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Secrets, Lies, and Disclosure

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Those opposing campaign disclosure and disclaimer requirements[1] on First Amendment grounds have largely focused on such requirements' potential for inhibiting speakers' expressive choices and thus their autonomy.[2] Too often overlooked in these debates, however, are such disclosure requirements' potential for enhancing *listeners'* autonomy interests – i.e., listeners' ability to make choices that maximize their own preferences free from manipulation by others.[3] In this essay, I suggest that we can sometimes understand a political speaker's interest in anonymity or pseudonymity as an interest in keeping a secret and occasionally even in telling a sort of lie about her identity. Such secrets and lies threaten listeners' autonomy interests when the speaker seeks to keep such secrets (and sometimes seeks to tell such lies) to enhance her ability to influence her listeners' decisions.

For these reasons, I suggest greater attention to the reasons speakers seek to keep secrets (or occasionally tell such lies) in assessing the First Amendment implications of disclosure and disclaimer requirements in a range of campaign, commercial, professional, and other contexts. As a doctrinal matter, such a focus might helpfully inform our choice of the

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[1] In this paper, I use the term campaign "disclosure" requirements to refer to required disclosure of contributors' financial support for political candidates or causes. By campaign "disclaimer" requirements, I refer to required identification of the source of political advertisements or related communications in support of or opposition to political candidates or causes.

[2] *See, e.g.*, William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 878-79 (2011) ("[I]ndividuals engage in political activity in part to fulfill their own search for truth and meaning, and disclosure impedes their freedom to do so.").

[3] Here I separate instrumental First Amendment interests in facilitating citizens' participation in democratic self-governance from dignitary First Amendment interests in protecting individual autonomy. *See, e.g.*, Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980) (separating various First Amendment interests for analysis).

Here, too, I adopt Joseph Raz's concept of autonomy – as he explained, "to be author of one's life, one's choices must be free from coercion and manipulation by others." JOSEPH RAZ, THE MORALITY OF FREEDOM 372 (1980); *see also* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 75, 106 (forthcoming 2012) (describing a vision of autonomy "based on the simple and deeply rooted anti-paternalist principle that each person is entitled to a limited sphere within which she is free from external coercion or interference . . . .").

appropriate level of scrutiny to be applied to such disclosures – for example, we might be less suspicious of disclosure requirements designed to protect listener autonomy than those motivated by other governmental purposes. Such a focus might also (or instead) help determine whether a contested disclosure requirement survives a specific level of review, depending on the justifications offered by both challenger and government. In short, this essay contends that disclosure and disclaimer requirements should be understood as least troubling for First Amendment purposes when applied to speakers who seek to keep secrets or tell lies to manipulate their listeners' decision-making.

I. SECRETS, LIES, AND DISCLOSURE ON THE CAMPAIGN TRAIL

What, more specifically, do I mean by "secrets" and "lies" in this context? First, political speakers who resist campaign disclosure or disclaimer requirements would prefer to keep secret from their listeners either the identity or the intensity of their support for a candidate or cause. Second, some speakers seek to use pseudonyms that disguise the source of political contributions or communications, and such pseudonyms are occasionally sufficiently deceptive that we might at times even think of them as a type of lie. The Supreme Court, for example, has recognized this dynamic:

> Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. "Citizens for Better Medicare," for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And "Republicans for Clean Air," which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals—brothers who together spent $25 million on ads supporting their favored candidate.[4]

In other words, we might think about those fighting disclosure and disclaimer requirements as seeking to keep their identity a secret – and

[4] McConnell v. FEC, 540 U.S. 93, 128 (2003), *overruled on other grounds by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

occasionally even to tell a sort of lie about their identity through potentially misleading pseudonyms.[5]

Of course, neither secrets nor lies are always bad,[6] much less illegal, and in many contexts the First Amendment prohibits their regulation. But in thinking about when secrets and lies are (or should be) regulated through disclosure and disclaimer requirements, we might helpfully focus on the various reasons why speakers may seek to keep their identity secret or sometimes even tell a type of lie about their identity. These reasons vary in the threats they pose – or do not pose – to listener autonomy.

