

The Public/Private Divide and Coherence in First Amendment Jurisprudence

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PREPARED FOR PRESENTATION AT THE UNIVERSITY OF MARYLAND, MARCH 5, 2004. VERY, VERY ROUGH DRAFT BADLY IN NEED OF EDITING. NOT TO BE CITED OR REFERENCED UNLESS AUTHOR'S NAME IS SPELLED CORRECTLY.

One of the perennial questions in constitutional theory is whether there is an inherent norm – perhaps understood as a canon of construction – to the effect that the different parts of the Constitution should be understood in a way consistent with one another. In some ways, the argument in favor of such a principle echoes theories that characterize legitimate systems of law in terms of “coherence” and “consistency” (Thomas Grey), unifying “Grundnorms (Hans Kelsen), or “rules of recognition” (H.L.A. Hart). For purposes of this discussion, I will refer to a “norm of coherence” as a principle that states the desirability of interpreting all of the constitutional text – or, at a minimum, all of the text of a particular piece of the Constitution – in a way that renders the elements consistent, mutually intelligible, and explicable by reference to common explanatory principles.

One obvious test for this principle is presented by the variety of subjects covered in the First Amendment. Should our understanding of one provision – say, the Free Speech Clause – be tested in terms of its implications for other provisions such as the Establishment Clause? At times, it seems that within First Amendment discourse our choices are which provisions to reconcile with which other provisions; thus in recent First Amendment jurisprudence we have seen the old paradigm that posited a tension between the Establishment and Free Exercise Clauses give way to one in which the task of reconciliation is directed toward the Free Speech and Establishment Clauses. Justice Scalia, in particular, has proposed a version of the new “neutrality” theory that explicitly borrows between all three clauses and is asserted to apply equally between them. Expanding our viewpoint beyond the clauses of the First Amendment, we can equally ask whether a search for consistency between First Amendment norms and those informing civil liberties more generally is a desirable or possible project.

Regardless of whether we ultimately conclude that a unifying constitutional paradigm is

either desirable or feasible, the exercise of considering such questions has value in that it allows us to view the First Amendment itself from an external perspective. To assert a clumsy metaphor, viewing the First Amendment from the perspective of non-First Amendment norms is akin to rotating the plane of a visual field by 90 degrees. In the process, patterns of continuity and discontinuity in once familiar terrain may be revealed. That, at least, is the ambition of this essay. I propose to reconsider basic categories of traditional First Amendment jurisprudence in terms of a general understanding of the public/private divide, and to consider how, seen through this lens, recent shifts in that jurisprudence result in a more or less internally coherent model of the First Amendment.

The choice of the public/private divide as the *standpunkt* for a non-internationalist perspective on the First Amendment is motivated by several factors. First, the division between public and private is one of the fundamental ordering principles of liberal society, as writers from Locke to Hayek, Hegel to Marx, and Kant to Brandeis have recognized. Second, the public/private divide has been the motivating category for American civil liberties for as long as that category has been seriously considered in legal discourse; that is, since the adoption of the Fourteenth Amendment.¹ And third, Justice Kennedy's provocative rhetoric in *Lawrence v. Texas* has reopened the question of whether, in addition to some asserted protection for an individual "right to privacy," the public/private divide exercises a structural limitation on the

¹ To mention only a few examples: *Munn v. Illinois* (1877) declared that government's reach extends to that which is "clothed with a public purpose"; *Plessy v. Ferguson* (1873) insisted that racial segregation was justifiable only because it was in the public interest; *Hurtado v. California* (1884) accepted the principle that only enactments that serve the "public" welfare qualify as "laws" at all (echoing Justice Chase's argument of *Calder v. Bull*), and *Lochner v. New York* (1905) became notorious not because it rejected the public/private divide but rather because of its declaration that regulation of the economy per se, unlike the exercise of police powers to protect health, welfare, safety and morals, did not qualify as serving a public good, properly understood. For lesser-known arguments that the Due Process Clause, specifically, invalidates all "arbitrary" enactments, see *Gulf, Colorado & Santa Fe v. Ellis*, 165 U.S. 150 (1896), *Minnesota Iron Co. v. Kline*, 199 U.S. 593 (1905).

legitimate assertion of state authority.

