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WHOSE PRIVACY?*

Clemens P. Work**

A word is not a crystal, transparent and unchanged, [but] is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.¹

Oliver Wendell Holmes may not have had privacy in mind when he wrote one of the most beautiful passages in American jurisprudence, but his sentiments about context would be endorsed by the American press. Privacy is clearly a relative concept. The press favors more privacy when its own free-flow-of-information interests are at stake, but favors less privacy (more openness) when the privacy or reputation interests of citizens are at stake, when seeking information from government, or even when the news media's own pocketbook interests are at stake. At a time when public concern about privacy, and about the news media's incursions into privacy, seems to be growing, or at least reaching a cyclical high-water mark, it is time to take a closer look at the news media's complex relationship with privacy.

There are plenty of examples of the news media's seemingly inconsistent, ambivalent—or even hypocritical—attitude toward privacy, and I will discuss some of them. However, it is not merely a matter of whose ox is being gored. For one thing, accusations of news media invasions of privacy ignore or diminish the historically robust role of the American press. Concern for individual privacy has never been the news media's most sacrosanct value. Plenty of support exists also, in modern American jurisprudence, for the news media's insistence that the free flow of information should usually prevail over notions of individual privacy. Much of the news media's inconsistency, and much of the public's attitude about press invasions of privacy, seems to stem from the fact that privacy is such a broad and amorphous concept. Privacy breeds

* This article is adapted from a speech given at the University of Montana Law School on April 29, 1993, during a University of Montana-Toyo University symposium on American and Japanese press freedoms.

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confusion among journalists, citizens and jurists alike.

To be sure, the erosion of privacy is a legitimate and significant concern to Americans, and the news media do, not infrequently, step on toes and over lines. Today, people—voters, readers, viewers, citizens—are upset and confused over their eroding privacy. In a 1991 survey of citizens by Louis Harris & Associates, seventy-nine percent of respondents expressed concern about personal privacy, up from sixty-four percent in 1978.2 Recent polls and studies, which show declining trust in the media, often cite the perception that privacy is invaded far too often as one of the reasons. In a nationwide telephone poll conducted by the Los Angeles Times in March 1993, two of the five most frequently mentioned complaints against the news media were that they are too sensational (twenty-eight percent) and that they are rude, intrusive and violate people's privacy (eleven percent). Other complaints centered on bias (twenty-two percent), inaccuracy (fifteen percent), and news media negativity (ten percent). In the same poll, sixty-three percent of respondents agreed with the statement that the news media “reveal too much about the private lives of public figures,” while fifty-eight percent thought that “[m]ost newspaper reporters are just concerned about getting a good story, and they don't worry very much about hurting people.”3

Readers' complaints to ombudsmen show a whole range of new issues bugging them, besides the perennial complaints such as lack of balance.4 Charles Bailey, former editor of the Minneapolis Tribune, reported that “[r]eaders of both sexes are readier to object to journalistic invasion of privacy—and quicker to complain when they think their newspaper is wallowing in sleaze.”5 When four California newspapers and others in the country printed the names of the jurors in the first Rodney King trial (and one radio station even broadcast their phone numbers) the day after their explosive verdict was announced, the public outcry was loud and immediate.6

We seem to be in an era of changing public sensibilities and greater sensitivity or testiness, and the news media are often the target of complaints. One small-town newspaper editor tallied six times as many complaints from 1985 to 1990 than in the previous

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5. Id.
6. Id.
five years. Many readers reacted to such seemingly innocuous items as public employees' salaries and details about the lives of political candidates, as well as the names of juveniles convicted of felonies, and photos and accounts of crime. Editors from big-city newspapers noticed the same phenomenon, reporting increased complaints not only about graphic photos of violence and accident scenes, but also about bankruptcy notices, home sales, causes of death and even divorce and marriage notices. "Privacy has a visceral appeal for the average person," observed Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press. She noted further, "After all, if the news media, or the public, can gain access to records about me, that information could end up on the evening news, or the front page."

All hell broke loose when Geneva Overholser, editor of the *Des Moines Register*, wanted to ask rape victims if they wanted their names published. This followed on the heels of a now-famous and publicly acclaimed series of stories about a rape victim, Nancy Ziegenmeyer, who had agreed to be named. But when the *Register* merely wanted to see the names of other rape victims on incident reports, in order to ask them if they wanted to go public, they found the names blocked out in violation of the state's open records law. A TV station erroneously reported that the *Register* wanted to force the names of rape victims to be published; thus, it was no surprise at all when a poll conducted by the same station showed 2,700 people in favor of police closing rape victims' records and 100 people voting for free access by the media.

When a tabloid television program was given permission to interview serial killer Jeffrey Dahmer in prison, a Wisconsin state senator protested that the privacy of the victims' families was being invaded. He said:

There is no First Amendment issue here. We are protecting society and internal security when we stop these interviews. We are protecting children who might watch such a program, and sick

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8. *Id.* at 3.
people who might copy Dahmer. I’d shut down all interviews. The news media have a monetary interest in these interviews to sell papers and advertising.¹⁴

Public concern about the news media seems to have been heightened by publication of details of public figures’ private lives. The last decade has seen a veritable orgy, some would say, of “infotainment” gossip-mongering, with newspapers and magazines, print and electronic, scooping and tripping over one another to reveal the very latest peccadilloes of public figures. A short list would include:

- Presidential wannabe Gary Hart, without whom Donna Rice would not even be in a dog food commercial and Monkey Business would be . . . well . . . just another boat.
- Former Virginia governor Chuck Robb, without whom Tai Collins would be just another Donna Rice.
- William Kennedy Smith, accused of rape by Palm Beach habitué Patricia Bowman, whose name and unremarkable lifestyle were painstakingly chronicled by the New York Times.
- Tennis legend Arthur Ashe, who launched a forecourt offense to forestall a possible USA Today story on his AIDS infection.
- Presidential candidate Bill Clinton, whose alleged sexual adventures with Gennifer Flowers made him, as one journalist put it, “the latest to be trampled in the rush to the Sea of Sleaze.”¹⁸
- Sen. Bob Packwood (R-Ore.), whose diaries, in the finest tradition of Samuel Pepys, have captivated just as much attention today as Pepys’ observation did in his day.

