

THE PRIVACY PARADOX

Newsgathering and reporting are hampered by an ever-increasing wall of restrictions erected in the name of protecting personal privacy. The result may be a loss to the public good greater than the protections gained.

CIVIL SUITS

Suing the Media: Individuals have been suing the media over the four standard privacy torts for years, but related claims — such as fraud and intentional infliction of emotional distress — are becoming more popular, as are state laws that give individuals the right to sue for activities like following a newsworthy subject. **Page 3**

GOVERNMENT ACCESS

Freedom of Information Acts and Privacy Exemptions: Limits on access to data contained in government-held files are becoming more common based on claims that release of the information would invade personal privacy. **Page 6**

COURT ACCESS

Judicial Proceedings and Documents: Increasingly, judges, attorneys and parties cite privacy concerns to justify denying access to criminal and civil proceedings, undermining long-established First Amendment and common law rights of access. **Page 10**

ELECTRONIC DATA ACCESS

Will the U.S. try to conform with the European Union's strict Directive on Data Protection? It may already be happening. **Page 14**

Introduction

The news media in the United States have a long-standing history of revealing things that some people would prefer to keep private.

“The press is overstepping in every direction the obvious bounds of propriety and of decency,” complained Samuel Warren and his former law partner Louis Brandeis in 1890.

“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.”

Warren and Brandeis were hardly the last unhappy subjects of American journalism, nor were they the last to propose that the law be used to restrain the media. Throughout American history, individuals have launched innumerable schemes to require journalists to see them as they see themselves, whether by limiting access to embarrassing information or by punishing the press for publishing. Any such effort is necessarily limited in some way, however, by the simple command of the First Amendment: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

Despite the absence of the term “privacy” in the text of the Constitution itself, the Supreme Court has recognized at least some constitutional protection for a “right to privacy.” This sometimes nebulous concept protects the right of people to make their own decisions about birth control, vocation, travel and other issues without government interference. The Constitution also provides explicit protection for certain types of privacy, such as the Fourth Amendment’s prohibition of unreasonable searches and seizures.

However, the Constitution’s prohibitions are directed at state action. Nowhere does it explicitly protect individuals from invasions of privacy committed by private actors, persons and organizations unsupported by the power of the state. Thus, those who wish to manipulate public perception by controlling what others say about them must usually look elsewhere for legal restrictions on what may be learned, spoken or printed.

In recent years, legislatures and courts have been all too willing to

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impose such restrictions. Newsgathering and reporting, protected though they are by the First Amendment, are hampered by an ever-increasing wall of statutes and court decisions erected in the name of protecting personal privacy. Accordingly, journalists must be aware of new restrictions imposed by these laws and how they operate to limit news coverage.

An exaggerated concern for privacy is also seriously interfering with the ability of the media and the public to gain access to personally identifiable information held by the government, weakening the presumption of openness that forms the foundation of freedom of information laws. Courts and legislators often fail to recognize the public interest in making this information available. Journalists use freedom of information laws as a starting point for their investigative work, enabling them to identify trends and uncover corruption or other misconduct of great interest to the American public.

Access to personally identifiable information from government files has made it possible for reporters to uncover groundbreaking stories, such as an account of crimes committed by inmates released early from Florida prisons, a report exposing Indiana

physicians who continued to practice medicine despite having been found liable for malpractice several times and a series uncovering the fact that obsolete night-vision goggles had contributed to the crash of at least 56 military aircraft. After obtaining access to raw information available in government files, reporters can question, analyze and follow-up on their discoveries.

Privacy concerns are also fueling efforts to limit press access to judicial proceedings, where important political and social issues are resolved. Until recently, the public’s access rights to the judicial system were broad. In the absence of a countervailing interest of constitutional dimension, courtrooms were open to anyone interested in attending, and court files available to anyone who asked to see them.

Journalists rely on these access rights to gather and disseminate news about specific trials as well as the court system in general. In turn, the public relies on the press to keep it informed about these matters.

However, with increasing frequency, purported privacy concerns drive efforts to keep judicial proceedings and documents secret. Judges who are concerned about publicity but unable to stop the news media from publishing information lawfully in their possession cut off information at the source by limiting the information available to reporters by sealing documents, conducting closed proceedings and issuing gag orders.

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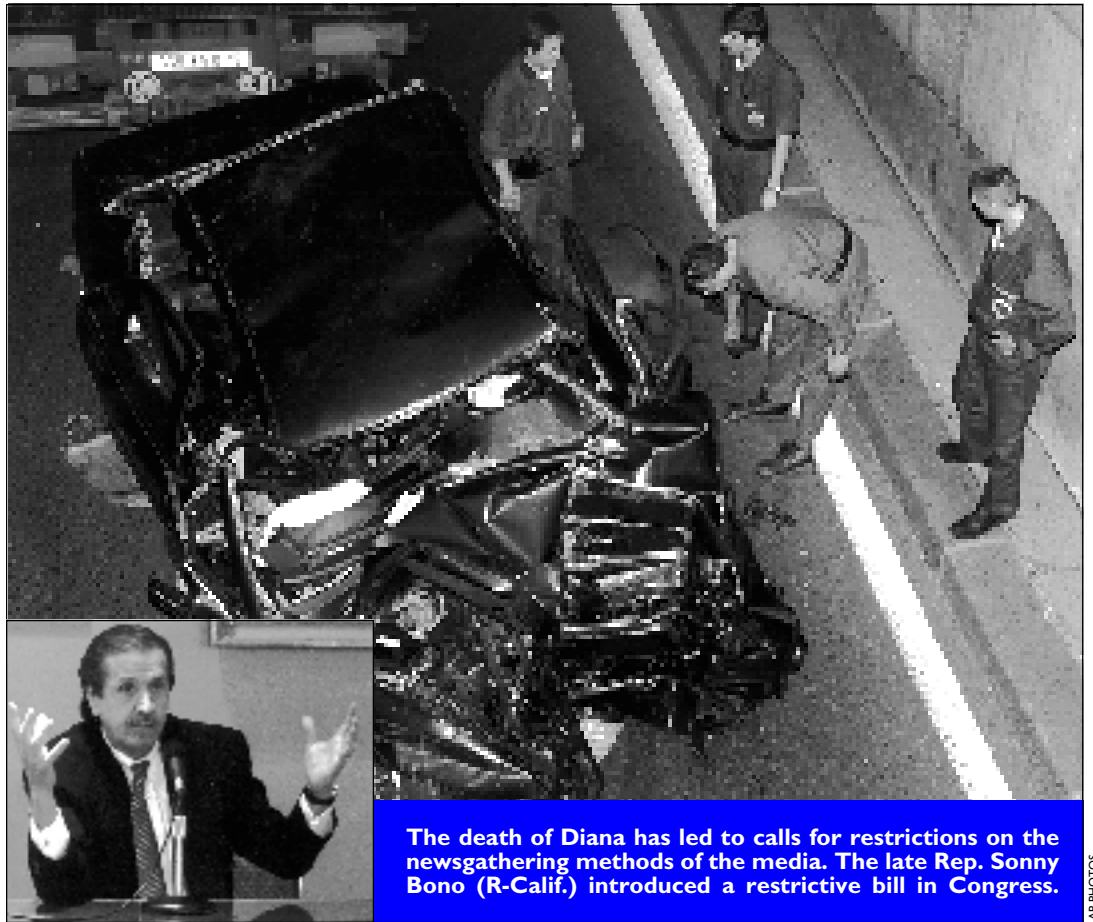
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This trend has serious implications for the public's right to be informed about important issues resolved through litigation in state and federal courts. By limiting public scrutiny, secrecy reduces the accountability of judges and attorneys.

