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# PRIVACY AND THE PRESS IN THE NEW MILLENNIUM: HOW INTERNATIONAL STANDARDS ARE DRIVING THE PRIVACY DEBATE IN THE UNITED STATES AND ABROAD

Jane E. Kirtley\*

In 1890, an American attorney named Louis D. Brandeis was fed up with what he saw as the excesses of the popular press in Boston, Massachusetts. Gossip columns regaled the *hoi polloi* with insolent and insinuating details about the doings of their socially-prominent betters, including the wife of Brandeis's law partner, Samuel D. Warren. The stories were truthful—if snide—so suing for libel was not an option.

Instead, Warren and Brandeis did what any enterprising and outraged lawyer would do. They wrote a scholarly article, which they published in the *Harvard Law Review*.<sup>1</sup> They advanced the following:

The press is overstepping in every direction the obvious bounds of propriety and 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.<sup>2</sup>

Brandeis and Warren further asserted that not only were these stories embarrassing to their news subjects, but the stories degraded the readers as well.

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.<sup>3</sup>

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

2. *Id.* at 196.

3. *Id.*

The law partners concluded that the ideal solution would be to create a new legal theory, a "right to be let alone," to be recognized at common law.<sup>4</sup>

Of course, Brandeis and Warren were not the first to conclude that the gutter press was going too far, with their new-fangled "mechanical devices" that could record conversations and cameras that produced "instantaneous" pictures. As they recognized, lawsuits in England had already prevented the exhibition and distribution of copies of photographic portraits without the subject's consent.<sup>5</sup>

Nor did the law partners invent the concept of "privacy." They acknowledged that France already had recognized the right to "*la vie privée*" in its 1868 press law.<sup>6</sup> Nevertheless, Warren and Brandeis decided to create a distinctly American remedy for this most offensive practice, sounding in tort "in all cases," with the option of recovering monetary damages, and in equity, in the form of an injunction, "in perhaps a very limited class of cases."<sup>7</sup> Courts in the United States initially were reluctant to embrace this new legal theory. The New York Court of Appeals refused, in a 4-3 decision, to recognize a common law remedy for the unauthorized use of a young woman's image in an advertisement in *Roberson v. Rochester Folding Box Co.*<sup>8</sup> Congress did nothing to enact laws to codify the privacy rights proposed by Warren and Brandeis, and, for the most part, state legislative action was limited to statutes that would protect an individual's right to safeguard his name and image from commercial exploitation.

Yet with one law review article, this pair of Boston lawyers lit the slow fuse on a time bomb that took about 100 years to explode. When it did, the impact was felt around the world.

A variety of international human rights declarations and conventions created after the Second World War recognized that privacy—traditionally defined as a person's family life, home, and correspondence—is a fundamental right.<sup>9</sup> Preservation of personal

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4. See *id.* at 195 n.4. Although scholars often credit this phrase to Warren and Brandeis, apparently Judge Thomas Cooley first coined it. See *id.* 195 at n.4.

5. See *id.* at 202.

6. See *id.* at 214 n.1.

7. Warren & Brandeis, *supra* note 1, at 219.

8. 64 N.E. 442, 447-48 (N.Y. 1902).

9. See, e.g., Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 8(1) (visited July 6, 2000) <<http://www.coe.fr/eng/legaltxt/5e.htm>>; Office of the United Nations High Commissioner for Human Rights, *Universal Declaration of Human Rights*, art. 29 (visited July 6, 2000) <<http://www.unhchr.ch/udhr/lang/eng.htm>>.

privacy, often subjectively defined, was perceived as essential to functioning within a democratic society, justifying the enactment of comprehensive privacy legislation regulating all sectors of society.<sup>10</sup>

Meanwhile, in the United States, William Prosser had catalogued four distinct forms of "invasion of privacy" in the *Restatement (Second) of Torts*: physical intrusion into the individual's seclusion,<sup>11</sup> public disclosure of facts that are not deemed "newsworthy,"<sup>12</sup> portrayal of an individual in a false light,<sup>13</sup> and misappropriation of a person's name or likeness.<sup>14</sup> In the states, legislatures enacted statutes ranging from broad declarations of general rights to privacy, to codifications of one or more of the common law torts, to sectoral-specific regulation.<sup>15</sup>

Inevitably, the rights of the news media to gather and report news, and to inform the public, collided squarely with this "fundamental" right of privacy. In the United States, at least, repeated skirmishes between proponents of these seemingly irreconcilable interests were generally resolved in favor of the press, at least if the publisher had lawfully obtained truthful information which was arguably newsworthy.<sup>16</sup>

