

1991

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### Recommended Citation

Anita L. Allen, *The Power of Private Facts*, 41 Case W. Rsrv. L. Rev. 757 (1991)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol41/iss3/10>

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# THE POWER OF PRIVATE FACTS

Anita L. Allen\*

IF AN ENGAGING style could serve as a palliative, Frederick Schauer's *Reflections on the Value of Truth* would have caused his symposium commentators no trouble.<sup>1</sup> But, Erwin Chemerinsky and Susan Gilles contend that Professor Schauer's substantive arguments, however engaging, are "misguided," "dangerous,"<sup>2</sup> "of little help," and "elitist."<sup>3</sup> My reaction to Professor Schauer's assessment of first amendment values and the competing privacy values recognized by tort law is different from the other commentators' reactions. I am substantially in accord with Schauer's main points and will try to explain why below.

Professor Schauer begins by arguing against a conception of the value of truth held by some first amendment theorists.<sup>4</sup> According to Professor Schauer, the value of truth is not inherent and categorical; it is contingent and instrumental.<sup>5</sup> A community is not always better off knowing everything that might conceivably be known about each of its members.<sup>6</sup> Professor Schauer concludes that not even the media best serve the community by publishing facts about individuals simply because they are facts. He suggests that courts are sometimes justified in holding defendants liable in tort for injuries stemming from the publication of private facts;<sup>7</sup> tort compensation for invasion of privacy is justified where the disclosure of private facts is "highly offensive," at least in part, because of the particular allocation of power immunized disclosure would represent.

Where do Professor Schauer's reflections leave venerated lib-

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1. Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991).

2. Chemerinsky, *In Defense of Truth*, 41 CASE W. RES. L. REV. 745, 745 (1991).

3. Gilles, *All Truths Are Equal, But Some Truths are More Equal Than Others*, 41 CASE W. RES. L. REV. 725, 729 (1991).

4. Schauer, *supra* note 1, at 699-704.

5. *Id.* at 704-07.

6. *Id.* at 708.

7. *Id.* at 717.

eral ideals of truth and truth-telling? They are largely left alone. Viewing his overall argument schematically, it is apparent that Professor Schauer's analysis does not denigrate truth. He argues as follows:

- (1) Truth has instrumental, not intrinsic, value.<sup>8</sup>
- (2) Truth's instrumental value is contingent rather than necessary.<sup>9</sup>
- (3) Acquiring truth usually has better consequences than acquiring falsehood.<sup>10</sup>
- (4) Gains in knowledge—justified true belief—do not always lead to aggregate utility, happiness, or welfare.<sup>11</sup>
- (5) Gains in knowledge may “come at the expense of someone else's well-being or dignity.”<sup>12</sup>
- (6) Since gains in knowledge may come at someone's expense, knowledge may be used as an instrument of power.<sup>13</sup>
- (7) Those who know what is true or probably true about a person have a degree of power over that person.<sup>14</sup>
- (8) The design of legal rules regulating the dissemination of knowledge should include consideration of who will have that knowledge, at whose expense that knowledge will be gained, and what, if any, are the societal benefits or costs of that shift in power.<sup>15</sup>
- (9) Privacy law regulates the dissemination of knowledge. In rendering decisions in tort cases alleging wrongful publication of private facts, courts should consider the class of individuals or institutions likely to be empowered by victory or defeat.<sup>16</sup>
- (10) Media defendants in privacy actions alleging wrongful publication of private facts should not prevail simply because they are the media and have published what is true.<sup>17</sup>

The first two premises are logically consistent with the proposition that truth is as valuable as the most valuable human good. These assertions, therefore, do not entail a denigrated view of truth.<sup>18</sup> The next five premises are essentially empirical claims

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8. *Id.* at 706.

9. *Id.* at 709.

10. *Id.* at 707.

11. *Id.* at 707-08.

12. *Id.* at 710-11.

13. *Id.* at 713-14.

14. *Id.* at 714.

15. *Id.* at 717.

16. *Id.* at 722-24.

17. *Id.* at 724.