As technology makes information more readily and widely available, growing concerns about privacy rights have triggered myriad efforts to keep "personal" information confidential. This reaction is disastrous for journalists, creating new obstacles to their newsgathering efforts which undermine the First Amendment's free press provisions and freedom of information laws.



The death of Diana has led to calls for restrictions on the newsgathering methods of the media. The late Rep. Sonny Bono (R-Calif.) introduced a restrictive bill in Congress.

AP PHOTOS

Suing the media for invasion of privacy

Samuel Warren and Louis Brandeis were not happy with some of the things they read in the "yellow" press, particularly stories about parties thrown by Warren's wife, "blue blood" items that covered Mrs. Warren's social events in embarrassing detail. So they conceived a new kind of legal theory that would allow private parties to sue the media for invasion of privacy. In a *Harvard Law Review* article, they outlined situations where individuals could turn to the courts to punish the media for reporting news about them. Though the two attorneys envisioned a single cause of action, "invasion of privacy" actually includes four different types of lawsuits: intrusion, disclosure of private facts, false light and misappropriation.

A PRIVACY PRIMER

Intrusion resembles the much older tort of trespass, and prohibits unauthorized entry into an area where a person has a reasonable expectation of privacy, whether or not such entry occurs for

the ostensible purpose of gathering news. Intrusion is the only one of the four traditional invasion of privacy lawsuits to which newsworthiness provides no defense.

For example, in the course of working on a story about the high salaries and extravagant lifestyles of some HMO executives, reporters for "Inside Edition" videotaped U.S. Healthcare chairman Leonard Abramson and his family at work and at home. The "Inside Edition" crew at one point rented a boat, anchored it in a public waterway outside the Abramsons' Florida estate, and used a camera equipped with a telephoto lens and a sensitive microphone to videotape the exterior of the house. Abramson's daughter and son-in-law sued the journalists for intrusion, and a federal district court in Philadelphia, despite recognizing the importance of news coverage of the HMO industry and the people who run it, ordered the "Inside Edition" crew to stop following and

taping the subjects of their story. (*Wolfson v. Lewis*)

Even coverage of persons and events that take place on public property may be considered intrusion in some circumstances. In a recent case in California, a cameraman for the television show "On Scene: Emergency Response" videotaped emergency medical technicians rescuing a woman who had been injured in an auto accident. In the course of covering the story, the cameraman joined rescuers in a helicopter as the woman was transported to a hospital. The woman sued the show's producers for intrusion and disclosure of private facts. Although a lower court dismissed the suit, a state appellate court reinstated the intrusion claim based on the videotaping that took place inside the helicopter itself, holding that once the helicopter's door had shut, the victim could claim a reasonable expectation of privacy. The court's decision is being appealed. (*Shulman v. Group W Productions, Inc.*)

Similarly, wiretapping and eavesdropping are illegal in most states even if done for the purpose of gathering news. The intent to document newsworthy information may nonetheless be an important factor in determining whether or not a particular recording was made illegally. For example, a flight attendant who had served O.J. Simpson on his trip to Chicago hours after the death of his ex-wife sued a reporter who came to her door and interviewed her without informing her that he was recording the conversation. A federal appeals court in San Francisco (9th Cir.) held that because the plaintiff was aware that she was talking to a reporter, she could not have reasonably expected the contents of their conversation to remain private and thus could not sue the reporter for illegal taping. (*Deteresa v. ABC Inc.*)

Disclosure of private facts typically involves the public dissemination of information that is "intimate," highly offensive and of no legitimate public concern. Unlike intrusion, newsworthiness is a defense to a private facts claim, and information of legitimate public concern may not serve as the basis for a private facts lawsuit. For example, the victim of a sexual assault in a jail in South Carolina sued a newspaper for printing his name in a story about the crime. The state Supreme Court held that the man could not prevail because the crime was a matter of public significance. (*Doe v. Berkeley Publishers*)

Disclosure of individuals' medical conditions has sparked a rash of private facts lawsuits. For example, the Colorado and Indiana Supreme Courts recently dealt with cases involving revelation of individuals' HIV status in the workplace. Though both courts concluded that the person claiming invasion of privacy had no valid claim, their decisions were based at least in part on holdings that the people being sued had not spread the AIDS rumors to enough other people to constitute "public disclosure." The news media will have a difficult time relying on this defense. (*Robert C. Ozer P.C. v. Borquez, Doe v. Methodist Hospital*)

False light has been called a "lite" version of libel. Indeed, the two legal theories are so similar that some states do not recognize a separate cause of action for false light. Plaintiffs who sue for false light must prove that the media published something false about them, just as in a libel suit. However, the plaintiff need not show that his or her reputation was damaged, but rather that he or she was falsely portrayed in a manner that a reasonable person would consider offensive. False light is intend-

rately concluded that the actors themselves endorsed the bars. A federal appeals court in San Francisco (9th Cir.) held that a jury would have to determine whether or not the resemblance was close enough to be misappropriation. (*Wendt v. Host International, Inc.*)

Because this tort generally requires a commercial use, news coverage, even when it includes the names and images of celebrities, is usually immune from misappropriation suits because its purpose is to provide information, rather than to promote the sale of a product or service.

OTHER PRIVACY LAWSUITS

The distinct tort of intentional and negligent infliction of emotional distress, as well as the related tort of outrage, are also invoked by plaintiffs in place of, or in addition to, the traditional

privacy torts. Though standards vary from state to state, plaintiffs must generally prove that a member of the news media engaged in extreme and outrageous conduct, causing the plaintiff to suffer severe emotional damage as a result. The U.S. Supreme Court has held that plaintiffs, at least those who are public figures, must prove that the outrageous conduct included a false allegation of fact published with knowledge of its false or reckless disregard for the truth. (*Hustler Magazine v. Falwell*)

However, if the plaintiff is a private individual, the standard of proof may be less rigorous. For example, in 1995 a news crew for a television station in Sacramento, Calif., interviewed three unsupervised children about the murders of two of their playmates. The children did not know their playmates were dead before the reporter told them, and they allegedly suffered severe emotional distress as a result of the revelation. A state appellate court in Sacramento held that a jury could reasonably conclude that the reporter was "bent upon *making* news, not *gathering* it," (emphasis in original) and thus the reporter's questioning of the children might have been outrageous enough to hold the station and its employees liable for intentional

ed to compensate for hurt feelings rather than damaged reputation.

For example, a television program called "Seized by Law" focused on unlawful search and seizures of individuals suspected of trafficking in drugs. The program asserted that African-American males are more likely to be detained by law enforcement than Caucasian males. Video footage accompanying the narration depicted several recognizable African-American males walking through an airport, unimpeded by drug agents. One of the men sued, claiming that the footage coupled with the narration made it appear that he was involved in criminal activity. The trial court, however, ruled that a reasonable person would not have found the segment to be highly offensive. (*Osby v. A & E Networks*)

Misappropriation may occur when a person's name or image is used without consent to promote a product or service. For example, a chain of airport bars decorated to resemble the set of the popular "Cheers" television series attempted to attract customers by installing robots that resembled two characters from the series. The actors who played the characters sued the chain for misappropriation, claiming that the robots resembled them so closely that some people had inaccurately

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infliction of emotional distress. (*KOVR-TV Inc. v. Sacramento County Superior Court*)

Because the right of the media to report the news is a powerful defense against most invasion of privacy suits, in recent years plaintiffs and their attorneys have shown considerable ingenuity in stretching the boundaries of a handful of other torts to attack the media's newsgathering efforts. For example, in 1992, ABC's "PrimeTime Live" broadcast a story about food handling practices at several Food Lion supermarkets. The report included hidden camera footage depicting employees disguising spoiled food so that it could be sold to unsuspecting customers. Though the grocery chain did not dispute the accuracy of the reports in court, it sued the network for fraud and trespass. The chain alleged that the journalists who shot the hidden camera footage had tricked their way into private, "employees only" areas of the stores by obtaining jobs by using falsified references. Although the jury found that the grocery chain suffered only \$1,402 in damages as a result of the journalists' "deceptive" acts, it awarded \$5.5 million in punitive damages. The case is being appealed. (*Food Lion, Inc. v. Capital Cities/ABC*)

A panoply of torts that might appear unlikely to apply to newsgathering and reporting have nonetheless been used against the news media. For example, government officials who violate an individual's privacy may sometimes be sued for civil rights violations. Members of the media, as private parties, typically cannot be. But some courts have concluded that even private entities, if they cooperate too closely with the government, may be considered to be "state actors" vulnerable to civil rights suits as well.

