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I. PRIVACY

ARTICLE

THE RIGHT OF PRIVACY—A LOOK THROUGH THE KALEIDOSCOPE

*Arthur R. Miller**

IT has been about twenty-five years since I was sitting quietly in my office, then in Ann Arbor, Michigan, when a telephone call came in from the late United States Senator Ed Long of Missouri, the Chairman of the Senate Subcommittee on Administrative Practices and Procedures. He said, "Miller, you're the only law teacher we can find in the United States who has ever written anything about law and computer technology." I said, "Well, Senator, I wrote a small, relatively simple piece on computers and copyright, because I teach copyright." So he said, "Well, I guess that makes you the pick of the litter. We need somebody to come down here and testify to my Committee and then to Senator Sam Ervin's Constitutional Rights Committee about the implications of computer technology on privacy." I said, "I can spell 'privacy,' but I really don't know anything about it." "Well," he said, "Learn!"

I decided to do it, since at that point I had never testified before a committee of Congress. I also assumed it was just going to be a one-night stand: I would go to Washington; I would testify; and that would be the end of it. But something unexpected happened. I prepared a written statement; I went to the hearing; and I testified about the growth of data banks and the loss of individual anonymity and autonomy in our society. That night I found myself on the national evening news. Then, several months later, a rewritten version of my testimony was published in the *Atlantic Monthly*.¹ Perhaps I should have known this notoriety might be narcotic. But I continued to believe the attention being given to computers and privacy was a short-term phenomenon. My assumption was that the interest would wane and that I would return to writing footnotes about Federal Rule 12 and recede into

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1. Arthur R. Miller, *The National Data Center and Personal Privacy*, THE ATLANTIC, Nov. 1967, at 557.

academic anonymity. But the issue of privacy did not recede; obviously, the subject was one that concerned many Americans.

It is now twenty-five years later, and I am still discussing privacy. And it has become one of the, if not the, great philosophical and intellectual loves of my professional life.² I care about it even though I have lost much of mine because of my television activities. I have come to realize that there is something quite primordial about privacy. It is a value people believe in and want. Even people who do not necessarily seek it out on a day to day basis would like to know that they can have it when they want and seek it.

As I have watched events unfold over the past twenty-five years, the privacy issue has been something like a kaleidoscope. The panorama is a constantly changing one. Every year or two you turn the kaleidoscope and the pretty little glass particles rearrange and there is a new issue — data banks, credit reports, school files, criminal records, medical and job information, drug and AIDS testing — the list goes on and on. The ever-changing character of the issues is a constant reminder that the value is something that we cherish and we constantly think about and need.

In these pages I want to give some attention to two aspects of privacy, both of which are defined by a set of relationships. First, I will examine the privacy of individuals when one person desires, or has an interest in, knowledge about another person that the *other* person wishes to keep private. Second, I will look at occasions on which the media has focused its intense and penetrating gaze upon the private lives of individuals. In each area we confront the problem of *informational* privacy,³ and current events provide a wealth of examples of how these values conflict. At bottom, one person's "I want to know" conflicts with another's "leave me alone."⁴

I. PRIVACY AND OBLIGATION TO REVEAL

One of the saddest realities of contemporary life is AIDS. During the last year or two we have witnessed an extraordinary debate both inside and outside the medical community over whether medical professionals have a duty to disclose the fact the they may be HIV-positive.⁵ Do they have a

2. See generally ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS DATA BANKS, AND DOSSIERS* (1971); Arthur R. Miller, *The Dossier Society*, 1971 U. ILL. L.F. 154; Arthur R. Miller, *The Privacy Revolution: A Report from the Barricades*, 19 WASHBURN L.J. 1 (1979).

3. Justice John Paul Stevens has written that the constitutional right of privacy protects "at least two different kinds of interests": "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (footnotes omitted) (upholding New York law requiring computer records of the names and addresses of all persons for whom doctors prescribe "certain drugs for which there is both a lawful and unlawful market").

