

THE STORY OF ME: THE UNDERPROTECTION OF AUTOBIOGRAPHICAL SPEECH

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ABSTRACT

This article begins the debate over the constitutional underprotection of autobiographical speech. While receiving significant historical, scientific, religious and philosophical respect for centuries, the time-honored practice of talking about yourself has been ignored by legal scholars. A consequence of this oversight is that current free speech principles protect the autobiographies of the powerful but leave the stories of “ordinary” people vulnerable to challenge. Shifting attitudes about privacy combined with advanced technologies, meanwhile, have led to more people than ever before having both the desire and the means to tell their stories to a widespread audience.

This article argues that truthful autobiographical speech deserves heightened constitutional protection. An analysis applying the various goals of free speech protection to autobiographical speech establishes that it occupies an exceptional place in the public discourse—perhaps rivaled only by political speech. Autobiographical speech adds vital knowledge to the public debate while also preserving the essence of human autonomy. This article concludes, therefore, that it is time for the law to recognize and to fully protect the freedom of autobiographical speech.

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“I was saying,” continued the Rocket, “I was saying—What was I saying?”

“You were talking about yourself,” replied the Roman Candle.

“Of course; I knew I was discussing some interesting subject when I was so rudely interrupted.”¹

INTRODUCTION

It was early evening on a non-descript Tuesday when Jessica Cutler, a twenty-something Capitol Hill staffer, debuted her weblog²—or online journal—with this seemingly innocuous entry:

¹ Oscar Wilde, *The Remarkable Rocket*, in *THE COMPLETE WORKS OF OSCAR WILDE* 310, 312 (Perennial 1989).

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I have a “glamour job” on the Hill. That is, I could not care less about gov or politics, but working for a Senator looks good on my resume. And these marble hallways are such great places for meeting boys and showing off my outfits.³

Writing under the pseudonym “Washingtonienne,” Cutler chronicled mundane details of her life such as the earrings she intended to buy (“I’m getting both blue and peach. And, yes, I will wear them to the office.”),⁴ a taco eating contest she planned to win (“Bring it on.”),⁵ and her activities over the past weekend (“[O]n Friday, I ate a really good quesadilla and went to a movie.”).⁶

Other details of her daily life, however, were decidedly less commonplace—in particular her ongoing sexual exploits with up to six different men. Identifying them by initials only, she openly wrote in graphic detail about her encounters with these men, some of whom she alleges were married, held powerful government positions and paid her for sex.⁷ Many of her entries were salacious and offensive, yet interspersed among them were her observations about issues such as money,⁸ sexual transmitted disease,⁹ religion,¹⁰ and workplace relationships.¹¹ Described by a reporter as “an American uber-individualist demanding the right to tell her own story her own way,”¹² Cutler admitted

² A weblog or “blog” is defined as “an online diary; a personal chronological log of thoughts published on a Web page.” Dictionary.com, <http://dictionary.reference.com/search?q=weblog> (last visited Aug. 28, 2005).

³ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 5, 2004, 5:32 p.m.).

⁴ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 6, 2004, 4:46 p.m.).

⁵ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 6, 2004, 3:26 p.m.).

⁶ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 17, 2004, 10:34 a.m.).

⁷ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 11, 2004, 2:21 p.m.) (describing one man as “Married man who pays me for sex. Chief of Staff at one of the gov agencies, appointed by Bush” and another as “[a] sugar daddy who wants nothing but anal. Keep trying to end it with him, but the money is too good”).

⁸ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 14, 2004, 4:34 p.m.) (discussing her salary and saying “[m]ost of my living expenses are thankfully subsidized by a few generous older gentlemen. I’m sure I am not the only one who makes money on the side this way: how can anybody live on \$25K/year??”).

⁹ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 14, 2004, 9:53 p.m.) (writing that one of the men she was seeing “wants us to get tested together so we can stop using condoms. Isn’t that sweet? I hope I don’t have anything!”).

¹⁰ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 14, 2004, 9:53 p.m.) (discussing one of the men, “So I don’t know if it’s getting serious or what. We’re seeing each other every day now. I like him very much and he likes me. But can it go anywhere, i.e. marriage? I don’t know. He’s Jewish, I’m not. . . . I really just want to be a Jewish housewife with a big rock on my finger.”)

¹¹ Washingtonienne, <http://washingtioniennearchive.blogspot.com/> (May 12, 2004, 12:59 p.m.) (discussing office rumors, “Me, I’m just hiding in my office until this blows over.”)

¹² See April Witt, *Blog Interrupted*, WASH. POST., Aug. 15, 2004, at W12.

later that her “blog” was in essence little more than “writing on the bathroom wall.” But she insisted, “[e]verything she posted was true.”¹³

Cutler’s weblog survived only two weeks before she was publicly identified and fired from her job.¹⁴ Later one of the men she wrote about sued her for public revelation of private facts.¹⁵ In the lawsuit, which is still pending, the man does not dispute the truth of Cutler’s stories—only her right to tell them at the expense of his privacy. Under traditional privacy law, the crucial question in this case is likely to be whether Cutler’s blog is of “legitimate public concern” or “newsworthy.” Since proving that her personal daily journal qualifies as “newsworthy” will be difficult under current law, Cutler is facing a real risk of being legally penalized for telling “her own story her own way.”

This face-off between rights of privacy and rights of publication is not a new one; courts and commentators have struggled with it for decades.¹⁶ But what is new about Jessica Cutler’s case is the type of speech at issue. Unlike journalists reporting about a crime or the intimate details of celebrity life, Cutler faces legal penalties for engaging in one of America’s most time-honored pastimes—talking about herself. Through her blog, she was telling her life story in her own voice by relating personal experiences, observations, thoughts and emotions. The question this article addresses is exactly where an individual’s freedom to tell her own personal—and truthful—story falls in the free speech spectrum. What, if any, constitutional safeguards exist for the simple right to say, “this is what I did” and “this is what happened to me”? In essence, is there a First Amendment right to declare, “I was here”?

To best illustrate the interest at stake, it is helpful to compare Cutler’s case to that of another woman, Susanna Kaysen. During the late-1990s, Kaysen began experiencing severe vaginal pain.¹⁷ For several years she suffered from her mysterious malady as she engaged in a wide-ranging and desperate search for a cure.¹⁸ Her medical condition

¹³ *Id.*

¹⁴ *Id.* She also reportedly received a six-figure book deal and an offer to pose naked in *Playboy* magazine. She claimed, however, that these outcomes were not her motivations for writing the blog. *Id.*

¹⁵ See *Steinbuch v. Cutler*, No. 1-05-cv-0970 PLF (D.D.C. filed May 18, 2005).

¹⁶ See, e.g. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975) (“Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent”)

¹⁷ *Bonome v. Kaysen*, 2004 WL 1194731 (Mass. Sup. Ct. 2004).

¹⁸ *Id.* at *1.

caused havoc to many areas of her life, but none so much as to her relationship with her then live-in boyfriend.¹⁹ According to Kaysen, her boyfriend grew frustrated with her refusals to have sex and began having angry and violent outbursts that walked the line of criminality. Their relationship ended in 1998.

An author by profession,²⁰ Kaysen published a memoir about her ordeal in 2001 titled, *The Camera My Mother Gave Me*.²¹ In her memoir Kaysen described her painful medical symptoms and their effects on her sex life in intimate detail. Referring to her ex-boyfriend in the book only as “my boyfriend,” she portrayed him as crude, insensitive and sexually aggressive. Their relationship culminated in the book with a scene where she suggests that he might have tried to rape her.²²

After the book was published, Kaysen’s ex-boyfriend sued her claiming she violated his privacy by reveling intimate details about their relationship.²³ As in the *Cutler* case, there was also no dispute about the truth of Kaysen’s speech. The question before the court concerned the balance between the ex-boyfriend’s right of privacy and Kaysen’s freedom of speech. The court ruled in favor of Kaysen, finding that her discussion of how her medical condition affected their relationship was a matter of “legitimate public concern” and therefore protected under current privacy law.²⁴ The court, however, went on to note in dictum that there was “an additional interest in this case.” That interest, according to the court, was Kaysen’s “right to disclose her own intimate affairs,” which was at issue because she was “telling *her own* personal story.”²⁵

Comparison between Cutler and Kaysen’s stories is striking. Kaysen wrote about the intimate effects a medical condition had on her sexual relationship. Cutler, meanwhile, wrote about the intimate effects age, money and power had on her sexual relationships. Both women spoke truthfully. The difference between the two, of course, is that Kaysen is an award-winning author and her speech was published as a book by Random House. Cutler, on the other hand, is a young unknown who published her

¹⁹ *Id.* at *2.

²⁰ Kaysen gained fame writing about her teenage experiences in a mental institution in her first memoir, *Girl, Interrupted*, which was made into a critically acclaimed movie.

²¹ SUSANNA KAYSEN, *THE CAMERA MY MOTHER GAVE ME* (Vintage 2002).

²² *Id.* at *2.

²³ *Id.*

²⁴ *Id.* at *6.

²⁵ *Id.*

speech through a personal weblog. The Constitution protected Kaysen in her desire to tell her story. Cutler, however, is in danger of being punished for telling hers.

The question, therefore, is raised: When a speaker desires to tell her personal story, yet society has decided her life experiences are not “newsworthy” or of “legitimate public interest,” does the speaker nonetheless retain an “additional interest” of constitutional significance? In other words, does Jessica Cutler have the same interest as Susanna Kaysen in “telling *her own* personal story” and the same constitutional right “to disclose her own personal affairs”? With any possible “newsworthy” element removed, does an individual’s autobiographical interest carry any legal weight?²⁶

The question of the freedom of autobiographical speech is important and timely, because Jessica Cutler is not alone. Rather she is part of an unprecedented movement of modern autobiographical speakers who possess a unique combination of a relaxed view of personal privacy, the desire to share their stories publicly and the technological access to reach a widespread audience. To date, an estimated 50 million weblogs are in existence.²⁷ While blogs cover all varieties of topics, more than 70 percent of them, like Cutler’s, are some type of personal journal.²⁸ The fast and furious influx of weblogs and Internet “personal pages” services such as My Space and Facebook has left scholars scrambling to discern their potential social and historic impact. As one historian noted, “I do not think it is an exaggeration to say that there are more diaries online now, than can be found in all the archives neatly preserved as the harvest of many centuries.”²⁹

New York magazine culture editor Emily Nussbaum theorized that this new desire to talk publicly about personal experiences, particularly among the young, “has multiple roots, from Ricki Lake to the memoir boom to the AA confessional, not to mention 13

²⁶ This article places the term “ordinary” in quotations because, as oral historian Studs Terkel explained, “it’s a patronizing word. They are not celebrities. Celebrities, we know, are celebrated for being celebrated, and they’re not very exciting. And ordinary people [haven’t] been asked about his, her life.” Online NewsHour, http://www.pbs.org/newshour/bb/entertainment/july-dec05/studs_8-03.html (last visited Aug. 27, 2005) (transcript of interview with Studs Terkel).

²⁷ JEFFREY HENNING, PERSEUS DEV. CORP., THE BLOGGING GEYSER (April 8, 2005), <http://www.perseus.com/blogsurvey/geyser.html>.

²⁸ Fernanda B. Viégas, *Bloggers’ Expectations of Privacy and Accountability: An initial survey*, 10 J. COMPUTER-MEDIATED COMM. article 12 (April, 2005), <http://jcmc.indiana.edu/vol10/issue3/viegas.html>; see also Burton Cole, *I’ve Got the Blog Blues*, TRIBUNE CHRONICLE, July 30, 2002, http://www.tribune-chronicle.com/columnists/story/0710202005_col02cole10.asp (“Most bloggers “just write about how their day—or dates—went for anyone who cares to stop by and listen.”).

²⁹ Gerard Schulte Nordholt, *Online Diaries and Websites on Egodocuments in EGODOCUMENTS AND HISTORY* 175, 176 (Rudolf Dekker, ed., 2002).

seasons of ‘The Real World.’”³⁰ These modern speakers have learned that revealing personal experiences has its rewards and that “exposure may be painful at times, but it’s all part of the process of ‘putting it out there,’ risking judgment and letting people in,” Nussbaum reported.³¹

But as John Donne famously stated “[n]o man is an island, entire of itself.”³² As these bloggers write about their lives, they inevitably discuss others as well. And studies show they are doing so without reservation. Two-thirds of bloggers “almost never” ask permission before writing about another person by name, according to a survey coming out of the Massachusetts Institute of Technology.³³ Predictably, the survey found that “bloggers are starting to come up against a range of privacy-related issues varying from minor embarrassments with family and friends to termination of their employment.”³⁴ Jessica Cutler has been sued and she is surely not the last. Legal conflict over autobiographical speech is likely in its infancy.

Meanwhile, however, courts and commentators have paid basically no attention to the constitutional protection of autobiographical speech. The right to tell your own life story has received only passing reference in a handful of lower court decisions.³⁵ And unlike the extensive academic debates waged over political speech, hate speech, commercial speech, corporate speech, workplace speech, speech by criminals and obscenity, there has been no legal scholarship regarding the age-old practice of talking about yourself as it pertains to the First Amendment.³⁶ While at first glance some of this

³⁰ Emily Nussbaum, *My So-Called Blog*, N.Y. TIMES, Jan. 11, 2004, at 633.

³¹ *Id.*

³² JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS AND DEATH’S DUEL 103 (Vintage 1999).

³³ Viégas, *supra* note 28.

³⁴ *Id.*

³⁵ *Bonome v. Kaysen*, 2004 WL 1194731 at *6 (Mass. Sup. Ct. 2004) (finding an autobiographical story is protected by the First Amendment in so far as it is related to a matter of legitimate public interest); *Anonsen v. Donahue*, 857 S.W.2d 700, 705-06 (Tex. App. 1993) (finding autobiographical speaker had First Amendment right to reveal her own identity on matter of legitimate public interest); *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (finding autobiographical speech is protected if there is a logical nexus to a matter of legitimate public interest).

³⁶ Research for this article yielded no legal commentary on the question of how autobiographical speech should be treated by the courts or how it should be analyzed under the First Amendment. There has, of course, been a lively discussion among legal academics regarding the role of narrative and personal storytelling in legal scholarship. See, e.g., Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (discussing outsider legal scholarship and its reliance on autobiographical narratives); Mari J. Matsuda, *Public Response to Racist Speech*, 87 MICH. L. REV. 2320, 2323 (1989) (discussing that “[t]here is an outsider’s jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools.”).

contemporary autobiographical speech might appear trivial, egotistical, or merely salacious, the value of such expression on micro and macro levels is immense. These modern speakers are a continuation of an American tradition that has a proven value both to individuals and to the general public.

This article begins the discussion on the constitutional value of truthful autobiographical speech. On the first pass it might seem that the question of constitutional protection for autobiographical speech is settled. Clearly the First Amendment states that “Congress shall make no law” restricting free speech and, of course, a person telling his life story is speech. For all their disagreement, moreover, most free speech scholars accept the Supreme Court’s approach that speech is first assumed to be protected unless it is shown to fall into a narrow exception of harmful speech. Yet such a straightforward analysis applies to all speech and works only until the speech in question clashes with the rights of others. It is simply not clear at this time where autobiographical speech stands when it faces legal challenges and must be balanced against other interests. For example, is the autobiographical speech of a sex worker protected speech or is it obscenity?³⁷ Similarly, is the life story of a Klansman protected by the First Amendment or is it better classified as hate speech?³⁸ Can a state stop a convicted murderer from telling his story as an improper attempt to profit from a crime?³⁹ Is there a point at which the autobiography of a corporation’s C.E.O. will be construed as commercial speech and restricted?⁴⁰ Can school administrators censor a high school student’s online journal?⁴¹ How much does the Constitution value autobiographical speech, moreover, when it collides with laws in other areas such as

³⁷ See, e.g., Marjorie Heins, *A Public University’s Response to Students’ Removal of an Art Exhibit*, 38 N.Y.L. SCH. L. REV. 201, 208 (1993) (discussing the autobiographical work of a former sex worker and prostitutes’ rights advocate and arguing her autobiographical speech does not “merit dismissal with the reductionist epithet ‘pornography’”) (quotation omitted).

³⁸ See, e.g., DAVID DUKE, *MY AWAKENING* (1998) (autobiography of former Klansman and Louisiana politician).

³⁹ See, e.g., *Simon and Schuster v. Member of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (considering the constitutionality of “Son of Sam” laws).

⁴⁰ See, e.g., SAM WALTON, *SAM WALTON: MADE IN AMERICA* (Doubleday 1992) (autobiography of founder of Wal-Mart, the world’s largest retail chain).

