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A REFLECTION ON THE NEWS MEDIA, PERSONAL PRIVACY, AND THE FIRST AMENDMENT

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We All Love a Free Press, But . . .

The United States stands as a shining example to emerging democracies around the world as the beau ideal of open government. No other nation has such sweeping laws guaranteeing citizen access to public records and proceedings. No other country enjoys a tradition that so vigorously eschews prior restraints on speech, particularly if that speech concerns the affairs of government. And yet the American press, popularly regarded as the freest in the world, is under siege.

Throughout history, government has posed the greatest threat to the news media. Unchecked, a government can stanch the flow of information to its citizens by denying access to documents and by closing courtrooms. It can muzzle opposing viewpoints by withholding licenses, rationing newsprint, harassing reporters, and ransacking newsrooms.

The drafters of the Bill of Rights recognized the inherently adversarial relationship between press and government when they prohibited Congress from enacting legislation that would abridge freedom of the press. Since the ratification of the First Amendment in 1791, the news media have weathered countless threats from the government.

The United States Supreme Court has struck down government attempts to restrain publication, such as the "Pentagon Papers" case¹ in 1971, where the Court found that the mere invocation of "national security" is not sufficient to stop the dissemination of news.² The Court recognized a constitutional "right to be wrong" when the press criticizes the government in its 1964 ruling in *New York Times v. Sullivan*,³ which requires a public official who claims to have

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1. *New York Times Co. v. United States*, 403 U.S. 713 (1971).
2. *Id.* at 714.
3. 376 U.S. 254 (1964).

been libeled to show both falsity and fault on the part of the news organization before he can recover damages.⁴

These and other landmark decisions by the Supreme Court have preserved the principles of press freedom for 200 years. Moreover, most Americans recognize, at least in the abstract, that a free press is fundamental to preserving a democratic system of government. But in recent years, a subtle but pervasive force is undermining these fundamental principles. It insinuates itself into every phase of public life, tempting judges to close courtrooms and dispense secret justice, enticing legislators to criminalize truthful speech and bowdlerize the public record. The siren song? Personal privacy.

The idea that individuals have the right to be "left alone" was first articulated in a 1890 *Harvard Law Review* article by Louis D. Brandeis and his law partner, Samuel D. Warren.⁵ Through common law, and occasionally by statute, most states came to recognize a civil cause of action against news organizations which invaded privacy by gathering and publishing intimate information that was true, but not sufficiently newsworthy to justify the intrusion. This cause of action posed only a limited threat until the early 1970s. Perhaps because of their reluctance to penalize truthful speech, state courts generally interpreted the notion of newsworthiness broadly, to encompass the publication of virtually anything that was of interest to readers and viewers, at least if the information had some tangential relationship with the conduct of government affairs.

In 1975, the Supreme Court ruled in *Cox Broadcasting Corp. v. Cohn*⁶ that the news media may not be punished for publishing truthful information obtained from court documents.⁷ The opinion focused on the importance of protecting accurate reports of judicial proceedings, even including the broadcast of the identity of a rape victim whose name appeared in a public court document.⁸

But enterprising lawyers zeroed in on the narrowness of the *Cox* ruling. They began adding invasion of privacy counts to conventional libel suits, particularly where government information was not involved. Although state courts often were compelled by Supreme Court pronouncements to strike down the libel counts, more and more of the invasion of privacy claims survived. Unbridled by stringent constitutional tests, the court rulings, fact-driven and

4. *Id.* at 279-80.

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

6. 420 U.S. 469 (1975).

7. *Id.* at 491.

8. *Id.*

made on a case-by-case basis, varied widely from state to state.

As a result, news organizations have found themselves embroiled in extended court battles defending their rights to publish information such as the names of people who have been granted final divorce decrees⁹ and to air a videotape of a woman eating pizza in a restaurant during National Pizza Week.¹⁰ But the threat to press freedom posed by the invocation of privacy goes far beyond civil lawsuits. In the name of privacy, court records are sealed, and court proceedings conducted in secret. For example, a Delaware judge in a murder trial decided on his own motion to seal the names of all prospective and seated jurors "to protect the integrity of the jury."¹¹

