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# AN EDITOR'S DISSENT TO PROFESSOR GARY WILLIAMS'S PRIVACY PLAN FOR *A PRIORI*, STATUTORY CURBS ON PRESS SCRUTINY OF KEY INFORMATION ABOUT PUBLIC FIGURES

*Craig Matsuda\**

As a concerned citizen, lawyer and legal scholar, Professor Gary Williams proposes to carve out a statutory exemption in California to protect the privacy rights of public figures from what he sees as a rapacious, intrusive media. However, as a similarly concerned citizen, one-time reporter and now working newspaper editor, I think his plan is badly misguided and could cause significant, though unintended, harm.

I emphasize that I am not a lawyer.

I am not even a journalistic specialist on media law.

I am a worried editor who sees Williams's shield for the privacy of public figures as overly broad and thoughtless. I think it could have a real, *a priori* chilling effect on the free flow of vital information that has great value to the workings of our society.

I have several practical problems with his plan. First, I hate his proposition that the state legislature, a notoriously slow, cumbersome and unresponsive body, should attempt to interpret privacy law—a thorny, rapidly shifting area that must swiftly respond to societal mores. Second, unlike Williams, I am hardly sanguine that judges, rather than juries, are more discerning in weighing the difficult balance between an individual's rights and those of society, especially in matters involving the First Amendment. Finally, I find it almost risible that Williams would allow an unspecified, potentially vast number of individuals with a loosely defined relationship to a public figure to traffic in complex private information about that person, while blocking the media's ability to report that information. Doesn't common sense suggest that if so many people know something, it is already public—and should be publishable?

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These are my simple disagreements with Williams's ideas. I believe the biggest flaw in his proposals is that they send a vigorously anti-democratic message: these proposals suggest that the elite of our society, who already have at their disposal huge swaths of the globe's resources, deserve more and special protections than those accorded to ordinary Americans. Additionally, I believe that both the law and the media need to adopt a more, not less, expansive view of public figures and their privacy rights.

These are not easy times for media advocates who oppose any measure that would seem to protect the privacy of any American. The scandal involving President Clinton and the reports about it have raised grave, disturbing issues about how much our society needs to know about the private lives of even its most high and mighty. The death of Princess Diana and the possible links to a pursuit by paparazzi, as well as numerous cases regarding contentious conduct committed by members of the Fourth Estate with various personalities of note in Los Angeles, have inflamed public sentiments about the media. We read with great interest about European efforts to provide better protection of individual rights while receiving daily reports about United States privacy outrages, such as when companies film their workers in their bathrooms.

Williams is to be praised for the empathy and compassion he wants to show for some of the worthiest individuals in our society. The rich and famous are human beings and they should enjoy their marvelous American constitutional rights and privileges. But it seems to me that Williams blithely ignores another fundamental reality about public figures in our democratic society: their celebrity status gives them great, sometimes almost obscene, power in modern America. We shower money and other rewards on movie stars, popular singers, dancers, athletes, activists, religious figures, authors, entrepreneurs and business people—anyone who can command the headlines on page one, the covers of magazines and the prime stories on broadcast programs. We let them shape our thinking by absorbing their views on matters on which they may not even be expert. We model ourselves after them in our dress and emulate their conduct. We grant them these and other privileges, often for a lifetime and with little question.

And yet, Williams does not want the press to provide even the faintest check or balance upon such sway. Instead, he would make our celebrity class even more elite by muzzling the media, in advance, in critical areas based on the notion that the media has committed grave wrongs against them thus far.

I disagree. The great danger to our society, I would suggest, is not posed by the rare, painful or even sensational intrusion by the press into public figures' private lives. I am troubled when a women's magazine wants to publish peephole photographs of a movie star's genitalia. I am aggravated beyond belief by the leering excesses of various tabloid newspapers and broadcast shows. I condemn the crass purveyors of surreal "reality" programs who substitute shock value for careful, ethical journalism.