For example, in 1993 a CNN camera crew accompanied agents of the U.S. Fish and Wildlife Service on a raid of a ranch in Montana where the owner had allegedly placed poisoned sheep carcasses where they could be consumed by endangered bald eagles. The rancher, who was convicted of a lesser offense, sued not only the federal agents but also the network for violation of his Fourth Amendment rights.

The U.S. Court of Appeals in San Francisco (9th Cir.) concluded that the CNN employees' involvement with the agents before and during the raid was so extensive that they effectively became "state actors." The case is being appealed. (*Berger v. Hamann*)

LEGISLATIVE EXPANSIONS OF PRIVACY

Federal and state lawmakers have recently passed or considered legislation to expand privacy protection and to curtail more newsgathering activities.

trespassing to include use of "visual or auditory enhancement devices," even on public property, to capture recordings that otherwise could not have been captured without entering private property. A bill proposed by California State Senate Majority Leader Charles Calderon (D-Whittier) would create a 15-foot buffer zone between photographers and their subjects, regardless of how newsworthy that subject happened to be. (*S.B. 14*)

Distaste for other media "excesses" prompted a new Michigan law that prevents photographing corpses in open graves or locations from which



When the traditional libel and privacy claims wouldn't help in their fight against an ABC PrimeTime Live story presented by Diane Sawyer, Food Lion and its president, Tom Smith, chose to sue over claims that ABC employees had committed fraud and trespass to get jobs with the grocery chain and videotape employees' food handling practices. The verdict for Food Lion is being appealed.

AP PHOTOS

The death of Princess Diana prompted some celebrities to propose restrictive measures aimed at the "paparazzi." Rep. Sonny Bono (R-Calif.) introduced a bill in Congress that would impose stiff penalties for "persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure [sic] that privacy." (*H.R. 2448*) Senators Dianne Feinstein (D-Calif.) and Orrin Hatch (R-Utah) announced plans for a bill that would expand civil actions for

recovering a body would be difficult, such as mine shafts and underwater shipwrecks, (*M.C.L. 750.160a*), as well as proposed California laws that would make it illegal to broadcast or publish crime scenes. (*A.B. 1343, A.B. 1500*)

Members of the news media must tread ever more lightly through an expanding field of privacy landmines. Because the law can and does change over time, it is wise to check with an attorney before embarking on newsgathering or reporting that could be considered to violate an individual's right to privacy.

Freedom of Information Acts and Privacy Exemptions

Limits on access to personal data contained in government-managed files are increasing. Courts and legislators cite heightened concern for personal privacy to justify sealing information that once was public.

This may be a reaction to the explosion of information readily available in computer databases. The government is capturing much more information about individuals than ever before. Privacy advocates assert that the risk of invasion of privacy is greater if identifiable information is easily retrieved from computers. The Internet has already become a source for information that once would have been available only through reviewing voluminous paper files located in a government office.

As the private sector finds new ways to obtain information about individuals and to use that information for commercial purposes, a reaction has taken place. One manifestation has been an increase in litigation to establish the parameters of access to personally identifiable information in government files.

Every state, as well as the federal government, has a freedom of information act and open meetings law. Generally, these acts guarantee access to government records and meetings, subject to certain exemptions. Each is a valuable tool for journalists and others who want to know what their government is doing. For example, after interviewing rape victims named in police logs, *San Francisco Examiner* reporter Candy Cooper reported that calls to police for help from rape victims in Berkeley were more likely to be investigated than calls emanating from drug- and crime-infested neighborhoods in Oakland.

But in enacting these laws, legislatures also decided that secrecy is sometimes necessary to protect the

privacy of individuals. Exemptions from the presumption of openness were designed to balance the public's right to know against other competing interests.

Freedom of information laws try to balance the public's right to know and

the individual's right of privacy. They typically do not specify how to do so, leaving the courts to reconcile these interests on a case-by-case basis. Increasingly, state and federal courts appear to favor privacy interests over openness to the detriment of newsgathering efforts by reporters, as the following cases illustrate.

FEDERAL FREEDOM OF INFORMATION ACT

The federal Freedom of Information Act (FOI Act) contains two exemptions that allow an agency to withhold information if it concludes that release would invade the privacy of individuals. Exemption (b)(6) protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." (5 U.S.C. § 552(b)(6)) Exemption (b)(7)(C) applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." (5 U.S.C. § 552(b)(7)(C))

Once an agency decides that the release of information might implicate privacy concerns, it applies a court-

defined balancing test: does the public interest in disclosure outweigh the privacy interest that would be violated by disclosure?

Since the FOI Act was passed in 1966, the Supreme Court has chosen privacy over openness numerous times.

A 1989 decision skewed the balance in favor of privacy. In that case, the Court held that federal agencies may withhold "rap sheets" — compilations of arrests, indictments, convictions or acquittals — on private citizens, even though the information is public at its original source. The Court,

narrowly interpreting "public interest," held that those seeking personally identifiable information from government records must show an intent to use the information to examine the workings of the government. (*Department of Justice v. Reporters Committee for Freedom of the Press*)

Thereafter, the Supreme Court continued to permit agencies to withhold personally identifiable information on privacy grounds. The Court allowed the State Department to refuse to disclose records identifying refugees who were denied asylum and sent back to Haiti. Curiously, the Court found that release of the information might expose the Haitians to persecution or mistreatment, even though much of the information was already in the hands of the Haitian government. (*Department of State v. Ray*)

In another case, the Court held that the home addresses of government employees should not be disclosed to union organizers. The court reasoned that because the addresses do not relate to government operations, their release would not serve the public interest. The Court further noted that people have a privacy interest in their addresses even though the information "is not wholly private." (*Department of Defense*

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v. Federal Labor Relations Authority)

These examples are troublesome because they demonstrate how the presumption favoring disclosure embodied in the FOI Act is becoming subservient to privacy interests. In reshaping the boundaries established by Congress, the Court has restricted access to vital information that could shed light on questionable government activities.

Seven years after the *Reporters Committee* decision, Congress specifically rejected the high court's narrow definition of "public interest" in the Findings Section of the Electronic Freedom of Information Act Amendments of 1996. There, Congress said the FOI Act was intended to serve *any* purpose. The Senate Judiciary Committee Report accompanying the amendments confirms that the Findings section was intended to address concerns that *Reporters Committee* "analyzed the purpose of the FOIA too narrowly." (*S. Rep. No. 272, at 26-27 (1996)*).

STATE FREEDOM OF INFORMATION ACTS

State freedom of information and open meetings statutes also provide exemptions based on grounds of privacy. They are often invoked to seal public employee records.