4. Lest we forget, Justice Brandeis provided the classic formulation of privacy as the "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). He and a co-author first used the phrase in the seminal article on the right to privacy. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

5. *Leckelt v. Board of Comm'rs of Hosp.*, 714 F. Supp. 1377 (E.D. La. 1989); *Behringer*

right of privacy that transcends their duty to disclose to their patients? Conversely, of course, does a patient have a duty, when dealing with a medical professional or an emergency team, to disclose the fact that he or she may be HIV-positive?⁶ How do you deal with that conflict between an individual's right of privacy and the obligation to tell someone else something intensely private because that other person may be in jeopardy or because you know that the other person would want to know?

Also during the last year or two in various parts of this country, telephone companies have been rolling out a new technology called "Caller ID." For those who have not seen it yet in your communities, it's very simple: when your telephone rings, the number of the person calling you is displayed. A great many people want that capability. In a world filled with telephone solicitation, pollsters, and survey research, they want to know who is calling before they pick up the phone. The technology has other advantages as well in deterring various economic crimes and providing quick information to facilitate dispatching emergency services.

Caller ID has unleashed a national debate about who has the greater privacy right.⁷ Is it the person called, who says, "You're invading my privacy, you're intruding on me, I have a right to know who you are, you're stealing my privacy by making me pick up the phone, and that deprives me of my autonomy" — because privacy is in part autonomy — "you simply have to tell me who you are." Or is it the caller, who says, "I have a right to use the telephone system and call you without telling you who I am; I have the right to decide when I am ready to disclose that part of my personality. I have always had that right and the advent of Caller ID should not deprive me of it." Who has the best argument? There simply is no consensus on it.

v. Medical Ctr. at Princeton, 592 A.2d 1251 (N.J. Super. 1991); *In re Application of the Milton S. Hershey Medical Ctr.*, 595 A.2d 1290 (Pa. Super. 1991); *AIDS Proposal Dropped*, DALLAS MORNING NEWS, Sept. 28, 1991, at A7; Richard M. Alderman, *The Business of Medicine — Health Care Providers, Physicians, and the Deceptive Trade Practices Act*, 26 HOUS. L. REV. 109 (1989); Geoffrey Cowley, *A Ruling on Doctors with AIDS*, U.S. NEWS & WORLD REPORT, Feb. 18, 1991, at 66; Lawrence O. Gostin, *The AIDS Litigation Project*, 263 JAMA 1961 (1990); Lawrence O. Gostin, *The AIDS Litigation Project*, 263 JAMA 2086 (1990); Lawrence O. Gostin, *The HIV-Infected Health Care Professional: Public Policy, Discrimination, and Patient Safety*, 151 ARCH. INTERN MED. 663 (1991); Jesse Helms and Michael Isbell, *The AIDS-Infected Physician*, A.B.A. J., Oct. 1991, at 46; Barbara Kantrowitz, *Doctors and AIDS*, NEWSWEEK, July 1 1991, at 49; Mireya Navarro, *Patients of AIDS Dentist Seek Tests*, N.Y. TIMES, July 16, 1991, at B2; David Orentlicher, *HIV-Infected Surgeon: Behringer v. Medical Center*, 266 JAMA 1134 (1991); *Researcher Opposes AIDS Testing Bill*, DALLAS MORNING NEWS, Sept. 28, 1991, at A33; D.V. Snyder, *Disclosure of Medical Information Under Louisiana and Federal Law*, 65 TUL. L. REV. 169 (1990).

6. *Mason v. Regional Medical Ctr. of Hopkins County*, 121 F.R.D. 300 (W.D. Ky. 1988); Richard Saltus, *Losing Patience on the Front Lines*, BOSTON SUNDAY GLOBE, Aug. 4, 1991, at 19; Jean Seligmann, *A Very Risky Business*, NEWSWEEK, Nov. 20, 1989, at 82.