By 1990, the conflict began to come to a head. Much of the debate was driven by the same factors that had influenced Warren and Brandeis—brash, sensationalistic media who trafficked in salacious stories about the rich and powerful, and who utilized sophisticated photographic and recording equipment to capture their subjects in embarrassing and compromising situations. The British Parliament, for example, launched fact-finding committees to examine the need for new legislation to criminalize the use of surreptitious surveillance devices in newsgathering,<sup>17</sup> and a Press Complaints Commission ("PCC") was created to allow citizens to air their grievances about press misconduct.<sup>18</sup>

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10. See Peter P. Swire & Robert E. Litan, *Avoiding a Showdown Over EU Privacy Laws Policy Brief #29—February 1998* (visited July 6, 2000) <<http://www.brook.edu/comm/PolicyBriefs/pb029/pb29.htm>>.

11. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

12. See *id.* § 652D.

13. See *id.* § 652E.

14. See *id.* § 652C.

15. See Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights*, 44 FED. COMM. L.J. 195, 210-19 (1992).

16. See FRED CATE, *PRIVACY IN THE INFORMATION AGE* 70 (1997); see also Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1196-99 (1990).

17. See REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, 1990, Cmnd. 1102, at 1, 64-65.

18. See Louis Blom-Cooper, *Freedom and Responsibility*, 3 INDEX ON CENSORSHIP 2, 3 (1992); Brian MacArthur, *Deadline Looms as Editors Press On with Reform*, SUNDAY TIMES (London), Jan. 6, 1991, § 3 at 8 (quoting Louis Blom-Cooper).

But it was not until 1997, following the death of Diana, Princess of Wales, in a car crash in a Paris tunnel while she and her companions were attempting to dodge a pack of *paparazzi*, that public support for new restrictions on reporting about individuals really took hold. Using Diana's death as a pretext, the European Parliament scheduled an "emergency" debate on strengthening privacy laws, and its Culture and Media Committee asked the European Commission to launch a comparative study of existing legislation with the aim of developing an international "code of conduct" for the news media.<sup>19</sup> The PCC declared that British newspapers should stop buying *paparazzi* photographs obtained "illegally or unethically."<sup>20</sup>

In the United States, flurries of bills were introduced in Congress and in several states to invent a new crime of "harassment," to create buffer zones around famous people, and to authorize official inquiries into journalistic behavior.<sup>21</sup> In the frenzy to curb media conduct and coverage that some found distasteful, the state of Michigan adopted a law that prohibits photographing corpses in open graves or at disaster scenes, such as underwater shipwrecks, from which it would be difficult to recover the body.<sup>22</sup>

Although much of the initial hysteria about intrusive news coverage died down in relatively short order, more enduring privacy concerns continued to fuel efforts to restrict both newsgathering and reporting. Generally, this restriction took the form of trying to force the press to act in accordance with someone's idea of "responsibility." Unfortunately, in too many cases, "responsibility" translates into quiescence and self-censorship.

In 1999, the Hong Kong Law Reform Commission published its proposal to establish a statutorily-created (but supposedly "independent") Press Council with the mandate of "protecting" citizens from the excesses of the news media.<sup>23</sup> Among other things, the Council would draft a mandatory privacy code, hear complaints, and levy fines against news organizations who violate the code.

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19. See Leayla Linton, *Diana's Death to Spur Media Curbs?*, NAT'L L.J., Sept. 22, 1997, at A18.

20. Dan Balz, *British Newspaper Editors Endorse Rules Curbing Harassment by Media*, WASH. POST, Sept. 26, 1997, at A21.

21. See, e.g., H.R. 2448, 105th Cong. § 1 (1997); S. 1777, 1997-98 Reg. Sess. (Cal. 1998); S. 1379, 1997-98 Reg. Sess. (Cal. 1998).

22. See MICH. COMP. LAWS § 750.160a(1) (2000).

23. See LAW REFORM COMMISSION OF HONG KONG, SUB-COMMITTEE ON PRIVACY, CONSULTATION PAPER ON CIVIL LIABILITY FOR INVASION OF PRIVACY (1999).