To be sure, sometimes speakers seek to conceal – or keep secret -- their identity for very good reasons. For example, because a political speaker's reasonable fear of retaliation is a legitimate justification for such secret-keeping, the Supreme Court has held that the First Amendment does not permit the application of campaign disclosure requirements to those who can show "a reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals from either Government officials or private parties."[7] We should be slow, however, to indulge contemporary speakers who seek to draw parallels to the NAACP's experience in Alabama in the 1950s when resisting the state's efforts to force disclosure of its membership.[8] There, not only was the government's interest in disclosure unusually pernicious – as Alabama sought the NAACP's membership lists as part of its efforts to drive the organization from the state entirely[9] -- so too was the targets' experience of harassment, which included violence and even death.[10]

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[5] For additional examples of such pseudonyms, see THE ANNENBERG PUBLIC POLICY CENTER, LEGISLATIVE ISSUE ADVERTISING IN THE 108TH CONGRESS 20 (2005) (listing sampling of issue advertisers with "ambiguous or potentially misleading names," including "Americans for Balanced Energy Choices," a coalition of mining companies, coal transporters and electricity producers advocating for coal-based electricity; "Citizens for Asbestos Reform," a coalition of insurance companies advocating for limits on asbestos-related tort claims; and "Partnership to Protect Consumer Credit," a coalition of retailers and credit card companies opposing regulation of the credit industry).

[6] David Strauss, for example, has explained in another context how speakers' different reasons for telling lies pose very different costs to listeners' autonomy. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) ("[T]here is a difference between lies that are manipulative and false statements made for different reasons. False statements that are not manipulative lack the element of control and domination. An inadvertently false statement, for example, or a false statement made solely for the purpose of protecting a confidence, is less objectionable because it does not involve the same degree of manipulation as a false statement made for the purpose of influencing behavior or thought.").

[7] *See* Doe v. Reed, 130 S. Ct. 2811, 2820-21 (2010) (internal quotation marks and citation omitted).

[8] For an example suggesting such a parallel, see David Marston & John Yoo, *Political Privacy Should be a Civil Right*, WALL ST. J., Apr. 27, 2011, http://online.wsj.com/article/SB10001424052748704132204576284630941397792.html.

[9] *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 222 (1988) (describing Alabama's efforts as the "pioneer action" among "twenty-five separate lawsuits

But sometimes speakers seek to keep their identity secret for very different reasons – and for reasons that I think are less worthy of First Amendment protection. For example, some political speakers seek to shape their listeners' voting behavior by denying those listeners information about the source of the message or of the candidate's (or cause's) financial support[11] -- information that is not only indisputably true but also of great interest and value to listeners.[12] In other words, some speakers seek to keep such secrets precisely because they think that making such truthful information available to listeners will limit their ability to influence their listeners' choices.[13] Of course, these speakers often very much want their

challenging [the NAACP's] right to operate in the South, most of them filed by hostile states and municipalities").

[10] *See* NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) ("Petitioner has made an uncontroverted showing that on past occasions revelation of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."); *see also* Protect-Marriage.com v. Bowen, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009) (concluding that the plaintiffs could not show that a movement to define marriage as limited to that between a man and a woman "is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP").

[11] Just as private speakers do, government speakers sometimes try to conceal or mask their identity to improve their messages' ability to influence listeners. *See* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1009 (2005); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017 (1995); Helen Norton, *Campaign Speech Law With a Twist: When Government is the Speaker, Not the Regulator*, 61 EMORY L.J. (forthcoming 2011).

[12] A significant body of evidence suggests that reliance on heuristics may enable comparatively uninformed voters to vote as "competently"—to vote in a way consistent with their own policy preferences—as comparatively well-informed voters. *See, e.g.*, James N. Druckman, *Does Political Information Matter?*, 22 POL. COMM. 515, 515 (2005) (summarizing a study finding that "citizens can compensate for a lack of political information by using shortcuts to make the same decisions they would have made if they had that information"); Heather Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1160-62 (2011) ("We all know why shortcuts like disclaimers matter: we are familiar with the problem of the low-information voter. We all know that voters do not know a huge amount about the fine-grained details of policy proposals. So what do they do? They rely on shortcuts like the words 'Democrat' or 'Republican' which stand, in a pretty sensible way, for a larger set of policy positions. Shortcuts are what enable voters to make sensible policy decisions when they vote. And disclaimers and disclosures are shortcuts. They offer a signal to the voter about how to process the information in question."); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1161 (2003) ("[R]eliance on heuristic cues is a learned practice based on past success and accuracy. Voting behavior in candidate elections, when heuristic cues are readily available, is relatively rational, consistent, and well-ordered . . . . Even if they do not cure voter confusion in every instance, voters armed with heuristic cues will be much more likely to vote competently in the face of complexity than will voters without them.") (footnote omitted).