⁴¹ See, e.g., *Miss. School Suspends Student for Calling Teacher ‘Perverted in Online Journal*, Student Press Law Center, Jan. 29, 2004, <http://www.splc.org/newsflash.asp?id=736> (discussing student who was suspended because of her personal weblog in which she “vented about the teacher’s mispronunciation of her last name, mocked his clothing and rejoiced that she would no longer be in his class”).

intellectual property, workplace harassment,⁴² campaign finance,⁴³ contracts or, in the most likely scenario, privacy?

This article seeks to establish that truthful autobiographical speech deserves heightened constitutional protection so when those conflicts occur, as they will do with increasing frequency, the free speech values of autobiographical speech will be recognized and given a fighting chance to prevail. As with core political debate, which is routinely held to be of superior value, or newsworthy speech regarding a matter in the public interest, which is usually protected from challenges, autobiographical speech should be zealously guarded. Like these other types of speech, autobiographical speech is distinctive because of the important functions it plays on dual fronts—to society and to the individual. Part I starts with a short look at the history of autobiographical speech and the forces that have led to this new “tell-all” era. It explores how shifts in cultural attitudes about privacy and the value of “ordinary” stories have mixed with technological advances to create a situation where more people than ever before have both the desire and the means to tell their stories to a large public audience. Part II then lays the groundwork for the constitutional discussion by taking a look at the competing theories of why the First Amendment protects speech. It examines the ongoing debate over the perceived benefits of free speech to society as a whole as well as to the individual. Once these various theories are clarified, Part III turns to an analysis of how autobiographical speech fares under these justifications and concludes that autobiographical speech is unique in its long-established ability to advance the prominent goals of free speech on multiple levels. Then, Part IV closes by offering a proposal on how to adequately define and protect this right. Finally, a subsequent article will apply this proposal to the specific conflict between autobiographical speech and tort claims of public disclosure of inherently private facts such as the one at issue in the Jessica Cutler case.

⁴² See, e.g., *Fair v. Guiding Eyes For the Blind*, 742 F. Supp. 151, 153 (S.D.N.Y. 1990) (lawsuit where plaintiff claimed workplace sexual harassment based on her supervisor’s comments about his own homosexuality including that he visited a psychiatrist who told him he “would never have a meaningful relationship” and that he and his “alleged lover” attended an event where they “were treated poorly”).

⁴³ See, e.g., Kelley Beaucar Vlahos, *Blogs Face Possible FEC Regulation*, FOX NEWS, June 3, 2005, <http://www.foxnews.com/story/0,2933,158466,00.html> (discussing the Federal Election Commission’s consideration of government regulation of political weblogs).

I. THE RISE OF THE TELL-ALL ERA

People love to talk about themselves. It is a statement that, perhaps, needs no citation. As then-Professor Richard Posner noted “[a]nyone who has ever sat next to a stranger on an airplane or a ski lift knows the delight that people take in talking about themselves to complete strangers.”⁴⁴ Autobiographical speech has a long and pedigreed past that is likely as old as human communication. But it also has experienced a surging popularity of late that is testing existing social boundaries. The story of how and why America became the tell-all nation it is today is a tale that combines this basic human instinct with changing standards on personal disclosure. New technologies, meanwhile, are making it increasingly easier and cheaper for anyone to spread his personal stories to a broader audience. As one historian observed, “[a]t no other time in history have so many diaries been written and read by so many people in such a short time, using the centuries’ old formats of writing about oneself in a medium that is younger than most of the authors themselves.”⁴⁵

A. A Brief History of Autobiographical Speech

Answering the question of when human beings first began to talk about themselves raises philosophical, scientific, religious, historical and social questions to which reams of academic literature has been devoted. It involves complex issues such as when did man first gain consciousness or a sense of self, develop a comprehension of time and death, and when and how did human communication abilities arise. These queries are clearly outside the more modest ambition of this article. Suffice it to say, however, that the history of humans recording their lives is a long one.

As long as 50,000 years ago, early humans chronicled basic observations of their world by painting images on cave walls and carving notches into bones to record the phases of the moon.⁴⁶ Interestingly, one of the most widespread and repeated symbols of prehistoric rock art, discovered on every continent, is a stenciled or traced handprint⁴⁷—

⁴⁴ Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 400 (1978).

⁴⁵ Gerard Schulte Nordholt, *Online Diaries and Websites on Egodocuments in EGODOCUMENTS AND HISTORY* 175, 176 (Rudolf Dekker, ed., 2002).

⁴⁶ See Paul S. C. Tacon & Sven Ouzman, *Worlds Within Stone*, in *THE FIGURED LANDSCAPES OF ROCK-ART* 37, 62 (Christopher Chippindale and George Nash, eds., 2004); BLAKE EDGAR, *FROM LUCY TO LANGUAGE*, 106 (1996).

⁴⁷ Sven Ouzman, *Towards a Mindscape of Landscape*, in *THE ARCHEOLOGY OF ROCK ART* 30, 33 (Christopher Chippindale, ed., 2000).

possibly some early form of personal signature or individual mark.⁴⁸ The invention of writing brought more concrete evidence of humans recording their lives. From Egyptian hieroglyphic inscriptions⁴⁹ to personal narratives of the Greeks and Romans⁵⁰ to the “lyrical diaries” of tenth century Japanese aristocratic women,⁵¹ ancient texts of autobiographical writings are pervasive.

Clearly once humans began to write, they began to write about themselves. Thus it is accepted that “[a]n autobiographic instinct may be as old as Man Writing.”⁵² Yet some scholars, such as Professor Karl Weintraub, contend that “only since 1800 has Western Man placed a premium on autobiography.”⁵³ Autobiographical theorist Georges Gusdorf agreed, declaring that autobiography is “peculiar to Western man”⁵⁴—an Eurocentric view that has been challenged.⁵⁵ This debate, however, raises the question on how to define “autobiographical speech.” Under Gusdorf and Weintraub’s definition, “autobiography” means only a written narrative in which the author explores his own life in its entirety and reflects on his existence. Other disciplines, however, accept a broader definition both in format and content that would, for example, include more casual

⁴⁸ The precise meaning of prehistoric hand print rock art, however, is not clear. *See id.* (theorizing that hand prints might simply have been a desire of early man to touch the rock).

⁴⁹ For example, many ancient Egyptian hieroglyphic inscriptions are believed to be autobiographical texts. JAMES P. ALLEN, *MIDDLE EGYPTIAN: AN INTRODUCTION TO THE LANGUAGE AND CULTURE OF HIEROGLYPHS* 5 (Cambridge 1999). Others found on the walls of temples or tombs date back to 1600 B.C. and earlier. *See id.* Similarly, relics of the main types of “Old Egyptian,” dating from 3000 to 2000 B.C., include “a sizeable number of so-called ‘Autobiographies,’ which are accounts of individual achievements inscribed on the external walls of the rock tombs of the administrative elite.” ANTONIO LOPRIENO, *ANCIENT EGYPTIAN: A LINGUISTIC INTRODUCTION* 5 (Cambridge 1995).

⁵⁰ According to one scholar, “the earliest self-story thus preserved—that is, the earliest continuous narrative as contrasted to a mere king’s name and figure—is the record of King Sargon, the reputed founder of Babylon,” who lived approximately 3800 B.C. Nicholas van Rijn, *Introduction* to *AUTOBIOGRAPHY IN THE ANCIENT WORLD* ix, x (Nicholas van Rijn, ed., University Press of the Pacific 2002). There exist famous autobiographies from the Greeks, such as the “Apology of Socrates,” the self-reflective plea that the philosopher reportedly gave to an Athenian court before being sentenced to death. *Id.* And the Romans left behind Julius Caesar’s personal narratives of his military campaigns from about 100 B.C. *Id. at xi.* Saint Augustine’s *Confessions*, written around 397 A.D., is considered by many to be the first modern autobiography. *Id. at ix.*

⁵¹ SHUICHI KATO, *A HISTORY OF JAPANESE LITERATURE* 170 (Kodansha Int’l 2003) (the diaries were “‘were records, usually dated, of the day-to-day lives of the authors, the things they saw and heard, and their emotions and impressions”). The early Japanese also left national histories from the seventh and eighth centuries. *See id.* at 37.

⁵² Karl J. Weintraub, *Autobiography and Historical Consciousness*, 1 *CRITICAL INQUIRY* 821, 821 (1975).

⁵³ *Id.*

⁵⁴ Georges Gusdorf, *Conditions and Limits of Autobiography* in *AUTOBIOGRAPHY: ESSAYS THEORETICAL AND CRITICAL* 28, 29.

⁵⁵ *See, e.g.,* JANET GYATSO, *APPARITIONS OF THE SELF* 101 (1998) (calling Gusdorf’s statement “wrong” and pointing to the history of Tibetan autobiographies).

expressions such as diaries, letters or wills and other “[t]exts in which an author writes about his or her own acts thoughts and feelings.”⁵⁶ This more expansive definition is in accord with the view of autobiographical speech discussed in this article.

B. Americans Evolve into Confessing Animals

Regardless of whether autobiographical speech is somehow unique to Western cultures, it undoubtedly has a strong American tradition. From the early Puritan diaries to Benjamin Franklin’s famous memoir and Frederick Douglass’ personal writings on slave life, Americans have been writing about themselves for more than 200 years making autobiography a recognized American art form. As American literature critic William R. Robinson explained:

[W]hether practices by Cotton Mather, Thoreau, Whitman, Hemingway, Henry Miller, or William Carlos Williams, to mention only the established literary figures, this form . . . celebrates fact in the making.⁵⁷

While often the most celebrated, the conventional literary form of autobiography is only a small slice of the overall picture of Americans’ drive to talk about themselves. Literary critic Alfred Kazin explained that “the experience of being so much a ‘self’—constantly explaining oneself and telling one’s story—is as traditional in the greatest American literature as it is in a barroom.”⁵⁸ Autobiographical expression, according to autobiography critic Albert Stone “leaps barriers of literacy itself to become a form of folk expression.”⁵⁹

It is this leap from the dusty tomes lining library shelves to more casual expression that distinguishes the new American impulse toward autobiographical speech. Increasingly more Americans yearn to tell their story—both their successes and their sins—as if they “feel their very definition as persons, as selves, depends on their having matter to confess,” Professor Peter Brooks noted.⁶⁰ Commentators debate exactly why or

⁵⁶ Rudolf Dekker, *Introduction to EGODOCUMENTS AND HISTORY* 7, 7 (Rudolf Dekker, ed., Verloren Publishers 2002).

⁵⁷ George Garrett, *My Silk Purse and Yours* in *THE SOUNDER FEW* 327, 332 (R.H.W. Dillard et al., eds., 1971).

⁵⁸ Alfred Kazin, *The Self as History*, in *THE AMERICAN AUTOBIOGRAPHY*, 31, 32 (Albert E. Stone ed., 1981).

⁵⁹ ALBERT E. STONE, *AUTOBIOGRAPHICAL OCCASIONS AND ORIGINAL ACTS* 2 (1982).

⁶⁰ PETER BROOKS, *TROUBLING CONFESSIONS* 140 (2000).

even when this change occurred, but at some point, as philosopher Michel Foucault observed, “Western man became a confessing animal.”⁶¹

The possible causes of this free and open self-disclosure trend are many. This is due, no doubt, in part to “[a]utobiography’s complex nature as simultaneously history, art, confession and testament.”⁶² Some have pointed to the rise in Freudian psychotherapy and its belief that sharing and reflection on life events offers personal benefits. Others have argued that religious confession, particularly the Catholic model, “permeates our culture” and has promoted the perception that talking about past bad acts is redeeming. According to Brooks, “even those whose religion or nonreligion has no place for the Roman Catholic practice of confession are nonetheless deeply influenced by the model.”⁶³

Some blame Americans’ reverence for individualism and a capitalistic society that rewards self-interested conduct. These factors foster egoism and might have resulted in an explosion of “conversational narcissism,” which sociologist Charles Derber describes as the tendency of Americans “to turn the topics of ordinary conversations to themselves.”⁶⁴ Another theory is that in modern society there has been a breakdown of the traditional hierarchies of classes and social status—the past indicators of personal identity—forcing people to reveal more about themselves in order to gain trust and intimacy. Professor Jeffrey Rosen explained that “[t]he ease with which we reveal ourselves suggests that in the face of widespread anxiety about identity, people are more concerned with the feeling of connection than with the personal and social costs of exposure.”⁶⁵ This drive has created what Brooks calls a “generalized demand for transparency”⁶⁶ and Stone described as “[a] powerful need to listen to each others’ personal histories (and thus to learn more about our own)” which he claimed “runs throughout our mobile, polyglot culture.”⁶⁷

⁶¹ *Id.* at 99, citing MICHEL FOUCAULT, *HISTOIRE DE LA SEXUALITÉ*, 1: LA VOLONTÉ 80 (Gallimard 1976).

⁶² STONE, *supra* note 59, at xiv.

⁶³ BROOKS, *supra* note 60, at 2.

⁶⁴ CHARLES DERBER, *THE PURSUIT OF ATTENTION* 5 (Oxford 2000).

⁶⁵ JEFFREY ROSEN, *THE NAKED CROWD* 169-70 (2004).

⁶⁶ BROOKS, *supra* note 60, at 4; *see also* ANGELO COSTANZO, *SURPRIZING NARRATIVE* 7 (1987) (“The breakdown of the commonality of values and aims has given each individual the difficult task of seeking his own identity in a world that does not offer clear-cut guidelines to living. . . . and thus autobiographical writing has become a significant mode of literature.”)

⁶⁷ STONE, *supra* note 59, at xiii.

There is general consensus that cultural and social shifts of the last century play a role in the increased openness. As sociologist Richard Sennett observed in 1977, “[m]asses of people are concerned with their single life-histories and particular emotions as never before.”⁶⁸ Many point specifically to the change in the cultural climate during the onset of the “baby boom” generation and the rebellious 1960s. Journalist Celina Ottaway observed that the baby boomers adopted an altered view of the importance of their own “ordinary” life experiences, she commented that

[m]emoirs were once for presidents, retired generals and Cher. But in recent years, baby boomers have decided that their stories are at least as interesting as those of politicians. The first-person genre is perfectly suited to a generation that has grown up talking about itself and expecting the world to listen.⁶⁹

Whether acting as a cause or effect of the trend, the media are accredited with sending the message that a person no longer needs power, position, fame, wealth or even tragedy or oppression in order to engage in autobiographical speech. For example, radio and television talk shows embraced and broadcast the stories of “average” Americans. Brooks observed that talk shows reflected the changing norms by “put[ting] on television ordinary people speaking confessionally about their own lives in ways unthinkable to earlier generations.”⁷⁰ Such shows were so successful that soon the sight and sound of “ordinary” people discussing their problems became a ubiquitous part of American culture and “nearly banal.”⁷¹

C. “A New Kind of Intimacy” and the Rising Popularity of Self-Disclosure

It is clear nonetheless that the “tell-all” era is thriving. No longer is autobiography reserved for the powerful to reflect on key life events as they near the end of their lives. Today’s autobiographical speech is considered a democratic, beneficial mode of expression equally available to every person about any topic and at any time.

Television talk shows and reality programming that focus on the ordinary person remain prevalent. Memoir writing classes are exploding in popularity⁷² and numerous

⁶⁸ RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 5 (1977).

⁶⁹ Celina Ottaway, *Memoir Mania*, ALBANY TIMES UNION, March 6, 1999, at D1.

⁷⁰ BROOKS, *supra* note 60, at 140.

⁷¹ BROOKS, *supra* note 60, at 4.

⁷² Jill Hamburg Coplan, *Moved to Write Memoirs*, NEWSDAY, March 12, 2004.

how-to books offer assistance on writing a personal history.⁷³ The national non-profit organization, StoryCorps working with National Public Radio, is building stationary and mobile recording booths across the country in order to record the stories of everyday Americans.⁷⁴ Another non-profit organization, the Center for Autobiographical Studies, explains that life stories “may be written for self-understanding, for preserving family and cultural history, or for pooling the wisdom to be gained from diverse individuals’ life experiences.”⁷⁵

The newfound respect for the “every man” story also sparked a surge in the popularity of published memoirs by the non-famous. Many critics credit Frank McCourt’s 1996 best-selling and Pulitzer Prize-winning memoir *Angela’s Ashes* about his impoverished childhood in Ireland for the phenomenon. Today the “[n]onfiction shelves at Barnes & Noble are filled with the stories of average people.”⁷⁶ Indeed, personal memoirs no longer even require the traditional elements of tragedy or triumph to be published and read. Recently, author Amy Krouse Rosenthal perplexed literary critics with her autobiography, *Encyclopedia of an Ordinary Life*, which she began by declaring: “I have not survived against all odds. I have not lived to tell. I have not witnessed the extraordinary. This is my story.”⁷⁷ She went on to tell the reader of her personal experiences with such things as kitchen appliances, Q-tips and gas stations. In a recent *New York Times* article, art critic William Grimes lamented the memoir boom and asked his readers “[i]s there not something to be said for the unexamined life?”⁷⁸

And then there is, of course, the Internet. As the number of weblogs grows exponentially so does the amount of autobiographical speech. “The clacking noise we hear in the air,” Professor Rosen observed, “is the noise of endless personal disclosure.”⁷⁹ While blogs are devoted to a range of topics, many offer entry-by-entry snapshots of the author’s past and present life story—generally presented in reverse chronological order. One blogger mused on her weblog in an entry titled “Blogging as Autobiography” that

⁷³ See, e.g., JUDITH BARRINGTON, *WRITING THE MEMOIR* (Eighth Mountain 1997); TRISTINE RAINER, *YOUR LIFE AS STORY* (1998).