In the few pages of this essay, I will do no more than attempt to adumbrate the First Amendment landscape in the unfamiliar guise that it takes when viewed through the prism of the public/private divide. I will, however, assert two arguments on the basis of this limited -- indeed, self-evidently inadequate -- set of observations. First, that in the First Amendment jurisprudence of the period from World War II until the early 1990s, one can find a basically consistent version of the public/private divide mapped out in First Amendment discourse, although it is a version of that crucial divide quite different from the one that was simultaneously being developed in other contexts. Second, that since the early 1990s changes in the governing conception of the First Amendment have resulted in a system of jurisprudence that cannot be coherently mapped onto a single model of the public-private divide. Thereafter, I will return to the question of whether this kind of cross-topical “coherence” matters and offer a few thoughts on that subject.

Before entering into that discussion, however, and at the risk of stating the obvious, it is necessary to make the observation that “privacy” is a multileveled concept, and that, consequently, the line of division between the public private realms can be drawn on a number of different bases. Just for a partial typology, consider the following versions of “privacy”:

geographical/spatial – the idea that “public” and “private” refer to different physical locations, most frequently drawn in terms of property ownership.

consequential – the idea that conduct is “private” to the extent that it does not affect others (excluding those with whom one shares privacy, such as family members), and “public” to the extent that it does.

informational – the idea that the public/private divide distinguishes matters which one expects or intends to be made known to strangers from matters with regard to which one expects or intends to have control over the dissemination of such knowledge

privacy-as-status – the idea that actors are characterized as “public” or “private,” and that it their

status determines how the public-ness or privacy of their actions will be understood.

privacy-as-autonomy – Uniquely among these definitions, privacy-as-autonomy appears in a dual role as both a negative and an affirmative right. In its negative sense, this is the idea that there are matters of such intensively personal importance to an actor that even if they occur in the full view of the neighborhood, might affect the future of our collective welfare, and are undertaken without any expectation of or desire for confidentiality, they are nonetheless properly considered “private” and consequently beyond the reach of communal authority. Conversely, in its affirmative version, privacy-as-autonomy becomes a basis for legitimating (if not actually requiring) state action to secure individual autonomy against infringement from non-government actors.²

Each of these conceptions appears in jurisprudence that is explicitly concerned with the right to privacy, or with the limits on government that result from a recognition of the public/private divide. (It is noteworthy that under any of these categories, in our current legal discourse, it is far easier to explain or even to debate the meaning of the term “private” than the term “public.”)

What I will suggest here is that each of these concepts also appears in First Amendment jurisprudence.³ While all of these versions of the public/private divide appear in First

² It goes without saying that these categories are drawn from the work of other writers, some of whom are present at this conference. In any future draft of this essay, proper acknowledgments will be made by way of relevant citations, here and in many other places.

³ A separate consideration is the paradoxical fact that, under the “forum” theory, the more public the environment in which an activity takes place the more protected it is while at the same time the more extensive the police powers of the government. Conversely, the more “private” the setting, the less expression is protected against government action but the less power the government has to act at all. It can be argued, therefore, that the categories of the

Amendment jurisprudence, however, there is a larger pattern in which one or more particular versions of the idea are given primacy in a given period. In the period up to the 1990s, First Amendment jurisprudence (generally) displayed a “coherent” grounding in the idea of privacy-as-autonomy. One of the characterizing features of changes in that jurisprudence in recent years has been a move away from privacy-as-autonomy toward status-based theories of privacy in many areas, and an analytically inconsistent retention of privacy-as-autonomy in others. The result of this move is that First Amendment jurisprudence has become increasingly dissonant with the jurisprudence of privacy generally, and, further, that viewed through the lens of the public/private divide there has been a marked decline in the coherence of First Amendment jurisprudence itself.

Privacy-as-autonomy: the Construction of the Public/Private Divide in Speech, Religion, and Association Cases Prior to 1990.

The connection between privacy and the First Amendment is well established, at least rhetorically. In *Palko v. Connecticut*, Justice Cardozo turned to the First Amendment for his exemplar of a “fundamental freedom . . . without which, it is fair to say, other freedoms could not exist.” Cardozo’s formulation has since been adopted as the basis for modern substantive due process rights – including, most prominently, the right to privacy – as part of the *Moore-Palko* test.⁴ In *Griswold v. Connecticut*, Justice Douglas proposed to find a right to privacy in

public/private divide operate in a distinctly idiosyncratic fashion in the context of the First Amendment.