For example, *The Washington Post* in December sued Maryland Gov. Parris Glendening to force him to turn over appointment calendars and telephone records for himself and three top aides. State officials refused to turn over the records on privacy grounds. Similarly, a complete list of calls billed to Clark County officials' cellular phones was the subject of a lawsuit filed by the *Las Vegas Review Journal*. County officials argued that releasing the records would violate the privacy rights of people who communicate with public officials and would inhibit the frank discussion of policy matters. A state district court judge agreed in early March 1998. (*DR Partners v. The Board of County Commissioners of Clark County*)

Other personally identifiable

information about public employees may be withheld as well. An Arizona television station had used birth date information to verify that a substitute teacher, accused of masturbating in class, was a registered sex offender. The station asked a school district for the birth dates of all full-time and

prompt unwanted personal contacts." The case is on appeal to the state Supreme Court. (*Clymer v. City of Cedar Rapids*)

In granting heightened privacy protections to elected officials and state employees, courts minimize the public interest served by openness. In



Consumer pressure can force private companies to change their policy regarding "private" information. After *The Washington Post* revealed in 1998 that the CVS drug store chain provided prescription information to a company that contacted patients who did not refill prescriptions, consumer outcry led CVS to sever its ties with the company.

substitute teachers to determine whether any other teachers had criminal records. The Arizona Supreme Court held that the teachers' privacy interest in their birthdates outweighed the public's interest in knowing about their criminal backgrounds. (*Scottsdale Unified School District v. KPNX Broadcasting Co.*)

In another case, the *Cedar Rapids Gazette*, investigating employees' use of sick leave, sought city documents revealing public employees' pay records, home addresses, ages, and genders. A district court in Iowa held that the city could withhold the information from the newspaper because it is in "an employee's interest to not publicly disclose personal, intimate information that might

addition, courts are wary of disclosing information assembled into a compilation or computer database, even though identical information is accessible from other public documents.

In what has been described as an "unprecedented" decision, a three-judge panel of the federal appeals court in Cincinnati (6th Cir.) unanimously ruled that the release of undercover police officers' personnel files under the state Public Records Act violated their Fourteenth Amendment right to privacy. A friend-of-the-court brief filed by several news organizations argued that the court of appeals erred in holding that the federal Constitution precludes dissemination of personnel information possessed by the government. "No other federal court has ever

invalidated a state open government law as violating a constitutional right of privacy," the news organizations wrote. A petition for rehearing is pending. (*Kallstrom v. City of Columbus*)

The ruling is extraordinary because it recognizes a federal constitutional right to privacy that threatens journalists' ability to gain access to information about government employees that would otherwise be available under state public records laws. According to Dawn Phillips-Hertz, General Counsel for the Michigan Press Association, the decision "will chill access to information in the hands of government . . . [and] . . . is so broad in its reading that much more than personnel files will be removed from public scrutiny."

State governments also maintain extensive records on members of the general public, whose right to privacy is presumably greater than that of state employees. As a result, some courts have upheld nondisclosure even if the information requested can be obtained from other publicly available sources.

Pennsylvania's Open Records Law exempts records "which if disclosed would operate to prejudice or impair a person's reputation or personal security." In one case, the state used this exemption to withhold addresses, telephone numbers and social security numbers in firearms applications. The court said it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." However, the applicant's name, race, reason for requesting the license and answers to background questions could be disclosed because that information does not implicate privacy concerns. (*Times Publishing Co., Inc. v. Michel*)

Some state courts have ruled that computerized records raise special privacy concerns. The Michigan Supreme Court found that providing a computer tape containing names and addresses of students at a public university "was a more serious invasion of privacy than disclosure in a directory form" because "computer informa-

tion is readily accessible and easily manipulated," even though the same information would later be published in a public directory. (*Kastenbaum v. Michigan State Univ.*)

DRIVER'S PRIVACY PROTECTION ACT

In 1994, Congress passed the Driver's Privacy Protection Act (DPPA) which requires states to limit access to "personal information" in motor vehicle records. "Personal information" is defined as an individu-

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al's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information.

The law's sponsors invoked the 1989 murder of actress Rebecca Schaeffer, whose assailant hired a private investigator to obtain her address from state motor vehicle records, as justification for the statute's enactment. Although some states had previously restricted access to "personal information" in motor vehicle records, the DPPA imposes withholding specific requirements on every state.

The Act requires states to seal personal information in drivers' records, except in certain defined circumstances, or face imposition of a \$5,000 a day fine. However, several categories of requesters, including insurance companies, towing companies, and private investigators, are permitted access. Alternatively, the law allows states to permit public access to the records if they set up an "opt out" system, providing a way for individuals to tell the state not to disclose their personal information. (*18 U.S.C. § 2721-2725*)

In mid-September 1997, two federal district courts in South Carolina and

Oklahoma declared the DPPA unconstitutional. Both decisions relied on the Tenth Amendment, ruling that the act infringed on the sovereignty of the states by directing them to regulate the disclosure of state-controlled records under threat of penalty. The South Carolina court also found that the information sealed by the DPPA is not the type of "personal" information protected by the Fourteenth Amendment. (*Condon v. Reno; Oklahoma v. U.S.*)

However, in March 1998 a federal district court in Alabama ruled differently. The court said that the DPPA does not impermissibly compel states to pass laws or invent administrative schemes to govern their own activities. (*Pryor v. Reno*)

The DPPA took effect on September 13, 1997 and has already resulted in restricted access to motor vehicle records. In late 1997, Maryland drivers rushed to seal all personal information on their driver's licenses (including address, age, height, weight, medical disabilities as well as information about their vehicles), in response to the state's conforming statute. *The Washington Post* reported in early December 1997 that more than 1,000 motorists a day had asked that the motor vehicle bureau seal their records. By mid-February 1998, nearly 14 percent of Maryland's 3.4 million drivers had "opted out," *The Post* reported.

MEDICAL RECORDS

In September 1997, Secretary of Health and Human Services Donna Shalala submitted to Congress proposed medical privacy guidelines, as required by the Kennedy-Kassebaum Act.

The recommendations call for a national standard of confidentiality that would protect patient privacy. Specifically, the report proposes that medical records held by health care payers and providers should be disclosed only when necessary for medical treatment and payment, though it provides exceptions for medical research, public health and law enforcement purposes.

The report recommends criminal penalties for unauthorized disclosure of medical information.

Meanwhile, Congress is considering a major medical privacy law, the Medical Information Privacy and Security Act, that would require entities maintaining medical records to develop written privacy guidelines governing disclosure. The bill would impose criminal and civil penalties upon those who obtain or disclose medical information in violation of its provisions. (S. 1368)

In November 1997, President Clinton endorsed proposals set forth in a Consumer Bill of Rights and Responsibilities. The Bill of Rights, recommended by the Advisory Commission on Consumer Protection and Quality in the Health Care Industry, guarantees confidentiality of individually identifiable medical information.