"Personal privacy" is invoked by federal and state governmental agencies to justify withholding public records and closing public meetings. NASA used personal privacy to withhold the "Challenger" cockpit tape.¹² The Department of Education cited the personal privacy exemption to the federal Freedom of Information Act¹³ as its basis for refusing to release the names of individuals who defaulted on student loans.¹⁴ The State Department has argued that the names of Haitians deported after being denied political asylum are exempt from disclosure because "it would constitute a clearly unwarranted invasion of personal privacy."¹⁵ Law enforcement agencies are finding that the exemption for personal privacy is even more palatable to many courts than the expansive "investigatory records" or national security exemptions. The FBI used this exemption to justify withholding informants' names contained in 60-year-old investigatory files.¹⁶

In *Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁷ the agency persuaded the U.S. Supreme Court that disclosure of "rap sheets" maintained on a centralized computer constituted an unwarranted invasion of personal privacy for the recorded subjects, even though the information sought was publicly available in paper form at the original

9. *Doe v. Sherman Publishing*, 593 A.2d 457 (R.I. 1991).

10. *Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685 (Iowa 1987).

11. *Gannett Co., Inc. v. Delaware*, 571 A.2d 735, 737 (Del. 1989), *cert. denied*, 110 S. Ct. 1947 (1990).

12. *New York Times v. NASA*, 920 F.2d 1002 (D.C. Cir. 1990).

13. *See* 5 U.S.C. § 552 (1988).

14. *Gannett Satellite Information Network, Inc. v. Department of Educ.*, No. 90-1392 (D.D.C. Dec. 21, 1990).

15. *Ray v. United States Dep't of Justice*, 908 F.2d 1549, 1556 (11th Cir. 1990), *cert. granted sub nom*, *Department of State v. Ray*, No. 90-747 (1991).

16. *Schmerler v. F.B.I.*, 900 F.2d 333 (D.C. Cir. 1990).

17. 489 U.S. 749 (1989).

sources.¹⁸ Justice John Paul Stevens, writing for the Court, said that there is a stronger personal privacy interest implicated by disclosure of a rap sheet generated by a computer than by scattered records available only after a diligent search in courthouses, archives, and police stations.¹⁹ As he put it, "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computer summary located in a single clearinghouse of information."²⁰

Justice Stevens' opinion reflects a growing tendency in courts and legislatures to regard the conversion of data from paper to electronic form as having some talismanic significance. Although there is obviously a physical distinction between paper records in a file drawer and entries in a computer database, as well as in the effort and time required to retrieve them, the mere translation from one form to another should not and does not alter their inherently public nature. Surely the expectation of privacy, as opposed to the expectation of *non-discovery*, remains unchanged.

Yet this apparently self-evident proposition has been challenged again and again, in the states as well as in the federal government. For example, the Michigan Supreme Court ruled that a commercial requester could not obtain a computer tape containing lists of university students' names, even though the same information would be available subsequently in a publicly-available, printed directory.²¹ The court found that a computer tape presented a greater invasion of privacy because it was more readily accessed and manipulated than paper records.²²

Courts and legislatures alike often bristle at the prospect of commercial exploitation of lists of names and addresses compiled from government records. In 1989, the Texas legislature passed a short-lived amendment to the state open record act which allowed law enforcement agencies to withhold crime victims' names from the public.²³ The amendment was proposed by the Dallas City Council in response to complaints from local residents that security alarm salespeople contacted them shortly after they reported burglaries.²⁴

18. *Id.*

19. *Id.* at 763.

20. *Id.* at 763.

21. *Kestenbaum v. Michigan State University*, 327 N.W.2d 783 (Mich. 1982).

22. *Id.* at 789.

23. H.B. 119, 72d Leg., 1st Spec. Sess., amending TEX. REV. CIV. STAT. ANN. art. 6252-17a (West 1989).

24. *Id.*

Various news outlets brought suits to enjoin enforcement of the secrecy provisions. The *Odessa American* ran a blank space on the page where its crime roundup usually appeared, explaining to its readers that as a result of the new law, "you will not be able to read about crimes that occurred overnight in Odessa in today's newspaper. And you will continue to be prohibited from seeing that information unless the law is changed."²⁵

Media lobbying efforts persuaded the legislature to repeal the statute. But the Texas experience was by no means unique. In California, Governor George Deukmejian directed the Department of Motor Vehicles to restrict the release of driver's license records "to ensure that the public's safety and right to privacy is protected to the fullest extent possible" in the wake of the murder of actress Rebecca Shaeffler, whose alleged killer, Robert John Bardo, reportedly found her address through the Department of Motor Vehicles' records.²⁶ Similar bills were introduced in other states.