At about the same time, alleged concerns about protecting the rights of persons held in police custody prompted introduction of a French bill to prohibit photographs of individuals wearing handcuffs.<sup>24</sup> The same bill also makes it a crime to publish images of crime scenes if doing so would "compromise" the dignity of a victim.<sup>25</sup> And a proposed press law passed by the Senate in the Czech Republic later that year obliges news organizations which accurately report truthful facts that "infringe the privacy of a legal entity" to publish that legal entity's response.<sup>26</sup>

Laudable proposals these might be, at least to some eyes. After all, who can oppose a statute purporting to uphold the sacred presumption of innocence? Who can object to a law attempting to shield crime victims from public ridicule? Who can disagree with a law demanding that news organizations be "fair"? Who can be against privacy?

The problem with these proposals, as well as all the virtually identical measures contemplated elsewhere, including in the United States, is that they provide individuals, through the instrumentalities and often with the complicity of the government, the power to control the content of news reporting. News subjects are often selectively reclusive and reluctant. They would far prefer to keep intact their preferred public persona, rather than allow a persistent press to shatter a carefully-cultivated illusion. These laws give them the license to do so.

This scenario is troubling enough when it serves the purposes of celebrities and other public figures who merely capture the public's curiosity and imagination. It is downright dangerous when it serves public officials, who may have reasons of their own, only tangentially related to legitimate privacy, to try to hide the truth from the public.

In addition to legislation designed to directly regulate the conduct and editorial judgments of journalists, the dawn of the computer age has heralded an eruption of efforts to restrict the collection, retention and distribution of "personal" data, by news organizations as well as other businesses, all in the name of protecting privacy.

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24. See *Project de Loi Renforçant la Protection de la Presomption d'Innocence et les Droits des Victimes*, Presentation en Conseil des Ministres (1998) (Fr.); Charles Trueheart, *French Plan to Curb Candid Cameras Sparks Controversy*, WASH. POST, Sept. 21, 1999, at A13. The French senate passed the bill on May 30, 2000. See Jon Henley, *French Media Fury at Privacy Laws*, GUARDIAN, June 1, 2000, at 19.

25. See *Project*, *supra* note 24.

26. *Government Bill Act on the Rights and Obligations in Publishing of Periodical Press and on Amendment of Some Other Acts* (1999) (Czech Rep.).

The European Union's 1995 Data Protection Directive<sup>27</sup> is possibly the most influential and far-reaching initiative to control the dissemination of news ever conceived. It allows "data subjects" unprecedented rights to exercise dominion over information that uniquely identifies them, including everything from government identification numbers to physical, economic and cultural characteristics such as race, ethnicity, religion, or political affiliation.<sup>28</sup>

Among other things, the Directive requires "processors" of data<sup>29</sup> to notify individuals of how they will use information collected about them,<sup>30</sup> as well as give the subjects the right to approve or veto those uses, gain access to databases containing the information, and demand copies, corrections, or deletions<sup>31</sup>—most or all of which would be irreconcilable with the practice of journalism as we have known it in the United States.

It is true that the Directive includes an exemption of sorts for those engaged in data collection for "journalistic purposes."<sup>32</sup> But the exemption is by no means absolute. It applies only to the extent necessary to "reconcile the right to privacy with the rules governing free expression"—whatever those "rules" may be—and of course, only to those who can prove that they are "journalists" entitled to invoke the exemption.<sup>33</sup> One German data commissioner has written that it is "self evident that not everybody can declare himself to be a journalist in order to profit from exemptions from the general data protection legislation."<sup>34</sup>

As the effective date of the Directive loomed, the Clinton administration attempted to persuade the European Union to accept a government-created "safe harbor" principle, allowing United States companies to continue to self-regulate, "voluntarily," their collection, storage, and use of personal data—an approach characterized by some

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27. See EUR-OP, *EUR-Lex Community Legislation in Force—Document 395L006* (visited July 5, 2000) <[http://www.europa.eu.int/eur-lex/en/lif/dat/1995/en\\_395L0046.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html)>.

28. See *id.* art. 2(a).

29. See *id.* arts. 2(b), 2(d).

30. See *id.* art. 18.

31. See *id.* arts. 12, 15.

32. See *id.* art. 9.

33. EUR-OP, *EUR-Lex Community Legislation in Force—Document 395L006* art. 9 (visited July 5, 2000) <[http://www.europa.eu.int/eur-lex/en/lif/dat/1995/en\\_395L0046.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html)>.

34. Stefan Walz, *Relationship Between the Freedom of the Press and the Right to Informational Privacy in the Emerging Information Society*, 1, 5, in 19TH INTERNATIONAL CONFERENCE OF PRIVACY DATA PROTECTION COMMISSIONERS, BRUSSELS, BELGIUM (1997).