From the news media’s perspective, public concern about privacy has led to a backlash. For example, privacy concerns are being used to justify legislation that would close off public access to historically open information such as municipal utility records, licensing data, and Department of Motor Vehicle records.¹⁶ Although Congress found it difficult to pass a handgun control bill mandating a 5-day waiting period,¹⁷ the Illinois legislature had no trouble approving a 10-day waiting period for release of driving records.¹⁸

Victims’ rights legislation introduced in several states would seal off traditionally open information to protect victims in cases

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¹⁴. Kirtley, supra note 9.
¹⁶. Ringhand, supra note 2, at 11.
¹⁷. The Brady bill was finally signed into law by President Clinton on November 29, 1993.
¹⁸. Ringhand, supra note 2, at 12.
of racial or sexual assault. Alaska's Victim's Right Law bars the release of telephone numbers and addresses of witnesses in open court unless the court determines that the information is relevant.19

In Montana, despite one of the strongest and most explicit Right to Know provisions in any state constitution,20 University of Montana journalism Professor Bob McGiffert has documented close to 100 privacy exceptions.21

In 1991, Montana trial lawyers pushed through a law sealing all information in criminal affidavits before trial.22 The law was so blatantly unconstitutional that then-Attorney General Marc Racicot refused to defend it,23 and the Montana Supreme Court agreed with his judgment.24

Some courts are testing new theories for holding the press liable for personal harms. Opinions such as Florida Star v. B.J.F.25 and Cox Broadcasting Corp. v. Cohn26 have affirmed the ability of the press to publish without penalty truthful private information obtained from government officials, in spite of confidentiality laws, or from files ordered sealed. To hold the news media liable despite such holdings, some courts are entertaining liability claims under such laws as Sections 198327 and 1985(3)28 of the Civil Rights Act. For example, in Scheetz v. Morning Call, Inc.,29 a newspaper published details from a leaked confidential police report on a com-

19. Ringhand, supra note 2, at 12.
24. Id. at 303, 820 P.2d at 423.
25. 491 U.S. 524 (1989) (holding that a newspaper that published a rape victim's name in a police blotter roundup could not be punished under Florida Stat. § 794.03 (1987) which made it unlawful to "print, publish or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense).
26. 420 U.S. 469 (1975) (holding that a state could not punish a television station for broadcasting the name of a woman who was raped and murdered when the information came from a document introduced in court and thus was part of the public record).
27. 42 U.S.C. § 1983 (1988) (providing for civil penalties against any "person who, under color of any statute, ordinance, regulation . . . of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws").
28. 42 U.S.C. § 1985(3) (1988) (providing penalties for conspiracies to deprive "either directly or indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws").
plaint from a woman who had been beaten by her husband, a police officer who was also named Officer of the Year by his department. Husband and wife sued the paper under state intimacy and false-light privacy claims and also under Section 1983, alleging that the media defendants had conspired with the unnamed source to deprive them of their constitutional rights. The trial court held that the couple’s privacy rights could serve as a basis for a Section 1983 conspiracy claim, but granted the defendants’ motion to dismiss because their First Amendment interests outweighed the plaintiffs’ privacy interests. On appeal, the Third Circuit affirmed the judgment, but on different grounds, finding that the couple did not have a constitutionally protected privacy interest in the information contained in the police report.

Similarly, in Buckey v. County of Los Angeles, the plaintiff, who had been acquitted in the notorious McMartin Preschool child molestation case, filed a battery of charges, including a Section 1983 charge, against various government entities as well as against an ABC reporter. She claimed that the defendants had conspired to deprive her of her rights to due process and privacy by subjecting her to and encouraging a groundless prosecution. The district court dismissed her suit. The Ninth Circuit reversed, but granted plaintiff leave to replead her case, using section 1985(3). Media groups urged the panel to reconsider its decision, warning that it “opens the door for a new breed of federal ‘conspiracy’ claims against those who report to the public about criminal investigations and proceedings.” The court clarified its ruling but did not change its mind.

Despite such rulings as Cox Broadcasting and Florida Star, reporters still remain at jeopardy for publishing truthful, private, confidential information. Last March, Tim Roche, a reporter for The Stuart (Fla.) News, served eighteen days of a thirty-day jail sentence for contempt, for refusing to divulge the source of a leaked confidential order terminating a woman’s parental rights. The reporter claimed that he was really being punished for publishing the truthful information, in violation of Florida Star. The state appellate court found that the state interest in protecting the

30. Id. at 1527-34.
32. 957 F.2d 652, 653 (9th Cir. 1992).
33. Id. at 654.
34. Id. at 655.
36. Buckey v. County of Los Angeles, 968 F.2d 791 (9th Cir. 1992).
privacy rights of children outweighed any First Amendment interests, and higher courts refused to disturb the ruling. 37

All this public concern has prompted much navel-pondering and scalp-scratching by journalists. Some editors are clearly worried. A poll taken by the Society of Professional Journalists in 1990 found eighty-four percent of editors who responded said their organizations were "concerned or very concerned about privacy." 38

Forced to respond to changing times and changing attitudes, many print and electronic media no longer publish or broadcast addresses where crimes occurred, nor do they insist on identifying all crime victims. A 1985 survey of editors showed that more than half had decided to use fewer personal details in identifying crime victims. 39

Despite such concerns, the New York Times printed the name of William Kennedy Smith’s alleged rape victim. 40 And Geneva Overholser, the Des Moines Register editor, says:

What [newspapers] should be about is wide open and boisterous, unleashed and rambunctious, story-telling, mirror-holding, fact-imparting and truth-telling. That’s our history, which we should embrace with gusto . . . .