⁷⁴ StoryCorps, www.storycorps.net (last visited Aug. 27, 2005).

⁷⁵ Center for Autobiographic Studies, <http://www.storyhelp.com/index.htm> (last visited Aug. 27, 2005).

⁷⁶ Ottaway, *supra* note 69, at D1.

⁷⁷ AMY KROUSE ROSENTHAL, *ENCYCLOPEDIA OF AN ORDINARY LIFE* (2005).

⁷⁸ William Grimes, *We All Have A Life. Must We All Write About It?*, N.Y. TIMES, March 25, 2005, at E27.

⁷⁹ ROSEN, *supra* note 65 at 191.

online journals “differ from traditional forms of autobiography in that they do not, as yet, tell the story of an entire life. But they are, most certainly, autobiographical.”⁸⁰ This view of autobiography as fragmented and ongoing, part present and part past, is another break from the traditional autobiography format. This shift is likely a result of a modern culture that no longer can wait until the end to begin telling its story. This is the same quickening pace of society that led Malcolm X to write in a letter to author Alex Haley, “[h]ow is it possible to write one’s autobiography in a world so fast-changing as this?”⁸¹

Perhaps the most unique aspect of autobiographical speech on the Internet is the technological opportunity it offers people to talk about themselves to a very large, even global, audience. A reporter for the *Hindustan Times* observed that “the sheer number of people out there on the Internet rambling on about their personal lives, thoughts and beliefs for the benefit of random passers-by, can blow your mind.”⁸² Some of these online diaries offer insights into matters of worldwide impact. One young blogger, for example, described the beginning of his weblog in 2002 as being filled with admittedly trivial entries like “that girl got married, I had the flu, he had I don’t know what. Stupid stuff.”⁸³ But soon he began to write in more detail about the daily hardships of his life, which was internationally noteworthy because he was a young Iraqi living in pre-war Baghdad. Like a modern Anne Frank, his blog described life under the regime of Saddam Hussein, the build up to war, the beginning of the bombing and the lawlessness that followed. At one point his writings became the most linked-to blog on the Internet and was labeled “the most gripping account of the Iraq conflict” by one of Great Britain’s largest newspapers.⁸⁴

Most blogs, however, provide information about the authors’ lives that are not front-page news. Instead they discuss “ordinary moments in the lives of ordinary people,” one blogger wrote, they are written by and about the “people who wouldn’t

⁸⁰ Beautiful Monsters, <http://www.stonesoup.co.nz/ecoqueer/archives/004234.html> (Nov. 8, 2004, 7:49 PM) (last visited on July 27, 2005).

⁸¹ Alex Haley, *Epilogue to MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X*, at 390, 415 (Ballentine Books 1999) (quoting letter from Malcolm X to Alex HALEY).

⁸² KUSHALRANI GULAB, *Diaries of Nobodies*, HINDUSTAN Times, Aug. 6, 2004.

⁸³ Rory McCarthy, *Salam’s Story*, The Guardian, May 30, 2003 available at <http://www.guardian.co.uk/Iraq/Story/0,2763,966819,00.html> (last visited on July 27, 2005); *see also* Where is Raed?, http://dear_raed.blogspot.com/ (the weblog discussed in the text) (last visited July 27, 2005).

⁸⁴ McCarthy, *supra* note 83.

normally have the chance to share their stories with the world.”⁸⁵ Take, as another example, the personal website of Glenn K. Garnes, a 43-year-old lawyer. On his home webpage, Garnes likely speaks for many bloggers when he explains why he started his weblog: “I could never have gotten anyone to publish the book of my life story, but through the magic of the Internet, I can create the living autobiography of Glenn K. Garnes.”⁸⁶ He tells his website’s visitors: “I’d love to tell you all about me. I live a very exciting life, and I love for others to experience the burden of hearing about it! I can talk about me forever, and if you stay long enough I will.”

In talking about themselves in such an open forum, the bloggers highlight one of the most significant cultural shifts of the tell-all era—reduced inhibitions about self exposure. The new autobiographical speakers, according to *New York Times* culture reporter Emily Nussbaum, have “a degraded or a relaxed sense of privacy; their experiences may be personal, but there’s no shame in sharing.”⁸⁷ In return, the pay-off for this openness is “a new kind of intimacy, a sense that they are known and listened to. This is their life, for anyone to read.”⁸⁸ Another reporter noted that while past generations kept their diaries locked and hidden in a sock drawer, the blog by comparison is “lying wide open on the dining room table, and might even include digital photos.”⁸⁹ Many bloggers also cherish the chance to write to such a wide audience without going through the filters of teachers, employers, editors or publishers. As one blogger explained, “[t]here is no one to say ‘you can’t write about what you had for breakfast—nobody wants to read about that.’”⁹⁰

The trend toward increasingly more self-disclosure through autobiographical speech is significant and to many observers it appears unrelenting. Meanwhile, the social, political and legal ramifications of this free flow of personal information are only beginning to surface. As conflicts develop, courts will be asked to balance the freedom of autobiographical speech against other interests. The existing approach favors speech that is either “political” or “newsworthy”—terms that likely do not apply to the life

⁸⁵ Beautiful Monsters, *supra* note 80.

⁸⁶ Glen K. Garnes, <http://www.glenngarnes.com/> (last visited on July 27, 2005).

⁸⁷ Nussbaum, *supra* note 30.

⁸⁸ *Id.*

⁸⁹ Cole, *supra* note 28.

⁹⁰ Beautiful Monsters, *supra* note 80.

stories of “ordinary” people. Simple reliance on these traditional criteria threatens to put too small a price on the stories of the non-famous and non-powerful. The next Part explores the rationales for free speech protection—a widely debated topic. This section lays the groundwork for the examination that follows in Part III regarding where autobiographical speech fits under the constitutional umbrella.

II. COMPETING THEORIES FOR FREE SPEECH PROTECTION

That free speech is valuable and deserves constitutional protection is not a controversial idea in this country. To most, it is self-evident. As the United States Supreme Court has stated, the freedom of speech is “among the fundamental personal rights and liberties” secured under the Constitution.⁹¹ The question of why free speech is important is far from self-evident, but the answer is crucial to determining the amount of protection. Thus, a spirited debate has ensued.⁹² In order to determine the constitutional role of autobiographical speech, these various theories need to be examined. While any categorization of these many values is certain to be imperfect, it is nonetheless helpful to frame the discussion. This Part divides them broadly into society-based and individual-based theories of free speech.

A. Society-Based Theories of Free Speech

The first group of theories in support of guarding speech from censorship focuses on the benefits that open expression yields to society as a whole. Under these theories, freedom of speech advances the general welfare and aids the democratic process by promoting an ethical and open government and an informed citizenry. It accomplishes these goals primarily by encouraging the discovery of truth by all citizens through increased knowledge, debate and understanding of opposing views.

1. The Search for Truth

While not developed by him, the most prominent society-based theory was made famous by Justice Holmes in his dissent in *Abrams v. United States* where he argued that uninhibited speech is vital to the ever important quest for the truth in the “marketplace for ideas” stating that the best test of truth is the power of the thought to get itself accepted in

⁹¹ *Thornhill v. Alabama*, 310 U.S. 88, 95 (1967).

⁹² Frederick Schauer, *Must Speech Be Special?*, 78 NW. L. REV. 1284, 1284 (1983) (“We are now experiencing an attention to the underlying premises of the principle of freedom of speech that is both more conscious and more sustained than at any time in the past.”).

the competition of the market.”⁹³ Justice Brandeis agreed, arguing in a concurrence that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁹⁴ Eventually this theory of the First Amendment found its way into a Supreme Court majority opinion in which the Court held that “utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”⁹⁵

While Justice Holmes gave the truth-discovery theory prominence, John Milton first envisioned it in 1644 essay where he argued that true and false ideas should be debated openly. He wrote of the search for truth: “[I]et her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter.”⁹⁶ Two hundred years later John Stuart Mill developed the idea further in his famous essay “On Liberty.” Like Milton, Mill’s most basic idea is that truth emerges through competition with conflicting ideas and falsehoods. In Mill’s more eloquent words, if a truthful idea is silenced society is “deprived of the opportunity of exchanging error for truth,” and if a false idea is suppressed it loses “what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”⁹⁷

The harm of such censorship, according to Mill, is not on the silenced individual but rather is inflicted on “the human race: posterity as well as the existing generation.”⁹⁸ Similarly, the advantages of free speech apply broadly to everyone. Mill theorized that society is benefited by exposure to a diverse sampling of viewpoints.⁹⁹ He also used the word “opinion” interchangeably with “truth” suggesting that he was embracing the protection of more than simply provable empirical facts and including speech about values and other less tangible ideas. These thoughts were picked up by Judge Learned Hand a century later when he wrote that the First Amendment protects “the most vital of

⁹³ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁹⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁹⁵ *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

⁹⁶ JOHN MILTON, *AREOPAGITICA*, 45 (Liberty Fund 1999) (1644).

⁹⁷ John Stuart Mill, *On Liberty in The Basic Writings of John Stuart Mill* 3, 19 (Modern Library 2002).

⁹⁸ *Id.*

⁹⁹ *Id.* at 49 (discussing “the universality of the fact, that only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth).

all general interests”¹⁰⁰ that information be heard “from as many different sources, and with as many different facets and colors as is possible.”¹⁰¹

2. Advancing Collective Self-Governance

Diverging somewhat from Mill’s broad view, a subset of the marketplace of ideas theory evolved supporting the more narrow belief that only “public” speech that is relevant to self-governance must be protected. This theory is often attributed to Alexander Meiklejohn, although the originality of Meiklejohn’s ideas has been questioned.¹⁰² Meiklejohn believed that only speech contributing to the debate of public issues should receive absolute protection.¹⁰³ To scholars in Meiklejohn’s camp, free speech is an instrument that if used correctly will lead to more informed citizens who will then elect the most knowledgeable representatives who will “not only adopt the wisest course of action but carry it out in the wisest way.”¹⁰⁴ The ultimate Meiklejohnian vision is of the town hall meeting where informed and passionate citizens are openly and eloquently debating the pressing issues of the day with their elected officials.¹⁰⁵

While initially the Meiklejohn approach embraced a narrow view of “public” speech, his boundaries of which types of speech involve “self-governance” grew more permeable under pressure. Ultimately, Meiklejohn conceded that his newer view of “public debate” included any form of expression from which a voter might gain knowledge or understanding of others.¹⁰⁶ He explained that “the people do need novels and dramas and paintings and poems, ‘because they will be called upon to vote.’”¹⁰⁷ This expanded view of “public” speech raised difficult questions about the usefulness to self-governance of speech like commercial advertising, pornography, campaign contributions or hate speech. At what point, other scholars began to ask, does the definition of “public” speech become so expansive that it ceases to have any effective meaning? Professor Kalven noted the easy progression from speech about public issues to speech about pretty

¹⁰⁰ U.S. v. Associated Press, 52 F. Supp. 362, 372 (1943).

¹⁰¹ *Id.*

¹⁰² Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L. J. 428, 447-48 (1983).

¹⁰³ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 37 (1960).

¹⁰⁴ ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1954)

¹⁰⁵ Meiklejohn, *supra* note 103.

¹⁰⁶ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

¹⁰⁷ *Id.* at 263.

much anything.¹⁰⁸ Despite these problematic questions, the Meiklejohn concept that political speech lies at the center of all First Amendment protection has endured.

In an effort to reign back in the expanding ground protected by self-governance scholars, others attempted again to tie the purpose of free speech directly to public debate. The most extreme of these approaches is that proposed by then-Professor Robert Bork. Bork argued that to avoid “an analytical stampede” the First Amendment’s protection of free speech must be cut off purely at explicitly political speech and no more.¹⁰⁹ Under his view, there is no constitutional protection for educational, commercial, scientific or artistic speech because the benefits of these types of speech are no greater than the benefits derived from a range of other non-speech conduct that potentially is subject to restrictions passed by the legislative branch.¹¹⁰ Bork saw nothing in the First Amendment that required more.

While most First Amendment scholars considered Bork’s theory drastic and unconvincing, others agreed that the goal of protecting political debate should be the focus because of its societal importance. Professor Owen Fiss asserted that it is “collective self-determination” that should be the goal of free speech jurisprudence and the only relevant question should be whether the speech at issue adds to the public debate. According to Fiss, speech is and should be protected “when (and only when) it does [enrich the public debate], and precisely because it does, not because it is an exercise of autonomy.” Under Fiss’s theory, the phrase “the freedom of speech” in the Constitution “refers to is a social state of affairs, not the action of an individual or institution.”¹¹¹ Fiss’s approach rejects theories that he asserts were designed to protect “the street corner speaker” because such a theory that seemed “so glorious when we have the street corner speaker in mind is largely unresponsive to the conditions of modern society.”¹¹² In a modern world where communication channels and agendas are often

¹⁰⁸ Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221.

¹⁰⁹ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 27 (1971).

¹¹⁰ *Id.* at 28

¹¹¹ Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

¹¹² *Id.* at 1409.

controlled by media corporate conglomerates, Fiss's approach questions the premise that simply leaving individuals free to discuss issues will create a robust public debate.¹¹³

3. Fostering Democracy

Closely related to the goal of aiding Americans' ability to effectively govern themselves through political debate is the idea that free speech leads to a diverse, stable and tolerant democracy. By protecting diverse and minority speakers, free speech furthers public debate and forces society to tolerate differing viewpoints. The effect of all segments of the general public being free to speak and be heard is stabilizing and enhances a true democracy.

Professor Cass Sunstein has argued that promoting a diversity of opinions is essential to secure a true democracy, even if such a system requires more—not fewer—regulations on speech. Under Sunstein's view, increased government regulation of the communication media might be necessary to protect minority voices. He explained that

Such controls could promote both political deliberation and political equality. In such reforms, I contend, lies the best hope for keeping faith with time-honored principles of democratic self-government under modern conditions.¹¹⁴

Whether additional regulations are needed or not, several society-based scholars is that the goal are concerned with protecting diverse viewpoints and ensuring that the views of minority groups, whose opinions and beliefs might otherwise be waylaid by a more homogeneous majority, are included in the public debate. Democracy, ultimately, is the primary beneficiary of these protections.

Professor Lee Bollinger has argued that securing a diversity of viewpoints promises to encourage tolerance throughout society and that this is the primary value protected by the First Amendment.¹¹⁵ By removing the power of some to squelch the speech others, Bollinger's theory contends, the First Amendment forces people to tolerate the contrasting beliefs and viewpoints of others. Without the power to censor, moreover, Americans must look inward at their own prejudices and confront "the fears and angers [they] bear towards the contrary beliefs and behavior of others."¹¹⁶ Thus, under

¹¹³ *Id.* at 1410.

¹¹⁴ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, xviii-xx, 18-19 (1993).

¹¹⁵ LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 9-10, 140-44 (1986)

¹¹⁶ Bollinger, *supra* note 102, at 445.

Bollinger's theory, free speech protections function first and foremost to stop the societal urge to silence minorities and, as a result, create by example a greater societal tolerance for speech and non-speech differences. As Bollinger explained:

Providing some accommodation of these varied beliefs is a critical and basic task of the society. Simply coexisting and overcoming the wish to establish an overly homogenized society are important goals. In this sense, free speech may simply function as a zone of extreme toleration, not because the behavior tolerated is important to human self-realization or to truth, but because as a practical matter living with divergent behavior is necessary.¹¹⁷

The flip side of Bollinger's view is found in Professor Steven Shiffren's theory that the First Amendment is mostly concerned with the protection of "romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts."¹¹⁸

Shiffren's view is the mirror image of Bollinger's. While Bollinger adopted a defensive view that focuses on preventing majority censorship of the minority, Shiffren took an offensive approach that is concerned with championing minority speech and argued that

[t]he first amendment's purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within all of us.¹¹⁹

Whether accepting an offensive or defensive approach, these newer critics of the marketplace of ideas share Mill's goal of free expression for all opinions as a means to a more effective democracy. But to fulfill that ideal vision, they argue the focus should be on protecting the voices of those who might otherwise be silenced whether based on economics, education, class, race, religion, gender or other factors.