European officials as "some kind of fox guarding the chicken coop."<sup>35</sup> Nevertheless, by March 2000, it appeared that a rapprochement would be reached. Under the Safe Harbor agreement, a company in the United States would be permitted to choose one of four methods of complying with the Directive: accepting the authority of an EU member state's data protection agency; demonstrating that it is subject to federal privacy laws considered comparable to the Directive; agreeing to be monitored by an organization regulated by the Federal Trade Commission; or submitting to the jurisdiction of European regulators in any privacy disputes.<sup>36</sup>

Despite the triumphant statements of United States Undersecretary of Commerce David Aaron and European Commissioner Director General John Mogg that a "breakthrough" had occurred,<sup>37</sup> Europeans continue to be skeptical that the American approach will satisfy their privacy concerns.<sup>38</sup> Perhaps they need not worry unduly, however. Whether driven by the desire to conform with the Directive, or by separate and discrete concerns about personal privacy, United States law is rapidly moving toward European-style solutions to the privacy "problem."

Consider, for example, two recent decisions of the Supreme Court: *Condon v. Reno*<sup>39</sup> and *Los Angeles Police Department v. United Reporting Publishing Corp.*<sup>40</sup> The opinions in both cases, authored by Chief Justice William Rehnquist, do not bode well for the news media's ability to gain access to personal data contained in public records.

In *Condon*, the high court unanimously rejected a Tenth Amendment challenge, brought by several states, to the Driver's Privacy Protection Act ("DPPA").<sup>41</sup> This statute requires all state agencies responsible for maintaining drivers' and motor vehicle records to

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35. Deborah Hargreaves, *Progress in Talks Over Data Privacy*, FIN. TIMES, Feb. 23, 2000, at 8.

36. See Dep't of Commerce, *Draft International Safe Harbor Privacy Principles* (visited July 5, 2000) <<http://www.ita.doc.gov/td/ecom/redlinedprinciples31600.htm>>; David L. Aaron, *March 17, 2000 letter* (visited July 5, 2000) <<http://www.ita.doc.gov/td/ecom/aaron317letter.htm>>.

37. *U.S.-EU Joint Press Briefing: Data Protection Discussions*, Brussels, Belgium (Feb. 22, 2000).

38. As one journalist put it, "It's my impression that the discussion with the American side is being surrealistic to some extent because the aim is to protect data, but at the same time we know there are massive violations to our privacy by the Americans . . . ." *Id.*

39. 120 S. Ct. 666 (2000).

40. 120 S. Ct. 483 (1999).

41. See 18 U.S.C. §§ 2721-25 (1994 & Supp. 1998).



prohibit release to the general public unless record subjects affirmatively "opt in" to the master database.<sup>42</sup> Although certain public and private actors such as courts, law enforcement officers, insurance companies, tow truck operators, and commercial trucking employers would be permitted continued access, journalists would not.<sup>43</sup> Several states chafed at these strictures, in part because they represented a significant federal incursion into public records policy, and in part because they feared the loss of substantial revenue derived from the sale of motor vehicle records to any and all requesters.<sup>44</sup>

In defending the statute in these challenges, the federal government argued that the DPPA would enforce a constitutional right of privacy that "automobile owners and operators [reasonably expected in] their names, addresses, and phone numbers."<sup>45</sup> This argument was rejected by the Fourth Circuit, which noted that "there is no general right to privacy" guaranteed by the Constitution, and that to the extent such a right exists, it does not extend to the personal information in motor vehicle records—information easily detectible in ordinary interactions.<sup>46</sup>

Before the Supreme Court, the federal government relied solely on its second argument, that the DPPA was a legitimate exercise of congressional power under the Commerce Clause.<sup>47</sup> The high court agreed and distinguished rulings in earlier Tenth Amendment challenges. Rehnquist wrote that rather than "seek[ing] to control or influence the manner in which States regulate private parties," DPPA merely "regulate[d] state activities."<sup>48</sup> Although conceding that many states might have to amend statutes or regulations, such changes were simply "an inevitable consequence of regulating a state activity."<sup>49</sup>

In a startling pronouncement, the Supreme Court also rejected the contention that the federal government was effectively commandeering administrative functions that were solely within the authority of the states. Congress has the power to regulate a state-owned public database, just as it can regulate a database owned by a private entity.<sup>50</sup>

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42. See Pub. L. No. 106-69, § 350, 113 Stat. 1025 (1999).