But, do we really want to take a hammer and blow torch to the workings of *The Los Angeles Times* to rectify what some view as bad conduct by *Playgirl* magazine? Do we want to punish a pioneering, small-town weekly because we dislike the *National Enquirer*? Would we shut off investigative journalism by network broadcasters because we are unhappy with *Hard Copy*?

While I struggle, as Williams does, with the privacy issues raised when *USA Today* disclosed the HIV status of tennis star Arthur Ashe, I believe this matter turns more on broad discussions of morality than upon law and regulation. And, while significant thinking must occur about this special situation, it appears that we need to wrestle more often with just how much wealth, power and authority we invest in our highly public figures.

The media get closer to meeting their constitutional duty when they fulfill the acid newsroom aphorism that the journalist's job is to comfort the afflicted and afflict the comfortable. As a curmudgeonly editor, I see worrisome indications that we do less and less of this every day. Contrary to what Williams suggests, the press in many ways has become less the attack dog of those of privilege and more the celebrity lap puppy. The pages of all too many newspapers and magazines, as well as precious radio and television air time, is filled with mindless hagiography for the faces of the moment instead of the muckraking reports of the best kind. Our readers and viewers seem to want this. Also, it makes money—which is a key, but seldom discussed aspect of the discussion about the American press.

We in the media have, from this nation's outset, held a dual and sometimes conflicting role. We are guardians of some of our most precious societal freedoms. We must provide crucial information that allows our democracy to work. At the same time, we must make money. We are not charitable institutions. No one throws cash into a special account to keep afloat newspapers, magazines, or radio and television stations. Thus, from this results the sometimes bizarre media fixation on names, the notable, and other public figures. Information about them sells. This is something that the public, not media outlets, can change. And this happens, very often,

with lightning speed—through ratings, circulation, and advertising dollars. Williams advocates government regulation of the media. But why, when we already face tougher, faster reaction and correction from our audiences? Moreover, just who is he trying to protect and from what?

In our discussions, many of them conducted in his excellent Loyola Law School class sessions, Williams and I have jostled about privacy and public figures. I have tried to make the point, emphatically, that media, especially mass media, seldom deal all that much any more with ordinary folk. It belies the very definitions of news to do so. There are rare occasions when you or I might be thrust by events into the news. Williams and I have agreed that privacy law may need sensible distinctions, like those in the tort of libel, between figures who regularly and routinely appear in or seek public attention and those who are cast by events into the public spotlight.

But, as for press intrusions into the privacy of public figures, merely examining the case law he cites causes the areas of conflict to emerge clearly: these, by and large, are instances involving celebrities and media outlets that would hardly be considered mainstream. Those of us who work for most American newspapers, magazines and broadcast operations know why many of these situations arise. Some of our colleagues at the fringes conduct themselves in ways in which we are not allowed.

A reminder, please, about the practice of my craft. Journalists ask questions. They call people on the telephone and visit them at their homes or businesses to interview them. They read and report from documents or from their own experience—including what they can see, hear, taste, touch and smell. Unlike prosecutors, they cannot compel anyone to talk with them or appear at any place. They are subject to all laws imposed on all Americans and can be arrested, fined and jailed, for example, for trespassing, stealing materials or harassing others. They can be punished, severely, for errors in their work—by dismissal by conscientious employers, and, at another extreme, by civil lawsuit.

Meantime, we work under great duress. Our commodity—news—is ephemeral in its life span and substantive in its effect. The pressure upon us to produce reports in an instant and on deadline is immense. This is true, even as the corporate nightmares of downsizing and pressures for productivity and revenue growth have become scourges of newsrooms. Critics of the press see us rampaging across and pillaging the lives of our subjects, engaging in willy-nilly inquisitions into the private lives of many. But, if you listen to most reporters and editors—at newspapers, magazines and radio and television stations—you will hear an altogether different story. Journalists know all too well that they must crank, crank, crank

stories out and that this leaves little leisure time for idle scampers in search of dirt about just anybody. Try to contact a dozen people, interview them and then write an article of several hundred words in just one work day and you will see how little energy remains for trying to dish.

