose will make it “much easier for people to accept ‘codes of fair reporting,’ ‘codes of fair debate,’ ‘codes of fair filmmaking,’ ‘codes of fair political criticism,’ and the like”<sup>159</sup> is probably overstated. Revisability has been a value integral to the First Amendment since its inception and yet we have not slipped down the slope. To the extent more laws may need to be passed—and the state may need to take a more active role in preserving revisability going forward—that would be an effort to preserve a constitutional

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156. Volokh, *supra* note 16, at 1114.

157. The clearest explicit articulation of the principle and its relationship to recording technology probably appeared in the dissenting opinions of Justices Douglas and Harlan in the Fourth Amendment confidential informant case *United States v. White*, 401 U.S. 745, 764–65, 787–88 (1971). The principle also appeared explicitly in the challenge to the constitutionality of the federal wiretapping laws in *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001). The lines of cases dealing with sensitive deliberations and confidential information—with their concern for candor—have the principle within them, if only by extension, as do the cases dealing with freedom of thought and association. For more discussion of these and other cases, see *supra* Part II.

158. See *supra* note 157 and accompanying text.

159. Volokh, *supra* note 16, at 1116.

equilibrium that we already have.<sup>160</sup> It would not necessarily be a slide down an incline.

This also provides a full answer to Professor Bambauer's contention that efforts "to preserve the information status quo . . . clash with the First Amendment."<sup>161</sup> That superficially reasonable-sounding claim is in fact highly contestable. Preservation of the information status quo cannot clash with the First Amendment unless the First Amendment is understood in a particular way, namely, to unilaterally favor a certain distribution of information in society. Yet, the society in which we now live came after the Amendment was drafted, and involves technology the "Framers of the First Amendment surely did not foresee."<sup>162</sup> The First Amendment cannot, of its own force, dictate what the information balance of an information society it was never designed to operate within should be. To understand that efforts to preserve the information status quo clash with the First Amendment is to put forward a theory of the First Amendment. But to the extent Professor Bambauer draws on First Amendment principles in making her claim that the First Amendment unilaterally favors a society that does not care much for revisability, this Article is an effort to show that is an uncharitable view. The revisability principle forms an integral part of the same First Amendment tradition in which Professor Bambauer's information-affine First Amendment also resides.

#### IV. THE IMPACT OF TECHNOLOGICAL CHANGE ON THE REVISABILITY PRINCIPLE

There is good reason to suspect that new information technologies are so different in degree from those that have come before that they are in fact different in kind. There is no doubt that technology is becoming more scrutinizing and more granular in its capacity to record, store, index, and make accessible everything that happens:

Every search, query, click, page view, and link are logged, retained, analyzed, and used by a host of third parties, including websites (also known as "publishers"), advertisers, and a multitude of advertising intermediaries, including ad networks, ad exchanges, analytics providers, re-targeters, market researchers, and more. Although users may expect that many of their online activities are anonymous, the architecture of the Internet allows multiple parties to collect data and compile user profiles with various degrees of identifying information.<sup>163</sup>

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160. Kerr, *supra* note 5 (arguing that Fourth Amendment law is best explained as a persistent intergenerational effort to preserve the nation's privacy equilibrium).

161. Bambauer, *supra* note 15, at 60.

162. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

163. Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 282 (2012).

As such, the claim that technological self-protection, coupled with robust property rights, will result in a world “where much of our privacy can be [meaningfully] protected”<sup>164</sup> seems aspirational, or, at the very least, inconsistent with the facts that are developing—which reveal a world in which individuals feel less and less in control over what they disclose about themselves (let alone what is known about them) in everything that they do, think, and say.

There is no doubt that individuals feel revisability is already frequently at stake in their use of digital technologies. “Internet users routinely hide information by making it invisible to search engines, using pseudonyms and multiple profiles, and taking advantage of privacy settings. Individuals rely almost reflexively on the obscurity created by these techniques to protect their privacy in daily life.”<sup>165</sup> An insistent question raised by the fact that so many individuals feel a desire, even a need, to make themselves obscure on the Internet is whether it is preferable to live in a world where they must do so. The intercession of law more deeply into the digital world could significantly reduce the need to engage in costly efforts to keep one’s activities private, and thereby preserve revisability without forcing individuals to operate fearing that they have taken insufficient precautions to ensure that their obscurity has in fact been preserved.

Moreover, the problems of the Internet now stand poised to cross the threshold. They stand on the verge of making the critical leap to the physical world. Internet connected devices are becoming integrally enmeshed in the physical objects around us. Everything will have a microphone soon: not just the cellular phone, but also the refrigerator, the television, and the kitchen sink. All of these devices will be networked together, and connected to the cloud. That will be the society’s default setting—and it should be, as it will improve modern life enormously. But it will mean that everything around us, all the time, will either be capturing or capable of capturing everything that happens, and storing it somewhere. This will be a feature of every public and private place. It will be built into the walls of the world.