All of these initiatives limiting access to information are based on misguided or opportunistic exploitation of privacy concerns. By ignoring the fact that the fundamental invasion of privacy occurs when the agency first gathers information, those who would protect such data from public scrutiny fail to recognize that secrecy breeds a lack of accountability, which in turn encourages irresponsible misuse by the government. Unchecked, the government is free to exploit, leak, manipulate, or lose personally identifiable information -- sometimes with tragic results.

Reporters in Florida and Georgia vividly demonstrated the high price of allowing personal privacy claims to trump all competing values in their independent series on the child welfare system in their respective states.²⁷ Each recounted the deaths of dozens of abused children who were under the care of the child welfare system but who had been "lost" in a bureaucracy shrouded in secrecy.²⁸ As a result of these stories, the Florida Social Services Department was revamped, and new laws established a system to track individuals accused of child abuse.²⁹ In Georgia, a task force was created to evaluate the effectiveness of state agencies in protecting children.³⁰ But these moves toward openness, retroactive though they are, reflect a minority view. Each year, more and more states take steps to restrict public access to

25. *Reports*, ODESSA AMERICAN, June 27, 1989, at 3B.

26. *Access to Drivers' Records Limited*, EDITOR & PUBLISHER, September 23, 1989, at 28.

27. *Suffer the Children*, THE ATLANTA JOURNAL-CONSTITUTION, June 4-10, 1989; *Suffer the Children*, THE NEWS/SUN-SENTINEL, Oct. 5-7, 1986.

28. *Id.*

29. FLA. STAT. ch. § 119.07 (1990).

30. *Child Abuse Coverage Hampered*, THE NEWS MEDIA & THE LAW, Winter 1990, at 3.

information. Worse still, they consider punishing those news media who have the temerity to make such information public. The uproar over the Kennedy-Smith rape prosecution³¹ in Florida illustrates the visceral impact of personal privacy.

The decision by several news organizations to publish the name of the alleged victim, coupled in at least one instance with details about her personal life, revitalized a lively debate which has gone on for years in the journalism community. Prior to the Palm Beach incident, the question had been somewhat theoretical, since as a matter of practice the vast majority of news organizations chose not to report sexual assault victims' names. In covering even the widely-publicized story of the Central Park jogger,³² the vast majority of news organizations chose to keep the victim's identity secret. But in 1990, the *Des Moines Register* published a series chronicling in diary form the ordeal of a rape victim, whose name was published with her consent, opening the debate anew.³³

Those who support the publication of the names of rape victims argued that treating these victims of this crime differently from others actually contributes to social stigmatization. It is inconsistent, they argue, to publish the name of the accused perpetrator and withhold the name of his accuser. Those who oppose publication reply that victims who fear that their identities will be revealed will not report attacks, and that sexual assault crimes constitute such a violation of personal privacy that it is incumbent upon the press to protect the victims from further harm.

All sides were forced to face the issue squarely in the spring of 1991. While the internal debate raged on, those outside the press, with the possible exception of the criminal defense bar, almost universally condemned the decision to reveal the victim's identity. They did not sit idly by while the media moguls debated the ethics. They acted.

In the summer of 1991, legislatures in seven states considered or passed laws that would seal rape victims' names or would punish news organizations for publishing them.³⁴ A district court in Texas issued a gag order prohibiting the *Fort Worth Star-Telegram* from disclosing the name of a victim who claimed the paper invaded her privacy by printing details in a 1989 story about her

31. *Florida v. William Kennedy Smith*, No. 91-5482 CFAO2 (Palm Beach County Circuit Court).

32. *People v. McCray*, No. 4762-89 (N.Y. Sup. Ct. 1989).

33. *It Couldn't Happen to Me: One Woman's Story*, *DES MOINES REGISTER*, Feb. 25-29, 1990.