In summary, the society-based free speech theorists often disagree on what types of speech should be protected and, moreover, how to protect them effectively. Yet they find common ground in what they see as the primary goals of the First Amendment protections of free speech—a rich public debate that results in an informed citizenry and a successful democracy through exposure to diverse viewpoints from a wide variety of

¹¹⁷ Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 984 (1990).

¹¹⁸ STEVEN H. SHIFFREN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990).

¹¹⁹ *Id.*

speakers. In this manner, society as a whole reaps the rewards of free and open expression.

B. Individual-Based Theories of Free Speech

A distinct collection of theories on free speech principles finds the value of the First Amendment lies predominately with the individual. Under this line of reasoning, the right to speak freely is “justified not because it provides a benefit to society, but because it is a primary good.”¹²⁰ The beneficiaries under this view are the speakers and their listeners, who are free to exercise individual autonomy and pursue self-realization without constraints. Focusing on the individual benefits of free speech allows the theorists to encompass a broad range of personal expression. This is because they see the desire, the freedom and the act of self-expression as themselves worthwhile benefits regardless of any societal gains these freedoms might yield.

Based on an Aristotelian view of happiness, this theory contends that “[f]ree expression may be an indispensable means to the good life; free speech may be necessary to human flourishing or happiness.”¹²¹ While the society-based theorists concerned themselves with the self-governance of the citizenry, the individual-based scholars focus on the right of each human being to make choices and control his or her world through individual actions, thoughts and speech. The key word is “autonomy.” As Professor Charles Fried explained:

Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others. Autonomy is the foundation of all basic liberties, including liberty of expression.¹²²

To some of these scholars, the inquiry ends here; freedom of speech is a necessary right of an individual to be free from the control of others. It is the power of choice and of action and an essential component of liberty. These theorists, according to Schauer “claim to intuit the intrinsic goodness of free speech.”¹²³ Professor Ronald Dworkin is a strong proponent of this view and rejects any view that “treats free speech as an

¹²⁰ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 49-50 (1982).

¹²¹ Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 80 (1989).

¹²² Charles Fried, *Exchange; Speech in the Welfare State: The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (Winter, 1992).

¹²³ Schauer, *supra* note 120, at 48.

important instrumentally, that is, not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us.”¹²⁴

Other individual-based theorists, however, do see free speech as a means to an end and have focused on the positive consequences it provides to individuals. Their answer to the question of why to protect free speech comes in a thesaurus of phrases such as self-fulfillment,¹²⁵ self-realization¹²⁶ self-actualization,¹²⁷ or self-determination.¹²⁸ These scholars submit that the freedom of speech is valuable to individuals because it is a necessary path toward personal growth and the development of reason.¹²⁹ Professor Lawrence Solum explained that:

Speech (or more precisely, communication) is a prerequisite for the development of this potential. Man is a social animal; communication is required for individuals to grow, to become fulfilled, and to develop their rational faculties. Thus, the status of self-realization as an essential part of the good life requires the freedom to communicate.¹³⁰

While typically centered in the speaker, these benefits also affect the listener who is empowered with the ability to choose which speakers to hear and to judge the value of the messages.¹³¹

One main point on which these individual-based scholars diverge from the society-based theorists is on the necessity, or propriety, in examining the content of the speech to determine its level of protection. Professor Martin Redish explained that “a government determination that one type of expression fosters this value better than another is itself a rejection of the self-realization principle.”¹³² The opposing view is expressed by society-based scholar Professor Fiss who concluded that content regulations

¹²⁴ RONALD M. DWORKIN, FREEDOM’S LAW 199-200 (1996).

¹²⁵ THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6- 7 (1970).

¹²⁶ MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9-40 (1984); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 524.

¹²⁷ C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 254 (1989)

¹²⁸ *Id.* at 3-5, 47-51, 69.

¹²⁹ Schauer, *supra* note 120, at 49-50.

¹³⁰ Solum, *supra* note 121, at 80 (footnotes omitted).

¹³¹ *Id.*

¹³² REDISH, *supra* note 126, at 5.

are necessary and that individual autonomy “might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination.”¹³³

C. Multi-Valued Theories of Free Speech

Professor Harry Kalven once puzzled as to why free speech concepts suffer under the weight of a “quest for coherent general theory”¹³⁴ while other areas of the law freely enjoy “a great capacity to tolerate inconsistencies.”¹³⁵ This urge to define a single, overarching rationale for free speech has itself led to much scholarly pontification on speech and its proper role in society. In his discussion of the various justifications for free speech, for example, Professor Kent Greenawalt challenged the single rationale approach and concluded that humans struggle with speech issues as they do with other problems—by balancing numerous factors and values.¹³⁶

Thus while many free speech scholars tend to accept primarily either a society-based or an individual-based view of the First Amendment, there are also those who are willing to accept that a multitude of rationales are at play. For example, Professor Schauer expressed sympathy for an interdependent approach that takes into account multiple justifications stating that “although there need not be anything inherently wrong with a unitary theory, so, too, there need not be anything wrong with a multi-valued theory.”¹³⁷ He envisioned an approach where “we might in fact have several first amendments.”¹³⁸ Another view was taken by Professor Michael Perry who concluded that both justifications are proper because they “are congruent with one another; neither category is smaller nor larger than the other. They are one category.”¹³⁹ Philosopher John Stuart Mill also recognized a congruence between the two theories and noted that freedom of expression is unique among human liberties because the individual interest and societal interests are “inseparable.”¹⁴⁰

¹³³ Fiss, *supra* note 111, at 1411.

¹³⁴ HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 4 (1965).

¹³⁵ *Id.*

¹³⁶ Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 119-120 (1989).

¹³⁷ Schauer, *supra* note 92, at 1303.

¹³⁸ *Id.*

¹³⁹ Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1143 (1983).

¹⁴⁰ Mill, *supra* note 97, at 14.

Professor Thomas Emerson is perhaps the main proponent of the idea that all of the values discussed in the preceding sections are proper justifications for constitutional protections and that they complement each other, rather than conflict.¹⁴¹ On this basis, he outlined four main justifications for the protection of expression—the discovery of truth, the fostering of democracy, the protection of individual autonomy, and the promotion of a more stable, tolerant society.

It is not the purpose of this article to enter the debate about which justification for the protection of free speech is correct. The point of the preceding discussion, rather, was to get a sense of the range of proposed rationales. In order to discern the First Amendment value of autobiographical speech, and therefore how it should be balanced against competing interests, it is important to understand why speech is protected at all. The next Part examines how autobiographical speech fits into these common objectives.

III. AUTOBIOGRAPHICAL SPEECH UNDER THE MAIN FREE SPEECH THEORIES

The theoretical debate leaves us with no answer to the question of why the First Amendment protects free speech. But the debate has produced two prominent lines of thought—either the Constitution’s primary aim is to protect speech that benefits society or, alternatively, it is to safeguard speech that is important to the individual. Certain types of speech strongly satisfy both rationales. The primary example is political speech, which is uniformly accepted as premium level speech and oft said to deserve heightened protection. Similarly, a line of authority has developed that protects speech found to be “newsworthy” or about a matter in the public interest from various legal challenges. This Part takes a closer look at autobiographical speech and reveals that, like these other highly protected categories of speech, autobiographical speech advances the range of free speech goals by producing numerous benefits to both the individual speaker and society. These unique, multi-faceted benefits of autobiographical speech have been long recognized in the areas of history, philosophy, science and religion but for some reason, remain overlooked in the law. This analysis shows why the time has come for legal recognition of the importance of autobiographical speech.

¹⁴¹ EMERSON, *supra* note 125, at 6-9.

A. The Questionable Nature of “Truthful” Autobiographical Speech

Before going further, it is worthwhile to note that this discussion considers only *truthful* autobiographical speech. This phrase might strike some as an oxymoron. As biographer Humphrey Carpenter once said, “[a]utobiography is probably the most respectable form of lying.”¹⁴² Indeed, it is generally accepted that autobiography is often used (or abused) as a forum for re-interpreting life events in a way more favorable to the speaker. But it is also accepted that listeners of these stories tend to understand this tendency to reinvent or reshape past events and they take it into account when judging the truthfulness of the story. Although this article assumes the veracity of the speech in question is not challenged, the issue of truthfulness of autobiographical speech is an interesting one deserving a brief discussion.

It is always a difficult and unsatisfying endeavor to attempt to separate truth from falsity. This difficult effort becomes even more complex with autobiographical speech because it is driven primarily by memories of relationships and events. The interaction between first-person viewpoints, memory and truth is not always absolute. In his book on memoirs, William Zinsser explained that autobiographical speakers “arrive at a truth that is there’s alone, not quite like that of anybody else who was present at the same event.”¹⁴³ An example from American history of this phenomenon is found in the assassination of President John F. Kennedy. While there were dozens, perhaps hundreds, of known eyewitnesses to the shooting, the stories conflicted on key points—some claimed they saw smoke from the grassy knoll,¹⁴⁴ others did not;¹⁴⁵ some reported hearing shots from different directions,¹⁴⁶ others insisted they all came from the Texas Book Depository.¹⁴⁷ Yet are these speakers lying?

This ambiguity over the truth or falsity of memories is even more pronounced when the stories involve not just provable facts but human relationships, emotions or

¹⁴² A.N. Wilson, *A Child of Our Time*, EVENING STANDARD, Jan. 10, 2005 (quoting Humphrey Carpenter).

¹⁴³ William Zinsser, *Introduction to INVENTING THE TRUTH* 1, 6 (William Zinsser, ed., 1998).

¹⁴⁴ See, e.g., Larry A. Sneed, *No More Silence* (Three Forks Press, 1998) (Statement of Sam Holland).

¹⁴⁵ See, e.g., *id.* (statement of Clemon Earl Johnson).

¹⁴⁶ See, e.g., *id.* (statement of Marvin Faye Chism).

¹⁴⁷ See, e.g., *id.* (statement of Robert E. (Bob) Edwards).

reactions.¹⁴⁸ For these reasons, Professor Albert Stone noted that “autobiography asks to be judged skeptically as a version of history.”¹⁴⁹ The amount of leeway the proclaimed truth of autobiographical speech might deserve as compared to other types of statements is not obvious. As Professor Diane Zimmerman explained:

Human beings regularly recall experiences and relationships in forms that make them more exciting, less painful, or in other ways more satisfying to their deep-seated needs. Even though, on occasion, this reshaping may alter our stories in ways that are not entirely fair to others who have been involved, we do not ordinarily consider this to be seriously immoral behavior.¹⁵⁰

Thus, there might be argument that there is something uniquely valuable about individual memories, perceptions and viewpoints on personal life events regardless of their verifiable accuracy. Under this view, autobiographical speech might be deserving of protection beyond the boundaries of basic defamation law. But this inquiry, as stated earlier, goes outside the scope of this article. Perhaps the concept intended in this initial article would be more accurately described as “sincere” autobiographical speech, meaning simply speech in which the speaker genuinely believes its authenticity. At points, this article does use the word “sincere” to make this point. Nevertheless this article generally refers to “truthful” autobiographical speech and intends statements that are believed to be true by the speaker and not challenged for their accuracy by others.

B. Autobiographical Speech under Individual-Based Theories

In examining how autobiographical speech satisfies the various justifications for free speech, this Part first addresses the individual-based theories because the fit is more intuitive. This argument is also easier in part because the individual-based theories tend to find value in a broader spectrum of speech than the society-based approaches. But as the discussion shows, even under the more specific individual-based rationales that free speech leads to self-fulfillment and development of reason, the harmony between these goals and autobiographical speech is exceptionally compelling. The correlation is far more convincing than simply that all free speech aids in self-realization. Rather,

¹⁴⁸ See Diane L. Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364, 419 (1989) (discussing how memory and descriptions of relationships may not be necessarily true or false).

¹⁴⁹ STONE, *supra* note 59, at 5

¹⁵⁰ Zimmerman, *supra* note 148, at 426.

autobiographical speech in particular has unique scientific, philosophic, religious and legal backing to the claim that it leads to individual self-determination. At the end of this discussion, the conclusion is quite clear that if free speech receives constitutional protection because, as Professor Schauer concluded, it is capable of leading to “personal growth, self-fulfillment, and development of the rational faculties”¹⁵¹ then autobiographical speech should not simply be protected but it should be one of the most treasured of all human speech.

1. “I Was Here”: Autobiographical Speech as Basic Human Freedom

The least complex of the individual-based theories is the Kantian approach that free speech is simply a good unto itself. This viewpoint suggests that free speech must be protected because it is a necessary component of human liberty. The content of the speech and any value that might be derived from the subject matter are irrelevant. It is the freedom to express oneself that is vital. Therefore, proponents of this theory would protect essentially all types of speech with only rare exceptions. Clearly, autobiographical speech easily meets this standard and would deserve full protection under this theory.

But the correlation between the Kantian view of free expression and autobiographical speech goes further. Under a view that free speech is an innate right and part of what it means to be human and alive, protecting autobiographical speech is fundamental. Many famous philosophers have promoted the practice of exploring and sharing personal experiences as a method of testing and questioning our very existence—an essential part of being a self-conscious human. The philosopher Rene Descartes relied on his self-reflective dialog with himself to conclude his own existence and declare “cogito ergo sum” or “I think therefore I am.” This idea of self-reflection being the essence of humanity was adopted by several prominent philosophers including Socrates who is quoted as saying “the unexamined life is not worth living,”¹⁵² Plato who instructed his students “[k]now thyself,” and Friedrich Nietzsche who concluded that regardless of knowledge or education “ultimately [man] reaps nothing but his own biography.”¹⁵³ Philosopher and theologian St. Augustine discussed the importance of spending time “in

¹⁵¹ Schauer, *supra* note 120, at 49-50.

¹⁵² See ROBERT NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 15 (1989).

¹⁵³ FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* 269 (Gary Handwerk, trans., Stanford 1997) (1878).

the vast hall of my memory,” because that is where “I meet myself and recall what I am, what I have done, and when and where and how I was affected when I did it.”¹⁵⁴ In his book discussing modern American culture of self-examination and disclosure, Professor Peter Brooks noted that “[w]ithout confessional talk, one might say, you simply don’t exist.”¹⁵⁵

In addition to the philosophical desire to comprehend their own existence, many speakers tie autobiographical speech with the human desire to thwart death. The writer Aram Saroyan described the urge to leave behind evidence of our life experiences as a “kind of willed immortality” and the same drive that causes people to “write our names over and over and over again.”¹⁵⁶ The theme of immortality—both the hope to achieve it as well as to influence it—are common in discussions of autobiography. These life examining functions of autobiographical speech, whether it is a dialog on innermost thoughts or a boastful record for future generations, is literally the act of leaving a mark on the world and declaring, “I was here.” According to Nietzsche, every great philosophy is “a kind of involuntary and unconscious memoir.”¹⁵⁷ Autobiographical speech is thus particularly harmonious with the existential view of free speech, which equates the freedom with personhood. In the words of Justice Thurgood Marshall— “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”¹⁵⁸

2. Autobiographical Speech Promotes Self-Realization

Most individual-based theorists, however, defend free speech not as an innate human right but rather as a means to achieve the myriad benefits that accompany unrestrained personal expression. These benefits include self-fulfillment, self-realization and the development of reason. As with the Kantian approach, scholars taking the self-realization view argue that virtually all types of speech can play a role in an individual’s quest for fulfillment and, therefore, should not be censored.¹⁵⁹ Once more, however, a

¹⁵⁴ SAINT AUGUSTINE, *CONFESSIONS* 186-87 (Henry Chadwick, trans., Oxford World Classics 1998).

¹⁵⁵ BROOKS, *supra* note 60, at 140.

¹⁵⁶ ARAM SAROYAN, *LAST RITES: THE DEATH OF WILLIAM SAROYAN* 78 (1982).

¹⁵⁷ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 13 (Walter Kaufmann, trans., Vintage 1989).