Exposure by itself does not necessarily impinge on revisability. This is the difference between Justice Brandeis’s worry about newspapers and cameras 115 years ago and the problems posed by the technology of the world today. Mere capture is not enough to significantly impinge on revisability. It is *permanence* and easy access, which are powerful enough to largely subsume and replace the need for human memory, that stand to impinge on revisability in a new and incredibly significant way. In the

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164. Volokh, *supra* note 16, at 1111.

165. Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 2–3 (2013).

modern world, individuals already feel those pressures knowing anyone anywhere could take out a cell phone, snap a photo, upload it to the Internet, and tag<sup>166</sup> them in it. But even that procedure is infinitely more costly than the procedure that is coming, where Google Glass and other passive data collection-retention-indexing devices will become so pervasive, so built into everything, that anyone who wishes to will be able to find images, voice samples, jottings, meanderings, mutterings, eye-rolls, slips, and spills that have been recorded somewhere.

To the obscurantists, the technological pessimist-optimists who argue that in a world of so much data everything will be obscure, it should be noted that this vastly underestimates the power of computers and their cleverness. Searching an individual's name alongside even a few search terms will make it easy enough to find what one is looking for. Imagine a search for "[name's] most embarrassing moment." The algorithm will come up with something. Almost certainly, it will be embarrassing.

The interesting question all of this raises, is of course, whether individuals, being infinitely adaptable, will adapt to this world as well. Probably they will, but this is not a full answer to whether an individual's capacity to engage in revision will be impinged by these technological advances, or whether, therefore, her capacity to exercise significant autonomy will in some significant way be destroyed. Human beings lived for thousands of years in near starvation conditions, managing nonetheless to find happiness and fulfillment in that existence, at least episodically, at least often enough to perpetuate themselves. But we would hardly argue that we would choose to return to that world, where individual choice was so greatly diminished.<sup>167</sup>

The fast evolution of modern technology and its interaction with the First Amendment is forcing us to confront choices about what law requires and what values the law should express. And the great irony of the modern debate is that those who favor unfettered First Amendment protection for the collection, retention, and dissemination of information about everyone all the time, seem to be arguing against autonomy in the name of freedom. Perhaps at least all sides could agree that revisability is, in principle, valuable.

## V. OPERATIONALIZING THE REVISABILITY PRINCIPLE

Suppose it was taken as true that the revisability principle was something the government had a compelling interest in protecting. Two consequences might flow from that. First, under existing First Amendment

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166. "Tagging" is how users identify individuals in photographs or comments posted on certain social media sites.

167. Waldron, *Autonomy and Perfectionism*, *supra* note 30, at 1122 (explaining that significant autonomy could be considered "unconditionally as one of the advances of modern life").

scrutiny analysis, its regulations narrowly tailored to protect revisability would be constitutional. Second, and more importantly, however, it might be that revisability is so compelling and so difficult to protect through narrowly tailored laws that allowing the government a reduction in scrutiny for laws intended to safeguard revisability may be appropriate. In particular, a balancing analysis that weighs the state's asserted interest against the degree of imposition on the speech interests affected might be superior to strict scrutiny where the regulation is meant to safeguard revisability—even if the regulation is content-based.

This second method is the one I favor, but it does raise serious questions. The First Amendment possesses manifold strict scrutiny triggers, grounded in whether statutes make certain kinds of distinctions, either between content, viewpoint, or speaker. Content-neutral regulations, on the other hand, need only meet a lower scrutiny threshold.

A threshold question is whether it is even meaningful to try to parse content-based versus content-neutral regulation. Not only has it become exceedingly difficult in recent decades to disentangle the difference between such regulations, but the methodology is also poorly tailored where content- and speaker-based restrictions on speech would be the most effective means of eliminating harms to a core First Amendment value such as revisability while otherwise preserving the broadest possible protections for public speech. Individuals should be able to take photos of their friends in public, and store and playback video and audio of what they see around them. But major institutions—the intermediaries who can control, store forever, cross-reference, index, and aggregate everything that is known—pose the greatest threat to revisability for precisely the reasons Justice Sotomayor gave in her concurrence in *Jones*. It is the fact that institutional players—in *Jones* the government, in the rest of the world the large data institutions that will become the power brokers and robber barons of the digital gilded age—can put all of the pieces of the mosaic together, and create a binding, permanent, and inescapable portrait of a person, that makes those institution capable of impinging so profoundly on an individual's capacity to engage in revision.

Second, a balancing of interests approach, rather than strict scrutiny, in cases implicating serious revisability concerns, appears to be an appropriate path forward. The Supreme Court has been vacillating on the balancing question in recent years, with an intense fight occurring both among the Justices and across time in opinions addressing distinct First Amendment categories.<sup>168</sup> As a matter of aspiration, the Court has attempted repeatedly to emphatically reject balancing as an appropriate

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168. See LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 121–53 (2014) (explaining the Court's recent conflicts over these issues).

means of addressing First Amendment questions.<sup>169</sup> In *United States v. Stevens*, Justice John Roberts, writing for a nearly unanimous court (only Justice Samuel Alito dissented), explained that a balancing test, “[a]s a free-floating test for First Amendment coverage . . . is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”<sup>170</sup> In subsequent cases, the Court has either cited that proposition approvingly or done its best to follow it.<sup>171</sup>