43. See 18 U.S.C. §§ 2721(b)(1), (4), (7), (9) (1994 & Supp. 1998).

44. See David Beatty, *Protect Motorists' Privacy*, USA TODAY, Apr. 14, 1994, at 10A; John Yacavone, *Is Your State Prepared to Implement the Driver's Privacy Protection Act*, MOVE, Spring 1997, at 22.

45. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (citation omitted).

46. *Id.* at 464. The United States Court of Appeals for the Eleventh Circuit held similarly in *Pryor v. Reno*, 171 F.3d 1281, 1288 (11th Cir. 1999).

47. See *Condon*, 120 S. Ct. at 672.

48. *Id.*

49. *Id.*

50. See *id.*

To the *Condon* Court, personal information becomes a commodity susceptible to federal regulation once it enters the stream of commerce. States lose their unique status as sovereign owners and operators of databases, susceptible to regulation by the federal government, just as any other holder of similar information would be.

The *Condon* decision is also significant for what it does *not* address. The opinion fails to include any discussion of the competing interests of access and privacy, which presumably sparked the enactment of the DPPA in the first place. But ominous language in the *United Reporting* decision, handed down just a few weeks earlier, suggests that the balance would not be struck in favor of access.<sup>51</sup>

In that case, the high court rejected a publisher's First Amendment challenge to a California statute that forbade individuals to obtain copies of arrest records if the individuals intended to use the data for commercial purposes.<sup>52</sup> Under an earlier version of the California open records law, law enforcement agencies were required to "make public the full name, current address, and occupation of every individual arrested . . . ."<sup>53</sup> *United Reporting*, a private publishing service, routinely obtained names and addresses of persons recently arrested, then sold them to attorneys, insurance companies, substance abuse clinics, and other interested parties.<sup>54</sup>

After the 1996 amendment, persons requesting access to arrest records were compelled to declare, under penalty of perjury, that they sought the information for one of five enumerated purposes,<sup>55</sup> and that they would not use the information "directly or indirectly to sell a product or service."<sup>56</sup> Although *United Reporting* contended that its access to the records fell under the journalistic exemption, the statute clearly precluded it from reselling the data to its customers.<sup>57</sup> Accordingly, the publisher sought injunctive relief, arguing that the statute was unconstitutional because it restricted free speech.<sup>58</sup>

The Ninth Circuit held that the statute violated *United Reporting's* First Amendment rights, even though it concluded that the publisher's

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51. See *United Reporting*, 120 S. Ct. at 488.

52. See *id.* at 489 (citing CAL. GOV'T CODE § 6254(f)(3) (West Supp. 1999)).

53. CAL. GOV'T CODE § 6254(f) (West 1995).

54. See *United Reporting*, 120 S. Ct. at 486.

55. The statute exempts investigative, "scholarly, journalistic, political, or governmental" purposes. CAL. GOV'T CODE § 6254(f)(3) (West Supp. 1999).

56. *Id.*

57. See *United Reporting*, 120 S. Ct. at 487.

58. See *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1135 (9th Cir. 1998).

speech was solely commercial.<sup>59</sup> "United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price,'" the court said.<sup>60</sup>

However, the United States Court of Appeals for the Ninth Circuit agreed that United Reporting was entitled to some First Amendment protection.<sup>61</sup> Utilizing the four-prong test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>62</sup> the court found that the statute failed to advance the state's admittedly substantial interest in protecting the privacy of arrested individuals. Specifically, the court observed that anyone who was allowed access to the data would be free to publish the information in "any newspaper article or magazine in the country so long as the information is not used for commercial purposes."<sup>63</sup> By contrast, "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally)."<sup>64</sup>

The Supreme Court, however, rejected the argument that the statute infringed on United Reporting's First Amendment rights at all.<sup>65</sup> Chief Justice Rehnquist framed the issue as "nothing more than a governmental denial of access to information in its possession."<sup>66</sup> California, as owner and operator of the database, has authority to decide whether to limit or extend access to information contained therein, the Court said, adding that the state could even elect to withhold the information entirely without offending the First Amendment.<sup>67</sup>

Several Justices appeared troubled by the prospect that the state might arbitrarily grant favored status to requesters who claimed they would use the material for enumerated, favored uses, as opposed to other, disfavored uses. In her concurring opinion, Justice Ginsburg argued that a grant of access is the equivalent of a subsidy to certain users, permissible only so long as "the award of the subsidy is not based on an illegitimate criterion such as viewpoint."<sup>68</sup> She cautioned the

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59. See *id.* at 1137.