[13] *See, e.g.*, Bruce E. Cain, *Commentary, Garrett's Temptation*, 85 VA. L. REV. 1589, 1592-93 (1999) ("Many of the groups that succeed in getting initiatives on the ballot have primarily economic motives—e.g., insurance companies, lawyers, and teachers' unions. To make matters worse from an

identities known to the recipients of their contributions. So here, speakers' interest in anonymity (i.e., in keeping secret their identity as the source of a communication or contribution) is based not only on an interest in protecting their own autonomy, but instead also on a strategic – and arguably manipulative – interest in enhancing their ability to influence others and thus perhaps intrude on their autonomy.[14]

Secrets and lies of this sort can be seen as morally troubling from a Kantian perspective because the speakers are using the listeners as a means to the speakers' own ends, rather than treating listeners as ends in themselves.[15] Indeed, such secrets and lies can be seen as variant forms of deception that are both manipulative and disrespectful – which is why most of us generally prefer not to have secrets kept from us or lies told to us. As David Strauss explained in another context:

> [L]ying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy. . . . When a speaker tells a lie in order to influence the listener's behavior, the metaphor of commandeering the listener's mind, and making it serve the speaker's ends instead of the listener's, seems especially appropriate. The speaker really does inject her

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informational perspective, these groups often adopt false, generic labels such as 'Committee for a Just America' or 'Campaign for Consumer Justice.' . . . In an ideal world, information heuristics would operate like warning labels on consumer items. In reality, those who sponsor initiatives know that labels can be important, and they choose labels strategically in order to create images they think voters will receive best."); Chris Chambers Goodman, *(M)Ad Men: Using Persuasion Factors in Media Advertisements to Prevent a "Tyranny of the Majority" on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247, 257 (2010) ("The [organizations'] names are specifically designed, in some[] cases to obfuscate, and these names of the supporters can be very influential in the outcome of the ballot measure.").

[14] *See* Steven Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. L. REV. 1, 12 (2008) ("[T]he autonomy justification of free speech . . . cannot explain why society should protect one individual's autonomy if that autonomy will be used in a way that undermines the autonomy of many other individuals who populate mainstream society. Those who justify free speech by reference to individual autonomy usually describe the use of that protected autonomy in positive ways, as if all individuals will use their autonomy in ways that contribute directly to the growth and strengthening of the collective interests of society as a whole. In fact, we all intuitively understand that this is often not the case.").

[15] *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 63-65 (James W. Ellington, transl., 3d ed. 1993).

> own false information into the thought processes of the listener for the purpose of making those processes produce the outcome that the speaker desires.[16]

Although lies can be especially deceptive (and thus manipulative and disrespectful), secrets can raise similar concerns as well. As Strauss further observed, "Deliberately denying information . . . is not the same thing as lying, but it is a form of attempting to control the audience's mental processes. . . . [T]he difference is only one of degree; both a manipulative denial of information and a manipulative lie invade the victim's autonomy."[17]

I agree, and thus urge that we add an inquiry into *why* speakers want to keep their identity secret to the factors that we consider when thinking about disclosure requirements' First Amendment autonomy implications. In other words, while we sometimes should protect speakers' anonymity as a matter of protecting speakers' autonomy – i.e., their ability to express themselves, to be who they are free from threats or harassment – we should remain attentive to potential threats posed to listeners' autonomy by speakers who instead seek to keep secrets and occasionally even tell lies to influence listeners' decisions and shape their behavior to match the speakers' preferences.[18]

This analysis suggests that policy prescriptions and doctrinal analysis distinguish a speaker's interest in keeping her identity secret because she is vulnerable to abuse by power from a speaker's interest in keeping her identity secret to better wield her own power to shape others' choices. In another context, for example, Yochai Benkler characterized the distinction

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[16] Strauss, *supra* note 6, at 355, 366; *see also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108-10 (2006) ("At first glance, restraining deceptive communication furthers rather than disrupts enlightenment of the populace–by promoting truth. Moreover, other theories of the function of free expression–especially theories of autonomy–tend to support government restrictions on deception, at least when adopted to preserve the autonomy of those whom deceptive speakers otherwise might manipulate. . . . [T]he most powerful argument in favor of government authority to restrict deception, and the most powerful argument against government-imposed deception, are the same: the manipulative, domineering, and fundamentally disrespectful invasion of autonomy worked by deception.").

