

The Case Against Unwanted Publicity: A claim of privacy

by Sandy Larose

Advocates of the freedom of the press argue that it would be ridiculous to put a prior restraint on the media simply to protect people's "secret affairs." One argument is that if an individual is having an affair they should not do so in public knowing that anyone could record them and send it to their spouse. But regardless of the action being performed by an individual in public, he or she should have a right to autonomy without being exposed by the media. Should one's private affairs receive the same protection as his/her cell phone? If the police need a warrant to search a suspect's cell phone, why shouldn't the media be required to obtain a warrant before exposing one's private affairs and potentially ruin their reputation? As Justice Sotomayor stated in *United States v. Jones*,¹ "Viewing the contents of people's text messages exposes a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." By allowing the media to infringe upon the privacy of a person we risk exposing a wealth of detail about that person's life. While not making a case for putting a restraint on the media, there is a case to be made for requiring anyone, including the media, who wishes to expose sensitive information about a person to be required to obtain a warrant.

Suppose there are two men walking along the beach holding hands and kissing on a beautiful summer day. Suddenly, a TV crew perceives them as an object of interest and begins to record what appears to be a romantic scene. One of the men notices the TV crew and outrageously demands that they stop recording because he is married to a woman and does not

¹ *U.S. v. Jones*, 615 F. 3d 544 (2012), <https://www.law.cornell.edu/supremecourt/text/10-1259>, (last visited March 17, 2019.)

want her to find out about his affair, especially on TV. The man adds that this would not only ruin his marriage, but also his character in the eyes of his peers who do not know that he is bisexual. The TV crew acknowledges the man's legitimate concerns and stops recording. However, a few months later, the man's wife recognizes him on a five second TV news broadcast titled *Summer of Love*. Furious, she confronts him and consequently files for divorce. The man then files a lawsuit against the TV channel claiming that they invaded his privacy and intentionally inflicted emotional distress on him which ruined his marriage. But the court disagrees. They find that the public's interest in romance outweighs the man's privacy interest. The court concludes that there is no cause of action and therefore no legal basis to infringe upon the freedom of the press. The court further concludes that since no liability exists, this case has no merit.

Joseph Siprut, Adjunct Professor at Northwestern University School of Law, disagrees with the court. Siprut argues that, "Whether a picture should be deemed to be newsworthy should be determined, not by mere reference to whether the accompanying article or book is newsworthy, and whether there is a "reasonable connection" between the article and the photo, but rather by reference to whether the picture itself is newsworthy."² He adds that "If the picture is not newsworthy on its face, and the subject of the photo was chosen merely to illustrate the article, then (whether there is a reasonable connection between the article and the photograph's subject or not) the right should belong to the individual."³ Though privacy should be valued, Siprut's economic

² Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, Pepperdine Law Review, Vol. 33, No. 2, 2006, http://www.siprut.com/assets/attorney_biographies/Privacy_Through_Anonymity_Siprut%20.pdf, (last visited March 17, 2019.)

³ Id.

approach may not be the most appropriate. For instance, an insurance company may have an interest in estimating the extent to which its customers value their privacy because this might help determine which security programs may be more beneficial and competitive to protect the privacy of those customers. However, this does not prove that the insurance company's interest is to protect the privacy of its customers. Instead, it seems that the main interest is to make a profit. Similarly, in any case involving the rights of the media versus the privacy rights of an individual, not only should we focus on determining the "newsworthiness" of the information being reported but we also need to make sure that the media isn't the one to make this determination.