Do I approve of all this gossip? It’s not up to me to embrace it, to approve it or to reject it. It’s up to me to acknowledge it and, yes, to publish it. This, for heaven’s sake, is human nature.

Editors are the last people in the world who should decide that folks are just not up to making wise decisions if we give them some piece of information that we, personally, want to assure everyone we simply can’t stand. I’m willing to bet that part of why [newspapers have] become less read is because we’ve become less gossipy, not more.

We should think hard about whom we are protecting from what. Too often, the result is a public "protected" from knowing something they ought to know.

How prissy we are, safeguarding the public standards. 41

38. Hartman, supra note 7, at 7.
In light of the debate over the news media's perceived transgressions of privacy, let us look at some contemporary media positions on privacy that indicate an ambivalent, and sometimes even hypocritical, attitude:

- The news media back the broadest possible access to government information, rebuffing governmental assertions of individual or institutional privacy, yet react indignantly when reporters' or editors' own privacy is invaded, whether it be in civil discovery of editorial decision-making and mental processes or in newsroom searches.

- The news media press for the broadest possible interpretation of the right to publish truthful information, such as identifying innocent victims of violent crimes, yet criticize government and business for collecting and trading in confidential information about others.

- The news media have termed the confidentiality of news sources vital to the free flow of information, yet some journalists, and many prominent news media organizations in their support, have employed the very same value to justify their willingness to abandon pledges of confidentiality. As Justice Yetka of the Minnesota Supreme Court noted caustically in a dissent, the first time his court dealt with the case of Cohen v. Cowles Media,

It is unconscionable to allow the press, on the one hand, to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable. During the Watergate crisis, the press published many pious editorials urging that the laws be enforced equally against everyone, even the President of the United States.

42. See, e.g., Herbert v. Lando, 441 U.S. 153 (1979). After the initial outcry about Herbert, news media concern about getting its collective brains picked seems to have dropped off sharply, leading to further inconsistency, noted Professor Gilbert Cranberg. The news media, which so zealously protected the sanctity of newsrooms, "fell virtually silent about the wholesale looting of its newsrooms" via the civil discovery process. Gilbert Cranberg, Malice in Wonderland: Intrusion in the Newsroom 18 (1992). The root of the media's Herbert problem, Cranberg theorizes, is in New York Times v. Sullivan's recognition of fault as an element of libel. Fault has to be proven, and Herbert gave the courts a potent weapon for doing so. Id. at 12.


Nevertheless, the press now argues that the law should not apply to them because they alone are entitled to make "editorial decisions" as to what the public should read, see, or hear and whether the source of that information should be disclosed.47

- The press condemns government for an obsession with secrecy, yet few journalists would ever tolerate a government that bared information such as tax returns—unless they happen to be Richard Nixon's,48 or health information—unless it is that of a high public official.
- Journalists decry attempts to limit their right to publish intensely private information,49 yet approve censorship of youthful journalists' far feeble incursions into personal realms.50
- The same individuals who press for maximum disclosure of government information will not reveal their own hefty speaking fees, their six- or seven-figure salaries or their close web of ties to Washington sources. We are talking $250,000 to $300,000 in fees for Pat Buchanan and twice that or more for George Will, and more than a million dollars in ABC compensation for Sam Donaldson, who told Newsweek senior editor Jonathan Alter that disclosing his income would hurt his credibility as "the guy in the trenchcoat."51 "For some reason," notes journalist Michael Willrich, "journalists accept the idea that they are the kind of people insulated from money's subtle influences even though they wouldn't buy that line from, say, the president of the United States."52
- When it comes to pocketbook interests, freedom of information can conveniently be forgotten. After winning access to transcripts of jailhouse conversations between former Panamanian dictator Manuel Noriega and his lawyers,53 (indeed after having broadcast

47. 457 N.W.2d 199, 206 (Minn. 1990) (Yetka, J., dissenting). Cohen involved the breach of an oral pledge of confidentiality to a political aide, whose name was published to highlight an 11th-hour campaign tactic that newspaper editors found newsworthy enough to override their own reporter's pledge of confidentiality. The Supreme Court held for Cohen under a theory of promissory estoppel. See Cohen, 111 S. Ct. at 2520.
49. See supra note 44.
52. Id. at 16.
portions of those tapes despite having been subjected to a prior restraint) CNN turned around and opposed other news media who were attempting to gain access to those transcripts, on the grounds that they had a proprietary interest in them.

- The news media oppose massive data collection and distribution by government and industry, yet are blind to the possibility, remote as it may seem, that their own information collection could have anything but benign purposes. Most journalists would endorse the concept that the core danger with personal information is that it might fall into the wrong hands or be used for a purpose to which individuals did not agree. As James Rule, a privacy expert at the State University of New York at Stony Brook, put it, "In extremis, the sense that nearly any personal information about one's self might be recorded somewhere, and subjected to unfriendly use, chills all sorts of desirable public participation. A vigorous public life demands conditions in which the boundaries between public and private information are clearly understood and conscientiously respected."

In an era when huge communications giants are merging to form colossal communications giants, such as the recent $9.7 billion merger of Viacom and Paramount Communications, the proposition that the news media would never mishandle private information is surely worth reconsidering. Is the historically resonant watchdog role of the press enough to satisfy all doubts that information in the hands of the press will always be used for the public good?