[17] Strauss, *supra* note 6, at 356-57.

[18] *See* Gerken, *supra* note 12, at 1160-61 ("The way that the First Amendment works is that people get to push back if you say something with which they disagree. It is one thing to say that if there is a threat of violence–if someone is going to slash your company trucks' tires or throw a brick through your store windows–that you are entitled not to have your expenditures disclosed. But it's not clear that it is a cognizable injury under the First Amendment if someone stops buying your company's product.").

between privacy and transparency as turning on a theory of asymmetric power:

> The core of the argument is that privacy is at risk when there are powerful observers and vulnerable subjects. Transparency, by contrast, involves disclosure of information about powerful parties that weaker parties can use to check that power of its abuse. When we say that an act of information disclosure 'threatens privacy' or 'promises transparency' we are making a judgment about who has power and who is susceptible to it and how that power ought to be limited.[19]

Along the same lines and for similar reasons, Richard Briffault and other thoughtful commentators have proposed that we target campaign disclosure requirements to large, powerful, and well-financed speakers: their size and resources suggest that they are less vulnerable to threats and more capable of manipulating others.[20]

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[19] Yochai Benkler, *The Real Significance of Wikileaks*, THE AMERICAN PROSPECT, May 10, 2011, http://prospect.org/article/real-significance-wikileaks.

[20] Richard Briffault, *Two Challenges for Campaign Finance Disclosure after* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 1005 (2011) ("By the very size of their financial contribution, large donors are demonstrating an intense degree of support for a candidate, party, or cause. Large donors are likely to be wealthier and therefore less vulnerable to economic reprisals than small and middling givers. They are also more likely to be repeat participants and more used to public attention to their donations. Moreover, they are seeking to use their wealth and intensity of commitment to exercise a greater degree of influence over a collective, public decision than not only the vast majority of voters, but also most other donors. . . . [A] more focused law would do a better job of reconciling the competing constitutional values that ought to inform disclosure. Focusing on major donors would protect the political privacy of smaller contributors and eliminate the disincentive to making contributions that disclosure might cause while simultaneously protecting, and arguably advancing, the voter-information purpose underlying disclosure."); *see also* McGeveran, *supra* note 2, at 879-80 ("On the benefits side, public knowledge of single financial contributors or individual signatories on a petition offers little helpful information to most voters, and provides minimal aid in controlling corruption or enforcing other election laws. On the other hand, knowing about very large donations that effectively bankroll a candidate or ballot initiative, or about organized entities supporting a petition drive, would more likely provide valuable information to voters and perhaps bear on corruption concerns. Courts have acknowledged this scale difference in some recent campaign finance decisions where they diminished the weight of the state's informational interest in proportion to the amount of money contributed or spent in political activity.").

I do not mean to suggest that large or powerful speakers can never establish "a reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals from either Government officials or private parties." *See supra* note 7 and accompanying text. Instead, I emphasize the importance of assessing–rather than presuming–the reasons why a speaker seeks to keep such secrets or tell such lies.

II. SECRETS, LIES, AND DISCLOSURE IN OTHER CONTEXTS

As is the case in the campaign speech context, the autonomy costs that speakers' secrets and lies sometimes impose on listeners are too often overlooked in debates over contested disclosure and disclaimer requirements in a variety of commercial, professional, and other settings. In thinking about these controversies, again I urge attention to whether the speakers' reason for resisting such required disclosures (i.e., their desire to keep certain secrets or even tell certain lies) undermines listener autonomy and whether the government's interest in disclosure thus furthers or frustrates such autonomy.[21]

Governments require disclosure in different contexts for a variety of reasons. First, government frequently requires speakers to make certain disclosures to protect listeners from deception. The Supreme Court has long held, for example, that the First Amendment permits government to create disclosure requirements that "are reasonably related to the State's interest in preventing deception of consumers."[22] To be sure, such disclosure requirements are most commonly applied to potentially deceptive commercial speech.[23] But given the threat that lies may pose to listener autonomy more generally, we might understand government's

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[21] In addition to informing (and sometimes influencing) listener decision-making, the government's disclosure requirements sometimes also seek to shape behavior by the regulated speakers. *See* Paula Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089 (2007).