¹⁵⁸ *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

¹⁵⁹ These individual-based theorists, however, do not necessarily object to all restrictions on speech. As Professor Redish stated, there is “no logically necessary link between a belief in individual self-realization and a so-called ‘absolute’ construction of the first amendment.” REDISH, *supra* note 126, at 53.

look at the personal benefits gained by autobiographical speech shows that autobiographical speech far exceeds other types of speech in its capacity to advance this goal. Many of the forms of autobiographical speech discussed in this section are traditionally private forms of speech. Yet as the discussion of the new “tell-all era” in Part I demonstrated, increasingly more people now desire to make their personal stories public and they are finding increased benefits in this open disclosure. Individual-based theorist Professor Solum agrees that self-realization benefits come from being both a speaker and a listener because “[a]lthough one could develop one’s rational faculties to some extent by talking to one’s self, intellectual growth is far more rapid and perhaps more extensive if accomplished through interaction with others.”¹⁶⁰ Regardless of whether the speaker chooses a public or private forum, the self-realization benefits of autobiographical speech have been established.

a) The “Talking Cure”: Therapeutic Benefits of Autobiographical Speech

The curative benefits of human beings talking about life events are well accepted. Autobiographical speech, in fact, is the basic theory behind psychotherapy. Philosophy Professor J.M. Bernstein explained that “[t]herapy just is, in part, the constructing of a narrative, the making of a generalized biography into a specific autobiographical tale.”¹⁶¹ Thus the scientific and medical communities fully recognize the benefits of treating patients through an exploration of their self-history, according to Dr. Susan Vaughan, an instructor in clinical psychiatry at the Columbia College of Physicians and Surgeons, because there is “solid scientific evidence to suggest that the so-called ‘talking cure,’ originally devised by Freud, literally alters the way in which the neurons in the brain are connected to one another.”¹⁶² Vaughan explained that psychiatrists ask patients to tell and retell the stories of their lives because

the value of understanding our life story is simply that it is our life story.
It captures something key about who we are and how we came to be.
With self-understanding comes autonomy. The story of your life is

¹⁶⁰ *Id.*

¹⁶¹ J.M. Bernstein, *Self-knowledge as Praxis in NARRATIVE IN CULTURE* 51, 56 (Christopher Nash, ed., 1991).

¹⁶² SUSAN C. VAUGHAN, *THE TALKING CURE* 4 (Owl 1998).

something you will always have, something that defines you. No one can take it away.¹⁶³

Psychoanalyst Roy Schafer contends that the retelling of a life story is at the core of psychoanalysis because forcing the patient to synthesize life events reveals important information about the patient and brings about acceptance and understanding of past events and possible solutions for future problems. Discussing Schafer's theory, Vaughan states that

[t]his retelling ultimately allows us to synthesize a cohesive life narrative. It makes our history make sense, transforms it from a series of unintegrated fragments of plots into a magnum opus. In providing us with an opportunity to integrate disparate elements of our autobiographies, all depth therapies such as psychoanalysis allow us to conquer the past and move toward the future with a new sense of mastery.¹⁶⁴

Psychotherapy is an ongoing process of identifying conflict and seeking resolutions to those conflicts, according to Professor of Human Development Robert Atkinson, who explained that “[t]elling our life stories, with their deeply human elements, is an act of centering and integrating ourselves through gaining a clearer understanding of our experiences, our feelings about them, and their meaning for us.”¹⁶⁵

These recognized therapeutic benefits of autobiographical speech can be found beyond the psychologist's couch. The practice of personal journaling or the writing of diaries is generally believed to bring similar healing results. The claimed psychological benefits of a person exploring a personal narrative are many and include finding insights into personality, releasing emotions, understanding the influence of a person's family and childhood on his or her current life, escaping ruts and bad habits, coping with stressful situations like divorce or death, gaining the ability to forgive, goal making, problem solving, expanding creativity, enhancing relationships with others. The magazine devoted to the topic, *Personal Journaling: Writing About Your Life*, summed it up well with the tagline “write your way to a better you.”

The therapeutic aspect of autobiographical speech—of telling one's story and being heard—is also often an issue in the American legal system. To most Americans,

¹⁶³ *Id.* at 159.

¹⁶⁴ *Id.*

¹⁶⁵ ROBERT ATKINSON, *THE GIFT OF STORIES* 6 (1995)

allowing all sides the opportunity to tell their story in a legal conflict is nothing short of a vital “right” that is cathartic and inherently fair. Grand jury proceedings, for example, have been criticized for denying the defendant “the opportunity to testify and thus to tell his story to the grand jury.”¹⁶⁶ Similarly, the ability of a crime victim to tell her story publicly is a major objective of the “victim’s rights” movement. Groups supporting a constitutional amendment on victim’s rights have argued for a victim’s right “to tell the judge and convicted criminal the physical, emotional and financial impact of the misdeeds.”¹⁶⁷ Empirical evidence suggests that litigants are “more likely to be satisfied with an adverse outcome and think the process fair if they are given a chance to participate personally and ‘tell their story’ to the decisionmaker.”¹⁶⁸ Thus including these personal stories in the legal process creates positive effects by giving the speaker control, whether perceived or actual, over their own situation.

These broad therapeutic benefits of autobiographical speech are in complete accord with the self-realization approach to free speech. According to Professor Redish, self-realization is the “one true value” of First Amendment protections.¹⁶⁹ The term as Redish used it has two general meanings. The first regards “development of the individuals’ powers and abilities.”¹⁷⁰ This is in line with proponents of autobiographical speech who claim that it forces the speaker to find and further his individual qualities and makes him “more courageous, more authentic and more alive.”¹⁷¹ The second meaning of “self-realization,” according to Redish, refers to “the individual’s control of his or her own destiny through making life-affecting decisions.”¹⁷² This also comports with the claim that autobiographical speech gives speakers “a clearer sense ... of what is and is not within [their] control” and allows them to seize control of their lives “before it’s really too late, maybe, to make dramatic changes.”¹⁷³ Thus if speech is protected, as Redish claims, because of its “instrumental value in developing individuals’ mental

¹⁶⁶ Ric Simmons, *Re-examining the Grand Jury*, 82 B.U. L. REV. 1, 60 (2002).

¹⁶⁷ Andrea F. Siegel, *Crime Victims, Families Demand A Voice Proposed Amendment Would Give Them A Say In Court*, BALT. SUN 1B (Nov. 5, 1993).

¹⁶⁸ Robert G. Bone, *Agreeing to Fair Process*, 83 BOSTON U. L. REV. 485, 506.

¹⁶⁹ REDISH, *supra* note 126, at 11

¹⁷⁰ *Id.*

¹⁷¹ ATKINSON, *supra* note 165, at 51.

¹⁷² REDISH, *supra* note 126, at 11.

¹⁷³ ATKINSON, *supra* note 165, at 52-53.

faculties so that they may reach their full intellectual potential” and thereby better control their lives,¹⁷⁴ then autobiographical speech deserves one of the strongest constitutional shields.

b) Saving the Soul: Religion and Autobiographical Speech

Autobiographical speech also has a strong religious tradition.¹⁷⁵ In general terms, the religious practices involving autobiographical speech ask their followers to engage in various forms of self-reflection as a means to gain spiritual renewal or, alternatively, to perform an accounting of one’s life before death in order to achieve salvation. For example, the Puritans kept diaries of the events of their daily lives in the belief that it would reveal signs of divine providence. The Puritan diarist “offered what purported to be an accurate, straightforward account of the soul’s progress.”¹⁷⁶ Similarly, the Quakers wrote journals in “order to evaluate themselves in their spiritual development.”¹⁷⁷ Professor Angelo Costanzo, a prominent scholar on slave narratives, compared the early American religious form of autobiography with its secular counterpart, and stated that

[t]he narrator of a religious life emphasized his struggle to save his soul and then depicted his entrance into a spiritual community of shared values and goals. The secular autobiographer stressed his individual search for identity within the framework of society’s temporal institutions, such as those of government, business and education.¹⁷⁸

While most discussions of the religious tradition of autobiography focus on Christianity, forms of autobiographical speech are found in religions around the world. Several Native American religions practiced public confessional rituals as a means of propitiation.¹⁷⁹ The Jewish practice to seek forgiveness in the days prior to Yom Kippur also involves autobiographical speech seeking atonement. Buddhist monks in Tibet were found to have kept “secret autobiographies” in which they explored personal

¹⁷⁴ REDISH, *supra* note 126, at 30.

¹⁷⁵ Some historians, in fact, credit the rise of Christianity and its emphasis on the self for creating the modern autobiographical form. *See, e.g.,* van Rijn, *supra* note 50, at ix (stating that “[a]utobiography in our modern sense did not exist before the days of Jesus, the Christ”).

¹⁷⁶ William Berry, *Personal Politics: American Autobiography*, VA. Q. REV. Autumn, 1997, <http://www.vqronline.org/viewmedia.php/prmMID/7764>.

¹⁷⁷ ANGELO COSTANZO, SURPRIZING NARRATIVE : OLAUDAH EQUIANO AND THE BEGINNINGS OF BLACK AUTOBIOGRAPHY 50 (1987).

¹⁷⁸ *Id.* at 6.

¹⁷⁹ *See, e.g.,* ANN FIENUP-RIORDAN, BOUNDARIES AND PASSAGES: RULE AND RITUAL IN YUP’IK ESKIMO ORAL TRADITION 209-10, 345 (1995) (describing the Yup’ik Eskimo ritual of public confession for medical healing and social control).

religious experiences.¹⁸⁰ Medieval Japanese Buddhists also took an “extraordinary interest” in their pasts.¹⁸¹ For Buddhists who believe in reincarnation and the concept of “karma,” one scholar explained, reflecting on the present life was an essential means to revealing insights into a former life.¹⁸²

Perhaps the most prominent form of autobiographical speech found in religious practice, however, is the act of confession in which admitting past wrongs is taught as a path to religious salvation. In his book on confessions, Professor Peter Brooks explains that “[c]onfessional discourse is clearly the prototype of that typically modern form of writing we call autobiography—it is a fragment of autobiography.”¹⁸³ Saint Augustine’s *Confessions*, in which he gives an accounting of his life and the role of his faith, is considered by some to be “the first great introspective autobiography.”¹⁸⁴ Before his execution by the Nazi’s in 1945, Dietrich Bonhoeffer wrote about the importance of public confession in Christianity:

In confession the break-through to community takes place. Sin demands to have a man by himself. It withdraws him from the community. . . . The unexpressed must be openly spoken and acknowledged. All that is secret and hidden is made manifest. It is a hard struggle until the sin is openly admitted.¹⁸⁵

Clearly the most prominent religious tradition of confession is found in Catholicism, which has required its followers to confess their sins since 1215.¹⁸⁶ While now considered a private, individual act, Christian religious confession was once seen as a public, community exercise.¹⁸⁷ The Catholic act of confession both comforts believers and regulates their behavior. As Brooks explained, it has become “a crucial mode of self examination; . . . a dominant form of self-expression, one that bears special witness to personal truth.”¹⁸⁸ Beyond religious ritual, Brooks argued that confession “permeates our culture, including our educational practices and our law.”¹⁸⁹

¹⁸⁰ GYATSO, *supra* note 55, at 101-24.

¹⁸¹ GORDON DANIELS, *EUROPE INTERPRETS JAPAN*, 157-60 (1984).

¹⁸² *Id.*

¹⁸³ BROOKS, *supra* note 60, at 102.

¹⁸⁴ van Rijn, *supra* note 50, at ix.

¹⁸⁵ DIETRICH BONHOEFFER, *LIFE TOGETHER* 112 (Harper 1978).

¹⁸⁶ BROOKS, *supra* note 60, at 2

¹⁸⁷ *Id.* at 91.

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *Id.* at 2.

Indeed, the subject of criminal confession in the law is a controversial one. Yet while there is intense debate over how confessions should be obtained and used by law enforcement officers and the courts, the idea that there is inherent value in a person being free to tell his story is not challenged. In the most-famous confession case, *Miranda v. Arizona*,¹⁹⁰ the Supreme Court justices disagreed with each other over the proper procedure but they were in accord regarding the desirability of voluntary, truthful confessions. Writing for the majority, Chief Justice Earl Warren declared that the protective warnings outlined in the case would “enable the defendant under otherwise compelling circumstances to tell his story without fear.”¹⁹¹ While disagreeing on the need for constitutionally mandated warnings, in his dissent in *Miranda* Justice Byron White similarly recognized a personal value in confession, stating, “it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.”¹⁹² Much like the religious view, the legal system considers voluntary confession as a crucial means to the discovery of truth and the possible redemption of the speaker.

Confession and the closely related concept of apology are pervasively found in both psychotherapy and the teachings of many religions. And the line between religious confession and therapeutic self-reflection is often blurry. For example, a period of apology to those who were wronged is a central part to any classic “twelve-step” program such as Alcoholics Anonymous, which combines religious and therapeutic approaches. As Brooks observed, “[p]sychoanalysis, one of the most conspicuous inventions of the twentieth century, offers a secular version of religious confession; it insists on the work of patient and analyst—comparable to confessant and confessor—toward the discovery of the most hidden truths about selfhood.”¹⁹³

As with psychotherapy, the correlation between the religious practices of autobiographical speech and the self-realization justification for First Amendment free speech protection is manifest. The religious view of autobiographical speech is that examination of past experiences—whether public or private and whether for self-

¹⁹⁰ 384 U.S. 436 (1966).

¹⁹¹ *Id.* at 466.

¹⁹² *Id.* at 538 (White, J., dissenting)

¹⁹³ BROOKS, *supra* note 60, at 9.

reflection or confession of past wrongs—helps the speaker gain insight into himself, his life, his world and aids him in making future choices that will lead to redemption. As the philosopher Foucault observed, the ritual of confession is one in which

the expression alone, independently of its external consequences, produces intrinsic modifications in the person who articulates it: it exonerates, redeems, and purifies him; it unburdens him of his wrongs, liberates him, and promises salvation.¹⁹⁴

Therefore, under a theory that a constitutional shield for speech “is justified by the role speech plays in the processes of self-fulfillment, participation in change, development of personal faculties, and control of one’s own life-affecting decisions,”¹⁹⁵ religious tradition supports the argument that protection of autobiographical speech is paramount for meeting these objectives.

The blend between the philosophical, therapeutic, and religious uses of autobiographical speech corresponds directly with the individual-based justifications of the First Amendment. All of these approaches embrace the concept that having the freedom to explore the details of one’s life leads the speaker to understand herself and her world and, in turn, guides her to make better choices. None of these practices, moreover, makes much of a distinction between the basic (“I was born in January”), the dramatic (“I lied to my mother”) or the mundane (“I like toast.”). Rather they accept that the true importance of these various statements might not be fully understood until they are spoken, and they give the speaker the power to determine their ultimate significance.

The clear correlation with individual-based theories of free speech is evidenced by the overlap of terms used by both individual-based free speech theorists and autobiography scholars. For example, autobiography critic Karl Weintraub once described autobiographical speech as having “such varied functions as self-explication, self-discovery, self-formation, self-presentation, self-justification”¹⁹⁶—many of the same self-focused concepts advocated by individual-based free speech scholars. This suggests

¹⁹⁴ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 61-62 (Robert Hurley, trans, Vintage 1990).

¹⁹⁵ Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PENN. L. REV. 615, 683 (1991) (summarizing the “self-expression or self-realization theory” of free speech).

¹⁹⁶ Weintraub, *supra* note 52, at 824.

that autobiographical speech is an essential, if not preeminent, form of speech in the effort to protect an autonomous self-realization justification for free speech rights.

C. *Autobiographical Speech under Society-Based Theories*

To anyone who accepts the individual-based theories of free speech, the strong parallel between the personal benefits of autobiographical speech and goals of the First Amendment is unmistakable. The role of autobiographical speech under the society-based justifications is not as initially intuitive. A closer examination, however, reveals that autobiographical speech satisfies these alternative rationales with rival force. As discussed earlier, the society-based theorists believe that free speech is driven by the desire to discover the truth, improve self-governance through knowledge and debate, and foster democracy through increased understanding and tolerance of opposing views. This Part examines how truthful autobiographical speech furthers those goals by offering a unique forum for the public at large to hear a multitude of voices commenting on being human in America—the good, the bad and even the seemingly banal. This conversation on the human condition enlightens people to the experiences, beliefs and sufferings of others. This expanded knowledge of the realities of American lives provides society with the collective information it needs to better govern itself and allow democracy to flourish. An important lesson of past autobiographical speech, however, is that the benefit of a particular person’s story might not be clear when first told. Yet history has shown that taken as a whole these stories are invaluable to present and future generations. There is little danger, of course, of losing the autobiographies of wealthy and influential Americans. The threat, rather, is that contemporary society will undervalue, and thus underprotect, the life stories of the powerless or of the nonconformists. These stories are at risk of being judged to be unimportant or else somehow objectionable and thus silenced. This distinction is unsettling because in many ways the stories of “ordinary” Americans have the greatest potential of furthering the society-based goals of free speech.

1. Autobiographical Speech Leads Us Closer to the Truth

The predominant theory supporting free speech protections is that currently adopted by the Supreme Court: freedom of speech leads to the discovery of truth in the marketplace of ideas. The link between human life experiences and our understanding of

truth is undeniable. As the German philosopher Wilhem Dilthey declared at the beginning of the twentieth century, all human knowledge arises out of individual human experiences.¹⁹⁷ Therefore, autobiographical speech is vital to expanding human understanding of what is true.

