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Volume 19
Number 2 *Symposium—The Right of Privacy
versus the Right to Know: The War Continues*

Article 1

1-1-1999

Foreword

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Recommended Citation

Gary Williams, *Foreword*, 19 Loy. L.A. Ent. L. Rev. 215 (1999).
Available at: <https://digitalcommons.lmu.edu/elr/vol19/iss2/1>

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SYMPOSIUM

THE RIGHT OF PRIVACY VERSUS THE RIGHT TO KNOW: THE WAR CONTINUES

FOREWORD

*Gary Williams**

[A]s I saw the situation, the public's right to know really meant the newspaper's right to print. Of course, there would be people interested in, even titillated by, the news that I had AIDS; the question was, did they have a right to know. I absolutely did not think so. The law was on the side of the newspaper, but ethically its demand was wrong, as well as unnecessary.¹

If privacy rules all, only the rulers will have privacy.²

From its inception,³ the right to informational privacy⁴ has been at war with the public's right to know as guaranteed by the First Amendment.⁵ In their seminal article articulating the need for legal recognition of

* Professor of Law, Loyola Law School of Los Angeles. B.A., *magna cum laude*, 1973, University of California, Los Angeles; J.D., 1976 Stanford Law School. Many thanks to the staff of the Loyola Entertainment Law Journal, for conceiving of this Symposium, pulling together a wonderful group of authors, and inviting me to contribute. I also want to thank them for their patience awaiting my output.

1. ARTHUR ASHE, *DAYS OF GRACE* 9 (1993) (original emphasis).

2. Mailer from California First Amendment Coalition Assembly, to Professor Gary Williams, Loyola Law School (Feb. 5, 1999) (on file with author).

3. Recognition of a discrete right to privacy found its genesis, most agree, in the article written by Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

4. The right of informational privacy is the right to control the dissemination of private personal information. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392-398 (1960); Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994).

5. The First Amendment guarantees of freedom of speech and freedom of the press encom-

a right to privacy, Samuel Warren and Louis Brandeis implicitly acknowledged the tension between privacy and freedom of the press by determining that privacy claims must give way where the matters published are of "general or public interest."⁶

Courts and commentators who have acknowledged the existence of a right to informational privacy have explicitly recognized this conflict. Court opinions upholding the right to informational privacy dance a protean minuet around the First Amendment—balancing in favor of privacy by declaring that publication of certain information is "not in the public interest" or "not newsworthy" while bowing to the First Amendment by disclaiming any right to substitute the judgment of a court or jury for the discretion of an editor.⁷ The *Restatement (Second) of Torts*, in discussing informational privacy, states the following:

When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.⁸

This has now become a rule not just of the common law of torts, but of the U.S. Constitution as well.⁹

When Warren and Brandeis penned their article in 1891, they were concerned that the inventions of their time, including "instantaneous photographs and mechanical devices," threatened that "what is whispered in the closets shall be proclaimed from the roof tops."¹⁰ They decried the pressures driving the press to "satisfy a prurient taste" by supplying the public with details of sexual relations and personal gossip.¹¹

Publication of this Symposium in the *Loyola of Los Angeles Entertainment Law Journal* on privacy one hundred and eight years later is particularly timely, because the battle between privacy and the right to know is being waged along new technological and sociological fronts. On the technological front, the advent of mini-cameras, the continued refinement of

pass a right to receive information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

6. Warren & Brandeis, *supra* note 3, at 214..

7. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

8. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1976).

9. *Id.*

10. Warren and Brandeis, *supra* note 3, at 195.

11. *Id.*

directional and miniature microphones, and the development of ever more powerful telephoto lenses continue to constrict the limits of our private domains. At the same time, the invention and phenomenal growth of the internet, with its miniscule publishing costs, has made millions of citizens potential publishers increasing exponentially the opportunities for the publication of "private" information for public consumption.