[22] Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339-40 (2010) (upholding federal statute requiring bankruptcy professionals to include certain disclosures in their advertisements "to combat the problem of inherently misleading commercial advertisements – specifically the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs."); *see also* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (holding that disclosure requirements that are reasonably related to the state's interest in preventing consumer deception do not violate commercial speakers' First Amendment rights).

Along the same lines, certain disclosure requirements also seek to expose potential conflicts of interest in the commercial context. *See, e.g.*, United States v. Wenger, 427 F.3d 840 (10th Cir. 2005) (upholding federal law requiring disclosure of consideration received in exchange for publicizing security for sale). The Court has similarly recognized the value of disclosures in illuminating potential conflicts of interest in the campaign context. *See* Buckley v. Valeo, 424 U.S. 1, 67 (1976) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.").

[23] *See* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 868 (2010) ("[T]he Court tends to accord more deference to government determinations that commercial speech may mislead consumers when the regulatory means are mandated disclosure rather than restriction of speech. The Court has repeatedly emphasized that disclosure requirements are less burdensome alternatives to restrictions of commercial speech.").

interest in protecting listener autonomy as weighty even outside of the commercial speech context in circumstances where the speaker seeks to shape listener behavior through deception.[24]

Second, government not infrequently requires certain speakers to make factual disclosures to inform listeners' decision-making even in the absence of deception by the speaker.[25] Examples in the commercial context include state and local laws requiring restaurants to disclose the caloric and fat content of their offerings,[26] and the Federal Trade Commission's various disclosure rules that require sellers to divulge information like their

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[24] As discussed above, disclosure requirements are most often, and least controversially, imposed as an antidote to what would otherwise be regulable fraud in the commercial context. *See supra* notes 23-24 and accompanying text. Whether the First Amendment permits the regulation of fraud in the political campaign context, however, remains unclear. *See, e.g.*, William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 287 (2004) ("Generally, deliberately false statements have been held not to raise First Amendment concerns, while the dissemination of false statements has been considered to be exceptionally damaging to the integrity of the electoral system."); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 914 (2010) ("On the existing state of the law, therefore, a negligent or even non-negligent statement of a demonstrably false fact about cigarettes, diet products, or securities, for example, could constitutionally ground a civil, criminal, or regulatory remedy, but even a grossly negligent false statement about a candidate in an election would seem to remain under First Amendment protection although several lower courts appear to have adopted a narrower reading of *Brown v. Hartlage* and have consequently permitted state election commissions to regulate for factual falsity."). That the First Amendment may not permit legal remedies for fraudulent campaign speech may increase the value of disclosure and disclaimer requirements to enhance the possibility that speakers can at least be held politically accountable when they engage in such fraudulent speech.

[25] *See* Jacobs, *supra* note 23, at 857 ("All of the current Supreme Court justices agree that governments have the constitutional authority to require commercial speakers to publish some relevant facts when the government purpose is to supplement advertising that would otherwise be false, misleading, or have the potential to mislead consumers. But countering the potential for consumer deception has never been the only purpose that disclosure requirements have served. Increasingly, government regulators require disclosure along with commercial speech to counter the potential for consumer persuasion as well.").

Note that the Supreme Court has suggested in dictum that that the First Amendment may permit such disclosures only in the context of commercial speech. *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 573-74 (1995) ("[O]utside the context [of commercial speech, the State] may not compel affirmance of a belief with which the speaker disagrees. . . . [T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."). But, as discussed infra, courts not infrequently uphold factual disclosures outside of the commercial context under certain circumstances. *See infra* notes 27-31 and accompanying text; *see also* Riley v. Nat'l Fed. of the Blind, 487 U.S. 781, 799 n.11 (1988) ("[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.").