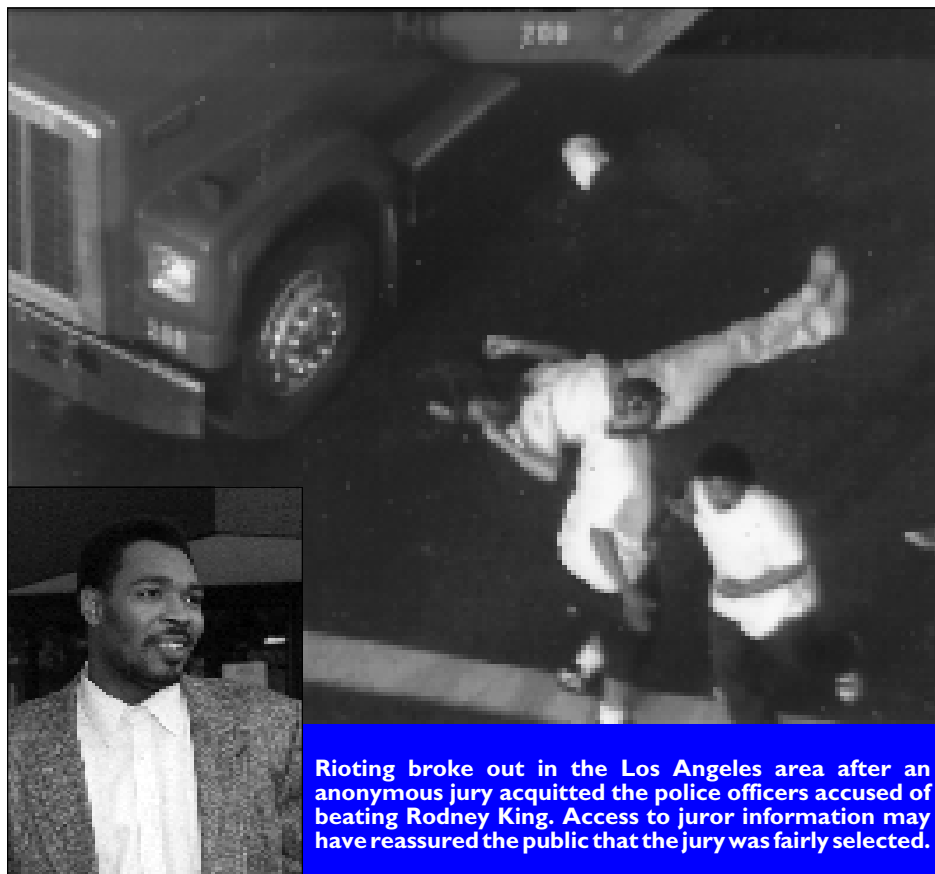
These initiatives present further roadblocks to legitimate newsgathering techniques. Journalists rely on medical information to report on such issues as traffic accidents, disasters and the health of public officials, and to investigate patient abuse and health-care fraud. Access to personally identifiable information allows journalists to present a more complete story to the public. Identification of individuals strengthens the impact and credibility of newsworthy articles. Without such information, reporters cannot probe behind anonymous facts and sanitized details.

Moreover, government regulation of "personal information" may not always be necessary. Consumer pressure can force private companies to change their policy regarding "private" information. For example, public concern about privacy of medical records was heightened in late February 1998 when *The Washington Post* revealed that a drug store chain and a supermarket providing pharmacy services in the Washington, D.C., area provided confidential prescription information to a Massachusetts company that then contacted patients who did not refill prescriptions. In the wake of consumer outcry, the pharmacies severed their ties with the company.

When courts balance the public

interest in disclosure against the privacy interest affected by release, the burden on the requester is a formidable one. It is relatively easy for someone opposing release to argue that disclosure of

personally identifiable information has an immediate negative impact. It can be much more difficult for a journalist to demonstrate how disclosure will ultimately serve the public interest.



Rioting broke out in the Los Angeles area after an anonymous jury acquitted the police officers accused of beating Rodney King. Access to juror information may have reassured the public that the jury was fairly selected.

LOS ANGELES NEWS SERVICE PHOTO

Judicial Proceedings and Documents

CRIMINAL PROCEEDINGS

It is a basic tenet of our jurisprudence that the courtrooms of this country are open to the public. The First Amendment guarantees a right of access to criminal proceedings and related documents. (*Press-Enterprise Co. v. Superior Court* ("Press-Enterprise II")) Therefore, before excluding the public from a criminal proceeding, a court must make specific findings that closure is necessary to protect a compelling governmental interest, and limit secrecy only to the extent necessary to protect that interest. (*Press-Enterprise Co. v. Superior Court* ("Press-Enterprise I")).

Traditionally, courts restricted public access to criminal proceedings principally to protect a defendant's

Sixth Amendment right to a fair trial. For example, during the pretrial phase of the two Oklahoma City bombing prosecutions, U.S. District Judge Richard Matsch sealed a motion to suppress evidence filed by Terry Nichols in order to prevent disclosure about evidence that could be ruled inadmissible at trial. (*U.S. v. McVeigh*)

Increasingly, however, judges, attorneys and court administrators cite privacy concerns to justify denying the public access to criminal proceedings, undermining long-established First Amendment and common law rights of access.

When journalists are unable to attend judicial proceedings, the public is denied access to information that may confirm that the courts are operating properly, or may reveal improprieties.

JUROR PRIVACY

Although jury deliberations are conducted in secret, the public has a right of access to information about jurors and to post-verdict contact with jurors. News reporting about jurors and their reasons for rendering a verdict may help explain a verdict that appeared to the public to be unfair. Access to juror information is similarly useful in cases where the jury verdict is consistent with popular opinion by affirming the fairness of the jury system.

Despite the social utility of access to juror information, judges increasingly are limiting public access to information about jurors, citing concerns about their privacy. In the federal trial of Autumn Jackson, charged with attempting to extort money from Bill Cosby, the judge sealed the transcript of a closed hearing that resulted in the release of a juror. Although neither the defense nor the government sought secrecy, the judge said her sealing order was necessary "to protect the juror's privacy in light of the intense media attention" garnered by the case. (*U.S. v. Jackson*) Such court orders limit reporting about matters of public concern, and elevate privacy concerns over the First Amendment.

JURY SELECTION

The U.S. Supreme Court has held that the First Amendment right to attend criminal proceedings applies to the jury selection process, or *voir dire*, which may be closed only if "the interests of justice so require." Threats to the judicial process, such as jury tampering or a risk of personal harm, may suffice, but personal preference for anonymity is not enough. (*In re Globe Newspaper Co.*) However, courts have held that jurors may ask to be questioned privately if *voir dire* concerns highly personal matters. (*In re Dallas Morning News Co.*)

Increasingly, however, trial judges' concerns about "protecting" jurors from media publicity have compromised the First Amendment right of access. Sometimes trial judges believe that closing *voir dire* will encourage

potential jurors to be more candid. The federal judge presiding over the retrial on fraud charges of boxing promoter Don King closed *voir dire* to the public, holding that "juror privacy" was necessary to ensure the "candor" of prospective jurors in light of trial publicity surrounding the case. The federal appeals court in Manhattan (2d Cir.) recently upheld the decision. (*U.S. v. King*)

On the other hand, the Brooklyn supreme court justice presiding over the trial of Darrel Harris, the first

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defendant to be tried under the state's 1995 death penalty law, held that the jury selection process must be open to the public. However, Kings County Supreme Court Justice Anne Feldman said that jurors who affirmatively request privacy while answering sensitive questions will be allowed to respond out of the presence of the public or media. (*New York v. Harris*)

Courts have also limited press access to the questionnaires filled out by jurors, a source of information used by journalists to describe the jury pool to readers. Until recently, completed questionnaires including questions not asked in court were public, although questionnaires from potential jurors never called were not in most states.

Courts have held that jurors who were erroneously told that their questionnaires would remain confidential should be given the opportunity to fill out a new questionnaire with appropriate alternatives for protecting their privacy. (*Lesher Comm. Inc. v. Contra Costa Superior Court*). And although the judge presiding over Darrel Harris' case held that jury selection would be open, she also ruled that jurors would be given the opportunity to maintain anonymity on questionnaires containing "personal and philosophical" questions.