On the sociological front, expansion of the boundaries of what the public wants to know, coupled with the willingness of the press to satisfy that curiosity, have placed additional pressure on our notions of who is a private person and what constitutes private space and private matters. The growing popularity of the tabloid press, and the adaptation of its methodology to television, have increased the demand for "inside" information about our stars, our politicians, our heroes, our victims, and our villains. The explosion of "reality programming" with its insatiable appetite for visual and aural images of exciting, bizarre, and tragic human occurrences threaten to intrude on the privacy of ordinary citizens. With these new and constricting pressures on privacy, the persistent war being waged between privacy and the First Amendment's guarantee of the public's right to know warrants reexamination as we approach the twenty-first century.

A recent skirmish in that war was fought in the California courts. In *Shulman v. Group W Productions, Inc.*,¹² the California Supreme Court attempted to reconcile recognition of a right to informational privacy with the public's right to know in the context of a reality show that videotaped and broadcast the emergency medical treatment of an accident victim. Interestingly, a majority of the court concluded that, in this instance, the right of informational privacy could not be recognized consistent with the public's right to know as protected by the First Amendment.¹³ The state high court turned instead to a relatively little used branch of privacy, intrusion, to hold that the unauthorized recording and subsequent broadcast of Ruth Shulman's receipt of medical treatment may be remedied at law.¹⁴

Gary Bostwick's article critiques the California Supreme Court's resolution of the privacy/press dispute in *Shulman*. After carefully tracing the development of the invasion of privacy tort in California law, Mr. Bostwick dissects and analyzes the fractured opinion issued by the California Supreme Court in *Shulman*. He then uses a lower court case decided just before *Shulman* to illustrate how two plausible readings of the *Shulman* plurality opinion could render diametrically opposed results. Mr. Bostwick

12. 955 P.2d 469 (Cal. 1998).

13. *See id.* at 475.

14. *See id.*

concurr with the dissenting opinion of Justice Brown in *Shulman*, which argues the plurality opinion hopelessly roils the waters in an area of constitutional law that was reasonably well settled.

As Mr. Bostwick's article points out, prior to *Shulman*, editors and plaintiffs could rest assured privacy claims could only be won in those instances where the information published was deemed "not newsworthy." While determination of newsworthiness in each case was entrusted to a trier of fact, Bostwick argues the standards governing that determination were clear cut. A plaintiff had to prove the published information was not "a morbid and sensational prying into private lives for its own sake."¹⁵ After *Shulman*, the standard appears to be that a publication is newsworthy, in the case of an involuntary public figure, if the material published has a "substantial connection to the subject matter of the newsworthy report."¹⁶ Mr. Bostwick agrees with Justice Brown that ascertaining whether publication of personal information violates the right to privacy is, after *Shulman*, literally an act of blind faith.

Kunoor Chopra's article revisits an area of the battle involving a question of extraordinary importance—whether government can protect the victims of rape and sexual assault from having their names published in the press. Many argue this question was answered with a definitive "no!" in the case of *Florida Star v. B.J.F.*,¹⁷ and the result in that case makes it challenging to argue otherwise. However, the majority opinion, which declared that reporting on the crime of rape is always a matter of public interest, also said the following: "It is clear . . . that the news article concerned a 'matter of public significance' That is the article generally, *as opposed to the specific identity contained within it*, involved a matter of paramount public import"¹⁸

Utilizing this as a beach head, Ms. Chopra assaults the argument the public has an inviolable right to know the identities of rape victims. She fashions her argument by focusing on two aspects of the reasoning of the majority in *Florida Star*. First, Ms. Chopra takes at face value the Court's declaration that the First Amendment interest served by stories on rape is regulation of the criminal justice system. She argues that allowing unauthorized publication of the names of rape victims impairs the public's ability to govern that system because it discourages rape victims from reporting the crime. She posits that while the public has an interest in knowing the details of the commission of crimes of sexual assault, it also has a compel-

15. *Id.* at 485 (citing RESTATEMENT (SECOND) OF TORTS §652D cmt. h (1976)).

16. *Id.*

17. 491 U.S. 524 (1989).