Mark Tunick, Associate Professor of Political Science at Florida Atlantic University, discusses many reasons why people value privacy such as reputation: "Having information about oneself exposed to others can obviously affect one's reputation, and when one's reputation is damaged and one's standing is reduced in the eyes of one's friends, family, coworkers, or community, one can suffer a number of setbacks, including monetary loss and emotional or physical distress."⁴

Current social mores seem to indicate that people feel the need to keep others out of their private business, and even to withhold important information from those who may deserve to know the truth, like the case of the bisexual man's wife. In his economic argument, Siprut recommends that the right to privacy be given to the person who values

⁴ Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media*, Routledge, 2014.

it the most economically.⁵ For example, in the case of the bisexual man, it is clear that the plaintiff economically values the right to his image as indicated by his attempt to sue the TV Channel. Siprut argues that if the TV Channel bargains with the plaintiff and offers an amount which the plaintiff refuses, the plaintiff obviously values his image more than the TV Channel and therefore should own the right to his image. But what if the plaintiff does not want to put a price on his/her image? What if they simply do not want to be put under a false light or have their private facts published? One example is the case of *Carl De Gregorio v. CBS Inc.*,⁶ in which two co-workers were filmed walking hand-in-hand on Madison Avenue by a CBS-TV camera crew. De Gregorio demanded that the film be destroyed because he was married and feared that this would not look good. However, CBS-TV went ahead and broadcasted the film, after which De Gregorio sued. Unfortunately, he lost because the court did not find any cause of action. The New York County court quoted, “[T]he privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events, but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.”⁷ This decision raises the question of what is considered newsworthy.

The dictionary defines the word ‘news’ as “a report of a recent event;

⁵ Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, Pepperdine Law Review, Vol. 33, No. 2, 2006, http://www.siprut.com/assets/attorney_biographies/Privacy_Through_Anonymity_Siprut%20.pdf, (last visited March 17, 2019.)

⁶ *De Gregorio v. CBS Inc.*, 123 Misc. 2d 491 (1984), Leagle, <https://www.leagle.com/decision/1984614123misc2d4911528>, (last visited March 17, 2019.)

⁷ *Id.*, quoting *Paulsen v Personality Posters*, 59 Misc.2d 444, 448.

previously unknown information.”⁸ If we choose to define the news reported by the media as such, then it is simply a report of an event that has recently happened and is somewhat relevant. In the case of the bisexual man, the information being reported is that of a couple kissing in a park. Since this is probably not the first or the last time that a gay couple is kissing in a park, it seems that this information should not be considered “news”. Some might argue that since this specific couple has never been seen before in this specific act, then it is considered “something new” and therefore it is “news”. Which brings up the question of whether or not it is “newsworthy”? The De Gregorio court seems to think that it is. But for an information to be “worthy” of being revealed to the public shouldn’t there be some sort of social utility or value to it? How can seeing a gay couple kissing in a park add any value to our society? The De Gregorio court argued that romance is “entertainment,” which is of public interest.⁹ Should a private individual be forced to give up his right to privacy to “entertain” others? Could we not find an alternative that would not require such an infringement upon the privacy of those men? If the goal of the media was simply to show a gay couple kissing in a park, couldn’t they have asked another gay couple for permission? They could have also hired models to illustrate the exact same scene. There are quite a few options available that do not require violating the privacy of people in public places as illustrated by both cases mentioned above, particularly in which the privacy interest outweighs the interest of the public.

⁸ *News*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/news>, (last visited March 17, 2019.)

⁹ *De Gregorio v. CBS Inc*, 123 Misc. 2d 491 (1984), Leagle, <https://www.leagle.com/decision/1984614123misc2d4911528>, (last visited March 17, 2019.)

In the case of *Penwell v Taft Broadcast*,¹⁰ for instance, Billy Gene Penwell was videotaped being arrested at a bar by undercover police officers during a drug raid. He sued to get an injunction because even after the news reporters were made aware that his arrest was a mistake because he was innocent, they continued to broadcast the video claiming that it was of public interest. In fact, the court concluded that, “Persons who are so unfortunate as to be present at the scene of a crime are regarded as properly subject to the public interest and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims.”¹¹ This is a clear example of a legitimate public interest conflicting with a compelling privacy interest. Going back to the notion of newsworthiness, there is no apparent reason why broadcasting the same event over and over again would have any social utility other than probably annoying the public or the subject of interest, who in this case is Penwell.