⁴ See, e.g., *Bowers v. Hardwick* (1986), opinion of Justice White: “[T]he cases are legion in which those Clauses have been interpreted to have substantive content . . . In *Palko v. Connecticut* it was said that this category includes those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were

the “emanations of the penumbras” (unquestionably, a risible phrase) of, *inter alia*, the First Amendment. “The association of people is not mentioned in the Constitution . . . The right to educate a child in a school of the parents’ choice – whether public or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.” . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen.” While Douglas’ rhetoric may have been unfortunate (indeed, undeniably risible), in some very concrete sense he was merely reiterating a point that had appeared in numerous earlier cases, and would continue to appear in First Amendment cases thereafter. The right of association, after all, is widely accepted as an element of the First Amendment.

The model of privacy, or of the public/private divide, has varied widely across time and in different areas of First Amendment jurisprudential discourse. For example, in the context of the Free Speech Clause, a consequentialist model of privacy was explicitly at issue in the dicta that informed the holding of *Stanley v. Georgia*. *Stanley* is usually understood as a straightforward evocation of physical privacy, a kind of Fourth-Amendment-masquerading-as-First-Amendment-doctrine case. There is considerable truth to this version of the case, particularly when one combines the holding in *Stanley* with other holdings permitting regulation of the shipment, sale, or distribution of obscene materials,⁵ leading to the conclusion that the

sacrificed. A different description of fundamental liberties appeared in *Moore v. East Cleveland* . . .”

⁵ See, e.g., *Pope v. Illinois*, effectively concluding that outside the physical confines of the home there are no constitutional protections for the possession or dissemination of obscene materials. *Pope* also contains Justice Scalia’s mysterious pronouncement “*de gustibus non disputandum*” (there is no arguing with taste). The pronouncement is mysterious in that it could reasonably be followed by “and therefore localities should be allowed to regulate anything they want,” or by “and therefore localities should not be allowed to regulate anything at

First Amendment guarantees a right to view pornography that one has produced one's self in the privacy of one's home – unless, of course, that pornography features depictions of children, in which case even that solitary activity may become grounds for prosecution.

In fact, though, *Stanley* leaves the door open for an exercise of public authority that does not stop at the front door at all. In a remarkable appeal to social science for authority, Justice Marshall rejected the arguments of the State of Georgia that consumption of pornography might lead to antisocial conduct by declaring that “*Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits....?*” No such evidence would be required where obscene materials were mailed (*Miller*), or sold in stores (*Pope*), because those activities took place in public. The privacy of the home, however, would be protected against intrusion so long as that privacy was consequential as well as physical. The intriguing suggestion of these dicta is that a move from private to public status on one axis might overcome “private” status along another, or perhaps that a realm of “privacy” exists only where there is no justification for finding a “public” status, or perhaps that the consequentialist measure of “public”-ness trumps the others.

The ultimate justification for limiting the state's reach, however, turns neither on the limits of consequentialism nor on the restrictions of physical location, but rather on a conception of the individual's right to privacy-as-autonomy. The State of Georgia, says Justice Marshall, “asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts.” That the State has no right to control the

all.” Subsequent case opinions suggest that Justice Scalia had the latter interpretation in mind.

moral content of a person's thought is, presumably, a proposition whose truth does not vary with physical location. And this is not merely an assertion that the state has failed to justify its action by a consequentialist argument, it is an affirmative counter-argument against which any claim of consequences would have to be measured. While Marshall never spells out the connection, for this argument to make sense one must presume as a matter of psychological fact that untrammelled access to materials (obscene and otherwise) in the physical privacy of one's home has something to do with the moral content of one's thoughts. It therefore appears that preserving the individual's autonomous control over that moral content is what drives the protection of physical space, rather than the converse.

By extension, Marshall's reasoning in *Stanley* could extend perfectly well outside the home, as well, creating a sphere of portable privacy that travels with us as we pass through the public world. This is exactly the premise that is implied in *Cohen v. California*. *Cohen* is not usually thought of as a case that involved the public/private divide, yet that case, too, includes comments that can only be understood in terms of a construction of this crucial dividing concept. Justice Harlan's main emphasis, like that of Justice Marshall, is on the physical division between spaces. But Harlan's distinction was not binary; he suggested the existence of a range of categories when he observed "while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home." There is nothing in this observation that requires departure from the simple physical model of a public/private divide – the subsequent creation of a "quasi-public forum" illustrated the recurring tendency of turning binary oppositions into triptychs – but the following comments more clearly implied that other conceptions were in play

when consideration turned to “the special plight of the captive auditor.”