34. *Globe Charged for Identifying Alleged Victim*, *THE NEWS MEDIA & THE LAW*, Summer 1991, at 25.

assault.³⁵ And in Florida, state prosecutors charged *The Globe* tabloid newspaper with a criminal misdemeanor, invoking for the first time a 1911 statute making publication of a sexual assault victim's name by the news media a crime.³⁶

The Florida law is one of only three states criminalizing the publication of a rape victim's name.³⁷ The statute was scrutinized by the U.S. Supreme Court only two years earlier in *Florida Star v. B.J.F.*³⁸ In that case, a rape victim had successfully sued a small Jacksonville newspaper for invasion of privacy when the newspaper published her name in a crime roundup.³⁹ The paper had obtained her name from an incident report made available in the press room at the sheriff's office.⁴⁰

In an opinion by Justice Thurgood Marshall, the majority of the Court struck down the suit, holding that since the information was truthful and lawfully obtained, its publication could not be punished absent a showing of a state interest of the highest order.⁴¹ Since the government failed to keep the victim's name secret, the government could not then sanction the press for publishing it.⁴²

Significantly, the Court did not explicitly declare the Florida statute unconstitutional. Moreover, Justice Marshall wrote:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.⁴³

Justice Byron White, joined by Chief Justice Rehnquist and Justice O'Connor, dissented.⁴⁴ Having traced the Court's attempts to grapple with the competing

35. *Doe v. Fort Worth Star Telegram*, No. 96-128753-90 (Tex. Dist. Ct., 96th Dist. July 3, 1991).

36. *Florida v. Globe Communications Corp.*, No. 91-0110088MM A02 (Fla. Cir. Ct., Palm Beach City., Oct. 24, 1991).

37. FLA. STAT. ANN. § 794.03 (West 1976); GA. CODE ANN. § 16-6-23 (Michie 1988); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1985).

38. 491 U.S. 524 (1989).

39. *Id.* at 528.

40. *Id.* at 526.

41. *Id.* at 536.

42. *Florida Star v. B.J.F.*, 491 U.S. 524, 537-38 (1989).

43. *Id.* at 541.

44. *Id.* at 542.

interests of free press and privacy, Justice White wrote:

Today, we hit the bottom of the slippery slope There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime -- and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed.⁴⁵

Justice White's dissenting opinion reflects the willingness of the Court to step in and decide the ethical issue of when and whether to publish sensitive information. White's opinion presaged another opinion of his in a quite different case, *Cohen v. Cowles Media Co.*⁴⁶ Dan Cohen was a Republican campaign worker in the 1982 Minnesota gubernatorial race. On the eve of the election, he offered reporters from four media outlets damaging information about the opposing candidate, on the condition that his identity would not be revealed. Two of the outlets abided by the reporters' promises. The other two, the *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune*, identified Cohen as their source, over their reporters' objections. Cohen lost his job, and shortly thereafter sued both newspapers in state court, alleging fraud and breach of contract.

The breach of contract claim was a novel one, seldom invoked and never previously addressed by the U.S. Supreme Court.⁴⁷ In 1990, the Minnesota Supreme Court had held that state contract law could not be applied to a promise between a reporter and a source.⁴⁸ It also held that the First Amendment prevented Cohen from invoking the doctrine of promissory estoppel, which permits recovery for damages resulting from reliance on a promise which is then broken.⁴⁹

The U.S. Supreme Court ruled five to four that the First Amendment does not protect a news organization from generally applicable law if it breaks its promise to a confidential source, even though enforcement of such laws would have an "incidental" effect on reporting.⁵⁰ Justice White wrote:

Unlike the situation in *The Florida Star*,⁵¹ where the rape victim's

45. *Id.* at 553.

46. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

47. See Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991).

48. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).

49. *Id.* at 205.

50. *Cohen v. Cowles Media Co.*, 1991 U.S. LEXIS, 3639, at *14, 15 (June 24, 1991).

51. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise which they did not honor. The dissenting opinions suggest that the press should not be subject to any law . . . which in any fashion or to any degree limits or restricts the press' right to report truthful information. The First Amendment does not grant the press such limitless protection.⁵²

Curiously, the Court's ruling was praised by some journalists, particularly reporters, who believed that the decision would heighten their credibility with sources and strengthen their positions if editors threatened to overrule their promises of confidentiality. But the salutary effect of *Cohen*,⁵³ if any, occurred long before it went to the Court. Years earlier, when the case was first widely publicized, newsrooms around the country reexamined their policies on making promises to sources: who had the authority, under what circumstances, and so forth. Probably no two organizations emerged with identical standards, because there is no unanimity on the issue within the news industry.

By contrast, the damage dealt the news media by the Court's decision to review the case in the first place was immediate and severe. In *Cohen*, the Supreme Court elected to craft a remedy for a harm more illusory than real.⁵⁴ Prior to this case, there were no reports of thousands of disaffected sources claiming that they had been "burned" by journalists who had broken their promises to keep identities secret. Whether for ethical or pragmatic reasons, journalists keep their promises. Some have spent time in jail rather than break them. Others know that when they break promises, sources dry up. But now, not content to trust to ethics or the marketplace, the court has imposed that obligation as a matter of law.