ANONYMOUS JURIES

An anonymous jury exists when all identifying information about the jurors, such as their names, addresses, ages and professions, is sealed. Often, the jurors will be referred to by number. Until recently, anonymous juries were rarely utilized, limited primarily to cases where a credible threat to the safety or well-being of jurors existed. For example, courts have approved the use of anonymous juries in organized crime trials, where a serious risk to jurors is threatened by people seeking to influence them or to retaliate after a verdict.

In recent cases of great interest to the public, courts have used anonymous juries to protect the jurors' privacy. In November 1997, before Ted Kaczynski pleaded guilty in the Unabomber case, *voir dire* was open to the public, but all identifying information about the 12 jurors and six alternates who were eventually selected was confidential. U.S. District Judge Garland E. Burrell Jr. told the jurors that they would remain anonymous until the end of the trial. News organizations challenged Burrell's decision to the federal appeals court in San Francisco (9th Cir.), arguing that the use of an anonymous jury violated their First Amendment newsgathering rights. The appeal, which continues despite Kaczynski's guilty plea, is going forward, with argument scheduled for mid-May. (*Unabomb Trial Media Coalition v. U.S. Dist. Ct.*)

Anonymous juries were used in both Oklahoma City bombing prosecutions in federal court in Denver, the trials of Branch Davidian survivors of Waco, Oliver North, and the World Trade Center bombers. This is a disturbing trend, particularly in cases of great public interest, because news reports that incorporate information about the jurors help assure the public that the process was fair. For example, an anonymous jury acquitted the police officers accused of beating Rodney King, a verdict that some members of the public dismissed as the result of blatant racial bias. Access to juror information may have reassured the

public that the defendants were convicted by a jury that was unbiased and fairly selected.

The trend toward anonymous juries shows no sign of dissipating and in fact is becoming an accepted practice in some courts. In December 1996, the Los Angeles Superior Court adopted a policy of juror anonymity in all criminal trials, relying on a state civil procedure rule that requires the names of jurors to be sealed following the verdict in a criminal trial. Media groups have lodged complaints with the Judicial Council of California. (*Memo-randum on Juror Confidentiality*)

Not only journalists are concerned about anonymous juries. Defense attorneys worry that anonymous juries stigmatize their clients, by giving potential jurors the impression that the defendants are dangerous, or associate with dangerous individuals.

POST-VERDICT INTERVIEWS

Adding insult to injury, some courts are now imposing restrictions on the media's right to seek interviews with jurors after proceedings have ended. Although such interviews cannot threaten the defendant's Sixth Amendment rights or the jurors' impartiality, courts claim that such orders "protect" jurors from the news media. During the trial in New Jersey last spring of Jesse K. Timmendequas, the man accused of killing 7-year-old Megan Kanka, the judge threatened to jail reporters who attempted to interview jurors in the days immediately following the verdict.

As with access to juror information, post-verdict interviews enhance the fact-finding process by restoring

perceptions about the judicial system. For example, Rev. Wiley Drake, a Buena Park, Calif., minister who was convicted of violating a city ordinance by housing the homeless at his church, sought a new trial on the ground that some jury members did not deliberate in good faith. Local newspapers quoted jurors who disputed Drake's allegation

the newspapers' petition to review the case. (*U.S. v. Cleveland*)

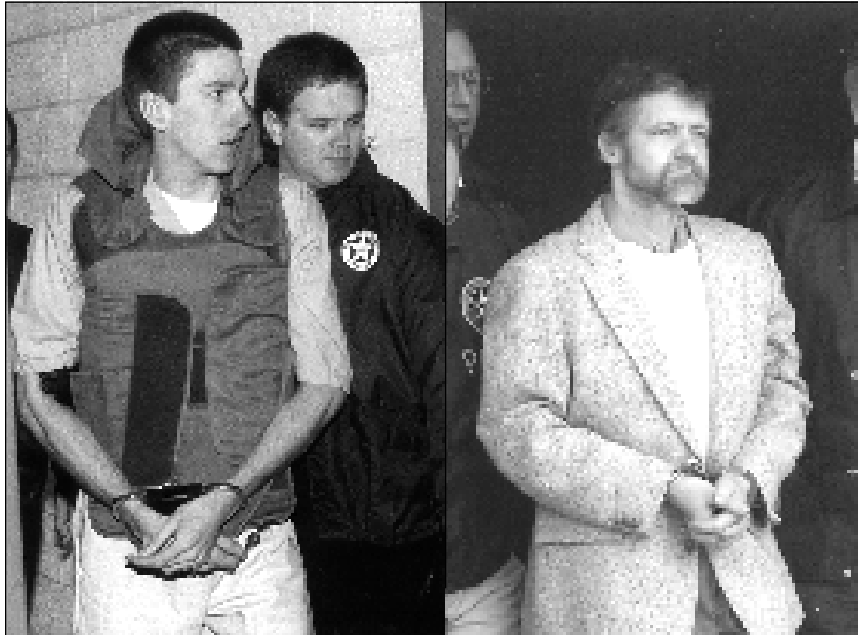
By contrast, a state appeals court in San Francisco reached the opposite conclusion on similar facts, holding that a trial court cannot issue a "blanket order" prohibiting the press from contacting jurors who have been discharged from their duties. In that case, a Contra Costa Superior Court jury found former County Supervisor Gayle Bishop guilty in June 1997 of using county employees to work on her unsuccessful re-election campaign and then lying about it. After the verdict, the judge said that the press was not to contact the jurors after they were discharged because the jurors had expressed to him their choice not to speak about the trial or their deliberations.

The appeals court said that the judge's order was an unconstitutional prior restraint on newsgathering and that the court had no authority to order the news media not to contact the jurors. The

panel distinguished cases where courts have barred parties and attorneys from contacting jurors, holding that judges are "without the power to restrict the press's right to investigate and publish information which it has lawfully obtained." The court noted that the press was not given notice or an opportunity to respond before the judge imposed the restriction. (*Contra Costa Newspapers v. Superior Court of Contra Costa County*)

VICTIMS

The growth of the victims' rights movement has encouraged initiatives to permit victims, particularly those who have been sexually assaulted, to remain anonymous during the prosecutorial process. Most of these efforts have been rejected by the courts on



An anonymous jury was used in the trial of Timothy McVeigh, left, and jurors selected to try Unabomber Ted Kaczynski before he pleaded guilty were promised they would remain anonymous until the end of the trial.

AP PHOTOS

and stated that Drake received a fair trial.

But in November 1997, a federal appeals court in New Orleans (5th Cir.) upheld a district court order barring the news media from questioning jurors about their deliberations after they reached a verdict in a high-profile racketeering trial, holding that intense media scrutiny of the trial justified the restriction. U.S. District Judge Sarah Vance told jurors they could not be interviewed "by anyone concerning the deliberations of the jury" unless she issued an order permitting it. Two newspapers asked Vance to do so, arguing that it was too vague and interfered with their newsgathering rights. Vance declined to modify her order in July, and in mid-April the U.S. Supreme Court denied

Sixth Amendment grounds. For example, in 1997, Romel Reid was charged with 23 offenses involving sexual assaults. Prosecutors in Santa Clara, Calif. sought to restrict discovery in order to protect the victims' privacy. The superior court judge forbade the public defender to contact witnesses in the case, pointing out the "high profile" of the case and the fact that the witnesses had all signed sealed affidavits saying they did not want to talk to the defense.