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

The observation – undoubtedly correct – that “we are often captives outside the sanctuary of the home” sets a limit to the physical definition of “public” in favor of privacy-as-autonomy, the protection of a sphere of action necessary to permit the individual to design the environment of their personal existence.

The point is made stronger when Harlan assert that the state must show an invasion of “substantial privacy interests” in an “intolerable” manner to justify its actions. This is a portable version of physical privacy, a space around an individual’s person intrusion into which may be prevented by government action. There is no argument here that adverse consequences to the person must be demonstrated, the “intolerable”-ness of the intrusion appears to have to do with the degree of the violation of that personal space rather than the content of the communication at issue. This is an approach, interestingly, that is consistent with the *Chaplinsky* theory of fighting words. Under Justice Murphy’s *Chaplinsky* rule, the mere content of the expression was not enough to render it unprotected; it was the manner of expression – directed at a particular individual in a manner reasonably expected to provoke an average person to violence – that

created a harm the state might act to prevent. That harm cannot simply be the risk of disturbance to the peace of the street, however, as in that case the rule about a heckler's veto would make no sense. If the norm of coherence is to be preserved, the *Chaplinsky* rule must turn on a harm to the individual being addressed. *Chaplinsky* does not name that harm, but it fits neatly with Harlan's explication of an invasion of portable physical privacy in *Cohen*; the consequential justification is personal, not societal.⁶ The model of privacy that most nearly fits this description is privacy-as-autonomy, here demonstrating its affirmative side in legitimating the state's efforts to preserve each individual's ability to shape their immediate environment even as they pass through public spaces.

Yet a further gloss on the meaning of "public" emerges from Harlan's description of the political purpose of the Free Speech Clause. "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." In this, Harlan echoes the arguments of Alexander Micklejohn to the effect that the Free Speech Clause is intended to protect only "public" speech – i.e., expression that is of value for an understanding of matters of collective concern – and limits the regulation of the manner and location of expression only to ensure that all ideas, as opposed to all speakers, are publicly heard. This, it should be noted, is a version of "public"-ness that is essentially informational, but in a version that is the opposite of

⁶ A portable model of privacy is also at issue in *FCC v Pacifica*, where the intrusion of airwaves into an automobile – the quintessential example of mobility – is analogized to the intrusion of noise from a sound truck into a living room. Again, the idea of portable privacy appears connected to an idea of privacy-as-autonomy, as it is the captivity of the father and son in their car – their inability to design their own environment by "averting their eyes" – that captures the Court's attention.

the “expectation of privacy” idea discussed earlier. Here, the argument is that certain classes of information, ideas, and opinions are inherently “public” and consequently protected against regulation. Again, this is an evocation of a version of privacy-as-autonomy, this time the special purview of each individual to employ whatever ideas or information they wish in the service of an affirmative goal of constructing for themselves a political persona.

The famous compelled speech cases provide yet a third illustration of the complexity of the public/private divide as it appears in pre-1990s Free Speech cases. Why is it unthinkable to require private persons to declare a public creed? For that matter, why may public employment (of teachers) not be conditioned on loyalty oaths? Again, guided by a norm of coherence, it is privacy-as-autonomy that provides the best answer. The Court appears to fear that performance of public rituals may seep into the private consciousness, thus dissolving the critical public/private divide that is the essential assumption of a liberal polity. “Symbolism,” wrote Justice Black in *Barnette*, “is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” It was that intrusion into the private mind by public observance that ran afoul of First Amendment principles. “[The state] requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks” in a “[struggle] to coerce uniformity of sentiment.” The move from coercing expression to coercing sentiment points to a dissolution of the barrier between the public actor and the private person; the preservation of that barrier is at the heart of the idea of privacy-as-autonomy. Similarly, the public function of teaching could not be conditioned on the public recitation of a loyalty oath lest the cost of public employment be the surrender of a private

autonomous mind. In sharp contrast, the Hatch Act's restrictions on the public activities of public officials was upheld; whatever the merits of this outcome on First Amendment grounds, it is perfectly consistent with *Barnette* when viewed from the perspective of the division between public and private conduct.