7. *Communications, House Panel Approves Caller ID; Senate Committee Votes 900-Number Regulation*, DAILY REP. EXECUTIVES, July 31, 1991, at A27; *Communications Separate House, Senate Panels Approve Caller ID Legislation*, DAILY REP. EXECUTIVES, June 21, 1991, at A15; Steve Couter, *Caller ID Service Protects Your Privacy*, S.F. CHRON., July 8, 1991, at A17; Dave Powell, *Is ANI and Invasion of Privacy: Automatic Number Identifications*, TELECOMMUNICATIONS PRODUCTS & TECH., Feb. 1991, at 21; *Privacy and Technology*, BOSTON GLOBE, Aug. 5, 1991, at 10; Molly Sinclair, *Caller ID Service Rings in New Era of Phone Privacy, Customers Praise Ability to Screen Numbers*, WASH. POST, July 27, 1991, at B1.

Perhaps it depends on the identity of particular individuals and their circumstances. Suppose you are sitting at home at dinnertime and the phone rings and it is some clown trying to sell you oil investments in Texas or assuring you that you have won a prize and can claim it by looking at some vacation condos. I am pretty confident you would say, "I have the greater privacy claim; the called party has a right to know who is telephoning." On the other hand, suppose the person at the other end of the phone is calling from a battered woman's shelter, or is an undercover narcotics agent. Most of us would say that it is the caller who has the greater claim of privacy. Caller ID is a paradigm of the privacy issues we are experiencing today, and with the constantly increasing maturity in information and communications technology we are going to face that type of issue again and again.⁸

To become somewhat insular for a moment, think of the legal profession. One of the most heated debates among lawyers today is over what is called court confidentiality — or, if you are on the other side of the debate, you might call it "court secrecy."⁹ Journalists might refer to it as the public's right to access. I am not talking about access to the papers actually filed in the courthouse,¹⁰ or access to the courtroom¹¹ — the Supreme Court has made it rather clear that they are public. What I am talking about is the massive amounts of material generated in the course of pretrial discovery — papers that never are introduced into evidence because the case is settled or the material was not evidentiarily relevant and are rarely filed with the court. I am also talking about the terms of a settlement.¹²

8. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *United States v. White*, 401 U.S. 745 (1971); Rosalind Resnick, *The Outer Limits*, NAT'L L. J., Sept. 16, 1991, at 1; Gene Stephens, *High-tech Crime Fighting: The Threat to Civil Liberties*, FUTURIST, July 1990, at 20. Problems are beginning to arise from computer bulletin boards and electronic mail.

9. See generally Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428 (1991).

10. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (noting several exceptions, but stating general rule that "[i]t is clear that the courts of this country recognize a general right to inspect and copy records and documents, including judicial records and documents"); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (protective order preventing dissemination or publication of information obtained in pretrial civil discovery held not violative of first amendment).

11. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."); see also *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (criminal proceedings are open to public under qualified First Amendment right unless there is a substantial probability the defendant's right to a fair trial will be prejudiced and no reasonable alternatives exist to protect adequately the rights of defendant to a fair trial).

12. Ann-Theresa Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have A Right to Know?*, 66 NOTRE DAME L. REV. 117 (1990); Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988); Cheryl Lynne Coon, *Common Law of First Amendment Right of Access to Sealed Settlement Agreements*, 54 J. AIR L. & COM. 577 (1988); Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); Brian T. Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381 (1990); Patricia Larson, *Civil Procedure—Rule 26(C) Protective Orders and the Fifth Amendment* — *Andover Data Services, Inc. v. Statistical Tabulation Corp.*, 786 F.2d 1080 (2d Cir.

Is it anti-social secrecy to issue a protective order sealing these matters, or is that simply part of the privacy rights of the parties to litigate with some assurance that their affairs are protected by a modicum of privacy? To put it in the larger frame of reference, the real question is whether defendants and plaintiffs lose their privacy rights at the courthouse door. Whether, in effect, everything discovered from that moment on — your medical record, your past peccadilloes, your trade and research data, your confidential information — is now open for public view. Is that to be the price of admission to the civil litigation system? Last year, statutes and procedural rules were proposed in thirty-three states to change court practices regarding these matters.¹³ That is the dimension of the debate about litigation secrecy or confidentiality.¹⁴ So far significant changes have occurred in only three states.