In *Briscoe v. Reader's Digest Association, Inc.*,¹² Marvin Briscoe hijacked a truck in 1956. But he was then rehabilitated and never committed another crime again. He chose not to tell anyone including his daughter about the hijacking in order to leave behind his past criminal life. In 1967, Reader's Digest published an article regarding hijacking which included *Briscoe's* crime. This disclosure also included *Briscoe's* name while excluding the information that this crime was committed in 1956. As a result, *Briscoe's* relationship with his daughter was ruined. *Briscoe* filed a lawsuit against Reader's Digest for invasion

¹⁰ *Penwell v Taft Broadcast*, 13 Ohio App. 3d 382 (Ohio Ct. of App. 1984), <https://casetext.com/case/penwell-v-taft-broadcasting-co>, (last visited March 17, 2019.)

¹¹ *Id.*

¹² *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal. 3d, 529 (1971), <https://scocal.stanford.edu/opinion/briscoe-v-readers-digest-association-inc-27624>, (last visited March 17, 2019.)

of privacy.¹³ The Supreme Court of California remanded the case back to the trial court to determine, “. . . (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff’s identity existed.”¹⁴ So, should the press be required to obtain a warrant in order to publish information about a criminal and his crime for which he had already been punished? Eugene Volokh quotes the *Briscoe* Court ruling, “But revealing Briscoe’s identity eleven years after his crime, the court said, served no “public purpose” and was not “of legitimate public interest”; there was no “reason whatsoever” for it.”¹⁵

Eugene Volokh argues, however, that “[O]thers definitions of me should primarily be molded by their own judgments, rather than by my using legal coercion to keep them in the dark.”¹⁶ Tunick would argue that once a person has received legal punishment, they should not have to face societal punishment. Advocates of rehabilitation, especially the *Briscoe* court, would agree with him. However, critics would agree with Volokh in that others should be free to create their own judgments of an individual without the interference of the law. Perhaps Briscoe’s daughter abandoned him not for knowing of his past crime, but for knowing that he’s not trustworthy. Just like Briscoe may have kept this information from his daughter not because he is a “rehabilitated man”

¹³ Id.

¹⁴ Id.

¹⁵ Eugene Volokh, *Free to Tell the Truth About People’s Past Crimes*, The Volokh Conspiracy, 2014, <http://volokh.com/2004/12/20/free-to-tell-the-truth-about-peoples-past-crimes/>, (last visited March 17, 2019.)

¹⁶ Id.

but because he did not want to disappoint her. Whatever the reason may be, the media should not have the power to share one's personal affairs, including past crimes, unless the information is clearly newsworthy.

It is important to note that the *Briscoe* court decision was overturned with the California Court of Appeals decision in *Gates v. Discovery Communication, Inc.*¹⁷ In this case, Gates was convicted of being an accessory after the fact to a murder-for-hire crime. His role in the murder was reported by Discovery. He sued for invasion of privacy and his suit was dismissed by the court, "We are led to the conclusion that insofar as *Briscoe* held that criminal or civil penalties could result from the publication of the public record of a judicial proceeding, it was overruled by *Cox*. Gates's invasion of privacy action is based on Discovery's disclosure that he was convicted of being an accessory after the fact to a murder for hire. The disclosure was a truthful report of information in the public record of a judicial proceeding and was privileged under the First Amendment."¹⁸

Some people argue that sometimes the information is not one's to keep. For instance, in the case of cheaters: when one cheats on their partner, as much as they have the right to privacy in their infidelity, their partner has a right to know the truth. This raises the question of whether it would be wrong for the media to publish the picture of a man cheating on his wife. Should it not be the individual's choice to reveal the information that he, the husband, is cheating, to the wife. Some people would argue that not every information about us is our choice to reveal. They would further argue that the cheater's wife has a right to make the

¹⁷ *Gates v. Discovery Communications, Inc.*, No. Do39399, Ct. of App. 4th District, Division 1, California, <https://caselaw.findlaw.com/ca-court-of-appeal/1324402.html>, (last visited March 17, 2019.)