The familiar distinction that emerged from consideration of libel law was between public and private figures. *New York Times v. Sullivan* declared that public figures were entitled to less protection for their reputations than private figures, and *Gertz v. Welch* spelled out the distinction between the two categories. In the process, however, something was lost. The justification for providing "public figures" with lesser protection for their reputations in *Sullivan* was the familiar argument that an unrestricted political process required a free exchange of views. But *Gertz* defined a class of "public figures" whose reputations were in no obvious way a matter of political concern at all. Instead, movie stars and other celebrities were characterized as "public figures" on the grounds that they had an unusual opportunities for self-defense, and that they should accept the loss of reputational protection as the cost of voluntarily seeking publicity. These two justifications become inconsistent, however, when one considers that involuntary public figures have the kind of access to the media that is unavailable to ordinary citizens and, furthermore, that this special access does not always seem to do them very much good; think of the case of Richard Jewell.

Sullivan and *Gertz* make perfect sense together, however, if one considers them as expressions of an expectations-based theory of informational privacy, and if one accepts the suggestion in *Gertz* that a "truly involuntary" public figure would not be subject to the lesser *Sullivan* standard for protection. A voluntary public figure, whether in politics, the arts, or any other field, acts in a way that may be said to indicate that they have no legitimate expectation of

privacy. That personal autonomy was not the driving conception of privacy in libel cases was emphasized by the extension of “private person” protection to a corporation in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), an outcome that is difficult to fit into any version of the public/private divide other than the informational version. Furthermore, in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Court concluded that where the subject matter was one of “public interest” then the protections of a corporation would be relaxed. For corporations, then, it appears that the subject matter determines the level of protection, whereas for individuals it is the status of the person that controls. One explanation for this difference might be that informational privacy and privacy-as-autonomy are not entirely unrelated concepts, after all: corporations simply cannot possess privacy-as-autonomy in the way that individuals can, and consequently their informational privacy rights are less well defined.

A further development of this idea was suggested by cases considering the constitutionality of suits for invasion of privacy. Where information is a matter of public record, said the Court, there can never be an expectation of privacy. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974). By negative implication, where information is not a matter of public record – and does not relate to a public figure? the nexus between these two issues has not, to my knowledge, been explored – governments may be entitled to enact legislation to prevent its dissemination in the interests of preserving informational privacy. Which was precisely Justice Marshall’s conclusion and the basis for the outcome in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (upholding damages awarded in invasion of privacy suit for unauthorized publication of rape victim’s name.)

Cases involving the Religion Clauses displayed this same two-step analytic process of

beginning with whatever version of the public/private divide best suited the subject, then moving from there to a legitimating principle grounded in privacy-as-autonomy. (Space, unfortunately, does not permit a consideration of the Establishment Clause, so for the moment the Free Exercise Clause will be the focus of the discussion.) Consider, for example, the classic accommodation cases, *Sherbert v. Viner* and *Wisconsin v. Yoder*. In *Sherbert*, the public interest of the state in regulating the distributing unemployment benefits was not in question, but that interest was found to give way to a constitutionally protected right of free exercise. That description is noncontentious, but, of course, the case was not nearly as simple as that. What was at issue was the claim that the Constitution affirmatively required an accommodation, an alteration of universally applicable public standards to fit the individual – private – commitments of each individual citizen. It is relatively easy to see a conflict between the public and private spheres at issue in that question; what is much less easy is defining the version of the public/private divide that is at work. That question is complicated in *Yoder* by the fact that there what was at issue was a conflict between public authority and a *collective* model of privacy.⁷ In both cases, granting that religious freedom required protection, the question remained whether “protection” required accommodation, and, if so, on what basis? The answer that I want to suggest is, unsurprisingly, that both cases turned on the application of privacy-as-autonomy.

Sherbert does not, at first glance, present itself as a case concerning the public/private divide at all, but rather as a case that asks whether states are responsible for the unintended effects of their general enactments. To answer that question, however, requires deciding whether the construction of the conditions of public life must be limited from intruding into private

⁷ I would argue that *Wisconsin v. Yoder* is the only case in which the Supreme Court has genuinely embraced a theory of “group rights.”

spheres. The state's authority to act was justified in the first place because its laws served the cause of *salus populi*, the public good.⁸ The question, then, became whether the state's effort to serve the public good would be required to stop at a certain point solely on the grounds that its measures were infringing on the exercise of private freedoms, making these accommodation cases quite different from those involving endorsement.