These inconsistent or ambivalent attitudes by the press about privacy are, if not explainable, at least understandable, when viewed through the prism of history. From the earliest days, American journalists have not placed individual privacy among their greatest concerns. Those who believe in the "good old days" are kidding themselves.

Colonial newspapers were spirited, robust, highly opinionated, and unapologetically biased. Benjamin Franklin Bache, the grandson of Benjamin Franklin, took on the revered George Washington in his broadsheet Aurora, calling the national hero "an anemic imi-
tation of the English kings” and commenting that “[i]f ever a na-
tion was debauched by a man, the American nation has been de-
bauched by Washington.” An enraged mob beat the impertinent
Bache senseless and he died soon afterward in a yellow fever
epidemic."

Despite Thomas Jefferson’s support for the First Amendment,
and his oft-quoted remark “were it left to me to decide whether we
should have a government without newspapers or newspapers
without government, I should not hesitate a moment to prefer the
latter,” Jefferson was irked enough by the press to devote a major
portion of his second inaugural address in 1804 to the subject:

[T]he artillery of the press has been levelled against us, charged
with whatsoever its licentiousness could devise or dare. These
abuses of an institution so important to freedom, and science are
deeply to be regretted, inasmuch as they tend to lessen its
usefulness.

Alexis de Tocqueville, the 19th century French chronicler of
American mores, observed that:

The characteristics of the American journalist consist in an open
and coarse appeal to the passions of his readers; he abandons
principles to assail the characters of individuals, to track them
into private life and disclose all their weaknesses and vices.

Democracies tend to undervalue the rights of private persons,
De Tocqueville observed: “the consequence is that [such rights] are
often sacrificed without regret and almost always violated without
remorse.” But he also recognized the value of the press: “[I]t con-
stitutes a singular power, so strangely composed of mingled good
and evil that liberty could not live without it, and public order can
hardly be maintained against it.”

De Tocqueville came to America during the administration of
Andrew Jackson, and his impressions were formed by a highly par-
tisan and rambunctious press. Anti-Jackson newspapers, for ex-
ample, printed charges in the course of the 1828 campaign, that “Gen-
eral Jackson’s mother was a common prostitute and that Jackson

60. President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1804).
61. I Alexis de Tocqueville, Democracy in America 194 (Henry Reeve, trans., P.
62. II Alexis de Tocqueville, Democracy in America 345 (Henry Reeve, tran., P.
63. I de Tocqueville, supra note 61, at 191.
was the result of her marriage to a mulatto man.”

Jackson’s newspapers were hardly above the fray: They reported that arch-rival John Quincy Adams had, among other things, slept with his wife before marrying her and warned that “his immoral practices will redound to his shame and confusion. . . . [T]he hour of retribution approaches, and he will be obliged to . . . end his days in . . . retirement, where he may curse his madness at his leisure . . . .”

The press had hardly been tamed when Abraham Lincoln campaigned for the presidency; his private life, too, was fair game for a gamey press. Lincoln often expressed his bitterness with humor. When his Secretary of War once remarked that “the press is hardly reliable,” Lincoln shot back: “Oh, yes they are. They lie. And then they re-lie. So they are nothing if not re-lie-able.”

During Grover Cleveland’s campaign for the presidency in 1884, the Buffalo Evening Telegraph charged Cleveland with fathering an illegitimate son. Worse, when President Cleveland was married two years later, reporters followed the honeymooners to Deer Park, Maryland, and staked out the couple all night. A Washington paper reported:

Among the objects which met [Cleveland’s] astounded gaze was a small pavilion . . . and in and around [it] lounged the flower of Washington journalism, somewhat battered by lack of sleep and midnight wrestle with county telegraph operators, but still experiencing a lively interest in the Chief Executive.

A few months later, in an address at Harvard University, he denounced “the silly, mean and cowardly lies that every day are found in the columns of certain newspapers which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life.”

It is quite possible that two Boston lawyers were in the audience. Certainly, President Cleveland’s annoyance must have reverberated with Samuel Warren and Louis Brandeis, for Boston newspapers’ breathless tales of the private lives of Back Bay society, including Warren’s own family, propelled the two men to postulate

65. Id.
66. I DE TOCQUEVILLE, supra note 61, at 190 (quoting VINCENNES GAZETTE).
68. A Terrible Tale, BUFFALO EVENING TELEGRAPH, July 21, 1884.
70. Id. at 511.
the legal right to privacy. In their famous Harvard Law Review article in 1890, Warren and Brandeis excoriated the press:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

The spirit of American journalism is neatly captured in Henry James' *The Reverberator*, an 1888 novel whose protagonist is a young journalist, George Flack. He enthuses:

The society news of every quarter of the globe served up at every breakfast table in the United States—that's what the American people want. I'm going for the secrets what the people want is just what isn't told, and I'm going to tell it. That's about played out, anyway, the idea of sticking up a sign of 'private' and thinking you can keep the place to yourself. You can't do it—you can't keep out the light of the Press.

What James was gently lampooning, and what Warren and Brandeis were reacting to, the turn-of-the-century excesses of American journalism in the sex, scandal, and bloody murder era of “yellow journalism,” were made all the more widespread by tremendous increases in newspaper and magazine circulation. Daily newspaper circulation probably doubled in the decade from 1892 to 1902, and the combined circulation of the morning and evening editions of the *New York World*, the largest American newspaper of the time, topped one million. Some newspapers sold for a penny; some illustrated monthly magazines for a dime.

Such increases were made possible by major technological ad-

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71. But it is probably not the case, as speculated by Dean William Prosser in his own famous 1960 law review article categorizing privacy torts, (*Privacy*, 48 CAL. L. REV. 383, 383 (1960)), that Warren's ire was fueled by media publicity of his own daughter's wedding, as she could not have been more than seven years old. See James Barron, *Warren and Brandeis, The Right of Privacy*, 4 HARV. L. REV. 193 (1890): Demystifying a Landmark Citation, 13 SUFFOLK U. L. REV. 875, 898 (1979).