18. *Id.* at 536-37 (emphasis added).

ling interest in encouraging rape victims to come forward to report those crimes. Because unfettered reporting of rape victims' names subjects them to physical danger, and exposes them to the stigma often attached to rape victims, Ms. Chopra concludes the public's interest in governing the sexual assault aspect of the criminal justice system is better served by enforcement of statutes prohibiting publication of information identifying the victims of rape and sexual assault.

Second, Ms. Chopra takes aim at the high Court's inconsistent resolution of another skirmish in the battle between privacy and the public's right to know. Ms. Chopra points out the Supreme Court held, in *Department of Justice v. Reporter's Committee for Freedom of the Press*,¹⁹ that the identities the persons in the Department of Justice's criminal record database were not important to the public's understanding of the operation of the criminal justice system.²⁰ Ms. Chopra argues the Court's resolution of the privacy dispute in *Reporter's Committee* relies upon a normative definition of "public interest," and that this definition is superior to the descriptive definition used by the majority in *Florida Star*.

Using the preferred normative analysis of "public interest" drawn from the *Reporter's Committee* case, Ms. Chopra concludes the names of rape victims are equally unimportant to the public's understanding of the operation of the criminal justice system in sexual assault cases. She urges that this analysis should be utilized to sustain a properly drafted state statute protecting the names of rape victims from publication against a First Amendment challenge. She concludes by offering her example of a properly drawn statute.

The article written by Rex Heinke and Seth M.M. Stodder (hereafter "Heinke") addresses a question the United States Supreme Court has left open—whether the First Amendment allows government to punish an individual or company for publishing true information of public significance where it is known the information was illegally obtained. Using the recent case of *Boenher v. McDermott*²¹ as a vehicle, Heinke gives a balanced analysis of the issue.

In *Boehner*, a couple using a scanner intercepted and recorded a telephone conversation between several Republicans, including Representative John Boehner, plotting a strategy to defend then Speaker Newt Gingrich against ethics charges pending in the House of Representatives.²² The cou-

19. 489 U.S. 749 (1989).

20. *Id.* at 766 n.18.

21. No. CIV. 98-594 TFH, 1998 WL 436897, at *1 (D.D.C. July 28, 1998).

22. *Id.*

ple gave a copy of the tape recording to Representative James McDermott, who in turn released the tapes to the media. Boehner sued McDermott, alleging the release of the tape recording violated 18 U.S.C. section 2511(1), the Federal anti-wiretapping statute.²³ Among other things the statute makes it unlawful to disclose the contents of any electronic communication knowing the information was obtained through interception of an electronic communication.²⁴

Heinke argues the statute cannot be used to punish people or media who publish information concerning matters of public interest so long as they have obtained that information without violating the law. He contends the First Amendment prohibits sanctions against anyone who publishes information pertaining to matters of public interest, even if they know the information was illegally obtained. Pointing out the wiretap statute does not purport to prohibit the receipt of illegally intercepted communications, Heinke reasons that Representative McDermott broke no law in receiving the information. Relying upon the cases of *Florida Star*, *Landmark Communications*, *Cox Broadcasting* and *Oklahoma Publishing* and the protection they extend to the publication of truthful information about matters of public interest, Heinke posits the public's interest in disclosure outweighs any governmental interest in protecting privacy. He reaches this conclusion, in part, by contrasting the interest in protecting privacy involved in *Boehner* with the interest in protecting the privacy of rape victims that was rejected as insufficient in *Florida Star*. In short, Heinke concludes the public's right to know what was being discussed defeats any claim to privacy.

"Reality television," the shows that take us inside police cruisers and flying ambulances, and into the homes of the victims, the patients and the accused, have opened a new front in the battle between privacy and the right to know. The piece written by Henry Rossbacher, Tracy Young and Nanci Nishimura (hereafter "Rossbacher") argues that the media's desire to satisfy the public's "right to know" through "reality programming" has caused the government and the media to become, at times, partners invading the privacy all citizens are guaranteed by the Fourth Amendment to the Constitution. Rossbacher argues the constitutional guarantees of the sanctity of the home and the presumption of innocence are being sorely tested by "reality programming" where law enforcement and the media cooperate in the execution of search warrants, the making of arrests, and the filming and broadcast of those events.