If *Sherbert* was implicitly about requiring the state to preserve the autonomy of the individual to shape their religious environment, *Yoder* made that argument explicit in the context of a community's assertion of its collective right to privacy-as-autonomy. There was considerable discussion of a consequentialist test for public-ness in *Yoder*, as when Chief Justice Burger observed of the Amish that "they reject public welfare in any of its usual modern forms." The ultimate consideration, however, was that exposure to public education would threaten the ability of the Amish community to structure its social environment and, by extension, the thoughts and moral sentiments of its members.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During

⁸ It is useful to recall the line of equal protection cases running from *Wick Yo v. Hopkins* to *Romer v. Evans* that depend on the presumption that the desire of the majority to harm a minority can never constitute a "public good." As a result, *Munn v. Illinois* remaining good law (for that matter, on this point *Plessy v. Ferguson* also remains valid authority), there was a necessary implicit assumption in *Sherbert* that the South Carolina had succeeded in identifying a benefit to the public at large flowing from its act of regulation.

this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. . . . And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith -- and may even be hostile to it -- interposes a serious barrier to the integration of the Amish child into the Amish religious community. . . . On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.

The “destruction” at issue had nothing to do with economic or physical harms; what would be “destroyed” was the ability of the community to shape its collective mind by excluding the intrusion of unwelcome messages. This is precisely the kind of portable privacy that was identified in *Cohen v. California*; Amish high school students thus appear as the equivalent of a captive audience, and are equally entitled to protection of their privacy-as-autonomy against “intolerable” intrusions regardless of where those intrusions might occur. What makes this equation uncomfortable is that in the Amish case the “privacy” in question is collective rather than individual; it was the loss of collective autonomy that was the intolerable result that the State of Wisconsin was constitutionally required to forestall.

While the preceding discussion is far too short to establish anything with certainty, it

does suggest some interesting implications for the view of the First Amendment that is obtained by looking through the lens of the public-private divide. Fundamentally, what emerges is the observation that the Court(s) first employed the version of the public-private divide that suited the subject matter before them, but that the reasoning that followed consistently gravitated toward a model of privacy-as-autonomy. Thus, where the issue was free speech, the frequent references to a geographical model of privacy turn out to have little explanatory purchase on the pattern of outcomes and rules. Instead, the model that emerges is privacy-as-autonomy, with the caveat that a finding of consequentialist public-ness might overcome even a strong claim of privacy. Leaving that caveat aside, however, privacy-as-autonomy emerges as both the limit of state authority and the key legitimating goal of state action in a version of the First Amendment that satisfies the requirement of coherence.

In the 1990s, the Court – and Justice Scalia in particular – have redefined many First Amendment rights in a way that fundamentally alters its relationship to an analysis of public and private. The result is that there is no longer any construction of privacy that applies to the First Amendment in a way that satisfies the requirement of coherence. Both the initial move of applying a particular version of the public/private divide that suits the subject matter and the subsequent recognition of privacy-as-autonomy have given way to an approach that employs a purely negative conception of privacy to craft a “neutrality” principle applicable across the board.

This is probably most obvious in the Free Exercise context, where *Smith v. Employment Division, Oregon Dept. of Social Services* took the public/private divide entirely out of the equation. Smith did not merely conclude that, in the pursuit of a neutrally defined public good, intrusion on private life was permissible; this outcome, after all, might have signaled nothing

more than a shift from privacy-as-autonomy to physical privacy as the focus of the inquiry. But Justice Scalia's opinion in *Smith* went much further than that, declaring that consideration of the public/private divide was irrelevant, indeed that such considerations were alien to First Amendment jurisprudence. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," -- contradicts both constitutional tradition and common sense." The earlier cases had precisely focused on the idea that an individual's right to control the environment of their "spiritual development" imposed a cognizable limitation on government action. This, of course, is the negative conception of privacy-as-autonomy in a nutshell. To make the point explicit, Justice Scalia described earlier free exercise cases as "hybrids," separating those elements that relate to privacy – childrearing, family life, education – as separate from Free Exercise concerns rather than as the defining characteristics of the importance of religion to privacy, whether conceived of as autonomy or something else. The Free Exercise Clause was limited to render it coherent with a version of privacy that specifically excluded any autonomy-based claims to a prerogative to control the environment of one's "spiritual development." The case that announced the limiting principle to *Smith*, *City of Hialeah*, did nothing to reassert a model of privacy-as-autonomy into Free Exercise analysis, but rather focused explicitly on a characterization of impermissible actions by state officials per se.