This article is limited to an examination of the constitutional role of *truthful* autobiographical speech. As discussed briefly earlier, if the veracity of the speech is challenged, the analysis would likely change.¹⁹⁸ Truthful speech in general is highly valued by the First Amendment. In his analysis of the various justifications for free speech protections, Professor Greenawalt determined that general factual statements were the one type of communication that was covered by virtually every rationale. Factual assertions, he concluded “are critical for people’s understanding of the world they inhabit, for their choices about how to live, and for their decisions on public issues.”¹⁹⁹ Therefore, he found that the truth-seeking rationale of free speech “applies strongly to general factual statements.”²⁰⁰

Any discussion of “truth” and “facts,” however, quickly hits the conceptual roadblock of whether objective truth actually exists. Greenawalt noted that “some notion of empirical truth” is generally accepted and suggested, as example, that because “all the available evidence suggests that the earth is round rather than flat,” this allows people to “say that someone who believes that the earth is round is closer to the truth than the person who believes it to be flat.”²⁰¹ But in his criticism of the “marketplace of ideas” theory, Professor Stanley Ingber argued that “truth” is inherently subjective. Rather than accepting an objective or empirical truth, Ingber suggested that all truth is based on individual’s personal experiences and backgrounds. He explained that

[i]f the marketplace actually revealed truth, diversity and conflict presumably would diminish rather than increase. But, because people’s perceptions are based on their varying interests and experiences, their perceptions are not likely to be socially homogenized. Consequently, as long as people have differing experiences, there is little guarantee that any

¹⁹⁷ See WILHELM DILTHEY, INTRODUCTION TO THE HUMAN SCIENCES 81 (Wayne State Univ. Press 1989).

¹⁹⁸ See *supra* Part III.A.

¹⁹⁹ Greenawalt, *supra* note 136, at 154.

²⁰⁰ *Id.*

²⁰¹ Greenawalt, *supra* note 136, at 132.

society can agree on what is ‘true,’ and diversity and conflict will likely persist.²⁰²

Ingber concluded that the marketplace of ideas is not likely to result in a general consensus of what is true, but rather “serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is ‘true’ or ‘best.’”²⁰³

Autobiographical speech is essential to advancing both objective and subjective “truth” discovery. Ingber’s view of subjective truth in which the marketplace allows diverse cultural groups to share their differing experiences is especially aligned with unfettered autobiographical speech rights. But autobiographical speech also furthers the discovery of the more objective view of truth. Any scientific, historical or philosophical definition of “truth” usually relies on personal observation and experience. A dictionary definition of “fact” is “[k]nowledge or information based *on real occurrences*.”²⁰⁴ Similarly, the definition of “scientific fact” is “*any observation* that has been repeatedly confirmed and accepted as true.”²⁰⁵ In other words, we draw “facts” about the world from human observations or experiences of real occurrences. Just as the philosopher Dilthey stated—human knowledge originates in particular human experiences. For example, the primary reason we accept as fact that a solar eclipse has occurred today is because we observed it happening. Similarly, we accept as fact that solar eclipses occurred in the past because ancient humans wrote down their personal experiences and observations when the sun went black. Some medical conditions such conditions as “color-blindness” and dyslexia, moreover, are recognized as fact almost entirely based on the personal stories of those who told others about what they saw and what they experienced. While we do not accept as empirical fact each individual story that is told, when enough people relate the same experiences we eventually accept them as factual. The anthropologist Margaret Mead wrote in her autobiography that “[t]he essence of

²⁰² Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 25-26

²⁰³ *Id.* at 27

²⁰⁴ Dictionary.com, <http://dictionary.reference.com/search?q=fact> (emphasis added) (last visited Aug. 28, 2005).

²⁰⁵ Dictionary.com, <http://dictionary.reference.com/search?q=scientific%20fact> (emphasis added) (last visited Aug. 28, 2005).

anthropological work is comparison.”²⁰⁶ In other words, scientific observation moves from the realm of the particular to the realm of the general and if the comparisons are constant, eventually the thesis is adopted as fact.

This process of moving from the particular to the general based on human observations and experiences goes beyond purely scientific queries to include the discovery of broader truths about history, culture, and community. In other words, a society that allows its citizens to express freely their sincere personal observations of their lives, communities, and world maximizes the amount of observational information of real occurrences. From this information the truth will emerge. In this regard, autobiographical speech is invaluable in the quest for truth. For example, recorded accounts of survivors of the Nazi concentration camps lead us closer to the truth about the Holocaust. Letters from soldiers deployed abroad lead us closer to the truth about war. Diaries kept by early black Americans lead us closer to the truth about slavery.²⁰⁷ Testimonies of abused children and battered wives lead us closer to the truth about domestic violence. And, it therefore follows, even weblogs kept by young Capitol Hill staffers can lead us closer to the truth about contemporary youth culture and about modern sexual ethics.²⁰⁸

Far more significantly, moreover, first-person accounts of American life might eventually lead us closer to the truth about issues we cannot yet identify but will become known only with time. While it is unlikely that early-American judges and legislators understood the significance of slave narratives, for example, these texts are now considered to be invaluable evidence of the truth of this country’s racist background. Accurate reports of all human experiences in some way add to the greater search for

²⁰⁶ MARGARET MEAD, *BLACKBERRY WINTER: MY EARLIER YEARS* 236 (Kodansha America 1995).

²⁰⁷ See, e.g., Toni Morrison, *The Site of Memory in INVENTING THE TRUTH* 183, 190 (William Zinsser, ed., 1998) (discussing autobiographical narratives of American slaves and observing “no slave society in the history of the world wrote more—or more thoughtfully—about its own enslavement”).

²⁰⁸ Jessica Cutler’s story already has begun a debate about these issues as well as others such as whether Cutler was treated more harshly than the men with whom she was involved. See, e.g., Discussion on TalkLeft, http://talkleft.com/new_archives/007593.html (including comments such as “[w]hy isn’t the mainstream media all over the committee staffer who used his connections with the senator—and even worse, the senator’s office staff—to arrange paid-for trysts with a young staffer? He, and the others detailed in Jessica’s diary, should be the ones wearing the scarlet ‘A.’ and “[w]hy do thes men get to keep their jobs? Nothing amazes me anymore with the exploits of those that govern.”) (on file with author).

truth. Thus any restrictions on truthful autobiographical speech should come with the warning that they are also limiting our knowledge of the truth.

The American legal system, moreover, recognizes the role autobiographical speech plays in the discovery of truth. In the most basic model of the adversarial system, the plaintiff tells his story, the defendant tells hers and whichever is deemed more credible prevails as the truth. Seemingly influenced by John Stuart Mill's view of truth colliding with falsity, the adversarial system adopts the belief that in a courtroom truthful testimony will prevail over falsehoods. While, of course, evidence other than first-person testimony also is utilized in the adversarial system, witness testimony of past events is the foundation of an American trial. The significance of first-hand accounts is seen in the strict rules of hearsay and is also behind a number of other legal tenets in some form including due process,²⁰⁹ the attorney-client privilege,²¹⁰ jury rights, mediation and arbitration,²¹¹ the confrontation clause, and the right of a death penalty defendant to present mitigating evidence.²¹²

Permitting sincere first-person accounts of human experiences is one of the primary methods for a society to learn the facts about its people and their families, their goals, their beliefs, and their fears. These stories, moreover, lead us closer to the truths about government policies, the educational system, economic structure, criminal procedure, health issues, and many other public concerns. "Reading another's life story," autobiography critic Albert Stone explained, is "to immerse oneself in human experience

²⁰⁹ See, e.g., *Richards v. Jefferson County*, Ala., 517 U.S. 793, 797 n.4 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.").

²¹⁰ See, e.g. *United States v. Zolin*, 491 U.S. 554, 562 (1989) (noting that the purpose of the attorney-client privilege "requires that clients be free to make full disclosure to their attorneys of past wrongdoings.") (quotation omitted).

²¹¹ See, e.g., Michal Alberstein, *Negotiating for Justice, Fighting for Law: The Dialectic of Promoting and Settling Dispute in the Current Global Era in Studies in LAW, POLITICS AND SOCIETY* 64 (Austin Sarat, ed., 2003) (stating that the analysis of a mediator is "a delicate quest into autobiography, social and environmental condition, cultural narratives, life stories and histories and the ways individuals process their disputes through these systems"); Richard Fullerton, *Searching for Balance in Conflict Management: The Contractors' Perspective*, 60 DISP. RESOL. J. 48, 54 (Apr. 2005) (explaining that in mediation "[o]pposing parties usually present their positions to each other, allowing them to tell their story and feel that they have been heard").

²¹² See, e.g., Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1384 (1994) (explaining that in requiring capital defendants be allowed to present mitigating evidence, "the [Supreme] Court recognized that the opportunity to humanize the defendant by telling his story is constitutionally required prior to imposition of a death sentence").

in all its interconnections and manifestations.”²¹³ This important undertaking gives autobiographical speech a key role in the truth-seeking theories of free speech.

2. “A Mosaic Portrait”: Understanding Our Collective Experience and History Aids Self-Governance

A primary concern of the society-based theorists is the fostering of political debate in order to enhance self-governance. Meiklejohn argued that “[p]ublic discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents.”²¹⁴ Autobiographical speech, described by the philosopher Dilthey as “the germinal cell of history,”²¹⁵ offers the purest method for collecting information on American experiences that eventually ripen into the public issues of the day. Autobiographical speech fills in the complexity, richness and diversity of human experiences that are often omitted from the more formal public debate. It is, therefore, an essential freedom for a nation to successfully govern itself.

In the Gettysburg Address, President Abraham Lincoln eloquently described the American political system as a “government of the people, by the people, for the people.” With this understanding of democracy, it is self-evident that a government that is so reliant on the informed choices of “the people” to guide it in a way that benefits “the people” would be greatly aided by hearing the varied experiences of “the people.” Autobiographical speech provides an insider’s view on American life from those who have experienced it first-hand. It provides necessary insights to current voters while building a record for future Americans about their past and current government.

As mentioned in Part I, the tradition of autobiography has a long and pedigreed past. In what could be one of the longest footnotes in scholarly history if exploited, this article could list the prominent and infamous persons who have written their autobiographies. The footnote would include politicians, scientists, musicians, teachers, athletes, social activists, religious leaders, explorers and poets. The variety of names would be astonishing, even perplexing, and include names such as Benjamin Franklin,²¹⁶

²¹³ STONE, *supra* note 59, at 3.

²¹⁴ MEIKLEJOHN, *supra* note 103, at 257.

²¹⁵ WILHELM DILTHEY, *PATTERN AND MEANING IN HISTORY* 89 (H. Rickman, ed., Harper & Row, 1960).

²¹⁶ BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* (Dover Thrift 1996).

The Story of Me: The Underprotection of Autobiographical Speech

Lee Iacocca,²¹⁷ Martin Luther King, Jr.,²¹⁸ Helen Keller,²¹⁹ Amy Fisher,²²⁰ Charles Darwin,²²¹ Gandhi,²²² Johnny Cash,²²³ Rosa Parks,²²⁴ Richard Simmons,²²⁵ Hank Aaron,²²⁶ Nancy Kerrigan,²²⁷ Madeline Albright,²²⁸ The Dalai Lama,²²⁹ Vanna White,²³⁰ and nearly every U.S. president.²³¹

The desire to write—and the appeal to read—autobiographies, however, does not belong only to the rich and famous. Mark Twain, who also wrote his autobiography, once said, “[t]here was never yet an uninteresting life.”²³² In proof of his point, published autobiographies of the more “ordinary” person also are enjoying increasing commercial success. Recent examples include Tobias Wolff’s *This Boy’s Life*²³³ chronicling his childhood with an abusive stepfather, Dave Pelzer’s trilogy of memoirs called *A Child Called It* on his life as an abused child and struggles in foster care,²³⁴ and Dave Eggers’ memoir *Heartbreaking Work of Staggering Genius* about his experiences raising his 8-year-old brother after the death of their parents.²³⁵ Oral historian Studs Terkel has gathered first-person accounts to bring attention to the “etceteras” of the world, as he has termed them, in his books such as *Working*,²³⁶ capturing the tales of blue-collar workers

²¹⁷ LEE IACOCCA, *IACOCCA: AN AUTOBIOGRAPHY* (Diane Pub. 1999).

²¹⁸ MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* (Warner 2001).

²¹⁹ HELEN KELLER, *THE STORY OF MY LIFE* (W.W. Norton 2003).

²²⁰ AMY FISHER, *AMY FISHER: MY STORY* (Pocket 1993).

²²¹ CHARLES DARWIN, *THE AUTOBIOGRAPHY OF CHARLES DARWIN 1809-1882* (W.W. Norton 1993).

²²² M.K. GANDHI, *GANDHI AN AUTOBIOGRAPHY* (Buccaneer 2005).

²²³ JOHNNY CASH, *CASH: THE AUTOBIOGRAPHY* (Harper 1997).

²²⁴ ROSA PARKS, *ROSA PARKS: MY STORY* (Dial 1992).

²²⁵ RICHARD SIMMONS, *STILL HUNGRY AFTER ALL THESE YEARS: MY STORY* (1999).

²²⁶ HANK AARON, *I HAD A HAMMER: THE HANK AARON STORY* (Harpercollins 1991).

²²⁷ NANCY KERRIGAN, *NANCY KERRIGAN: IN MY OWN WORDS* (Hyperion 1996).

²²⁸ MADELEINE ALBRIGHT, *MADAM SECRETARY: A MEMOIR* (Miramax 1996).

²²⁹ THE DALAI LAMA, *MY LAND AND MY PEOPLE: THE ORIGINAL AUTOBIOGRAPHY OF HIS HOLINESS THE DALAI LAMA OF TIBET* (Warner 1997).

²³⁰ VANNA WHITE, *VANNA SPEAKS* (1987).

²³¹ See, e.g., BILL CLINTON, *MY LIFE* (Knopf 2004); GEORGE BUSH, *ALL THE BEST, GEORGE BUSH: MY LIFE AND OTHER WRITINGS* (Scribner 1999); RONALD REAGAN, *AN AMERICAN LIFE* (Simon & Schuster 1990); JIMMY CARTER, *AN HOUR BEFORE DAYLIGHT: MEMOIRS OF A RURAL BOYHOOD* (Simon & Schuster 2001).

²³² BrainyQuote, <http://www.brainyquote.com/quotes/quotes/m/marktwain153878.html> (last visited Aug. 31, 2005).

²³³ TOBIAS WOLFF, *THIS BOY’S LIFE: A MEMOIR* (Atlantic Monthly 1988).

²³⁴ DAVE PELZER, *A CHILD CALLED “IT”* (HCI 1995).

²³⁵ DAVE EGGERS, *A HEARTBREAKING WORK OF STAGGERING GENIUS* (MacMillan 2000).

²³⁶ STUDS TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* (New Press 1997)

and *The Good War*,²³⁷ which won the Pulitzer Prize for its collection of World War II memories. Perhaps the most famous autobiography of an “ordinary” person is the diary written by Anne Frank, a German-Jewish teenager, during the two years she and her family were forced into hiding from the Nazis during World War II.²³⁸

The Supreme Court recognized the historical importance of autobiographical speech when it considered the constitutionality of so-called “Son of Sam” laws that prohibited criminals from profiting by telling the stories of their crimes.²³⁹ In finding New York’s version of the statute was constitutionally overbroad, the Court observed that

[h]ad the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments “my past foulness and the carnal corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard.²⁴⁰

This concern with the possibility of silencing the life stories of such influential authors shows that the Court’s recognized that trying to restrict the autobiographical speech of some speakers raises important historical implications.

First-person stories like these and numerous others play a significant role in our understanding of history. Autobiography critic Albert Stone noted that “[a]ll the major intellectual and political events and crises of the moderns era are represented” in autobiography. He explained that

[w]ars and other characteristic modes of American violence; immigration and the movement of Americans from country to city, from Southern farms to Northern ghettos, abroad to Europe and Africa; the impact of science and technology upon all areas of life; the struggle against the color line and the emergence of the Third World; women’s emancipation from male definition of their rights and roles; new movements in art, architecture, literature, and the mass media; the Roaring Twenties, the Depression decade, and the strife-ridden 1960s—all these and many other

²³⁷ STUDES TERKEL, *THE GOOD WAR: AN ORAL HISTORY OF WORLD WAR II* (New Press 1997).

²³⁸ ANNE FRANK, *ANNE FRANK: THE DIARY OF A YOUNG GIRL* (Bantam 1993).