74. Mott, supra note 69, at 546-47.

75. Mott, supra note 69, at 590.
vances, the "recent inventions" to which Warren and Brandeis re-
ferred. Typewriters were introduced into the newsroom in 1876,
telephones in the early 1880s, and news photography and half-
tones in 1897. Ottmar Mergenthaler's linotype, which became
available in 1886, as well as large, high-speed presses, and the com-
mon availability of wood pulp for newsprint, all helped revolu-
tionize and further democratize the daily press.

Ironically, yellow journalism's decline can be tied to the New York Journal's treatment of another president. In 1901, shortly af-
after Governor Goebel of Kentucky had been assassinated, the Hearst newspaper ran this incredible quatrain by Ambrose Bierce:

The bullet that Pierced Goebel's breast
Can not be found in all the West;
Good reason, it is speeding here
To stretch McKinley on his bier.

These sentiments were recalled seven months later when the anarchist Leo Czolgosz shot and killed McKinley. Hearst was
hanged in effigy and President Theodore Roosevelt, in his first ad-
dress to Congress, theorized that Czolgosz had probably been in-
spired by "reckless utterances of those who, on the stump and in the public press, appeal to dark and evil spirits." Roosevelt's ire at the press later spurred him to instigate a libel case in 1913 against the editor of the Iron Ore, a weekly paper in Ishpeming, Michigan, whose editor had had the temerity to state that during Roosevelt's "bull moose" campaign in 1912 he habitually became intoxicated. Roosevelt paraded to the witness stand a procession of famous men who swore to his temperance. The publisher apolo-
gized; the judge directed a verdict for Roosevelt for six cents.

No brief survey of scandal and the American press can be complete without mention of The Saturday Press, published in the late 1920s and early 1930s in St. Paul, Minnesota, by Howard Guilford and Jay Near, and its cousin, The Duluth Rip-Saw, whose prosecution as a public nuisance under the so-called Gag Law precipitated the seminal prior restraint case, Near v. Minne-
sota. During Prohibition, bootleggers, shielded by crooked politi-

76. Warren & Brandeis, supra note 72, at 195.
77. See Mott, supra note 69, at 498-501.
78. Mott, supra note 69, at 500-01.
80. Mott, supra note 69, at 541.
81. Mott, supra note 69, at 608.
82. Mott, supra note 69, at 608.
83. 283 U.S. 697 (1931).
cians, were flooding the Twin Cities with "hooch." "These miscreant purveyors of scandal" accused the Minneapolis police chief of failing to pursue a "Jewish gangster" who reputedly controlled gambling, bootlegging and racketeering in the city. Although Near and Guilford may have abused the liberty of the press, "[it] does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct," wrote Chief Justice Hughes for the majority, including Justice Brandeis.84

In more recent history, in post-World War II America, a press far less fractious and much more loyal to the administration looked the other way no matter what Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John Kennedy and Lyndon Johnson were up to. The same hands-off treatment applied to Congressmen. The press knew for fifteen years that Wilbur Mills was a public drunk, but it took Fanne Foxe's little dip in the Tiday Basin on October 8, 1974, to trigger what was then a massive wave of articles focusing on Mills' alcoholism, his initial denial of the problem, and his eventual fall into disgrace.85

What little bit of Ronald Reagan's teflon rubbed off on George Bush worked well enough to cover at least some private parts of his life. Now that we again have a president whose age is close to the median age of most working journalists, the gloves are off.86

If the history of American journalism reflects a certain consistency in the news media's attitude about (other people's) privacy, so too does the legal position of the press, at least as reflected in cases pitting freedom of the press against a right of privacy. The press position has been a fairly consistent one, grounded in the free flow of information and the democratic principles that underlie the First Amendment. Where the public interest is recognized, either by the news media or the court, the press usually prevails.

For example, the quartet of court access cases decided by the Burger Court in the 1980s87 are a clear statement of law and policy

84. Id. at 720.
85. The New York Times indexes for 1974 and 1975 cite nearly 50 articles in the Times related to the incident, Mills' alcoholism, his reelection, and subsequent disgrace following his refusal to cut ties with the stripper.
affirming the public’s right to attend proceedings in the criminal courts. In *Richmond Newspapers*, Chief Justice Burger focused on the long Anglo-American tradition of open courts, stemming from before the Norman Conquest. A more compelling case for access was made by Justice Brennan’s concurring opinion (adopted by Burger in the *Press-Enterprise* cases), examining the First Amendment’s “structural role . . . in securing and fostering our republican system of self-government.”

Brennan used at least four policy arguments connected to the free flow of information to conclude that “public access is an indispensable element of the trial process itself.” First is informed debate: “Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust and wide-open’ (citing *New York Times Co. v. Sullivan*) but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.” Secondly, argued Brennan, Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.

Moreover, he noted, “public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.” Finally, Brennan argued, “publicizing trial proceedings aids accurate factfinding.”

Similar statements reoccur in the other cases in the access quartet. The result amounts to a two-part test for further court examination of issues involving access not only to criminal trials but to governmental proceedings and government information: 1) whether the proceeding has traditionally been open and 2) whether public access plays a significant positive role in the functioning of the particular process in question. The access quartet has led to a

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89. *Id. at 587.*
90. *Id. at 597.*
91. *Id. at 587.*
92. *Id. at 595* (emphasis added).
93. *Id. at 596* (emphasis added).
94. *Id.*
considerable reduction, but hardly a disappearance, of court closures. The question now is the extent to which the access cases support public access to civil proceedings and judicial documents. News media litigants are using Brennan’s structural approach as well as common law and constitutional law arguments for access, but the question has hardly been decided.