18. Schauer's opening premises comprise a serious philosophical position, seriously

borne out by ordinary experience. Concrete cases offer significant support.<sup>19</sup> The last three premises do not follow inexorably as a matter of logic alone from the first seven. They are normative recommendations about the appropriate legal response to premises one through seven. Professor Schauer openly admits that the crucial assertions contained in the last three premises would be rejected by those who are antipathetic to either conjunct of his belief that "power relations among people and institutions are necessarily implicated in the design of legal doctrine . . . and thus ought to be considered explicitly in the design of doctrine . . . ."<sup>20</sup>

The schematic presentation of his argument plainly reveals that Professor Schauer rejects categorical equations of "the true" with "the good."<sup>21</sup> Yet, this presentation reveals that Professor Schauer does not reject truth or its free expression. Moreover, Professor Schauer does not send us sliding down a slippery slope toward low esteem for knowledge. He does not argue that we should habitually lie to one another to achieve private or public gain, nor does he recommend a regime of government secrecy. Professor Schauer does assert that the public might be better off if it occasionally believed a falsehood. However, unlike Socrates in Plato's *Republic*, Professor Schauer does not propose that public officials disseminate convenient falsehoods to gain citizen cooperation.<sup>22</sup> Professor Schauer does not urge that government adopt "Big Brother" surveillance policies to constrain debate and limit access to information. He does not propose that courts drastically or intemperately broaden their role in the social definition of permissible knowledge. Professors Chemerinsky and Gilles exaggerate the adverse implications of Schauer's stand.

Professor Schauer's emphasis on knowledge and power relations brings a refreshing realism to the discussion of privacy law. Judicial ascription of privacy rights is an allocation of power.

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defended. However, I am not certain what, in principle, a conclusive defense of premises one and two would look like.

19. See *infra* notes 47-48 and accompanying text.

20. Schauer, *supra* note 1, at 718.

21. Compare PLATO, *THE REPUBLIC* 220 (F. Conford trans. 1941) ("Both knowledge and truth are to be regarded as like the Good, but to identify either with the Good is wrong. The Good must hold a yet higher place of honour.").

22. *Id.* at 106-07 (Socrates explains that rulers must propagate the fable that citizens' are by nature golden, silver, or bronze—and that only golden citizens may rule—for the good of the public).

Those who have license to say what they please about others without fear of criminal penalty or civil liability enjoy a brand of power. It is appropriate that, when faced with the task of adjudicating privacy tort claims, courts consider the impact the rules they fashion will have on the relative allocation of power among affected parties.

Professor Schauer argues that "we should examine privacy law by looking at the class of individuals or institutions empowered by an increase in information brought by a relaxation of the current standard and at whose expense . . . ."<sup>23</sup> Where the societal and personal costs of telling what one knows are sufficiently high and sufficiently discernable in advance, legal immunity is problematic. The first amendment does not require blanket immunity for the media. Professor Schauer correctly concludes that the media should not always win: the mere fact that the media is the media and has published the truth should not automatically bar actions for invasion of privacy premised on the publication of private facts. The reason that the media and other defendants should not have legal immunity is that immunity gives them more relative power than the Constitution requires or fairness permits.

*Harris by Harris v. Easton Publishing Co.*,<sup>24</sup> a case involving the "private fact" tort, illustrates that revealing private facts can be a harmful exercise of power. *Harris*, like many other uncelebrated lower court cases, reflects the reality of power as a source of, and remedy for, some categories of privacy-related injuries.<sup>25</sup> In *Harris*, a Pennsylvania newspaper published by Easton Publishing Company ("Easton") ran a question-and-answer column about eligibility for public welfare benefits. The paper featured questions received and answered by the Pennsylvania Department of Public Welfare ("the Department").<sup>26</sup> After Brigitte Harris, the immigrant wife of an American serviceman, contacted the Department with questions, it forwarded a slightly altered version of Harris's questions bearing the initials "J.S." and a fictionalized hometown to selected print media.<sup>27</sup>

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23. Schauer, *supra* note 1, at 718; see A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); Allen & Mack, *How Privacy Got Its Gender*, 10 N. ILL. L. REV. 441 (1990).

24. 335 Pa. Super. 141, 483 A.2d 1377 (1984).

25. See, e.g., A. ALLEN, *supra* note 23, at 123-52; Allen & Mack, *supra* note 23, at 457-65.

26. *Harris*, 335 Pa. Super. at 149, 483 A.2d at 1381.

27. *Id.* at 149-51, 483 A.2d at 1381-82.