A state appeals court in San Jose reversed, holding that a trial judge cannot prohibit contact between a defendant's lawyers and investigators and the prosecution's witnesses solely to protect their privacy. The panel rejected the judge's conclusion that "embarrassment" to the witnesses justified denying the defense access to them. (*Reid v. Superior Court*)

JUVENILE PROCEEDINGS

Traditionally, juvenile courts have been closed to the public. As a policy matter, it was believed that youthful offenders should not be stigmatized forever because of one mistake. For example, the Vermont Supreme Court upheld a statute closing juvenile proceedings to the public, holding that publication of information about youthful offenders could impair the rehabilitative goals of the juvenile justice system. (*In re J.S.*)

But high-profile crimes involving minors, such as the March 1998 tragedy in Jonesboro, Ark., have contributed to changes in public attitudes about the juvenile justice system and a youthful offender's right to privacy. More states are opening up their juvenile courts to some degree, citing increases in violent juvenile crime.

For example, court records and proceedings involving youths charged with offenses that would be considered felonies if committed by adults are public in Maryland and West Virginia. Oklahoma and Arizona passed laws creating a presumption of openness for all juvenile records. Last year, an amendment to New York State's court rules created an explicit presumption that family court proceedings are open to the public, and members of the

public were admitted to several high-profile juvenile cases. In July 1997, Westchester County Family Court Judge Howard Spitz in White Plains, N.Y. permitted pool reporters to cover the proceedings involving Malcolm Shabazz, the 12-year-old grandson of Malcolm X and Dr. Betty Shabazz, accused of setting a fire that resulted in Shabazz's death. Spitz said that the proceedings should be open to "preserve the integrity of public proceedings." (*New York v. Shabazz*)

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Similarly, in the highly publicized case of Daphne Abdela and Christopher Vasquez, two 15-year-olds accused of murdering a man in Central Park, a voluntary disclosure form containing summaries of the youths' alleged oral statements made to police officers was unsealed. A state supreme court justice in Manhattan held that the public's right of access to the document outweighed concerns about protecting the privacy of the minor defendants. (*New York v. Abdela and Vasquez*)

CIVIL PROCEEDINGS AND DOCUMENTS

The public's common law right of access to civil proceedings and documents is well-established. (*Littlejohn v. BIC Corp.*) Although the Supreme Court has not explicitly found a constitutional right of access in the civil context, it has stated that the considerations supporting a First Amendment right of access to criminal proceedings also apply in the civil context. (*Richmond Newspapers, Inc. v. Virginia*) Five of the federal circuits have squarely held so. (*Doe v. Santa Fe Indep. School Dist.*) These decisions comport with the notion that the public is entitled to know who is utilizing the courts to resolve civil disputes and to

evaluate how the judicial system adjudicates their claims.

Civil proceedings raise different privacy concerns than criminal matters. Private parties in civil litigation often assert that the dispute is theirs to keep secret, asking judges to grant broad protective orders, impose gag orders and seal court files. But the public has an interest in what takes place in the courtroom, even in civil matters. Issues litigated by private parties often have implications for the general public as well.

For example, in Minnesota, insurance companies seeking a declaratory judgment that they are not responsible for the 3M company's potential liability for damages caused by injuries from silicone-gel breast implants sought and obtained a broad protective order sealing most of the court documents. Two publishers who challenged the broad secrecy order were unsuccessful, despite their argument that the public had a legitimate interest in both skyrocketing insurance costs and unsafe consumer products. (*First State Insurance Co. v. Minnesota Mining & Manufacturing Co.*)

Under the guise of protecting privacy, courts have taken extraordinary measures to prevent the media from publishing lawfully obtained information about civil proceedings. In 1995, a federal court in Columbus, Ohio, without conducting a hearing, enjoined *Business Week* magazine from publishing an article disclosing the contents of discovery documents in a fraud proceeding between Procter & Gamble Co. and Bankers Trust. The trial judge had given the parties broad authority to voluntarily seal any documents they chose. A *Business Week* reporter obtained the documents from an attorney who was a partner at the firm representing Bankers Trust, neither of whom knew that they were sealed. After conducting a hearing several weeks later, Judge John Feikens held that *Business Week* "knowingly violated the protective order" by obtaining the documents and was therefore forbidden to use "the confidential materials that it obtained unlawfully."

The federal appeals court in Cincinnati (6th Cir.) eventually vacated the

injunction, finding it to be an unconstitutional prior restraint on protected speech because it was issued in the absence of a showing that an urgent national security issue, or some other compelling constitutional concern, was at stake. The panel noted that *Business Week* was not a party to the action, and therefore was not bound by the protective order.

The court criticized the trial judge's expansive protective order as well, noting that the federal rules permit the sealing of court documents only in rare circumstances, and that the trial court had not engaged in the requisite inquiry prior to closing them to the public. The court observed that the trial judge had permitted the parties to proceed "based upon their own self-interest," in violation of the federal rules of procedure and the First Amendment. (*Procter & Gamble Co. v. Bankers Trust*)

PSEUDONYMOUS FILINGS

The use of pseudonymous civil filings (documents filed under "John Doe" or another pseudonym) represents a fundamental access issue because it denies the public the right to know who is utilizing the public courts to resolve a dispute.

In 1996, a prominent Illinois attorney accused of sexual abuse in a lawsuit by his niece sought to prevent her from disclosing his identity in court papers. The state trial court granted the attorney's request, based on his assertion that disclosure would result in "embarrassment, humiliation and detriment to his reputation" and relationship with his family.

The appeals court in Chicago reversed, holding that absent exceptional circumstances, parties must identify themselves in court documents. The court said that privacy interests outweigh the public's access rights only in "exceptional" circumstances. The attorney appealed to the Illinois Supreme Court, which refused

to review the case in December 1996. (*Reznick v. Hofeld*)

In a Pennsylvania case, on the other hand, a woman who was raped at a train station sought to keep her identity a secret by moving to seal the judicial record of her civil suit against Amtrak. The court, after balancing the interest of the woman's privacy against the public's interest in access to the information in the trial transcript, held



Reporter Kirsten Mitchell, left, was held in contempt of court after publishing details of an agreement in a court file. Another court barred the news media from questioning jurors about their deliberations in the high-profile racketeering trial of Louisiana state Sen. BB Rayburn, right, and others.

PHOTO BY KAREN TAY (MITCHELL); AP PHOTO (RAYBURN)

that sealing the record was proper. The court explained that rape is a "serious violation of a person's body as well as dignity," and "stirs many different emotions." The court particularly noted that, as a civil case, the proceeding did "not appear to involve issues of a public nature." (*Doe v. Nat'l Railroad Passenger Corp.*)

By contrast, a federal judge in Manhattan refused to allow the victim of a sexual assault to prosecute a civil suit for damages under a pseudonym. Recognizing that the plaintiff had "very legitimate privacy concerns," the court nonetheless found that because the plaintiff had chosen to bring the lawsuit, "fairness requires that she be prepared to stand behind her charges publicly." (*Doe v. Shakur*)

SECRET SETTLEMENTS

Secret settlements in civil litigation are becoming commonplace. Often parties to litigation make confidentiality

a condition to any settlement they reach. This is particularly true in cases where a defendant must pay damages. As a result, cases of great interest to the public can be settled secretly, and the public will never learn the terms of the resolution.