¹⁸ *Id.*

choice not to be with a cheater, indicating why she needs to know the truth. Similarly, Briscoe's daughter had a right to know about her father's past crime. Since humans are not always honest and trustworthy, does this indicate that the media also serves another valid purpose? Do we depend on the media to keep us honest? But, at which point do we draw the line? If you continue to allow the media to share our most personal affairs will we still have a right to privacy?

Some people go as far as claiming that there is no right to privacy. But, the Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁹ By simply reading this clause, without looking at any case law, one interpretation could be that we have a right to privacy in our private affairs. Others interpret their "effects" as being their cell phones, which means that if the police were to open their text messages without a warrant, it would constitute an illegal search and seizure. This interpretation is inconclusive due to the absence of actual federal legislation on the subject of cell phones. Looking at prior court decisions, generally warrantless cell phone searches are deemed unconstitutional. But there are also many cases in which these unreasonable searches have been upheld.

Suppose that during the arrest of John Doe, the driver of a stolen vehicle, the police locate a cell phone in the backseat. They then go through the text messages and find evidence of a drug deal between a

¹⁹ *Fourth Amendment*, U.S. Constitution, Cornell Law School, https://www.law.cornell.edu/constitution/fourth_amendment, (last visited March 17, 2019.)

John Doe and a dealer. Would this constitute an illegal search? More often than not, in order to justify searches that are incidental to an arrest, the police must prove that they had probable cause to make the arrest, which allows them to search only the area within the arrestee's immediate control. This obviously suggests that it would not be justifiable for the police to conduct a warrantless search of a person's car if that person was arrested at the mall and their car was parked in their garage. The inherent mobility of a vehicles makes it difficult to assign the same level of privacy to that vehicle that is assigned to their home. It is for this reason that when the police have probable cause to arrest, a warrantless search of a vehicle is more often than not considered reasonable.

However, let's assume that in the case of John Doe, the police did have the stolen report of the vehicle as probable cause. This means that they can simply turn over the stolen vehicle to the department and begin their legal investigation, rather than begin an invasive search of not just the vehicle, but also a cell phone that could belong to someone different than the owner of the vehicle or the arrestee. Some people would argue that this person could be the one who has stolen the vehicle and that only by searching their cell phone could the police confirm this information. But what if this person was someone who received a ride from the actual thief that pretended to be a taxi driver, thus by searching the phone the police could be violating the privacy of an innocent person. Because criminals also have the right to privacy, and because there was no exigency for the police to conduct this search without a warrant, they could have gone through the process of obtaining a warrant, particularly since they acquired control over the vehicle.

It is also important to remember that the scope of the warrantless search is no more and no less than what a warrant would authorize. In other

words, having a warrant would not necessarily mean that the police could search every part of the vehicle, or even the cell phone. In a similar case, *State v. Hinton*,²⁰ a police officer used the iPhone of Lee, who had just been arrested for possession of heroin, to send text messages to Shawn Hinton. The police officer essentially posed as Lee to arrange a drug transaction with Hinton. Eventually the transaction went through and Hinton was convicted for attempted possession of heroin. Hinton appealed arguing that his Fourth Amendment rights were violated. The state cited *California v. Greenwood*, *U.S. v. Miller* and *Smith v. Maryland*²¹ to argue that, “Once you send a text to a third party it is like leaving your garbage on the curbside or turning info over to the phone company and you can no longer expect privacy in it.”²² *Smith v. Maryland* involved the crime of robbery, the victim was receiving threatening phone calls from the robber, whose identity was known. The robber’s phone company, a private entity, at the request of the police, installed a pen register at their office to record numbers dialed from the robber’s house. The court held, “There is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the Fourth Amendment is implicated by the use of a pen register installed at the central offices of the telephone company.”²³ Because there was no “search, the court

²⁰ *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, <https://casetext.com/case/state-v-hinton-111>, (last visited March 17, 2019.)

²¹ *California v. Greenwood*, 486 U.S. 35 (1988), *Smith v. Maryland*, 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Miller*, 425 U.S. 435 at 440 (1976),

²² *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, <https://casetext.com/case/state-v-hinton-111>, (last visited March 17, 2019.)