I love my journalistic colleagues and hardly find convincing Williams's underlying belief that they have sweeping powers and have wrought grave harm upon huge numbers of public figures. Truth be told, why do the elite need statutory protections of the kind he proposes when they already possess manifest resources to carve their own, greater and more sweeping "zones of privacy" from press scrutiny? They must take some of these steps, I am sorry to agree, to safeguard themselves not from the media, but from unstable, unbalanced individuals. On a basic level, they can keep their addresses and phone numbers from being listed. They can and do live in protected enclaves and retain security forces that put some local police to shame. They can and do hire able legal and accounting minds to conceal their financial dealings. They can and do employ pricey public relations experts who spin journalists and information like tops. They can and do have their medical and psychiatric needs attended to in far-flung locales by first-rate and close-mouthed experts. They can and do require those who work with or for them to sign strict confidentiality agreements.

As if these measures were insufficient, if they feel harm is done to them after taking such prophylactic steps, these aggrieved parties still have further avenues to pursue. They can, for example, file invasion of privacy lawsuits and see them played through the courts. But Williams, in his flawed proposal, would extend them even more cover. He would not protect politicians and elected officials. He would offer a shield to a wide range of individuals who are voluntarily and involuntarily thrust into the public eye from media digging into their finances, medical information, intimate personal relations and psychological or psychiatric data.

It takes little imagination to swiftly conjure scenarios where the intent and practice of Williams's measures would collide—to the public's loss. Just for argument's sake, consider the following, totally imaginary, fictitious scenarios.

#### I. SCENARIO ONE: PRIVACY FOR A PUBLIC FIGURE'S FINANCES

The Reverend John Doe heads a mystical religious group that moves its operations into a Central Valley town. Doe and his followers quickly begin buying prime parcels and businesses in the area, listing the property

in Doe's name. He joins many civic groups and is seen often in the company of leading officials in the region.

Local newspapers begin to quote Doe widely, accepting some of his dark theories about guns and the need for the upstanding to protect themselves against the decay of society and values. Although they have no clue about the tenets of his church, the sources of his income, or power or the history of Doe himself, much of the local establishment lionizes Doe until he and his church begin constructing what they call "The Fort of the New Frontier."

Ominous whispers begin to spread about the size, purpose and cost of The Fort. However, because The Fort is built on private property, offers dozens of high-paying jobs, and employs Doe—who has a seeming boundless sway with public officials—community dissent about the project is muffled. This has caused Sally Good, editor of the town weekly newspaper, to hesitate about doing stories about Doe, who employs a band of aggressive lawyers. At the mere mention of anything other than basic coverage of Doe, his church or The Fort, the cleric's lawyers call and threaten Good with lawsuits. Her operation is so small that the prospect of any kind of legal costs is truly daunting.

Good, of course, would love to profile Doe. She especially wants to find for her readers what she thinks will be crucial information about Doe's finances, as the religious leader has intimated that his circle of influence is global and that he has ties with powerful forces in Russia, Italy and the Caribbean. Good is sure that Doe meets the legal test and is a public figure. But she wonders whether she and her tiny publication can afford a court test as to whether they can probe Doe's finances under what has come to be known as the Williams Law. Would they prevail or will The Fort go up unhindered and unpublicized?

## II. SCENARIO TWO: PRIVACY FOR A PUBLIC FIGURE'S MEDICAL INFORMATION

John Titan has lived an extraordinary life. He started poor, worked his way up from the bottom and now heads Dominating, Inc., the largest employer in a certain California metropolis. Titan has served on and headed the board of just about every civic and community organization found in the city.

Now in his golden years, Titan has made clear that he has shifted his personal priorities beyond being seen often with his wife at functions covered by all the society pages. With the wealth and power he has accrued, he says he wants to move beyond achievement and into

significance. Thus, he has proposed what the trade press has come to call the "Mother of All Deals." Titan has engineered the hostile take-over of his number one competitor, Mega Ltd. The audacious, mega-billion dollar deal, if it succeeds, will not only ensure the viability of Titan's company but also that its headquarters would remain in the metropolis for decades. Analysts say the deal will succeed and the new company that will exist afterward will prosper only because of Titan's leadership and involvement.