In the Department's version, J.S. related that she recently sought food stamps for herself, her pregnant teenaged daughter, and her grandson. Harris also applied for food stamps for herself, her pregnant teenaged daughter, and her grandchild. J.S. inquired about medical care for her pregnant daughter. Harris had made the same inquiry. J.S. said that the welfare office refused to process her application because she would not allow them to photocopy her naturalization papers, which she believed could not be copied lawfully. Harris had withdrawn her application because a caseworker insisted on duplicating documents bearing a written prohibition against photocopying. J.S. asked whether her eligibility for food stamps would be affected by the income of a son who lived at home and worked intermittently. Harris had raised the same concern about her son. Easton chose to publish the questions posed by J.S. without the initials and hometown provided by the Department and without the Department's disclaimer that the facts were fictionalized.<sup>28</sup>

Harris brought a lawsuit alleging invasion of privacy against Easton, the Department, the Northampton County Board of Public Assistance, and the Commonwealth of Pennsylvania. Harris maintained that seventeen people recognized her in the published account. Harris's complaint against all public defendants was dismissed with prejudice on the ground of governmental immunity. A trial court subsequently granted Easton's motion for summary judgment and Harris immediately appealed.<sup>29</sup>

The appellate court addressed the question of whether Harris established a prima facie claim for invasion of privacy. The court noted that Pennsylvania had adopted the *Restatement* definition of the tort of invasion of privacy.<sup>30</sup> Harris alleged that the publication of her inquiries invaded her privacy in two respects: the unauthorized publication constituted an unreasonable "intrusion upon seclusion"<sup>31</sup> and unreasonable "publicity given to private life."<sup>32</sup> The absence of physical intrusion into a place where the

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28. *Id.* at 151, 483 A.2d at 1382.

29. *Id.*

30. *Id.*

31. *Id.* at 153, 483 A.2d at 1383. According to the *Restatement* "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *RESTATEMENT (SECOND) OF TORTS* § 652B (1976), quoted in *Harris*, 335 Pa. Super. at 153, 483 A.2d at 1383.

32. *Harris*, 335 Pa. Super. at 152, 483 A.2d at 1383. The *Restatement* states that:

plaintiff had secluded herself or personal information led the court to conclude that the first type of privacy invasion had not occurred and thus to uphold that portion of the trial court's summary judgment.

On the second claim, the court held that Harris's allegations presented material questions of fact as to whether unreasonable publicity was given to her circumstances.<sup>33</sup> The court found sufficient evidence of publicity, even though it believed a stricter standard applied in "private fact" privacy cases than in defamation cases.<sup>34</sup> The court stated that the privacy tort requires publication not simply to a single person or newspaper but "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."<sup>35</sup> Stressing that at least seventeen persons identified the plaintiff from the publication, the court also found that the publication could be deemed to concern the plaintiff even though it did not expressly name or picture her.<sup>36</sup>

The court considered, but rejected, the trial court's conclusion that the "private facts" in the welfare column were not private by the time they reached Easton because the Department had made them public by releasing them to the press. However, the court noted that ultimate liability in the case would depend upon whether the seventeen people who recognized the plaintiff learned anything about her they had not already known. The seventeen may have learned for the first time that Harris was poor enough to be eligible for welfare, that her teenaged daughter was pregnant, and that her son's employment was irregular. This publication may have embarrassed Harris and damaged her reputation.

To buttress the contention that Easton's publication was unreasonably offensive, the court relied on provisions of the Public

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One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter published is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1976); *Harris*, 335 Pa. Super. at 154, 483 A.2d at 1384.

33. The court understood the central elements of the "private fact" tort to be: "(1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person and (4) is not of legitimate concern to the public." *Harris*, 335 Pa. Super. at 154, 483 A.2d at 1384 (citation omitted).

34. *Id.*

35. *Id.* at 155, 483 A.2d at 1384.

36. *Id.* at 158, 483 A.2d at 1386.

Welfare Code prescribing protection of information obtained in the course of applications for public assistance.<sup>37</sup> Thus, while welfare recipients "do not have an *absolute* right to keep private"<sup>38</sup> all facts about their status, "applicants have a legitimate basis for believing that the personal or confidential information revealed to the Department as part of their applications for assistance will not subsequently appear in their local newspaper for all to read."<sup>39</sup> The court understood that the Public Welfare Code did not attempt to define a duty of secrecy for third parties (like Easton). The court relied on the Code solely to confirm Harris's contention that certain disclosures of welfare information are unreasonable and offensive.