23. *Id.*

24. *Id.*

The cases discussed by Rossbacher involve media “ride alongs.” Rossbacher argues the government’s desire for positive publicity, the public’s appetite for reality based shows, and the media’s drive to satisfy that desire have coalesced to allow news media crews to videotape, photograph and broadcast arrests and searches. In one case, *Ayeni v. Mottola*,²⁵ the Secret Service conducted a search of the home of a man suspected of credit card fraud.²⁶ When the agents arrived, accompanied by a crew for the show *Street Stories*, the suspect was not at home, but his wife and child were.²⁷ Even under these circumstances, the agents conducted the search, the television crew videotaped the event, and one agent conducted an on camera interview despite the wife’s objections.²⁸

In a second case, *Berger v. Hanlon*,²⁹ Cable News Network (“CNN”) and the federal government executed a written agreement allowing CNN to ride along and tape the search of the ranch of Paul and Emma Berger, who were suspected of poisoning eagles.³⁰ The court explicitly found this agreement was reached because CNN wanted footage of the government discovering evidence that the Bergers poisoned eagles, and the government “wanted the publicity.”³¹ CNN filmed the search of the Bergers’ ranch property and home by a force of twenty-one armed agents and law enforcement personnel.³² CNN wired one agent with a concealed microphone and recorded his ongoing commentary.³³ CNN also recorded the government’s interrogation of the Bergers.³⁴

In both cases the searches were broadcast on national television. And, in both instances the subjects sued, claiming the government and the broadcasters violated their Fourth Amendment right to privacy. The Second and Ninth Circuits took an extremely dim view of these extraordinary events, finding the government’s decision to allow the media to accompany and broadcast these searches violated a central tenant of the Fourth Amendment—the privacy of the home is protected from unreasonable intrusion into areas where citizens have a reasonable expectation of privacy.³⁵

25. 35 F.3d 680 (2d Cir. 1994).

26. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 364-65 (E.D.N.Y. 1994).

27. *United States v. Sanusi*, 813 F. Supp. 149, 152 (E.D.N.Y. 1992).

28. *Id.*

29. 129 F.3d 505 (9th Cir. 1997).

30. *Id.* at 507.

31. *Id.*

32. Plaintiffs’ First Amended Complaint ¶ 55, *Berger v. Hanlon*, No. CV 95-46-BLG-JDS (D. Mont. Feb. 26, 1996) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

33. *Berger*, 129 F.3d at 509.

34. *Id.* at 508-09.

35. *Ayeni v. Mottola*, 35 F.3d at 686; *Berger*, 129 F.3d at 512.

Both courts concluded that when the government obtains a legitimate search warrant, the intrusion upon privacy is to be minimal because the search must be tailored to the purpose for the warrant.³⁶ Both courts concluded these searches exceeded those constitutional boundaries because they were calculated to inflict injury on the very value the Fourth Amendment seeks to protect—the right to privacy.³⁷ The purpose of bringing the cameras into homes was to “permit the public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy.”³⁸

Rossbacher notes that other circuits have disagreed, rejecting claims that law enforcement activities recorded and broadcast by the media violate the Fourth Amendment,³⁹ and that the Supreme Court has granted certiorari to resolve this clash between privacy and the public’s right to know. Rossbacher raises some thought-provoking questions about the significance of these liaisons between the press and the government. He argues the press in these cases abandons its traditional role as a watchdog over government misconduct, and acts more like a partner in law enforcement activity.⁴⁰ He also argues government law enforcement agents are, in effect, turned into reporters or performers for the media, providing commentaries for the broadcasters as the searches are being conducted. Finally, Rossbacher argues this alliance could result in prosecutions motivated more by the desire for good publicity than a quest for justice.