All of these illustrative issues I have just outlined are issues that I never dreamed of when I stumbled into this field twenty-five years ago. They and others like them are all by-products of technology and the constantly changing issues in today's society. Many of these controversies have not dissipated over the years. In the "primitive" era of the sixties and seventies, it was primarily the data bank question and even that continues to plague us. Interestingly, after more than twenty years of regulation of the consumer reporting industry,¹⁵ what we commonly call credit bureaus, one still has the sad feeling that those data banks are filled with garbage and leak like sieves.

All of these issues also illustrate the highly contextual nature of privacy. Both parties in the Caller ID situation have legitimate privacy interests. The strength of each's interest, however, vary according to the identity of the parties and the particular nature of the call. Similarly, the doctor-patient privacy interests seem to vary with the risk posed to each person in the relationship. A procedure or treatment that poses a substantial risk of transmission of the virus seems to increase a doctor or patient's interest in knowing the health status of the other. And in the litigation context, the public's right of access and the parties' privacy interests surely will vary with the *type* of information sought. A business obviously will have a greater interest in the privacy of trade secrets than in information that is available through other sources, such as reports required by the federal securities laws. Similarly, the public will have a greater claim to a right to know when health or

1989), 63 TEMP. L. REV. 637 (1990); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457; Susan G. Maurer, *Civil Procedure-Access to Sealed Settlement Documents Granted Based on Common Law Right of Access to Judicial Proceedings-Bank of American National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*, 800 F.2d 339 (3d Cir. 1987), 60 TEMP. L.Q. 1023 (1987).

13. See, e.g., FLA. STAT. ANN. § 69.081 (West Supp. 1991); GA. CODE ANN. § 24-3321 (Harrison 1990); N.Y. CIV. PRAC. L. & R. 216.1(a) (McKinney, forthcoming); TEX. R. CIV. P. 76a; VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991). For a listing of state proposed rules see Miller, *supra* note 9, at 429-30 n.7 (1991).

14. For a full discussion of the issue of confidentiality in civil litigation see Miller, *supra* note 9.

15. 15 U.S.C.A. § 1681 (West Supp. 1991); CAL. CIV. CODE § 1785.1 (West Supp. 1991); N.Y. GEN. BUS. LAW § 380a (McKinney Supp. 1991).

safety is involved than when it is merely a commercial dispute between companies.

Mention of words like "context" and "relationship" may suggest that any attempt to define or apply privacy interests would be mired in unguided, *ad hoc* decision making. This need not be the case. Standards are possible to formulate, as is evident from the Supreme Court's cases on Fourth Amendment searches. In this area, the Court, at times, has assessed a person's "reasonable expectations" in the privacy of certain locations or items.¹⁶

The Supreme Court has not been timid in assessing an individual's reasonable expectation of privacy against certain searches, and then balancing that privacy against the countervailing interest — effective law enforcement. A doctor performing a highly invasive procedure with a great risk of transmitting disease to his or her patient may not legitimately expect privacy as much as a doctor whose practice does not create those risks. Similarly, a business person who uses the telephone to engage in solicitation from the public may not reasonably expect the same privacy as someone in a battered women's shelter. Both context and relationship are crucial and they define our reasonable expectations of privacy.

II. PRIVACY AND THE MEDIA

Of all the privacy issues that I have been watching through the privacy kaleidoscope during the past twenty-five years, none are more interesting and challenging, at least to me, than questions about the media and privacy. The problems never stop arising and they never stop changing. Again, you do not have to go much beyond recent events to get a flavor of the confrontation.

Dateline: Palm Beach, Florida. It is the sexual battery trial of William Smith or, as the media indoctrinated us, Willie or Willie Kennedy Smith.¹⁷ Think about that. Isn't it interesting that we all have known his name from the beginning? Also, the media took us everywhere that Willie went. We even went to his graduation from medical school a year ago; the cameras and scribes were there.¹⁸ We did not know the name of his accuser, however, until after the trial was over.¹⁹ In a nation concerned about rape and the

16. See, e.g., *California v. Acevedo*, 111 S. Ct. 1982 (1991) (little expectation of privacy in closed container of automobile); *Horton v. California*, 110 S. Ct. 2301 (1990) ("A search compromises the individual interest in privacy."); *California v. Greenwood*, 486 U.S. 35 (1988) (no legitimate expectation of privacy in garbage left on curb outside of house); *United States v. Chadwick*, 443 U.S. 1, (1977) (finding expectation of privacy in individual's luggage); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1973) ("One has a lesser expectation of privacy in a motor vehicle.").