Free-flow-of-information values also underlie the news media defense to the tort of publication of private facts, the wrong about which Warren and Brandeis were most concerned. In fact, “the trend in ‘modern’ jurisprudence,” as Justice White pointed out in his dissent in *Florida Star* (not a common law invasion-of-privacy case), “has been to eclipse an individual’s right to maintain private any truthful information that the press wished to publish.”

White also observed:

by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the Court ac-

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96. Id. at 63-115.


Ironically, one of the most scathing attacks on [Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E.2d 442 (1902) (initially refusing to recognize a right of privacy)] was waged by a member of the press and published in the *New York Times* . . . which editorialized:

If there be . . . no law now to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law. Id. at 717 n.91 (quoting *NEW YORK TIMES*, Aug. 23, 1902, at A8).

98. 491 U.S. 524, 553 (1989). In *Florida Star*, a police incident report of a rape, naming the victim, was made available in the press room of the sheriff’s department and was picked up by a cub reporter. The Star published a police-blotter item on the rape, including the victim’s name (B.J.F.), contrary to its own internal policy to not name victims of sexual assaults. B.J.F. sued the Star for negligently violating a state statute automatically imposing criminal liability for news media identification of sexual offense victims. She was awarded $100,000 in a jury trial. On appeal from an appellate affirmance, the Supreme Court held that imposing damages on the Star for publishing B.J.F’s name violated the First Amendment. The Court held that the state statute failed the constitutional test announced in *Smith v. Daily Mail Publishing Co.*, 440 U.S. 955 (1979) because it imparts criminal punishment automatically, even to truthful information lawfully obtained, about a matter of public concern, without any specific determination of whether the prohibition on publication was justified under the particular circumstances presented. The Florida statute in question, FLA. STAT. 794.03 (1989), was held to be unconstitutional in 1991 on an appeal by Globe Communications after it was charged with violating the law by naming the rape victim in the celebrated William Kennedy Smith case. The order was affirmed by the Florida District Court of Appeals on August 4, 1993, in *Florida v. Globe Communications*, Inc., 622 So. 2d 1066 (Fla. Dist. Ct. App. 1993).
cepts appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. . . . If the First Amendment prohibits wholly private persons . . . from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television (footnote omitted).

White was exaggerating for effect; the tort is still the basis for numerous lawsuits. But broad recognition of news media defenses of newsworthiness—and recognition that the press must decide what is news—has led numerous commentators to wonder how much viability the tort has left. As one appellate court recently noted:

We do not think the Court was being coy in Cox or Florida Star in declining to declare the tort of publicizing intensely personal facts totally defunct . . . . The publication of facts in a public record . . . such as the police report in the Florida Star, is not to be equated to publishing a photo of a couple making love . . . .

Yet . . . the implications of those decision for [this] branch of the right of privacy . . . are profound . . . People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.

Likewise, what is sometimes referred to as "source privacy" or reporters' privilege to keep sources confidential, is predicated both on the need to preserve a free flow of information and on the fear that government use of information confided to the press will jeopardize the free flow of information. Justice Stewart, in his "majority dissent" in Branzburg v. Hayes, said that "[t]he reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of

information to the public.”103 Reasoning that the right to gather news was a corollary of the right to publish inherent in the First Amendment, Stewart added that “[t]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source.”104 “Finally, and most important,” noted Stewart, “when governmental officials possess an unchecked [subpoena] power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to ‘self-censorship.’”105 Even though contained in a dissent, Stewart’s three-part test106 for determining whether a reporter can be compelled to give testimony carried the day and has been widely adopted by lower courts.107

The constitutional privilege established in the famous libel case, New York Times v. Sullivan,108 and modified in Gertz v. Robert Welch109 was arguably the most significant press-privacy victory of all, because it allowed the news media far greater freedom to write and broadcast stories about the private lives of public figures by imposing a much higher fault standard of “actual malice.” The Court established the policy that public figures should be subject to public scrutiny, because of their position as opinion leaders or as participants in matters of public interest, and because of their greater access to the press. “[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” Justice Brennan declared in New York Times.110 Politicians, disciples of Darwinian principles of survival, have adapted to the new scrutiny and have developed a new, potentially very effective counter strategy: going straight to the public via the “new media” and cutting out the

103. Id. at 725.
104. Id. at 728.
105. Id. at 731.
106. Id. at 743 (the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (footnote omitted) (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information).Id.
news media in the middle. What does this have to do with privacy? Public officials now have the means of instantly countering bad publicity, in a direct channel to voters, many of whom would just as soon cut out the media, too—and now possess the means to do so.\(^{111}\)

Jerry Brown's 800 campaign number was the opening blow in demediating the media; Ross Perot's windy "infomercials" enlarged the possibilities.\(^{112}\) Clinton adopted the strategy in his campaign's use of talk-show forums and town-hall meetings for direct communication with voters. How much defter, for example, were Bill and Hillary Clinton, in their frontal defense on "60 Minutes" during the 1992 presidential campaign, than was Gary Hart, frozen in time like a buck in the headlights of our national memory?

President Clinton's administration continues to employ plenty of direct-communication strategies. Clinton is the first president to have an e-mail address; all his public statements are put out on computer data services and the White House is working on facilitating two-way communications. Got a gripe? Tap it out on your PC and zap it to clintonpz@aol.com. By the same token, of course, journalists' use of computerized access tools, including the Internet, private networks such as CompuServe and America Online, and CD-ROM and on-line data bases such as InfoTrac and Nexis, have enlarged investigative and data-gathering possibilities.