²³⁹ *Simon & Schuster v. Member of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

²⁴⁰ *Id.* at 121 (citations omitted).

social phenomena have been recreated as someone's personal experience to be collectively shared by the curious audiences of autobiography.²⁴¹

Adopting the idea of autobiographical speech as historical record, several government and non-profit organizations have worked or are working to preserve the previously untold life stories of Americans through audio and video recordings, personal interviews and the written word. In the 1930s, as part of President Franklin Roosevelt's New Deal, writers working for the Works Projects Administration's federal writers' project recorded the life stories of more than ten thousand men and women from a variety of regions, occupations and ethnic groups in an effort to create "a mosaic portrait of everyday life in America."²⁴² According to the Library of Congress, which now houses the documents, the collection provides "the raw content for a broad documentary of both rural and urban life, interspersed with accounts and traditions of ethnic group traditions, customs regarding planting, cooking, marriage, death, celebrations, recreation, and a wide variety of narratives."²⁴³ Similarly, the Legacy Project, a non-profit organization, collects and displays letters and e-mails from American soldiers serving during wartime.²⁴⁴ The "Voice of Civil Rights" project is collecting what it deems to be "the world's largest archive of personal accounts of civil rights history."²⁴⁵ Another non-profit group, Densho, records oral histories of Japanese-Americans incarcerated during World War II. According to the Densho center's official statement, it preserves these stories "for their historic value and as a means of exploring issues of democracy, intolerance, wartime hysteria, civil rights and the responsibilities of citizenship in our increasingly global society."²⁴⁶ Projects like these can be found for almost all cultural groups or regarding most major events. There is even an "Online Diary History Project" that seeks to preserve the stories of the earliest Internet bloggers before they disappear.²⁴⁷ All of these organizations recognize the historical importance of preserving these personal accounts.

²⁴¹ STONE, *supra* note 59, at 17

²⁴² LIBRARY OF CONGRESS, VOICES FROM THE THIRTIES, <http://memory.loc.gov/ammem/wpainro/intro07.html> (last visited July 27, 2005).

²⁴³ *Id.*, <http://memory.loc.gov/ammem/wpainro/wpalife.html>.

²⁴⁴ *See* The Legacy Project, <http://www.warletters.com/mission/index.html> (last visited July 27, 2005).

²⁴⁵ Voices of Civil Rights, <http://www.voicesofcivilrights.org/index.html> (last visited Aug. 14, 2005).

²⁴⁶ Densho, <http://www.densho.org/about/default.asp> (last visited July 27, 2005).

²⁴⁷ The Online Diary History Project, <http://www.diaryhistoryproject.com/> (last visited Aug. 18, 2005).

This tradition of writing or recording autobiographical speech is a recognition that these stories are Americans' collective and continuing history. As Ralph Waldo Emerson once wrote, "there is properly no history; only biography."²⁴⁸ Understanding the real-life causes and effects of government policies or lack of policies is clearly crucial to effective self-governance. If it is true, as American philosopher George Santayana once wrote, that "[t]hose who cannot remember the past are condemned to repeat it,"²⁴⁹ then autobiographical speech is a necessary tool for a society trying to best govern itself. This first-person history, whether discussing the distant past or ongoing events, provides Americans with needed knowledge and a common ground for debate.

Suppressing autobiographical speech, on the other hand, runs the risk Professor Emerson noted as a justification for free speech, the danger of "conceal[ing] the real problems confronting a society and diverts public attention from the critical issues"²⁵⁰ and preventing society from adapting to changing circumstances. A multitude of personal stories entering the public debate can, by itself, function as a grassroots political effort by bringing to light the real problems and critical issues Americans face. These voices are essential to effective self-governance because only by understanding the experiences of others can society best weigh future actions.

3. Autobiographical Speech Enhances Democracy

Society-based theorists tend to center their constitutional protections on political speech, which is declared to be imperative to a successful democracy. Yet a closer look at the value of political speech as compared with the potential gains of truthful autobiographical speech reveals that autobiographical speech provides equally valuable—if not superior—information for an effective democracy. In addition, autobiographical speech invites a diversity of voices, promotes tolerance and lessens the risk of corporate monopolization of debate. It is perhaps for these reasons that the American writer William Dean Howells once declared autobiography to be the "most democratic province of the republic of letters."²⁵¹

²⁴⁸ RALPH WALDO EMERSON, *ESSAYS AND LECTURES* 240 (Library of America 1983).

²⁴⁹ THE NEW DICTIONARY OF CULTURAL LITERACY (3d Ed. E.D. Hirsh, et al., eds., 2002), <http://www.bartleby.com/59/3/thosewhocann.html>.

²⁵⁰ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 884 (1963).

²⁵¹ Stone, *supra* note 59 (quoting William Dean Howells, *Autobiography, A New Form of Literature*, Harper's Monthly 119 (October 1909)).

While the lively town hall meeting or formal political debate is often viewed as the epitome of democracy-enhancing free speech, autobiographical speech adds comparable and potentially more useful information to the public discourse. There are many Americans who likely do not have an opinion on—or perhaps even the tools to form or desire to express an opinion on—most traditional political topics such as taxes, military action, government spending, law and order, foreign relations or economic policy. And even when they do have political opinions, these opinions might be of diminished value because they are based on misinformation or bias. Everyone, however, can speak about his or her life experiences. It is the one topic on which each person is an expert. And it is the one topic on which no other person is more knowledgeable than the speaker. Through her personal stories each citizen has the potential to impart constructive democracy-enhancing information about American society and its government. The speaker does not even need to intend to enter a public debate. As Professor Stone explained

Even when the autobiographer does not explicitly cast his or her life in shareable or typical terms . . . for history and the human sciences, as well as for literature and philosophy, the recorded perceptions of specifically located individuals of the meanings they themselves attach to past experiences may prove indispensable.²⁵²

For example, a young man might consider one of his personal stories to be nothing more than the tale of the night he was pulled over by a police officer while driving through town, but to others it could provide key information regarding the propriety of law enforcement policies on racial profiling. Another speaker might consider her life story to be simply an ongoing account of her difficulties searching for a job to support her child, but to her listeners it could shape their viewpoints on foreign trade agreements, welfare reform, child care policies, or the minimum wage. A pre-teen girl's weblog in which she regularly obsesses about losing weight could seem to her like everyday teen angst,²⁵³ but to others it might inform them on the need for increased

²⁵² *Id.* at 6-7

²⁵³ *See, e.g.*, Sora Song, *Starvation on the Web*, TIME, July 18, 2005 at 57 (discussing the trend of pro-anorexia websites and weblogs where “girls as young as 10 share tips for losing weight”).

health education regarding eating disorders in public schools.²⁵⁴ Under all views of free speech protection, the First Amendment would protect strongly the right of each of these hypothetical speakers to express a political opinion such as “President Smith should be impeached” or “income taxes must be lowered” or “I oppose a military draft.” Statements such as these are deemed to be essential to democracy and therefore are at the core of free speech rights.²⁵⁵ Yet does the value of these political statements outweigh the sincere first-person accounts of the speakers’ individual life experiences? In many cases, autobiographical speech could provide potentially more information beneficial to a successful democracy than would the traditional political statements considered to be at the core of the First Amendment.

Additionally, autobiographical speech is distinctive in its capacity to increase the diversity of voices in our public forum. Every individual has a life story regardless of her race, gender, age, religion, ethnicity, sexual-orientation, health, employment, wealth or education. And, as Professor Henry Louis Gates, Jr. said, “it’s important that the particularity of those life experiences be registered with as much frequency as the life stories of white men.”²⁵⁶ Allowing a person to talk about his life is empowering to every speaker but it offers particular promise for minorities and other marginalized groups to share perspectives that might not otherwise be expressed. Professor Anne Coughlin pointed out that “[c]learly, autobiography does perform an emancipatory function by conferring a voice on those whom culture has silenced.”²⁵⁷ It is perhaps for this reason that autobiography has been embraced by numerous minority²⁵⁸ or oppressed cultural groups including African-Americans, women, homosexuals, the disabled, the elderly,²⁵⁹

²⁵⁴ For an example of personal stories being used to further policy debate in public education *see* Karen E. Norum, Ph.D., *Hearing Voices—ALL of Them*, University of South Dakota, http://www.coe.uga.edu/quig/proceedings/Quig98_Proceedings/norum.html (last visited Aug. 31, 2005) (arguing that “a large body of practical wisdom [about public education] has been deemed expendable by neglecting and/or ignoring the voices of childless taxpayers, the homeless, parents, and even teachers”).

²⁵⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (stating that “[c]ore political speech occupies the highest, most protected position” in First Amendment jurisprudence).

²⁵⁶ Henry Louis Gates, Jr., *Lifting the Veil in INVENTING THE TRUTH* 101, 112 (William Zinsser, ed., 1998).

²⁵⁷ Coughlin, *supra* note 36, at 1250

²⁵⁸ Many scholars use the term “outsiders” instead of “minority, because the latter “belies the numerical significance of the constituencies typically excluded from jurisprudential discourse.” Matsuda, *supra* note 36, at 2323 n.15.

²⁵⁹ *See* Jennifer L. Huget, *Blogging Through The Ages*, Wash Post HE01 (Aug. 2, 2005) (discussing the trend of “elderblogs”).

and others. Professor Stone observed that “[i]n this century, and particularly in the years since World War II, no other mode of American expression seems to have more widely or subtly reflected the diversities of American experience.”²⁶⁰ Society-based First Amendment theorists have recognized the significant nexus between a diversity of viewpoints and an effective democracy. As Judge Learned Hand explained, in matters of public interest “right conclusions are more likely to be gathered out of a multitude of tongues.”²⁶¹ Because autobiographical speech is particularly important for increasing the diversity of viewpoints and including people who might otherwise be absent from the history, protecting the right of each individual to tell his or her personal life story is vital for any true democracy.

Furthermore, the risk that corporate control over communication channels will silence minority voices, as expressed by society-based scholars like Professors Owen Fiss and Cass Sunstein, is lessened with autobiographical speech. As mentioned before, the stories themselves belong to the individuals. Everyone, moreover, has innate expert status on his or her life story thus eliminating any requirement for specialized education or other privilege in order to tell it.²⁶² But while unique to each individual, life stories are also abundant, giving autobiographical speech the power of numbers. Thus the individuality and plentitude of autobiographical stories protect them somewhat from marginalization by speakers with more power and wealth.

Clearly, however, the ability of the speakers to distribute their stories to others might be affected by corporate powers or a lack of resources. To many, the Internet promises to help correct this inequity. Perhaps it is for this reason that the Capitol Hill intern, Jessica Cutler, told a reporter that “[e]veryone should have a blog. It’s the most democratic thing ever.”²⁶³ Similarly, the blogger identified as “Fionnaigh” opined that “[b]logging provides an opportunity for a diverse range of people to air their views ... it is an ideal form for minority groups, those who are denied a voice in the mainstream media.”²⁶⁴ Certainly there are many Americans who do not possess the needed computer skills and resources to create their own weblog. But that number is decreasing every

²⁶⁰ STONE, *supra* note 59, at 1.

²⁶¹ U.S. v. Associated Press, 52 F.Supp. 362, 372 (1943)

²⁶² This, of course, assumes some basic level of mental consciousness and communication ability.

²⁶³ Witt, *supra* note 15.

²⁶⁴ Beautiful Monsters, *supra* note 80.

year. A recent survey found that 87 percent of teenagers use the Internet²⁶⁵ and the number continues to grow. These numbers indicate that a time when most if not all Americans will have the power to publish and broadcast their life stories, if they so desire, is approaching.

Hearing a range of autobiographical speech from a diverse group of speakers also promises to enhance society's tolerance of others. Adopting Professor Lee Bollinger's theory that free speech is linked to a more tolerant society, the protection of autobiographical speech is essential. If the goal of the First Amendment is, as Bollinger suggested, to force members of this "large and complex society, with people of varied beliefs and interests" to tolerate each other, then autobiographical speech must be at the center of any constitutional protection. Hearing another's life story is essential to understanding, and eventually accepting, that person's current views and beliefs. For this reason there is, perhaps, no other category of speech where the correlation is so strong with societal tolerance as autobiographical speech. For example, hearing a personal story of someone who suffered sexual abuse by religious leaders might be the only way one person will understand and tolerate another's viewpoint that religious institutions are corrupt. Similarly, hearing a personal story from someone who received humanitarian kindness from religious groups might be the only way the first speaker will understand and tolerate the other's viewpoint that religious institutions deserve increased government protections. In addition to promoting understanding and tolerance, listening to each other's stories pushes each person to constantly reexamine and adjust his or her views based on the new information. Autobiographical speech, therefore, might be the most effective form of speech to promote a tolerant society and an effective democracy.

It is often repeated that political speech is at the "core" of First Amendment protection²⁶⁶—the society-based free speech theorists in particular anoint political speech with the highest levels of constitutional protection. Even the most restrictive theory propounded by Judge Bork concludes that the First Amendment safeguards "explicitly political speech." Yet truthful autobiographical speech provides equal—if not better—

²⁶⁵ Amanda Lenhart, et al., *Teens and Technology* (PEW Internet) (July 27, 2005), http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf.

²⁶⁶ *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (stating that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

information to aid an effective democracy as that offered by political speech. Allowing citizens to speak freely about their life experiences provides society with essential information regarding the truth of American culture and the human condition. This information promises to increase the effectiveness of government policies and actions. It leads to acknowledgment and understanding of diverse viewpoints and, thereby, greater hope for tolerance. It empowers each individual—regardless of class, gender, race, religion or age—the right to speak about the one topic on which he is the preeminent expert and thereby participate in her own unique way in the public debate. The chilling of such speech, on the other hand, impairs all of these goals of a democratic society. If, as this discussion concludes, the democracy-enhancing benefits of autobiographical speech is on par with or surpasses political speech then it must be deserving of the same heightened constitutional protection.

IV. DEFINING AND PROTECTING THE FREEDOM OF AUTOBIOGRAPHICAL SPEECH

The myriad theories regarding the free speech clause of the First Amendment are passionately held and fiercely debated. This article makes no comment on the correctness of any of these theories. Rather, it concludes that truthful autobiographical speech occupies an exceptional place in the public discourse—perhaps rivaled only by political speech—by advancing the broad range of free speech goals. Like political speech, autobiographical speech makes a fundamental contribution to the public discourse while at the same time representing the essence of any definition of what it means to be an autonomous human being. Denying a person the right to give testimony of his life should not be deemed any less an affront to a democracy of free individuals than denying that person the right to speak in favor of the candidate of his choice. Thus any discussion of the value of different categories of speech²⁶⁷ should place autobiographical speech at the center of the constitutional shield. Autobiographical speech is deserving of recognition and protection by the courts. Recognition is the first step. Protection is the second. Therefore, this Part suggests a proposal of first how autobiographical speech should be defined and then how it should be protected.

A. A Proposed Definition of Autobiographical Speech

²⁶⁷ Many courts and scholars dispute the priority of any categorization of speech based on content. See, e.g., Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 U.C.L.A. L. REV. 671, 671-675 and n.2 (and sources cited therein) (1983).

Once the constitutional importance of autobiographical speech is recognized, the next challenge is to define the speech deserving of protection. The definition of a category of speech can be one of the most challenging parts of the analysis. As discussed earlier, the question of how to define “political” speech has plagued society-based theorists relentlessly and there remains no consensus. Bork’s “explicitly political” definition was too narrow for most, while Meiklejohn’s ever-expanding definition drew protests that it was too inclusive. Several commentators have commented on the difficulty distinguishing between traditional “political” speech and speech on any matter. Professor Paul Finkelman discussed speech on cultural matters and observed that “[s]peech that on its face addresses cultural issues such as sex and birth control may at the same time address political issues such as fitness to serve public office.”²⁶⁸ Similarly, Professor Garrett Epps argued that speech by criminals about their crimes “even when distasteful, is too close to the so-called ‘core’ of political speech to make its excision from the body of protected speech a risk-free operation.”²⁶⁹ Professor Erwin Chemerinsky discussed the struggle to define political speech and noted, “[v]irtually everything from comic strips to commercial advertisements to even pornography can have a political dimension.”²⁷⁰

The same dilemma is present with autobiographical speech. A definition that is too liberal runs the risk of swallowing too much speech, making the category over-protective and too broad to be of use. A definition that is too strict leaves valuable speech vulnerable. Providing insufficient qualifiers creates vagueness, while including too many leaves inadequate breathing room. An overly complex definition, moreover, creates the danger of beneficial speech being wrongly chilled. This is, as Professor Lawrence Lessig described, “the contingency of present First Amendment doctrine.”²⁷¹ These are, nonetheless, the complexities of human speech that must be accepted to move forward. In keeping with the values of autobiographical speech discussed, this article offers this inaugural definition: autobiographical speech is speech that is substantially

²⁶⁸ Paul Finkelman, Book Review, *Cultural Speech and Political Speech in Historical Perspective*, 79 BOSTON U. L. REV. 717, 720 (1999).