17. Joan Beck, *When Media's Lapdogs Changed Into Pit Bulls*, CHI. TRIB., Sept. 19, 1991, at 25; Lucy Howard and Ned Zeman, *Where's Willie*, NEWSWEEK, May 13, 1991, at 6; Mary Jordan, *Willy Smith, the 'Independent' Kennedy, Anonymous No More*, WASH. POST, May 10, 1991, at A8; *Willie's New Ammunition*, NEWSWEEK, Sept. 16, 1991, at 6.

18. Ethan Bronner, *William Kennedy Smith Eludes Press at Medical School Graduation*, BOSTON GLOBE, July 1, 1991, at 6; Mary Jordan, *William Kennedy Smith Gets Degree in 'Abnormal' GU Graduation*, WASH. POST, May 26, 1991, at A21.

19. Some publications, however, chose to publish the accuser's name soon after the accusations became public. See, e.g., Andrew Bilski, *A Seaside Sex Scandal*, MCLEANS, Apr. 29,

effective prosecution of rape, maybe it is good that we often do not know the name of the accuser. That is privacy. But in a nation committed to the principle of "innocent until proven guilty," as well as the principle of fair trial, how much should we know about the accused?

The media are totally schizoid about the accused's privacy. Journalists love to tell us about the travails of the present and past denizens of Camelot. But they seem to know that at some point there is a right of privacy. So, in spite of the fact that the prosecutor in the Smith case was very anxious to tell us all about the three other women who accused the accused, most media organizations chose not to tell us their names.²⁰ Does that mean that the media have a greater respect for privacy than the prosecutor? Ten years ago I would have said that could not possibly be, but the Smith trial shook my judgment on the point. It has been restored, however, by the never-ending inquiry onto the private life of Bill Clinton.²¹ And, if you think that treatment is reserved for presidential candidates, think about the press' decision to reveal Arthur Ashe's HIV status.²² He was not seeking public office; nor was he accused of any crime.

Dateline: Los Angeles. Doris Day — everybody's sweetheart. The tabloid *The Globe* alleges that at sixty-seven, she has become a bag lady. Assume for the minute it is true, so that we can put the question of libel to one side.²³ What conceivable public value is furthered by being told that, even if it is true? She has receded from public view; she has been out of the lime-light for twenty years. Why shouldn't she be able to regain her privacy and why shouldn't it be respected by the press? Why are people forced to behave like Greta Garbo or Howard Hughes? Why can't the heroes or villains or unlucky people of yesteryear simply return to anonymity?

1991, at 28; Fox Butterfield, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance*, N.Y. TIMES, Apr. 17, 1991, at A17.

20. Janet Cawley, *Women Tell Similar Tales of Attack*, CHI. TRIB., July 24, 1991, at 1; *Damaging Evidence*, MCCLEANS, Aug. 5, 1991, at 19; *The Palm Beach Rape Case*, TIME, Aug. 5, 1991, at 25; Caroline Pesie, *Three Tales of Sexual Terror*, USA TODAY, July 24, 1991, at 3A.

21. See, e.g., Maureen Dowd, *Staying Alive: How a Battered Clinton has Stayed Alive*, N.Y. TIMES, March 16, 1992, at A1; Gwen Ifill, *Questioned About Trust, Clinton Turns Angry*, N.Y. TIMES, April 24, 1992, at A21; Gwen Ifill, *Players in Familiar Roles as Vote Nears, Clinton Faces Questions About His Past as Spars with Rival*, N.Y. TIMES, April 6, 1992, at A1; Elizabeth Kolbert, *As Political Campaigns Turn Negative, the Press is Given a Negative Rating*, N.Y. TIMES, May 1, 1992, at A18; Elizabeth Kolbert, *Clinton Moves to Retouch His Image*, N.Y. TIMES, April 22, 1992, at A20; Lance Morrow, *Who Cares Anyway*, TIME, Feb. 3, 1992, at 15; Anna Quindlen, *The Adultery Watch*, N.Y. TIMES, Jan. 26, 1992, § 4, at 19.