To be fair, inconsistent and confused attitudes toward privacy are likely to arise simply because privacy is such an amorphous concept, covers such an enormous range of human concerns, and encompasses values that are sure to conflict. Even within tort privacy, there are seemingly irreconcilable differences. The commer-

\(^{111}\) In the Gulf War, CNN provided as close to an unmediated window on events as had been seen to date, but the Internet, the global computer network linking perhaps fifteen million people directly and as many as twenty-five million through private networks, provided a completely unmediated channel of communication that allowed news of Gulf events to travel swiftly to many people. As the author of one popular guide to the Internet notes: Although a bit less glamorous—without the video and the heroic flak-jacketed reporters—the Internet hummed with live bulletins during the Gulf War, as it also did during the Tiananmen Square confrontation, the Soviet coup attempt, the civic uprising in Thailand, the riots in Los Angeles, and the civil war in what used to be Yugoslavia. . . .

. . .

In the Gulf War news coverage, we were the watchers, dependent on a few men and women with cameras and a company with the technology to bring those images home to us. On the Internet, we are the reporters, the viewers, and the production team.


\(^{112}\) See James M. Perry, Party May Be Over for Democrats, Republicans As Candidates Use 'Teledemocracy,' New Media, WALL ST. J., Nov. 4, 1992, at A16.

https://scholarship.law.umt.edu/mlr/vol55/iss1/7
cial appropriation tort is primarily a property interest; at first glance it seems to resemble false-light invasion of privacy or the disclosure of private information about the way that lobsters resemble tight shoes or Italian men in elevators.\textsuperscript{113} False-light privacy, much like defamation, depends on a sense of outrage, but does not require falsity. Intrusion, which requires no publication, depends entirely on invasion of individual autonomy and thus is more closely connected to the penumbral privacy found in home and family decisions.\textsuperscript{114} Like the giant fungus recently discovered in Washington state, privacy underlies a lot of legal acreage. As Oregon associate justice Hans Linde once said, "give . . . lawyers . . . a word like privacy to play with, and they will take it anyplace and do anything with it."\textsuperscript{115} We live in a country that is constantly embroiled in disputes labeled "privacy"—yet we live under a Constitution that does not even mention the word.

A frequent source of legal confusion about privacy stems from the recognition of a right of autonomous privacy. The values inherent in this constitutional right of privacy, derived from the sanctity of the individual and the home, are connected, but not identical, to tort and access privacy.\textsuperscript{116}

In \textit{Griswold v. Connecticut},\textsuperscript{117} the Supreme Court told the state of Connecticut that it did not have any business criminally punishing doctors for giving contraceptive advice to married couples because that intruded into the "sacred precincts of marital bedrooms."\textsuperscript{118} Justice Douglas' famous discovery of an unenumerated but "fundamental" right of privacy in the penumbras of the First,\textsuperscript{119} Third,\textsuperscript{120} Fourth,\textsuperscript{121} and Fifth Amendments,\textsuperscript{122} combined with other justices' simultaneous discovery of privacy in the concept of liberty protected by the due process clause of the Fourteenth and Fifth Amendments and the Ninth Amendment\textsuperscript{123}

\begin{footnotes}
\item[113.] They all pinch.
\item[114.] See infra text accompanying notes 117-29.
\item[117.] 381 U.S. 479 (1965).
\item[118.] \textit{Griswold} 381 U.S. at 485.
\item[119.] \textit{Id.} at 483.
\item[120.] \textit{Id.} at 484.
\item[121.] \textit{Id.} at 484-85.
\item[122.] \textit{Id.}
\item[123.] \textit{Id.} at 486, 499 (Goldberg, J., concurring), 502 (White, J., concurring).
\end{footnotes}
added up to a Supreme Court recognition of a constitutional right of privacy that really amounts to a right of individual autonomy.124

Subsequent court decisions in this field, most famously in the *Roe v. Wade* abortion case,125 extended this autonomous right of privacy to the right to marry,126 the right to choose family members,127 child-rearing decisions,128 and education.129 As opposed to autonomous privacy, grounded in the sanctity of the individual and his or her home, informational privacy (implicated in most press-privacy disputes) is grounded in the individual's right not to have private information evaluated by others without his or her consent.130 But courts have not always been intellectually rigorous in keeping separate the two strands of privacy that may be involved.131 For example, in *Frisby v. Schultz*,132 upholding a general residential anti-picketing law, the Supreme Court bought the autonomy value of the individual's right to privacy in the home, even though the First Amendment values of political speech were strongly implicated in the picketing. By contrast, in *Florida Star*, the Court held that free-flow-of-information values outweighed informational privacy claims, even though core First Amendment values were less strongly involved in the identification of a rape victim.133

Nor have legislatures kept the two privacy concepts straight. For example, the true privacy interest protected in the Privacy Protection Act of 1980,134 limiting newsroom searches, is not immediately obvious. The stated purpose of the act is "[t]o limit governmental search and seizure of documentary materials possessed by persons."135 The strongest interest of the news media seems to be in not being a tool of law enforcement, an objection grounded in the watchdog role of a free press that is institutionally antagonistic to, or at least skeptical of, government. A related interest would be

125. 410 U.S. 113 (1973).
130. See Huff, supra note 124, at 780-82.
131. See Griswold, 381 U.S. at 479; Loving, 388 U.S. at 1; Zablocki, 434 U.S. at 374.
press liberty and freedom from governmental interference in newsgathering. Another interest arises from the forced release of information obtained under a promise of confidentiality, possibly leading to a drying-up of sources and a diminishing of the flow of information. Any true privacy interest, perhaps the vicarious concern for governmental misuse of privately collected information, seems an inferior concern.