[26] *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 118 (2d Cir. 2009); Nicole Anderson, *Would You Like Some First Amendment Rights with That? How Mandatory Nutritional Disclosures on Restaurant Menus Violates the Freedom of Commercial Speech*, 36 HASTINGS CONST. L.Q. 105 (2008); Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159 (2009). For additional examples, see William Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999).

products' mercury content or their automobiles' gas mileage.[27] Professional speech (i.e., speech by a professional to client or patient[28]) offers another context in which the law often requires disclosures even absent a finding of deception – for example, by requiring medical professionals to disclose facts sufficient to permit patients to make decisions in a way that maximizes their autonomy. As Robert Post explains, "[i]nformed consent doctrine mandates the communication of medical knowledge to the end that a lay patient can receive the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive."[29]

Such governmental justifications for disclosure requirements parallel those in the campaign speech context, in that all require speakers to make truthful disclosures to facilitate listeners' ability to make choices that maximize their own preferences and thus enhance their own autonomy.[30] Requiring disclosures of such objectively verifiable facts thus potentially increases listener autonomy through more informed decision-making.[31]

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[27] *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (upholding state law that requires manufacturers of certain products with mercury to label their products and packaging about the presence of mercury and the requirement to recycle or dispose as hazardous waste: "To be sure, the compelled disclosure at issue here was not intended to prevent 'consumer confusion or deception' per se, but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products."); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Associations in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 584-85 (2006) ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception. The Federal Trade Commission now imposes mandatory disclosure rules on a wide range of industries, requiring sellers to divulge such information as 'the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel.' Congress has passed innumerable statutes that contain analogous disclosure requirements. These disclosure requirements force commercial speakers to engage in commercial speech, but they do not do so merely to prevent potential consumer deception. They primarily seek to reduce information costs and thereby to establish a more educated and efficient marketplace.").

[28] *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (2007).

[29] *See id.* at 972.

[30] In some of these contexts, moreover, the threat to speaker autonomy may be especially low. Recall, for example, that the Court's commercial speech doctrine rests in part on the premise that the costs to speakers' autonomy posed by regulation may be ameliorated by the "hardiness" of commercial speech given the speakers' economic interests in continued speech. *See* Va. Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc., 425 U.S. 748, 771 (1976). For an argument that the same may be true of well-financed and highly-motivated political speakers, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 797 (1999) (suggesting that those engaged in partisan political speech have the same very strong incentives to speak as those engaged in commercial speech).

[31] *See* Strauss, *supra* note 6, at 357 ("When the government prevents people from making decisions on the basis of false information, it does not manipulate their mental processes to serve the

Finally, and most troubling for First Amendment purposes, are "disclosures" that require speakers to recite factually-contested material to shape listeners' behavior in the government's preferred direction.[32] Such disclosures pose substantial threats to both speaker[33] and listener[34] autonomy because the speaker is required to say something that she may not believe in an effort to shape the listeners' decision to match the government's preferences. Examples here might include government efforts to require a doctor to tell a patient considering abortion that she will be terminating the life of a human being when such a characterization is deeply morally contested,[35] or to inform such a patient that abortion is

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government's ends. Rather, it enables those processes to function as they should, to promote the ends of the listener. Similarly, restricting speech in a way that effectively prevents a person from making ill-considered decisions does not deny her autonomy in the way that lying to her does. It does not manipulate the person and cause her to pursue the government's ends instead of her own. She remains free to decide what she wants to do on the basis of reasoned discussion. Such a restriction on speech may deny listeners something they value–people may enjoy being moved to impulsive action–but it does not control the listeners by causing them to pursue the government's ends instead of their own.").

[32] For an example outside of the abortion context, consider the Supreme Court's decision in *Meese v. Keene*, 481 U.S. 465, 480 (1987). There a plaintiff who sought to exhibit Canadian films on acid rain and nuclear war challenged a federal statute that required him to label the films as "foreign propaganda." *Id.* at 469. After discussing the wide variety of available definitions of the term "propaganda," the Supreme Court ultimately–and controversially–concluded that the labeling requirements did not burden speech (and thus posed no First Amendment problem) because Congress intended no pejorative connotation when using the term. *Id.* at 480. Recent government requirements that cigarette manufacturers include in their advertisements visual images of the dangers of smoking have also triggered charges that such required disclosures are not "purely factual and uncontroversial," given their graphic nature. *See* R.J. Reynolds v. United States, 2011 WL 5307391, at *5 (D.D.C. Nov. 7, 2011) (describing controversy over whether the graphic-image requirements are "purely factual and uncontroversial").