22. *Ashe Case Underlines Intrusiveness of Press*, N.Y. TIMES, April 27, 1992, at A16; *Ashe's Sad, Stunning AIDS Announcement: A Second Major Sports Figure Goes Public About His Infection*, TIME, April 20, 1992, at 33; Alex S. Jones, *News Media Torn Two Ways in Debate on Privacy*, N.Y. TIMES, April 30, 1992, at B11; William C. Rhoden, *An Emotional Ashe Says That He has AIDS*, N.Y. TIMES, April 9, 1992, at B9; Anna Quindlen, *Journalism 2001*, N.Y. TIMES, April 12, 1992, § 4, at 21.

23. E.g., *Fireman's Fund Ins. Co. v. City of Turlock*, 170 Cal. App. 3d 988, 216 Cal. Rptr. 796, 802 (Ct. App. 1985); RESTATEMENT (SECOND) OF TORTS § 581A (1977). If the subject of the publication is a public official or figure, the defense of truth is constitutionally required. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official).

Dateline: Washington. Several single-issue publications are trying to convince us that a certain high-level Pentagon official is gay.²⁴ Again, assume for the moment it is true so that libel issues do not clutter our thinking. Why should we be told that? Is that part of the public's right to know? Do we need to know that to make decisions in our daily lives? Should 240 million Americans be told something intimate, perhaps so intimate that the individual's own mother doesn't know. These are questions, just questions.

Dateline: Wiesbaden, Germany. American hostage Edward Tracy is released. We are told he is in good physical health, but they are not sure about his mental condition.²⁵ He pleads for privacy. Should he and will he get it? Do we really think we are entitled to know everything there is to know about Edward Tracy's mental health? He is not America's sweetheart, he does not live in Camelot, he is not a high-ranking Pentagon official — he is simply a human being who was caught up in the events around him over which he has no control. I, for one, hope that Edward Tracy's privacy is protected.²⁶

This media-privacy issue is a high-stakes poker game. We are talking about the holy of holies, the First Amendment. At issue is the scope of the press clause of the Constitution. I know that many who will read this Article, particularly people who have media instincts and orientations, including many of my friends and professional comrades, will say: "What can you put up against it?" Privacy? That is a soft, subjective virtue of modest stature. As former judge Robert Bork told us: "It's not in the Constitution."²⁷

Are we so sure that privacy is a "lesser" value or that it is not in the Constitution? As you read this in your office, at school, or on an airplane, are you worried that a policeman is breaking down your door at home? I doubt it. Why? Because you know you are protected by the Constitution against unreasonable search and seizure.²⁸ That is privacy. As you sit at a meeting or a public function, are you worried about who you are sitting next to — it might be a Whig, a Bull Mooser, a Commie, A Klansperson, or perhaps even a liberal Democrat? I doubt that you are concerned. You are not worried because you know the Constitution assures you freedom of asso-

24. James Cox, *'OutWeek' Magazine Goes Out of Business*, USA TODAY, July 1, 1991, at 2B; Leonard Doyle, *Forbes 'Gay' Claim Stirs Up a VIP Closet Debate*, INDEPENDENT, Apr. 1, 1990, at 14; David Firestone, *Columnist Stokes Gay-Naming Debate*, NEWSDAY, Aug. 9, 1991, at 17; Roger Friedman, *Inside Whitney*, TORONTO STAR, July 7, 1991, at C1; *Out with 'Outing'*, NEWSDAY, May 29, 1990, at 42; *The Trouble with Outing*, L. A. DAILY J., May 31, 1990, at 6.