²³ *Smith v. Maryland*, 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), <https://www.courtlistener.com/opinion/110118/smith-v-maryland/>, (last visited March 17, 2019.)

concluded no warrant was needed.”²⁴

The *Hinton* case and the *Smith* case can be distinguished. In *Hinton*'s case, there is an actual search of a state actor. The government cannot claim that *Hinton* voluntarily conveyed information to a third party because *Hinton*, though he believed that he was texting Lee, was involuntarily conveying the information to the police. Thus, unlike *Smith*, *Hinton* could not have assumed the risk of disclosure since he was not disclosing information to the intended party. In the *Miller* case, the court found that, “On their face, the documents subpoenaed here are not respondent’s “private papers.”²⁵ The court continues, “This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”²⁶ As stated above, in *Hinton*'s case, the information obtained was not revealed to a third party and conveyed by the third party to the police. Instead, the police used deception and posed as Lee to persuade *Hinton* to commit a crime. The third-party doctrine would not apply in this instance.

Turning to *Greenwood*, we see that the court established that the Fourth Amendment does not protect against the warrantless search of garbage left for collection.²⁷ If the *Hinton* court is referring to this case to say that *Hinton*'s phone is essentially “garbage” that seems to be mistaken

²⁴ *Id.*

²⁵ *United States v. Miller*, 425 U.S. 435, (1976), Justia, <https://supreme.justia.com/cases/federal/us/425/435/>, (last visited March 17, 2019.)

²⁶ *Id.*

²⁷ *California v. Greenwood*, 486 U.S. 35 (1988), Justia, <https://supreme.justia.com/cases/federal/us/486/35/>, (last visited March 17, 2019.)

correlation. There is a clear distinction between someone's cell phone and their garbage, which they have voluntarily abandoned.

In *State v. Hinton*, the Supreme Court held, "Considering the wealth of personal and private information that is potentially stored on a cell phone, we should continue to recognize a rule that does not incentivize warrantless searches of cell phones."²⁸ Additionally, with regards to the recipient of the message, the court held, "[T]he sender of a text message assumes a limited risk that the recipient may voluntarily expose that message to a third party, but under our cases, the sender does not assume the risk that the police will search the phone in a manner that violates the phone owner's rights."²⁹ Even though one could argue that once someone sends a text message to another person they no longer have an expectation of privacy in that text message, it is crucial to first determine whether the message is delivered to the intended person.

Clearly there needs to be a remedy which will serve as a uniform rule, whether the concern is our cell phone or our private affairs. In *Katz v. United States*,³⁰ the court established a rule in order to determine whether a person has a reasonable expectation of privacy, "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited a subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."³¹ A reasonable

²⁸ *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, <https://casetext.com/case/state-v-hinton-111>, (last visited March 17, 2019.)

²⁹ *Id.*

³⁰ *Katz v. United States*, 389 U.S. 347 at 361 (1967), Justia, <https://supreme.justia.com/cases/federal/us/389/347/>, (last visited March 17, 2019.)

³¹ *Id.*

person might agree that in Hinton's case, both Lee and Hinton had an expectation of privacy, and it is one that society is prepared to recognize as reasonable. Some people might argue that Lee left his phone in a stolen car without a password and therefore could not expect privacy. But if the car was locked, or if Lee didn't know the car was stolen, might you reach a different conclusion? Reasonable people probably do not expect anyone to open their car and search their phone, especially not the police. In the same way, reasonable people do not expect the media to open their car and search their phone or take a picture of them and their fiancé kissing and report it as a "beautiful love affair" without my permission or that of a court. Some people might argue that if we didn't expect such invasion of privacy we would not lock our cars. But taking security measures is not equivalent with protecting our right to privacy.

In regards to the previously mentioned scenario in which the two men are walking along the beach, the plaintiff clearly has an interest in keeping his relationship a secret. Whether or not he should be honest with his wife and his peers certainly isn't for the courts to decide. The fact here is that the plaintiff does have a compelling interest in privacy. The next question is whether there is a legitimate public interest in the information to be shared? Making that determination is one that will usually have conflicting answers and represents the next big question for our legal system to resolve.