Ironically, it appears that even a reporter who reveals a confidential source pursuant to court order will still be vulnerable to a civil suit. Under *Branzburg v. Hayes*,⁵⁵ the Supreme Court's 1972 decision on reporter's privilege, the majority opinion specifically held that journalists who witness crimes have no constitutional privilege against forced disclosure before a grand jury.⁵⁶ Justice White's opinion in *Cohen*⁵⁷ carved out no exemption for compelled

52. *Id.*

53. *Id.* at *14.

54. *Id.*

55. 408 U.S. 665 (1972).

56. *Id.* at 692.

57. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

disclosure.⁵⁸

In addition, journalists who keep a source's name confidential, but who publish other information about the source, may now be accused of rendering the source "identifiable." A reporter's zeal to provide readers with as much detail as possible may lead to lawsuits seeking damages for breach of contract, infliction of emotional distress and invasion of privacy. Several cases involving subjects who claim their identities were inadequately disguised have survived dismissal and been sent back for trial.

For example, the Eighth Circuit Court of Appeals refused to dismiss Jill Ruzicka's claim that *Glamour* magazine's feature about patients sexually abused by their psychotherapists had identified her by publishing truthful details about her life, even though her name never appeared in the story.⁵⁹ The appeals court ordered the trial court to determine whether a claim based on promissory estoppel was recognized in Minnesota.⁶⁰

Similarly, a special report on rape prepared by WABC-TV in New York included interviews with victims who had been promised that neither their faces nor voices would be recognizable. After the initial airing of the series, two of the victims claimed that the electronic disguise was inadequate, because co-workers and relatives had recognized them. They sued, claiming the station had breached its contract to them and caused them emotional distress.⁶¹ While the appellate court threw out the intentional infliction of emotional distress claim, finding that the television station's behavior was not sufficiently outrageous to justify liability, it affirmed the trial court's refusal to dismiss the negligent infliction of emotional distress and the breach of contract action.⁶²

Perhaps in response to these and other examples of reporting intimate facts, considered by some to constitute press "excesses," the courts now appear to be moving rapidly toward a judicially-created code of journalistic malpractice. Old strictures against prior restraints on speech or post-publication sanctions such as the rape shield statutes described earlier are eroding. The public tolerates, even demands, gags on the news media.

Part of the problem lies in the visceral appeal of invasion of privacy claims. Unlike government assertions of national security, which may be tempered by public cynicism, invasion of privacy claims have the ring of familiarity. They

58. *Id.* at 2518.

59. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578 (8th Cir. 1991).

60. *Id.* at 584.

61. *Doe v. American Broadcasting Co.*, 543 N.Y.S.2d 455 (N.Y. App. Div. 1989).

62. *Id.*

strike home because the individual identifies with them. That could be me on the front page or on the video screen. By all means, shutter the courtroom, ban the broadcast, silence the newspaper. Unhappy readers and viewers often begin their harangues against coverage they find distasteful this way: "We all love a free press, but . . ." A litany of press insensitivity and tastelessness follows, concluding with the question, "Why did the public need to know that?"

Failing to stem this rising tide of accusations, the press rarely does an effective job of explaining to the public that part of the price of an open and democratic society is the sacrifice of some personal privacy. Dan Lynch, the managing editor of the *Albany (New York) Times Union* dealt with the question this way:

If readers are going to live in a democracy and cast ballots that can affect other lives as well as their own, then they have an obligation to know something about what's going on in the world. That remains true even if it means they might encounter some words or images they regard as repelling and offensive.

By the same token, we newspaper people have an obligation to print material like that when the topic is important enough. We should not shrink from our duty to exhibit the world's most unprepossessing warts when the topic is important enough.⁶³

As Lynch suggests, journalists must respond to these accusations, not with rhetoric or self-censorship, but with the kind of stories that demonstrate that the public surrenders oversight of the actions of the agencies of government at its peril.

Those stories will make the best possible case for justifying both an open government and an untrammelled press. The press must make that case, and make it forcefully. The alternative is to sacrifice these and other fundamental principles of our democratic system on the altar of personal privacy.

63. *News Cannot Be Sanitized To Please Readers*, EDITOR & PUBLISHER, Sept. 14, 1991, at 44.