Justice Scalia was also the author of the opinion that most radically diminished the role of privacy-as-autonomy in its affirmative form, as a legitimating principle for state action. The

case is *R.A.V. v. St. Paul*, a case whose analysis is almost literally incomprehensible,⁹ but whose outcome is clearly grounded on two propositions: 1) that a state's conclusion that private expression is harmful to other individuals' ability to preserve conditions for their own autonomous development is not a sufficient basis for regulation, thus overruling *Beauharnais* and 2) that if there would continue to be a category called "fighting words" at all, it would no longer be explained in terms of an "intolerable intrusion" on what I have called here the portable privacy of the listener, but rather could be justified only without reference to what was actually said but rather as a form of content-neutral time, place and manner restriction that happened to be defined by content: content-neutral content akin to the blue-eyed-ness of actresses in pornographic films as distinguished from the actions appearing on the screen. In other words, whatever else the majority opinion in *R.A.V.* meant, it clearly rejected the idea that the state is authorized to act by a need to preserve the privacy-as-autonomy of unwilling listeners based on the "intolerable intrusion" of unwelcome messages based on the content – rather than the volume? – of what Justice Murphy, in *Chaplinsky*, described as "not in any proper sense communication of information or opinion safeguarded by the Constitution." The point, again, is not that the new case dictated a different outcome in the balancing of public interest against

⁹ Not only is the analysis of the reasons why "fighting words" allegedly remain subject to limitation exceedingly difficult to explain, but it is also the case that in his ruling Justice Scalia: contradicts the definition of fighting words by suggesting that speech could both constitute fighting words and have political content; includes an exception that entirely swallows the rule, in the form of a "most extreme example of bad content" rule, itself obviously not content-neutral; and applies his own rule in a way that makes no sense at all, since there is no explanation for the apparent conclusion that St. Paul could not have concluded that racist hate speech is an example of the "most extreme example of bad content" exception to the neutrality rule. Readers of this case may be forgiven for concluding that Justice Scalia's real goal was to undermine the viability of a category of fighting words, if not the entire categorical approach to Free Speech analysis. If that was Scalia's goal, his point would not be without merit; the specific categories of unprotected speech are, at best, difficult to justify in a way that adheres to a norm of constitutional coherence.

privacy-as-autonomy, nor that it shifted the focus of consideration to a different version of privacy. The point is that the new approach moved this element of First Amendment jurisprudence out of the category of public/private divide altogether.

The same move occurred in the context of the invasion of privacy. These cases, it will be remembered, turned on the application of a theory of informational privacy, itself grounded in privacy-as-autonomy as the basis for defining the harm to be prevented. As a result, so long as public records were not involved, states would be affirmatively empowered to prevent publication in order to preserve an individual's privacy against the intrusions of others. That principle was substantially weakened in *Bartnicki v. Volper*, which defined privacy purely as a term of status, then concluded that where the actors at issue are private rather than public persons the First Amendment and privacy have no essential connection. In this context, then, "privacy" becomes a purely negative limitation on the actions of a particular class of actors, and the First Amendment becomes the basis for refusing to apply privacy-as-autonomy rather than the vehicle for its expression.

Elsewhere in Establishment Clause jurisprudence, however, the move away from privacy-as-autonomy and toward privacy-as-status continued, most notably in the refusal to consider the effects of legislation beyond the status of the actors making the spending decisions in the school financing cases (*Agostini* and, most recently, *Zelman*). But the most important shift to thinking about privacy solely in terms of status occurred in the cases involving access to public resources. Cases such as *Rosenberger* and *Good News Club* turned solely on the definition of a location as "public," and the conclusion that in that context the Free Speech Clause defines the limits of Establishment Clause. Framing the question in terms of a conflict between speech and establishment marked a significant departure from the more traditionally

recognized tension between establishment and free exercise, and in the process disassociated the guarantees of religious freedom from any assertion of a sphere of privacy. Instead, as had been the case in *Smith*, all three clauses came to be understood as purely negative checks on a category of actors. The “neutrality” concept that was explicitly applied across all three categories declared that the crucial issue was to permit untrammelled access to public spaces by private actors, not to protect any particular aspect of privacy against the consequences of exposure to public environments. The key was the distinction between public and private actors and the characterization of a s. These three moves – expanding access rights, limiting free exercise rights, and restricting the freedom from compelled speech – all served to make the First Amendment coherent with a view of privacy-as-status that excludes any role for privacy-as-autonomy. Furthermore, privacy-as-status has been accompanied by the discovery of public-ness-as-status. From a description of traditional physical spaces, the public forum doctrine has become the vehicle for identifying formal status of metaphorical as well as physical spaces. Where such a space is not established, the government is free to condition receipt of its benefits on compelled silence or expression (*Rust v Sullivan*, *NEA v Finley*), but in the unique situation of a metaphorical public forum those compulsions may not be imposed (*Rosenberger*, *Velasques*).