For example, a federal judge in Albany, N.Y. denied a newspaper's request for access to settlement conferences and related documents under seal, by agreement of the parties, in a toxic tort lawsuit against General Electric. Although the court acknowledged that there was a significant public interest in the negotiations, the judge said that secrecy is crucial to successful settlements. The court observed that the public benefits when parties settle, and this benefit outweighed the public's right of access to the information in this case. A local newspaper is appealing the decision to the federal appeals court in Manhattan (2d Cir.). (*U.S. v. Town of Moreau*)

In another environmental case, Conoco Inc. and trailer park residents who alleged that Conoco had contaminated their water supply entered into a secret settlement. After publishing the details of the agreement which had been erroneously included in the court file provided by a court clerk, reporter Kirsten Mitchell was held in civil and criminal contempt, and her newspaper, the *Wilmington Morning Star*, in civil contempt. Mitchell and the *Morning Star*, who were jointly fined \$500,000, have appealed to the federal circuit court in Richmond (4th Cir.). (*Ashcraft v. Conoco, Inc.; appealed as Wilmington Star-News, Inc. v. Conoco, Inc.*)

The lack of access to settlement information is most troubling in cases where the defendant is a public entity, because any settlement will be funded by taxpayer dollars or other public monies. During a class action lawsuit filed in connection with an inmate riot at an Ohio state prison, *The Cincinnati Enquirer* sought access to a summary jury trial, a non-binding proceeding conducted to persuade the parties to

settle the litigation in accordance with the jury's reaction. The court held that the media's right of access does not attach to summary jury proceedings because their purpose is to encourage settlement. The court thus found that the parties had a legitimate interest in confidentiality, even though the government was involved in the proceeding. (*In re Cincinnati Enquirer*) Such decisions impede the public's ability to monitor government operations and the decisions made by elected and appointed officials.

COMPUTERIZATION OF JUDICIAL DOCUMENTS

Journalists routinely utilize the Internet and other electronic databases in the newsgathering process.

With varying degrees of enthusiasm, state and federal courts are embracing the computer age, and computerized court records make information readily and easily accessible without having to make a trip to the government building where the documents are housed.

But the convenience of computerized access to court records has prompted privacy advocates to voice concerns, and, as a result, some government officials and court administrators treat computerized information differently from printed documents. For example, when the federal district court in Brooklyn, N.Y. established procedures for the electronic filing and retrieval of legal filings in some civil cases, it allowed litigants to apply for an order prohibiting such filing if privacy interests would be prejudiced. These provisions appear to expand the court's power to seal discovery and other judicial documents beyond the limitations of the federal rules and the courts' inherent authority to manage their cases.

Streamlined access to court documents formerly available only through laborious searches of paper records have also triggered privacy concerns, as a 1994 California controversy illuminates. A private company that sold criminal background information to the public asked the Municipal Courts of Los Angeles County to provide a monthly list of every person against whom criminal charges were pending in the 46 municipal courts. The court denied the company's request, even though the information sought was public, holding

that "[w]hile there is no question that court proceedings should not be conducted in secrecy, the public's right to information of record is not absolute. Where that right conflicts with the right of privacy, the justification supporting the requested disclosure must be balanced against the risk of harm posed by disclosure." (*Westbrook v. Los Angeles*

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County)

Similarly, unserved arrest warrants, public under Maryland law, were included in a newly established database of computerized court

records. Defense attorneys began soliciting clients by sending mass mailings to individuals wanted by the police, sometimes notifying suspects before officers had a chance to arrest them. Law enforcement officials claimed that the lawyers were endangering police officers and giving suspects a chance to flee, destroy evidence or intimidate witnesses before their arrest.

In mid-January 1998, the state judge's Standing Committee on Rules of Practice and Procedure recommended keeping unserved arrest warrants secret for 90 days prior to posting them on the database, rejecting a subcommittee recommendation to permanently close such warrants. The Maryland Court of Appeals will review the proposal for several months before deciding whether or not to adopt it.

Emerging Issues

As troubling as the many domestic initiatives to curtail the rights of the press and the public in the name of protecting privacy may be, one of the most potent threats to newsgathering actually comes from Europe.

In 1995, the European Union adopted a sweeping Directive on Data Protection, which is intended to harmonize privacy provisions among the disparate member states. Among other things, it requires any entity, public or private, that handles personally identifiable information to comply with strict regulations dubbed "fair information practices." Among the mandates are guaranteed rights for individuals to see and correct any information about themselves and to opt out of databases, as well as limitations on the use of data for purposes other than those for which it was originally collected. The Directive also requires each country to create a supervisory authority to administer and enforce the privacy laws.

Although the Directive in itself does not apply to the United States, it will prohibit member states from transferring personally identifiable information into or out of countries that do not

have "conforming" legislation as of October 1998. And the Europeans believe that the United States, with its patchwork of federal and state open records and privacy laws, does not begin to comply with the rigorous standards dictated by the Directive, and that it will take significant changes in the law to achieve the required level of security.

The threat of a data embargo has prompted American industry to scramble to adopt codes of conduct that would mirror the European Directive's requirements. But it is unclear whether the self-regulatory approach will satisfy the EU. And in the meantime, privacy advocates have hopped on the European bandwagon and are warning the Clinton administration and members of Congress that the United States will be frozen out of electronic commerce if it does not move swiftly to enact conforming legislation and create a federal privacy commission to enforce it.

The Federal Trade Commission has been particularly active in this area, holding a series of workshops on "consumer information privacy" in the summer of 1997, where it critically

examined the growing commercial industry that markets computerized directories containing a variety of personally identifiable information ranging from addresses and telephone numbers to credit ratings and sales transactions. The commission exercised its formidable power to intimidate a number of vendors into “voluntarily” agreeing to withdraw some of their more controversial offerings from the marketplace. Although Congressional hearings in March 1998 revealed that at least some members question whether the FTC actually has authority to regulate the private collection and use of personal data, the Commission has shown no signs of backing off.

In any event, elements of the European Union Directive have already begun to influence lawmaking in the United States. The Driver’s Privacy Protection Act is perhaps the first American attempt to replicate the terms of the Directive, requiring states to provide their citizens with the right to “opt out” of motor vehicle master databases before the information can be made available to the public. And in Utah, the state’s Information Technology Commission has proposed that the

existing privacy law be amended to impose criminal liability on anyone who reports, among other things, an individual’s name, address, age, race, criminal history, educational or employment background, or personal views unless the individual “unambiguously consents in writing.” (*Personal Information Privacy Amendments*)

Although neither the Utah law nor the federal Driver’s Privacy Protection Act contains any exception for journalists, the European Data Protection Directive does permit governments to prescribe exemptions for those processing data for “journalistic purposes.” But this presents two difficulties. The first involves allowing the government to define who is or is not a journalist — an undertaking that would seem to be proscribed by the First Amendment, and which would be a formidable task in view of the explosion of voices utilizing new media of communication such as the Internet.

The second problem goes to the essential question of whether the government has any business regulating the exchange of truthful information in the first place. Certainly governmental entities may control their own collection and release of

personal information within the bounds of constitutional principles of public oversight. But it could be argued that the First Amendment precludes government interference in the exchange of this information between private entities.

As we have seen, courts increasingly recognize the authority of legislatures and the judiciary to attempt to strike a balance between competing interests of privacy and the free flow of information. Increasingly, the balance has favored the side of prior restraints and secrecy.

The advent of the Information Age promised an explosion of data, readily available to anyone with access to a computer and a modem. Ironically, this ease of retrieval is now being used to justify restrictions on access to and dissemination of information which by law or by long-standing practice had previously been freely available.

To stem this rising tide of increased secrecy in the name of privacy, journalists must be prepared to make the case for openness and free expression — bedrock principles of our democracy. Unless they do, the inevitable result will be that the public’s right to know will be irrevocably eroded. ♦

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- A.B. 1500 (Cal. 1997) (crime scene reporting)
- California Civil Code of Procedure § 237
- Directive 95/46 of the European Parliament and of the Council of Oct. 24, 1995 (Data Protection Directive)
- New York Uniform Rules of the Family Court § 205.4 (1997)
- H.R. 2448 (1997) (Rep. Bono's paparazzi bill)
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