During bitter wrangling over the deal, a reporter of *The Street*, a scrappy but respected financial show, learns that Titan has been heard throughout his elite golf club discussing his plans. The reporter has a friend who takes him there, and, as he is standing on the street near the clubhouse entrance, he sees the CEO walking out, gesturing wildly and speaking loudly. Titan declares to several accompanying aides that the take-over, whether it makes sense, financially and for the community, must occur quickly because he says his health is declining rapidly and he wants this to be the last great deal by which he will be remembered.

The shocked reporter later confirms from a variety of sources—including others who have heard Titan make similar statements and from those who can attest to his bad and weakening health—that all of this is true. But when the publication calls Titan for comment, prior to going with the story, a legal donnybrook ensues: he has a phalanx of lawyers threatening the producers of *The Street*, arguing he has a statutorily guaranteed right to privacy for his medical information.

### III. SCENARIO THREE: PRIVACY FOR A PUBLIC FIGURE'S INTIMATE PERSONAL RELATIONS

Doktor Wingding has taken the television season by storm. Wingding has become a new broadcast and recording sensation with a silly, nonsensical but endearing children's character. Wingding is played by an individual whose real name is Bob Careful. Careful, who is a surprisingly taciturn and closed individual when off-the-air, somehow has hit a hot button with kids. He makes them feel good about themselves by offering a warm, nurturing personality while also managing to mix in just a little bit of teasing humor with wise lessons about life.

Careful's outrageous costumes also appeal to the young, so much so that he is quickly becoming one of the highest-grossing Hollywood stars, simply based on his well-managed and plentiful personal appearances at an array of events for kids. Careful clearly is also a shrewd player with his career. In fact, he adds to his professional luster by linking Doktor Wingding to "The True American Thing," a national, moral campaign with

the whiff of partisanship to it. The organization plasters Doktor Wingding's pictures on print and broadcast advertisements that saturate the media.

Through Doktor Wingding, Careful also launches "Kiddie Compass," a program to create after-school centers for children across the nation. Careful's supporters want him to appear widely at model centers, where he would be surrounded by kids. Of course, no sooner than this happens, rumors begin to circulate about Careful in Los Angeles, the entertainment capital. *The Daily Planet*, a Los Angeles periodical, is not only a newspaper of national stature, but also the *de facto*, make-it-or-break-it publication of the surrounding Hollywood industry.

*Planet* reporters start receiving countless tips, urging them to search records about Careful and his past relationships, paying special attention to allegedly unsavory conduct with boys and girls. Some of the tipsters, for example, urge the paper to look at Careful's five divorce proceedings, talk to some of his many former lovers, and examine some buried criminal files and resolved civil lawsuits.

Sarah True, Entertainment Editor of the *Planet*, has no hesitation about pursuing this story, because it seems worth at least checking out for more than just its lurid value. But, as a well-educated and skilled professional, she is aware of the Williams Law and pauses. True calls Christopher I.M. Green III, the paper's young, new media law associate. He is literal minded and tells True that the law is clear: the personal relationships of public figures are protected by privacy laws. He says he cannot see compelling reasons to test them over what he sees as the shaky basis of uncovering potential material about a star with kids. What should True do?

#### IV. SCENARIO FOUR: PRIVACY FOR A PUBLIC FIGURE'S PSYCHOLOGICAL OR PSYCHIATRIC INFORMATION

Michael "Red" Hot is a living legend. Not only did he shatter athletic records at State University like a bad dishwasher breaks plates on a busy Friday night, but he also set so many marks in a range of pursuits that the record book looks like a phone directory that lists only his name.

Hot went on to professional sports, where he played with several contender or championship teams. After a storied career as a star on the field, he is now the head football coach, athletic director and a member of the faculty at his alma mater. In his post, he is paid more than the president of State U. and even more than the Governor. His contract is confidential, but it is conventional wisdom that Hot, who also heads the annual fund-

raising drive for his city's major charity, enjoys more perks than the President of the United States. But there has been no joy in recent days at the leafy campus of State. That may be, in part, because Hot is experiencing his first down season in which his usually championship-winning team has struggled.