25. David Gelman, *Still Psychic Captives*, NEWSWEEK, Aug. 26, 1991 at 17, 27; Chris Hedges, *Freed U.S. Hostage Emerges A Frail and Disoriented Man*, N.Y. TIMES, Aug. 12, 1991, at A1; Alan Riding, *Psyche of Captive is Not Discussed*, N.Y. TIMES, Aug. 13, 1991, at A10; Anastasia Toufexis, *Exploring the Tea Bag Factor*, TIME, Aug. 26, at 28.

26. Fortunately, Tracy has been able to enjoy the privacy he requested. He has been subjected to very little scrutiny since his release. Stay tuned to see if that continues to be true.

27. See *Nomination of Robert H. Bork to be Associate Justice of Supreme Court of the United States*, 100th Cong., 1st Sess. 241 (1987) (testimony of Judge Bork); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 98 (1990); Robert H. Bork, *The Constitution, Original Intent, and Economic Right*, 23 SAN DIEGO L. REV. 823, 828-29 (1986); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8-9 (1971).

28. U.S. CONST. amend. IV.

ciation.²⁹ That is privacy. As you daydream or allow your thoughts to wander, you can think any fool thing you want — that the moon is made of green cheese, or that the Texas Rangers are going to win the World Series next year. That is because the Constitution gives you ideological freedom — freedom of the mind.³⁰ That is privacy. And, of course, at the center of one of the great issues of our time, you know you have a constitutional right to control your body. At least as of this writing, under most circumstances a woman can choose to have an abortion or not;³¹ also anyone can choose to terminate medical treatment or not.³² And that is privacy. Thus, there are at least four constitutionally-based privacy rights. Of course, what I have been writing about in this Article concerns a fifth: informational privacy. That is a much harder one to tease out of the Constitution or the Supreme Court's decisions, although there are some intimations that to some degree it is there.³³

I recognize that I am articulating my own point of view — I am a privacy buff. I also recognize that it is an uphill fight to maintain a right of privacy against the media or to expect the Supreme Court to recognize a constitutional right of information privacy. Perhaps it is a hopeless cause. I realize that a David comes along and slays a Goliath only once every millennium or two and that you are not supposed to challenge people who buy ink in fifty-gallon drums. But I must admit to a certain perverse pleasure in rooting for an underdog value like privacy. If my beloved colleague Alan Dershowitz were writing, he'd say, "It takes chutzpah!"³⁴ Well if he can be the lawyer of last resort,³⁵ I can be the advocate of hopeless causes. I have always been that way. I happen to believe the New York Yankees are going to win the World Series next year. And even more bizarrely, I believe that at some point in the future the Harvard Law School may even require its students to be prepared for class.

CONCLUSION

So I will keep putting my small and virtually weightless finger on the scale in favor of the right of privacy, even if no one else will. Maybe it is because I believe that in a nation that abjures absolutes, in a nation that always finds a

29. U.S. CONST. amend I; *see Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (sets out the statement upon which freedom of association cases are decided); *Brown v. Socialist Work '74 Campaign Comm.*, 459 U.S. 87 (1982); *NAACP v. Clairborne Hardware Co.*, 459 U.S. 898 (1982); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

30. U.S. CONST., amend. I; *see, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute and pledge of allegiance unconstitutional).

31. *Roe v. Wade*, 410 U.S. 113 (1973).

32. *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841 (1990).

33. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Whalen v. Roe*, 429 U.S. 589 (1977); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

34. ALAN M. DERSHOWITZ, *CHUTZPAH* (1991).

35. ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE* (1986); ALAN M. DERSHOWITZ, *BEST DEFENSE* (1983).

way to accommodate competing values, the great Court in the sky someday will say, "Well, we have to accommodate important concerns like the press and national security and public health to another important concern — individual privacy." And if I am permitted another twenty-five years of functionality, I suppose I still will be kicking up a fuss and sounding the klaxon about privacy a quarter century from now. And I am sure that if we gaze once more through the privacy kaleidoscope at that time, we will see that the twenty-first century has brought us a spate of new and challenging privacy problems.