60. *Id.* at 1137.

61. See *id.* at 1140.

62. 447 U.S. 557 (1980).

63. *United Reporting*, 146 F.3d at 1140.

64. *Id.*

65. See *United Reporting*, 120 S. Ct. at 489.

66. *Id.*

67. See *id.*

68. *Id.* at 491 (Ginsburg, J., concurring).

Court to avoid presenting states with the Hobson's choice of either keeping records open to all comers, or sealing them completely.<sup>69</sup>

Justice Scalia, whose concurrence was joined by Justice Thomas, chided the Court for failing to address the question of whether the California statute created "a restriction upon access that allows access to the press (which in effect makes the information part of the public domain), but at the same time denies access to persons who wish to use the information for certain speech purposes,"<sup>70</sup> which would, in his view, constitute an unconstitutional restriction upon speech.

Justice Stevens, who had delivered the majority opinion in *United States Department of Justice v. Reporters Committee for Freedom of the Press*<sup>71</sup> ten years earlier, dissented here. Joined by Justice Kennedy, he agreed that California could constitutionally limit access to arrestee data to those with a "special, and legitimate, need for the information," or even close it off entirely.<sup>72</sup> But he found that the state's approach of making the information available to scholars, news media, politicians, and others, while denying access to requesters solely because they intended to use the information for a constitutionally protected purpose, was a form of unconstitutional discrimination.<sup>73</sup>

Stevens' dissenting opinion underscores the most troubling aspect of the *United Reporting* decision. The high court's ruling effectively allows governmental entities to condition access to public information based on a declaration that data would be used for "approved" purposes only, even when other uses would be legal. As the Ninth Circuit found, and as Justice Stevens argued in his dissent, such unlimited discretion allows states to establish irrational standards that do nothing to promote allegedly substantial interests. The high court failed to examine in detail the underlying privacy concerns that had provided the rationale for the legislation, or to balance those interests against the equally compelling public interest in access, apparently leaving the states free to curtail access to information that had long been public, presumably at will.

At the heart of the European Directive, the Hong Kong proposal, and the myriad privacy laws and regulations that are cropping up throughout the world, we find a concept profoundly at odds with a truly

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69. See *id.* (Ginsburg, J., concurring).

70. *Id.* at 490 (Scalia, J., concurring).

71. 489 U.S. 749 (1989) (holding that subjects retain a privacy interest in criminal history records maintained in a centralized computer repository, even if the data is derived from public sources).

72. *United Reporting*, 120 S. Ct. at 492 (Stevens, J., dissenting).

73. See *id.* (Stevens, J., dissenting).

free press: that the government is the best entity to protect people's privacy. Modern European history provides countless illustrations of why government restrictions on the dissemination of information in the name of promoting press "responsibility" pose real and significant threats to the common good. As Franz-Olivier Giesbert, referring to the French privacy bill, wrote in *Le Figaro*, "Our government is in the process of inventing a new concept: clean news, washed whiter than white. What images of our terrible 20th century could be censored out if we lost the right to look at the world in which we live?"<sup>74</sup>

No one can deny that the traditional news media, as well as the new Internet-based media whose unruly presence is only beginning to be fully felt, can and do publish revelations that violate individuals' privacy rights. Sometimes these revelations can be extremely hurtful to the subject involved, and it may be appropriate to provide legal remedies to grant them redress in meritorious cases where no public interest is adversely affected. The difficulty lies in deciding where the public interest stops and the private interest holds sway. It is wrong for governments to make those determinations by adopting bright-line, inflexible rules that can be misused to curtail legitimate inquiry and revelation.

In the end, privacy is a subjective, and therefore, elusive, concept. Its reflexive invocation creates unlimited opportunities for mischief and for genuine damage to public welfare. Instead of embracing such paternalistic concepts, we must have the courage to tolerate the potential for some "excesses" in order to preserve higher values—preeminent among them, the right of the people to be informed. The alternative is to allow the government free rein, to "protect" the public from the press.

The only question is: Who, then, will protect the public from the government?

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74. Franz-Olivier Giesbert, *Privacy and la Presse*, reprinted in *TIMES* (London), (October 6, 1999) <<http://www.sun.../tim/1999/10/06/timopnpe02006.html>>.