More important, though, is the growing concern about Hot's own erratic behavior. He has turned mean and ugly, in private with his players and even in public with university staff, alumni and some key civic leaders with whom he does his charity work. Most people are willing to excuse his behavior, blaming it on his inability to deal with his first-ever losing season. But, increasingly, some are even more concerned because they see Hot as irrational, not idiosyncratic. They note that this once-punctilious individual has been arriving late and leaving early from work. He earned his nickname, in part, for his snappy dressing but now often appears disheveled and frequently unshaven. He has forgotten key papers for practices and missed appointments with his colleagues. He has been seen wandering aimlessly, late at night on campus. He has been sighted and stopped by university security, but released once officers recognized their suspect's identity.

Hot's wife and family are known for being tight-lipped and supportive beyond belief of him. But those who know his wife well say they can see strain etched on her face in her rare public appearances.

The situation appears to be spinning out of control, at least in the view of Robin Hood, sports editor of the local ratings-leading television station, which broadcasts a Sunday game review show with Hot. Hood thinks it is finally time to report on Hot's situation when stories circulate that he, in a fury, verbally—and maybe even physically—abused an athlete on scholarship, who is said to have been reduced to tears before teammates by the unprovoked assault.

The university has totally shut down information about this incident and the coach. But tipsters are telling Hood to do some checking and she will easily find a hard to face story—the coach has had a long, secret history of mental illness and has been under care for a long time. Of late, though, he has stopped taking his medications and has fallen into substance abuse. He is deeply suicidal, totally resisting professional aid and may be a threat to the young people with whom he works every day.

Hood believes this is a story of great public interest and concern. She and her news director don't want to rush into any reports that aren't well founded. But when this story happens to come up with the vice president for operations, who is also a lawyer, he tells them that he thinks some other

source will have to break it because he sees a budget-busting invasion of privacy lawsuit coming up on Hot's behalf.

The news and sports staffs argue for at least starting to work on the story. But, the operations vice president stands his ground, especially when the station's general counsel advises that he knows Hot's personal lawyer is something of a litigation hot head.

So does this story get done?

## V. CONCLUSION

Of course these scenarios, perhaps like this very piece itself, are filled with hyperbole and the astute legal minds reading here can work around Williams's ideas and these situations. But I hope they help make my final point: truth is stranger than fiction when it comes to the news. Who, today, can anticipate what—and more importantly who—will be the news of tomorrow?

Our lives are tossed and turned these days by a wider array of individuals than ever before. We need deep, telling information not just about elected or government officials, but a whole spectrum of individuals who change our world and really are public figures in this sense. Business people. Scientists. Artists. Engineers. The list could go on and on.

As for the issues of people and privacy, I have been lucky enough to have been a member of the working press for almost two decades now and I could never have anticipated the way the business has changed. Who could have imagined just a few years ago that we would report and write about the people and issues we have, especially of late. Presidential sexual practices? Killer viruses that are linked to human intimacies? Huge lay-offs and hirings that turn on the quirks and personalities of tycoons?

We have seen this and more. Go figure.

I do not mean to make light of privacy concerns. Certainly, as Americans, our vital rights are under constant assault. Our health providers are swapping confidential data about us as if we were baseball trading cards, not human beings. Businesses collect and sell cheap so much crucial information about our lives. Our employers can be culprits, too, monitoring our messages, thinking and even our most personal conduct. Our privacy is even imperiled when we engage that little box that is our home computer and open our door to the wonders of cyberspace.

Given all these battles to wage, just how much ought we worry about press intrusions into the private lives of public figures? Or do we really need a more aggressive, vital press, albeit one that is focused less on celebrity and more on critical issues like our rights to privacy?

Hmmmm. I know mine is a most imperfect profession. It needs constant vigilance and improvement. Still, let's do it right and do it well. Unfortunately, I do not think that Williams's proposal works or that it functions in the ways he would hope.