[33] For examples of government requirements that strike most directly at the heart of speaker autonomy because they compel individuals to express support for that which they do not believe, see Wooley v. Maynard, 430 U.S. 705 (1977) (striking down state requirement that dissenting motorist display state's "Live Free or Die" motto on his car's license plate); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down public schools' requirement that dissenting students salute the flag).

[34] *See* Whitney D. Pile, *The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws*, 73 MO. L. REV. 243 (2008) (arguing "that informed consent laws which force physicians to disseminate the State's moral ideology fall outside the purview of protections given to informed consent laws that involve the disclosure of scientific facts"); Post, *supra* note 28, at 977-78 ("[W]hen physicians speak to us as our personal doctors, they must assume a fiduciary obligation faithfully and expertly to communicate the considered knowledge of the 'medical community.' We would therefore be concerned if the state could freely, without First Amendment constraint, manipulate the trustworthy information that we were able to receive from our physicians. This concern does not reflect anxiety only about the quality of our medical care, for we endow the state with virtually unlimited discretion to regulate the nature of that care. It instead reflects our wish to receive knowledge that our doctors can uniquely provide, so that we can decide for ourselves what our medical care ought to be.").

[35] *See* Post, *supra* note 28, at 956-57 ("Whether the fetus is a 'human being' is thus understood by all sides to the abortion controversy to be an essentially contested moral proposition. For South Dakota to require a physician to 'inform' his patient that she will be terminating the life of a 'human being' is

linked to depression and suicide – even though that is factually contested by many in the medical community.[36]

In sum, I suggest greater attention to the reasons speakers seek to keep secrets (or occasionally tell such lies) in assessing the First Amendment implications of disclosure and disclaimer requirements in a range of contexts. Such a focus might helpfully inform our choice of the appropriate level of scrutiny to be applied to such disclosures – for example, we might be less suspicious of disclosure requirements designed to protect listener autonomy than those motivated by other governmental purposes. [37] As argued above, such a focus might also (or instead) help determine whether a contested disclosure requirement survives a specific level of review, depending on the justifications offered by both challenger and government.[38]

For example of what this might mean in practice, consider yet another contemporary arena in which disclosure requirements are hotly contested. After concluding that certain pregnancy service centers had engaged in deceptive speech about the sorts of services they did and did not offer, a number of local governments enacted ordinances requiring such centers – among other things[39] -- to display signs in their waiting rooms that disclose

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consequently not innocent. It deliberately and provocatively incorporates the language of ideological controversy and forces physicians to affirm the side of those who oppose abortion.").

[36] *See id.* at 961-62 ("[I]t is very likely that [South Dakota's requirements that doctors inform patients that depression, psychological distress, suicide ideation, and suicide are statistically significant risks of abortion] require physicians to disclose information that is false."); *see also* Planned Parenthood v. Rounds, 650 F. Supp. 2d 972, 983 (D.S.D. 2009) ("Defendants have provided no evidence to show that it is generally recognized that having an abortion causes an increased risk of suicide ideation and suicide.").

[37] For example, controversy continues as to the appropriate level of review to apply to disclosure requirements intended to inform listeners absent a history of deception by regulated commercial speakers. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (discussing whether rational basis scrutiny or some heightened level of review should apply to disclosure requirements designed to inform consumer decisionmaking in the absence of a finding of deception by the regulated commercial speakers). The Supreme Court applies "exacting scrutiny" to disclosure requirements in the campaign speech context, which requires that the required disclosure be substantially related to a sufficiently important government interest. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010); Buckley v. Valeo, 424 U.S.1, 64 (1976). The Court has applied strict scrutiny to disclosures required of those engaged in charitable solicitation. *See* Riley v. Nat'l Fed'n Of the Blind, 487 U.S. 781, 796 (1985).