²⁶⁹ Garrett Epps, *Wising Up: “Son of Sam” Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 549-50 (1992)

²⁷⁰ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 899 (2002);

²⁷¹ Lawrence Lessig, *The Path of CyberLaw*, 104 YALE L. J. 1743, 1753 (1995).

related to the story of the speaker's life and that a reasonable person would presume was communicated with the primary intent of sharing information about the speaker.

This definition, while relatively simple, includes several limiting elements. Each limiting device aims to exclude speech that is not truly autobiographical while still capturing the most valuable speech. First, the "substantially related" element requires that there be a significant nexus between the information communicated and the speaker's life. This is borrowed in part from the law of privacy torts, which protects the publication of facts that are substantially related to topics that are newsworthy or in the public interest in order to prevent "a morbid and sensational prying into private lives for its own sake."²⁷² The idea is the same here. The individual and societal benefits of autobiographical speech discussed in this article are lessened the further the speech drifts from the speaker. A substantial relation requirement prevents a story that begins "I met Susan for lunch today and she told me a story about John" from turning the story primarily about John into the speaker's autobiographical speech about the events of his day. While arguably "autobiographical" in the strictest sense, the speaker telling the story of his lunch with Susan and in it retelling a gossipy story about John would not generate the significant benefits of autobiographical speech that this article hopes to protect. The substantial relation question, of course, is highly dependent on the context of the speech. If, for example, John was the speaker's child and the story was that John had been in a debilitating car accident, then the information likely would be substantially related to the speaker's life. The speaker's decision in that scenario to tell the story of the day he learned about his son's accident would trigger the many benefits of autobiographical speech and thus would be deserving of heightened protection.

Second, the definition requires the speech to be about "the story of the speaker's life." This limiting element, again, simply demands that the speech be about the speaker. Certainly the story of the speaker's life can include a broad range of information, both minor and dramatic, and take a number of forms such as daily events, personal observations, thoughts and emotions. But, at the same time, not every random thing the speaker ever knows, learns, sees, hears, feels or smells necessarily impacts the speaker's life story. As before it is ultimately a matter of degree and context. Generally the

²⁷² RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

smaller the role the speaker plays in the storyline, the less like it is autobiographical speech.

Finally, the definition includes an intent requirement.²⁷³ The unique value and benefits of autobiographical speech stem from the speaker's desire to share information about herself with others. As long as the speaker's primary intent is to communicate information about herself, the goal of sharing the personal information is not relevant. Thus the speaker might reveal information about herself to seek fame, to create a record for the future, to blow off steam, to shock, to cry for help, to reflect on the past, to amuse or entertain, to offer guidance to others, or simply to pass the time. But the primary intent must remain on the self and a desire to communicate information about one's self. Speech that intends to impart information about others, such as repeating a gossipy story, would not be autobiographical. Because the focus is on the intent of the speaker, moreover, the definition does not include an element that the speech must be received by the listener as autobiographical.

This requirement would also function to exclude speech that is spoken with another primary intent. Of course, there is much that can be learned about a speaker from speech that is not spoken with the intent to reveal personal information. While arguably still constitutionally valuable under other standards, such speech would not fall into the category of autobiographical speech. Take, for example, a speaker whose primary intent is to harass and threaten his listener with a racially derogatory statement like “hey nigger . . . betta watch out we got an eye on you and others do to your reported to the aryan nation KKK mutherfucker!”²⁷⁴ Obviously this type of racist attack imparts a great deal of information about the speaker, yet a reasonable person would presume the statement was made with the primary intent to harass and, therefore, is not autobiographical speech. Another statement, however, could be spoken with a different intent even though it also involves hateful and derogatory language, such as “I'm no bully; I never hurt a nigger in my life. I like niggers—in their place—I know how to work ‘em.”²⁷⁵ A reasonable

²⁷³ The intent requirement is based on an objective “reasonable person” standard to avoid the difficulties involving a court inquiry into the speaker's subjective intent.

²⁷⁴ Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1134 (2000) (quoting messages Professor Kang received after identifying himself as African American in an Internet chat room).

²⁷⁵ William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, LOOK, Jan. 24, 1956, reprinted in 1 Reporting Civil Rights: American Journalism 1941-1963, at 239 (Clayborne Carson et al.

person would believe this statement was spoken with the primary intent of revealing information about himself, and the speech would be autobiographical. The second statement, of course, still raises important issues of harm that any legal analysis can and should consider.²⁷⁶ The point is simply that the autobiographical component of the statement also needs to be recognized. By comparison, a statement can be both racist and political—for example, “the Justice Department is trying to make us draw nigger [voting] districts and I don’t want to draw nigger districts.”²⁷⁷ In such a case our courts would weigh the political speech aspect of the statement with great care before allowing any restrictions. The same constitutional caution is warranted with autobiographical speech.

It is worth noting that nothing in this definition explicitly requires the speaker to identify herself by name. The benefits of autobiographical speech are present even when anonymous. This is seen in the tradition of anonymity in confessional and therapeutic autobiographical speech such as Catholic confession or Alcoholics Anonymous. Similarly, mainstream publishers have published several autobiographies written anonymously or under pseudonyms.²⁷⁸ Some persecuted groups and powerless victims, moreover, will be able to tell their stories “either anonymously or not at all.”²⁷⁹ Anonymous autobiographical speech, moreover, might lessen conflicts by hiding the identity of not only the speaker but others in the speaker’s story as well. But as with other types of speech, such as anonymous political speech, anonymous autobiographical

eds., 2003) (quoting the confession of J.W. Milam, one of the acquitted killers of Emmett Till, a 14-year-old African-American boy).

²⁷⁶ See, e.g., Matsuda, *supra* note 36, 2360 (arguing “that explicit content-based rejection of narrowly defined racist speech is more protective of civil liberties than the competing-interests tests or the likely-to-incite-violence tests that can spill over to censor forms of political speech.”).

²⁷⁷ *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982) (quoting deposition testimony of Georgia Representative Joe Mack Wilson).

²⁷⁸ Anonymously written autobiographies fall into a range of categories. There are many written by women living under oppressive world regimes. See, e.g., LATIFA, *MY FORBIDDEN FACE: GROWING UP UNDER THE TALIBAN: A YOUNG WOMAN’S STORY* (Miramax 2003) (written under a pseudonym by an Afghan teenage girl); ANONYMOUS, *A WOMAN IN BERLIN: EIGHT WEEKS IN THE CONQUERED CITY* (Boehm Phillips, trans., Metropolitan 2005) (an anonymously written diary written during the 1945 Russian invasion of Berlin); SOUAD, *BURNED ALIVE: A VICTIM OF THE LAW OF MEN* (Warner 2004) (written under a one-word pseudonym about by a Palestinian woman who survived an honor crime). Another example is the eleven-volume autobiography by an unnamed Victorian gentleman about his sexual adventures, probably written in the 1880s, which has been said to contain “invaluable material for social and cultural historians, literary scholars, students of manners and morals.” JAMES R. KINCAID, INTRODUCTION IN *MY SECRET LIFE* v (Signet 1996). A more benign example is found in the popular series of autobiographical books beginning with about the experiences of an English veterinarian, which were written under the pseudonym. See JAMES HERRIOT, *ALL CREATURES GREAT AND SMALL* (St. Martin’s 1998).

²⁷⁹ *Talley v. California*, 362 U.S. 60, 64 (1960) (discussing anonymous political speech).

speech raises difficulties in accountability and accuracy. Most important to this discussion, anonymity could hinder the ability to judge the truthfulness of the speech.

In sum, this definition attempts to carve out purely autobiographical speech while also protecting the broad range of topics and forms autobiographical speech can embody. Autobiographical speech under this definition can be a traditional published memoir or a short and symbolic statement (for example, a bumper sticker with the Greek letters “ΔΔΔ” placed on a car with the intent to communicate that the driver is a member of a particular college sorority would fit this definition of autobiographical speech). The key point is for the focus to stay on the speaker’s life story and for the speaker to intend to convey information about herself. As with any speech issue, the line is difficult to draw and grey areas are unavoidable. These difficulties are not necessarily a fault of the definition but rather simply an acceptance of the complexities of free speech law and human communication. This definition is an initial attempt to identify the category of autobiographical speech that provides the immense personal and societal benefits discussed and is, therefore, deserving of the highest constitutional protection.

B. Early Thoughts on Protecting Autobiographical Speech

Because, to date, the issue of autobiographical speech under the First Amendment has received virtually no court or scholarly attention, it is the primary goal of this article simply to bring autobiographical speech to the surface. The aim is to demonstrate that autobiographical speech is a distinct and important category of speech that thoroughly fulfills and advances the spectrum of justifications for constitutional protection of speech. How exactly this new recognition and proposed definition of autobiographical speech should and will play out in the legal arena is still unknown. That uncertainty is acceptable as long as the value of the speech is no longer ignored. As Professor Lawrence Lessig explained, “there is a great value and an important need for lower courts to wrestle with these [First Amendment] questions, if only to create a body of legal material from which others may draw in considering these questions. ... because stable doctrine is only built upon the ground of long-standing experimentation.”²⁸⁰

²⁸⁰ Lessig, *supra* note 271, at 1752-53 (discussing the application of First Amendment doctrine to cyberspace).

The proper method for protecting the freedom of autobiographical speech likely will depend on the context in which it appears. A future article will examine the conflict between autobiographical speech and the privacy tort of public disclosure of private facts. As stated earlier, the rise of the tell-all era combined with new technological outlets for speech likely will result in increased litigation pitting privacy interests against the freedom of autobiographical speech—as found in the Jessica Cutler case. A face-off with privacy issues is currently the most pressing issue regarding autobiographical speech. This conflict is inevitable because the freedom to speak about yourself is, in many ways, the mirror image of the right of privacy as Warren and Brandeis first outlined it. They wrote in favor of a right that would secure “to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”²⁸¹ This is, indeed, the same right that this article aims to protect through the concept of autobiographical speech. One simply protects the desire to conceal the information while the other protects the desire to share it. In the messy interlocking web of human relationships, conflict over the two desires is unavoidable.

Issues involving autobiographical speech, however, are also possible in numerous other legal areas. In the area of free speech alone, the right of autobiographical speech conceivably might overlap with issues of pornography, obscenity, commercial speech, student speech,²⁸² or hate speech. Outside of civil torts, autobiographical speech and privacy might clash through new privacy legislation in Congress and the states. It is also possible to imagine autobiographical speech issues arising in the areas of intellectual property such as trademark, copyright or rights of publicity. Criminal law certainly involves autobiographical speech by both the defendant and the victim. Employment and business law promise disputes over autobiographical speech on subjects such as trade secrets, confidentiality agreements, whistleblower statutes or workplace harassment.

²⁸¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

²⁸² See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, (1988) (allowing school administrators to censor articles in student newspaper regarding the personal experiences of students with pregnancy and divorce and specifically noting one student’s statements that prior to divorcing her mother, her father “wasn’t spending enough time with my mom, my sister and I,” “was always out of town on business or out late playing cards with the guys,” and “always argued about everything” with her mother).

Autobiographical speech involving government employees raises additional issues.²⁸³ In one case, for example, laws preventing the revelation of government classified information prevailed in the Supreme Court against the autobiographical speech of a former CIA agent.²⁸⁴ In all of these potential cases, the appropriate damages and remedies are also a question.²⁸⁵ It would not be prudent or really even possible, at this early stage, to attempt to address these many situations. Instead this Part offers a few general guidelines on the protection of the right.

As an initial matter it is important to point out that autobiographical speech is a speech right, not a property one, and therefore should be guarded by the First Amendment of the Constitution. It is the personal expression of autobiographical speech, not a property interest in the stories themselves, which creates the individual and societal benefits discussed. This is major a difference between autobiographical speech and the right of privacy as defined by Warren and Brandeis, who drew their privacy concept out of “[t]he right of property in its widest sense” although ultimately declaring it to be a distinct right.²⁸⁶ Thus the right of autobiographical speech is not a common law right protected through the law of civil torts but rather a constitutional one protected by the free speech clause. The consequences of this distinction are important. As with all speech issues, prior restraint and delay of speech are themselves a special harm that should raise concern. Similarly, there is a risk of self-censorship, “a harm that can be realized even without an actual prosecution.”²⁸⁷ Thus adequate breathing room is necessary. Yet as with other speech, autobiographical speech is subject to content-neutral restrictions that are narrowly tailored and serve an important government interest. And, as discussed earlier, false or defamatory autobiographical speech would require a different analysis.

²⁸³ See, e.g., undated posting available at <http://www.67cshdocs.com/> (purporting to be the weblog of an army physician ordered to stop blogging because weblog entries violated army regulations) (copy of file with author).

²⁸⁴ See *United States v. Snepp*, 444 U.S. 507 (1980) (finding former CIA agent breached fiduciary obligation to employer by failing to submit manuscript of personal memoirs for prepublication review although no confidential information was revealed).

²⁸⁵ In *Snepp*, for example, the Court ordered a constructive trust be imposed on the profits from Snepp’s book. *Id.* at 515-16.

²⁸⁶ Warren and Brandeis, *supra* note 281, at 211.

²⁸⁷ *Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 393 (1988).

Second, the protection this article proposes for autobiographical speech is much like that bestowed on political speech. A person's right to express her individual political views and her right to make a truthful record of her life's events are both fundamental interests that offer unrivaled personal and societal benefits. Therefore many of the same ideals and problems apply to the protection of autobiographical speech as to political speech. Like political speech, any attempt to silence autobiographical speech should set off constitutional alarms and receive the highest levels of scrutiny. Also like political speech, it should be recognized that autobiographical speech can be expressed in many formats including through speech that is written, spoken, sung, photographed, danced or painted. The main limitation of these various methods of expressing autobiographical speech is simply that the more difficult it is to discern the autobiographical message and intent of the speaker, the less likely the speech will be recognized as autobiographical.

One noteworthy difference between the protection of autobiographical speech and the protection of political speech is the primary concern of censorship. With political speech, the fear is usually that a *message* will be silenced based on its particular viewpoint on an issue, but with autobiographical speech the worry is more likely that the *speaker* will be gagged because of his social status or lifestyle. In other words, the danger is that autobiographical speakers will be quieted because their lives are viewed as insignificant or objectionable.

Finally, there should not be a requirement that the autobiographical speech be about a topic "in the public interest" to warrant protection. Most likely, such speech would be protected through already existing legal doctrine. For example, newsworthy speech is already protected from most privacy tort claims and speech about a public person or matter already receives a higher level of protection from defamation suits. Speech about a political issue, moreover, is already protected through the political speech doctrine. Therefore adding a public interest requirement would likely render the autobiographical speech category moot.

More importantly, giving an uninterested party the power to adjudge the public worthiness of another person's autobiographical speech would destroy the personal autonomy interests of free humans talking about their lives. It also would open the door for the censorship of stories that, while undervalued today, would provide important

knowledge to future generations. Most concerning is that a public interest requirement would allow the autobiographical speech of minorities and the oppressed to be wrongly silenced as unimportant in the public debate. Yet, it is precisely this type of seemingly non-newsworthy speech by ordinary citizens regarding everyday occurrences and observations that is at the heart of the autobiographical speech concept. This is the speech that is threatened to be undervalued and chilled by our current system and the speech that has the most insights to offer. The power to decide what is of consequence in a person's life story should ultimately lie with that person alone. As long the content and intention of the speech is truly autobiographical, its perceived importance by others should not affect its constitutional protection.

CONCLUSION

Humans talking about themselves and their lives is a longstanding and enduring phenomenon. While receiving significant historical, scientific, religious and philosophical respect, autobiographical speech has yet to engender any legal debate on its constitutional role. This article does not attempt to address every hypothetical or practical consideration that courts will face involving the freedom of autobiographical speech. It also does not seek to engage in the numerous debates over free speech theory or First Amendment doctrine. Instead, the narrow aim is to bring overdue recognition to a category of valuable speech that heretofore has gone unnoticed by courts and scholars.

Perhaps paralleled only by political speech, truthful autobiographical speech is a rarity in its ability to promote the wide range of justifications for constitutional protection. It respects human autonomy. It comments on the human condition. It introduces a diverse society to itself. It records individual lives and collective histories. It empowers the powerless. It promotes understanding and tolerance. It preserves democracy. The benefits, moreover, flow both to the individual speaker as well as to current and future societies. Stifling autobiographical speech, however, does more than censor viewpoints, it silences lives. If prevented from telling their stories, people who wish to give witness to their existence will instead to be erased from the public sphere. Increasingly more people today are expressing their desires to speak out about their lives and new technologies promise them a broader audience than previously imagined. They

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are, in essence, drafting a new chapter in the ongoing and lengthy American story. Therefore, it is time to recognize and protect their freedom of autobiographical speech.