The shift in focus was far from total, however. In two areas, it can be argued that a model of privacy-as-autonomy continued to govern the analysis. First, consider the negative associations cases, *Hurley v ILGBT of Boston* and *Dale v. Boy Scouts of America*. Both, to be sure, began with an analysis of privacy-as-status by characterizing the relevant organizations as “private” rather than by asking about their effects on the autonomy of others. Granting the highly contentious conclusion that the associations at issue were genuinely “private,” however, it is noteworthy that in both cases the analysis thereafter moved to considerations of autonomy.

The focus on the ability of private persons in an association to craft their message and to refrain from having views ascribed to their group against their will echoes earlier discussions of privacy-as-autonomy. The desire to avoid the inaccurate ascription of a view to a private person, after all, was an element of the majority's analysis in *Lee v. Weisman*, as well. And indeed, a second area in which privacy-as-autonomy continued to play an important role in the 1990s was in Justice O'Connor's endorsement test and Justice Kennedy's test of psychological coercion. Both approaches to the question of establishment focused on the risk that conditions in the public environment would seep into the consciousness of private individuals in ways that would interfere with their "spiritual development" or challenge the political legitimacy of their desire for self-definition.

The result is that at the end of the 1990s the coherence of the First Amendment is gone, replaced by two competing models of the public/private divide, each of which informs a set of cases that cut across particular clauses. Across the 1990s, in most areas of the First Amendment, the paradigm of privacy-as-status displaced the earlier paradigm of privacy-as-autonomy in First Amendment jurisprudence. In a few areas, that earlier paradigm was retained. The coherence each of these competing models of the private/public divide should be contrasted with the absence of other obvious principles of coherence. In the 1990s, for example, privacy-as-status led to outcomes that increased the scope of government authority in some areas (*Smith*) and decreased it in others (*Rosenberger*), permitted individuals more freedoms in some contexts (*Bartnicki*) but fewer rights in others (*Rust*), gave greater scope to religion in some contexts (*Good News Club*) but less in others (*Smith*). What is consistent, however, is that the status of actors and spaces as "public" or "private" came to define a model of the public-private divide (again, with the notable exceptions of the endorsement and psychological coercion theories the

Establishment Clause promoted by Justices O'Connor and Kennedy) that caused First Amendment to approximate coherence, just as in an earlier era the model of privacy-as-autonomy had done the same thing.¹⁰

In the last two Court terms, there have been indications that the tide is turning back toward an understanding in which the First Amendment and privacy might be understood as mutually constitutive ideas rather than as unrelated, and hence incoherent, constitutional concepts. *Virginia v Black*, while far from clear in its implications, implies a retreat from the absolutism of the holding (if not the analysis!) of *R.A.V.* by virtue of Justice Thomas' recognition that certain communications, by virtue of their content, impinge on the consciousness of the listener in ways that diminish their security. The tensions within Establishment Clause jurisprudence are likely to receive an airing with the hearing of *Newmeyer* (the Pledge of Allegiance case) in the coming term.¹¹ But what may signal the most important reconsideration of the role of the public/private divide in First Amendment jurisprudence is the recent dramatic reassertion of privacy-as-autonomy as the basis for privacy doctrine per se. I am referring, of course, to the evocative opening words of Justice Kennedy's majority opinion in *Lawrence v. Texas*. "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." In *Griswold* and *Palko*, Justices Douglas and Cardozo

¹⁰ A concern in the current utilization of status-based analysis is its apparent inconsistency. For example, the receipt of money from the government sometimes does, and sometimes does not, transform the recipient into a government actor. Compare *Rust v Sullivan* and *NEA v Finley* with *Rosenberger*, *Zelman-Harris*, and *Velzaquez*. *Rust* is the extreme case, in which we were told that a doctor who receives money from an employer who receives money from an institution that receives money from the government thereby becomes a government spokesman.

¹¹ Particularly, of course, in light of Justice Scalia's warning in *Lee* that the holding in that case implied precisely that the words "under God" would render recitation of the Pledge of Allegiance an unconstitutional practice in a public school classroom.

looked to the First Amendment to inform their understanding of the meaning of privacy. Today, it may be that the time has come to reverse the process. If Justice Kennedy's words are taken seriously, and if our understanding of the Constitution is driven by a norm of coherence, then significant areas of current First Amendment jurisprudence require substantial reconsideration.