[38] Although I do not claim that the Supreme Court's First Amendment analysis of various disclosure and disclaimer requirements is entirely coherent, such a focus on comparative autonomy costs might also explain the Court's holding in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), where it struck down Ohio's disclaimer requirement as applied to a single individual circulating hand-produced political literature. *See* Briffault, *supra* note 20, at 991 (characterizing the McIntyre Court as engaging in a "balancing of informational gains [to listeners] against threats to political participation [by the individual speaker]").

[39] In this discussion, I focus only on the laws' provisions requiring the regulated centers to disclose objectively verifiable information about their own services. I do not address the First Amendment

to potential clients that the centers do not provide or refer for birth-control or abortion services and that they do not have health care professionals on site.[40] In other words, these laws require the centers to disclose objectively verifiable information in response to legislative findings of deception.

Instead of a rigid and categorical approach in which factual disclosures to prevent deception may be required of commercial and professional speakers but not others, here again I suggest we focus instead on the potential threats posed to listener autonomy. This requires us to ask, more specifically, why the speakers resist disclosure – i.e., why they seek to keep secrets and perhaps even tell lies.

So why *do* the pregnancy crisis centers resist disclosing truthful information about themselves that their listeners would find valuable – i.e., that they don't provide birth control or abortion services or referrals and they don't have health care professionals on site? One possibility is that they seek to keep a secret from their targeted listeners to increase their chances of shaping or steering their listeners' behavior – and if one credits the local governments' legislative findings of deception,[41] we might also understand them as seeking to tell a type of lie about themselves to achieve such influence. Just as we saw with respect to campaign disclosures,[42] if speakers resist disclosure not because they reasonably fear harassment but because they instead fear that truthful disclosures will limit their message's

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implications of provisions in some of these laws that further require the centers to recite the government's own message. *See, e.g.*, Evergreen Ass'n, Inc. v. City of New York, 2011 WL 2748728, at *3 (S.D.N.Y. July 13, 2011) (describing additional requirement that centers must state "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider").

[40] *See* Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 459 (D. Md. 2011); O'Brien v. Baltimore, 768 F. Supp. 2d 804, 815 (D. Md. 2011); *Evergreen Ass'n*, 2011 WL 2748728, at *4. These lower courts preliminarily enjoined or struck down these laws on First Amendment grounds; these decisions are now on appeal. Even while declining to dispute the legislative findings that certain centers had engaged in deception, the lower courts applied strict scrutiny to strike down the disclosures as regulating speech outside of both the commercial speech context (because such centers often do not charge for their services) and the professional speech context (because such centers do not employ doctors; indeed, the failure to disclose the absence of health care professionals on site when advertising health care services was one of the centers' allegedly deceptive practices). *See Tepeyac*, 779 F. Supp. 2d at 462-68 (discussing, and ultimately rejecting, defendant's claims that the disclosure requirements should be subject to relaxed review as regulations of commercial or professional speech); *O'Brien*, 768 F. Supp. 2d at 814 (same); *Evergreen Ass'n*, 2011 WL 2748728, at *9-14 (same).

[41] *See Evergreen Ass'n*, 2011 WL 2748728, at *14-15 ("This Court recognizes that the prevention of deception related to reproductive health care is of paramount importance. Lack of transparency and delay in prenatal care can gravely impact a woman's health. Unlicensed ultrasound technicians operating in pseudo-medical settings can spawn significant harms to pregnant, at-risk women who believe they are receiving medical care. Plaintiffs' categorical denial of the existence of any such deception–and refusal to acknowledge the potential misleading nature of certain conduct–feigns ignorance of the obvious.").

[42] *See supra* notes 4-20 and accompanying text.

ability to influence listeners' choices, such disclosure laws may appropriately seek to ameliorate the threat that would otherwise be posed to listeners' autonomy.[43]

CONCLUSION

This essay urges greater attention to why the government seeks to require certain disclosures and why speakers may resist. We should understand disclosure and disclaimer requirements as more likely to further, rather than frustrate, First Amendment values when they regulate speakers who seek to keep secrets (and occasionally tell lies) to manipulate listeners' choices and thus threaten their autonomy.

[43] For a contrary view, see Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. CONTEMP. HEALTH L. & POL'Y 223 (2010).