The area of citizen or consumer privacy, like Fourth Amendment privacy, derives its philosophical underpinnings from both privacy bases, informational and autonomous privacy. The news media has often warned of the awesome proliferation of data bases of individual information traded, sold, and swapped by government and business, accessed with ease through personal computers. Is that a concern based on informational privacy, the same privacy interest that underlies the arguments of plaintiffs in privacy tort cases, or is it based on autonomous privacy?

On average, according to privacy expert David Linowes, there are at least fifteen federal agency files on every man, woman and child in America and most likely an equal number in the hands of private institutions such as credit bureaus and insurance companies.

Often, the news media is only vicariously involved in citizen or consumer privacy. But at times, its concern is more immediate. When Procter and Gamble wanted to discover the source of an embarrassing leak about company insiders, used as the basis for a story in the *Wall Street Journal*, it subpoenaed tens of millions of telephone call records from two Baby Bells to identify “all 513 area code numbers that dialed the home or office phone number” of the reporter who wrote the story. The *Journal* argued that this sweeping data collection had a chilling effect on its ability to gather news and on the free flow of information.

Law professor Arthur Miller speaks eloquently of the danger of our transmogrification into a dossier democracy, if such an oxymoron can exist. He warns of “a society in which there are no time, space, or quantitative limits on the movement, transfer, and manipulation of information.” Realization that large and powerful

organizations in our society are using data to make decisions about us "creates enormous anxiety as to the accuracy of the information, the currency of the information, the relevance of the information, and the wisdom of the middle-level bureaucrats who manipulate and make decisions based on the information," he notes.  

In fact, some commentators argue, protecting against massive intrusion into autonomous privacy is where privacy law ought to be directed. "Many of the most troubling privacy questions today arise not from the media's wide dissemination of private information, but from the rise of technology that allows for the exchange of computerized information . . . ." says Richard F. Hixson.  

And Diane Zimmerman suggests that:

[privacy law might be more just and effective if it were to focus on identifying (preferably by statute) those exchanges of information that warrant protection at their point of origin, rather than continuing its current, capricious course of imposing liability only if the material is ultimately disseminated to the public at large.]

Judges' personal attitudes about privacy are no less inconsistent. The Supreme Court's broadly worded string of opinions on access to courts was based not only on historical access but on fundamental principles underlying the First Amendment, such as citizen participation in government and citizens' ability to check the power of government through observation of public bodies at work. Yet that civics lesson hardly seems to have swayed Supreme Court prohibition of cameras in the high court.

In addition, further confusion about privacy is likely to arise among many citizens because they are at least as likely, if not more likely, to see the moral and ethical implications of an invasion of privacy by the news media than they are to appreciate the finer legal niceties. Unfortunately, the legal pressures on the media are so enormous that issues which should be decided on ethical grounds often get shoehorned into an acceptable legal pigeonhole by lawyers and judges—definers and limiters by trade. It is just as likely that the inherent caution of the legal review process also kills a lot of perfectly good stories with no troublesome moral or ethical dimensions.

Take the case of Clarence Arrington, the middle-class black


142. See Zimmerman, supra note 100, at 362-63.

143. See Zimmerman, supra note 100, at 362-63.
who sued the *New York Times* unsuccessfully for invasion of privacy for using his photo for the cover shot for a magazine story about how middle-class blacks ignore their less-fortunate brethren.\(^{144}\) How just is it to the average person that Arrington’s recovery—or lack thereof—was determined more by jurisdiction (New York’s very restrictive privacy law) than by perhaps any other factor? What about Oliver Sipple, the gay man in San Francisco who saved the life of President Ford and was then “outed” by columnist Herb Caen—and lost his privacy case, too,\(^ {145} \) because his sexual orientation was deemed “newsworthy”? Or *Florida Star v. B.J.F.*,\(^ {146} \) in which a rape victim named in a newspaper story failed to recover for invasion of privacy? And the woman with Elephant Man disease, cruelly lampooned by two radio disk jockeys, would hardly agree that their thoughtless and hurtful comments did not amount to conduct “highly offensive to a reasonable person.”\(^ {147} \) Each of these opinions has legal reasons for holding for the media, but also suggest very strongly that for the average person, concerns of fairness, responsibility and outrage at invasion of privacy weigh just as heavily, or more so, than the norm of the free flow of information and freedom of the press.

On the other hand, there is probably considerable truth to the observation by historian and sociologist Hannah Arendt that obsession with privacy can be unhealthy. As Arendt observed, the German bourgeoisie during the Nazi period were so obsessed by their right to privacy, to be let alone, that they were most vulnerable to a totalitarian movement. “Nothing proved easier to destroy than the privacy and private morality of people who thought of nothing but safeguarding their private lives.”\(^ {148} \) Obsession with privacy in the legal arena can also be unhealthy when, as Huff points out, it is extended to protecting one’s image by “petty claims to dignitary harms.”\(^ {149} \) With modern information technology,
ject to evaluation. What is troublesome is that it can also be mis-
used to try to protect ‘images,’ which is dishonest and destructive
of the very social relations privacy helps protect.”

In summary, conflicting attitudes and even bald inconsistenc-
ies on the issue of privacy are bound to re-occur because privacy
is so amorphous, all-encompassing and situational. Privacy has al-
ways played a central role in the affairs of mankind and probably
always will. The news media cannot thrive if they don’t pay atten-
tion to the concerns of the readers and viewers and evolve in step
with the times. These days, that means paying more attention to
privacy concerns. But neither can the news media survive if they
are not vigorous advocates of openness and citizen participation.
To yield too much to privacy concerns would be to turn one’s back
on a rich tradition and a lot of hard-won victories in the courts and
legislatures. In the long run, the relationship of the news media to
privacy may change, but it will still remain a complex one, even a
hypocritical one at times. As Mark Twain once said, “History may
not repeat, but it sure rhymes.”