However, at least some members of the Court appear committed to the view that balancing plays (or *should* play) an important role in deciding First Amendment questions in several areas. As Justice Stephen Breyer, joined by Justice Elena Kagan, explained in a concurrence in the judgment in *United States v. Alvarez*:

Regardless of the label, some [type of balancing] approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as “strict scrutiny” implies) nor near-automatic approval (as is implicit in “rational basis” review).<sup>172</sup>

Justice Breyer has expressed a similar view across a series of cases, including in his dissent in *Sorrell* (joined by Justices Kagan and Ruth Bader Ginsburg), and in his concurrence in *Bartnicki v. Vopper*, two of the most important cases bearing on the kinds of First Amendment questions that courts will increasingly confront in the digital age.<sup>173</sup>

169. See Laurence Tribe, *Free Speech and the Roberts Court: Uncertain Protections*, VOLOKH CONSPIRACY (June 3, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/03/free-speech-and-the-roberts-court-uncertain-protections/> (“Thus, while upholding borderline speech claims that involve significant social harms and barely implicate concerns of political censorship, the Court has condemned just the sort of common law interest-balancing that manifestly animates what it has actually done in [*Holder v. Humanitarian Law Project*], *Beard* [*v. Banks*], *Morse* [*v. Frederick*], and *Garcetti* [*v. Ceballos*]. In a booming voice, the Court has declared itself scandalized—*scandalized!*—by the notion that courts can be trusted to play a role in reshaping First Amendment rights.”).

170. 559 U.S. 460, 470 (2010).

171. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2734 (2011).

172. *Alvarez*, 132 S. Ct. at 2552.

173. *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2679 (2011) (“In short, the case law in this area reflects the need to ensure that the First Amendment protects the ‘marketplace of ideas,’ thereby facilitating the democratic creation of sound government policies without improperly hampering the ability of government to introduce an agenda, to implement its policies, and to favor them to the exclusion of contrary policies.”); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (“I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?”). See generally Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 296 (2014) (discussing the kinds of First Amendment tensions that are likely to arise in the next century).

Though the Court has ostensibly rejected balancing, the center cannot hold. Technological change is happening too rapidly for the Court to wed itself to “historical practices” that have little applicability to the world that is forming, or principles articulated at high levels of generality—levels of generality that are, in retrospect, far too broad.<sup>174</sup> Balancing is the methodology of the common law. It is a minimalist, all-things-considered approach. Ordinarily, under traditional rational basis review, Courts would not even permit themselves to meddle that far into legislative policymaking. As such, balancing strikes a balance of its own—between transforming the courts into an obstacle to sensible legislation meant to safeguard important First Amendment values, and retaining their role as a meaningful break and a check on overeager legislators bent on protecting individual privacy without considering all of the possible consequences. That partnership model of First Amendment development in cases where a threshold showing has been made that the justification for the law is the preservation of revisability, could navigate between the Scylla of judicial obstruction and the Charybdis of legislative excess.

A final note is that this test would not alter the First Amendment’s core. The courts are amply capable of distinguishing between cases that clearly impinge on an individual’s right to share and receive ideas without countervailing justifications, save the speaker’s disfavored status or message (banning sex offenders from Twitter, for example), and laws designed to further the important individual interest in preserving revisability (such as a law requiring Twitter to allow individuals an opportunity to delete “tweets,” or barring Google from storing Google Glass video on its servers forever). Currently, courts would treat all three of these laws as subject to the same constitutional test—strict scrutiny—and would almost certainly strike down all three. That seems not only wrong, but inconsistent with the overriding concern for revisability built into American law and American culture.

If balancing became the test, line drawing problems would arise. They always do. But a flexible test that allows for the preservation of a value as built into the very fabric of American culture as revisability seems a better way forward than to simply give up on the idea that revisability is a significant constitutional value. Especially because it is one that, increasingly, only legislation can realize.

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<sup>174</sup> On this measure, consider the far-too-sweeping language quoted in an earlier Part in *ACLU v. Alvarez*. See Tutt, *supra* note 126 (arguing against First Amendment tests rooted in historical analogies or literalism and in favor of First Amendment inquiry into the cultural position of particular speech in society).

## CONCLUSION

The overarching purpose of this Article was to name and explain a latent constitutional value, the revisability principle. It strove to show that the revisability principle is embedded in the Constitution and has long been recognized as essential to the right to freedom of expression. To the extent individuals must forever account for decisions in the distant past—people they in some sense no longer are—their freedom to be who they choose to be is powerfully constrained. This Article's ultimate aim was to reveal the centrality of the revisability principle to the right to freedom of speech protected by the First Amendment. Judges confronting a regulations meant to safeguard revisability will increasingly face a difficult tension between First Amendment doctrine and that important First Amendment value. Critical to any proper First Amendment analysis going forward will be consideration of the degree to which changing context means doctrines developed for another time and technological world will have to be adapted to fit a new one where, without law, everything that happens will be known.

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