Rossbacher, citing the broadcast images of Mrs. Ayeni clad only in her nightgown, and of the Bergers being questioned as their house was searched by the authorities, worries that these cooperative ventures between the press and law enforcement pose a serious threat to the ability of the Fourth Amendment to protect privacy.

This Symposium concludes with a colloquy between myself and Craig Matsuda, an editor for the Los Angeles Times, on the clash between the notion of a right to informational privacy for public figures and the public’s right to know. My article argues that California’s constitutional right to privacy can and should be interpreted to protect public figures from the unauthorized publication of a limited class of confidential personal information. I contend that California’s addition of an explicit declaration of

36. *Ayeni*, 35 F.3d at 688–89; *Berger*, 129 F.3d at 512.

37. *Ayeni*, 35 F.3d at 686; *Berger*, 129 F.3d at 511.

38. *Ayeni*, 35 F.3d at 686.

39. *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997) *rev’d on other grounds*, 141 F.3d 111 (4th Cir. 1998) (en banc), *cert. granted*, 67 U.S.L.W. 3321 (U.S. Nov. 9, 1998).

40. He points out, for example, that in the *Berger* case CNN agreed not to broadcast the footage it obtained until the government gave permission.

a right to privacy elevates informational privacy to the status of a compelling state interest that allows the state to establish a zone of privacy for public figures.

In my effort to reconcile the public's "right to know" with this right to informational privacy, I suggest that recognition of a limited class of protected personal information immune from publication without the subject's consent would not unduly chill the press or deprive the public of information it is entitled to know. I set the boundaries of that class of protected information utilizing the California Supreme Court's designation of certain private personal information as invoking a "legally cognizable privacy interest."⁴¹ I propose that where well-established social norms recognize the need to maximize individual control over dissemination of the information revealed, publication of that information about anyone would violate California's constitutional guarantee. I then argue that so long as any person, public or private, takes reasonable steps to keep such information confidential, their right to privacy can and should be protected without doing unconstitutional violence to the public's right to know.

Mr. Matsuda, a former reporter, takes my proposal to task from the point of view of the working press. He argues the law and the press need to adopt a more expansive view of what can be published about public figures because of their enormous influence on modern American society. He points out that entertainers, athletes and other public figures have as much, if not more, influence on our lives as politicians and judges, and that they possess an ability to insulate themselves from public scrutiny ordinary citizens can only dream of.

Matsuda contends the press has, in fact, become more complaisant with the rich and powerful. He argues this press timidity is a far greater concern for most Americans than the tabloid-like invasions of privacy catalogued in my article. And he raises an objection students in my class on Privacy and the First Amendment have also posed with great vigor: if the American public is truly concerned about the loss of privacy caused by a "peeping press," they can express their disgust by turning off *Hard Copy* and refusing to buy the *National Enquirer*. Matsuda argues this democratic regulation of the press by its audience is far more democratic, and far less dangerous, than any system of governmental regulation of the clash between privacy and the public's right to know.

Mr. Matsuda raises serious practical concerns about my proposal. I contend establishment of a limited class of protected information, with standards administered by the courts, will provide more protection for the

41. Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654-55 (Cal. 1994).

press because judges are more responsive to First Amendment concerns than juries. In response, Mr. Matsuda illustrates with powerful hypothetical situations how a rigidly defined class of protected information might handcuff the ability of the press to report on an incident or personality of public interest if the situation raises unique issues of privacy versus the public's right, and perhaps need, to know. While the difficult job of balancing the right of privacy against the public's right to know is entrusted to juries under the present scheme, Matsuda finds the resultant uncertainty infinitely preferable to a system that would be unresponsive to the ever changing definition of "news."

Carter G. Woodson, a famous African American historian, once observed, "We may know how a war starts, but we never know how or when it will end" ⁴² In this case, we do know how and why the war started. This Symposium chronicles some of that war's current skirmishes. As to its end

42. Carter G. Woodson, quotation from *Negro Makers of History, in MY SOUL LOOKS BACK, 'LESS I FORGET* 430 (Dorothy Winbush Riley ed., HarperCollinsPublishers 1993).