The final element of the "private fact" privacy tort embodies the common law newsworthiness privilege other courts have recognized.<sup>40</sup> The private facts publicized by Easton were arguably of public concern. Other members of the low income community might have pregnant daughters, legal documents they fear copying, and adult children living at home. The court cited the doubtless "benefits inherent in the publication of information to aid those eligible for public assistance who encounter difficulties in applying for assistance or continuing" assistance.<sup>41</sup> The court nonetheless concluded that "there is *no* legitimate public concern in giving publicity to the actual circumstances of a person's application . . . in . . . a way as to imply that those facts are true," and the facts about Harris "were unnecessary to aid those interested in receiving advice."<sup>42</sup>

The *Harris* case illustrates the relation between privacy and power. Poor women with children are among the most powerless groups in our society. State government and media concerns are among the most powerful. As a condition of obtaining public as-

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37. *Id.* at 158-59, 483 A.2d at 1386.

38. *Id.* at 159, 483 A.2d at 1386 (emphasis in original).

39. *Id.*

40. *See, e.g.,* Cape Publications Inc. v. Bridges, 423 So. 2d 426 (1982), *cert. denied*, 464 U.S. 893 (1983) (no invasion of privacy where photograph of nude crime victim is newsworthy).

41. *Harris*, 335 Pa. Super. at 160, 483 A.2d at 1387 (emphasis in original).

42. *Id.* An analogous, and equally meritorious argument, has been made about the publication of the identities of rape victims, an issue inconclusively addressed by the Supreme Court of the United States in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Although the community should be made aware of the incidence and location of violent crime, it is rarely necessary to reveal the identity of the victim.

sistance for her family, government authorities required Harris to disclose intimate facts about her circumstances. Once she made the required disclosures, her story was used without her express consent for the benefit of others. Admittedly, entitlement to benefits is a kind of private power over public officials. A woman can "compel" benefits simply by qualifying. As a practical matter, however, bureaucrats, not individuals, control access to public assistance programs.

In appropriate cases, media tort liability can empower the powerless through mechanisms of compensation, punishment, and deterrence. In cases like *Harris*, for example, a compensatory damage award would enable plaintiffs to finance the material consequences of unwanted publicity. A damage award would also penalize media defendants for recklessly disregarding the privacy interests of welfare recipients. From a public policy perspective, imposing liability would deter the media from inflicting future injury under the guise of providing a "public service." Newspapers might attempt to avoid liability by publishing such information only when effective disclaimers and assurances of privacy protection or consent have been given by the public assistance agency. Increasing the costs of running a newspaper business to prohibitive levels through the threat of liability is not in anyone's interest. However, encouraging the media and welfare officials to cooperate in publishing public service information without needlessly imposing reputational and emotional burdens on vulnerable segments of the community is very much in the interests of citizens like Brigitte Harris.

The trial court in *Harris* had attempted to frame the case as one about "the right of the press to publish information which it has already acquired without solicitation."<sup>43</sup> The appeals court reasoned that there is no "unsolicited materials" exception to the invasion of privacy tort. The court also rejected Easton's claim that the case was controlled by *Time, Inc. v. Hill*.<sup>44</sup> There the Court observed that the plaintiff, a former kidnap victim, was already a public figure at the time of the allegedly tortious publication. Harris was not. Also, the *Time v. Hill* plaintiff had alleged injury due to falsehood in a fictionalization of truth. Harris claimed injury due to truth in a fictionalization of truth. The court recognized that important constitutional issues raised by *Harris*

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43. 335 Pa. Super. at 161, 483 A.2d at 1387.

44. 385 U.S. 374 (1967).

were not resolved by the Supreme Court in *Time v. Hill* or its other privacy-related first amendment cases.

Responding to the constitutional questions ultimately raised by the case, the *Harris* court stated that:

The right of privacy competes with the freedom of the press as well as the interest of the public in the free dissemination of news and information, and these permanent public interests must be considered when placing the necessary limitations upon the right of privacy. . . . An action based on [the right to privacy] must not become a vehicle for establishment of a judicial censorship of the press. . . . However, on balancing the various interests, we hold that [Easton] was not entitled to judgment as a matter of law.<sup>45</sup>

A "balancing of interest" properly includes the interest of poor mothers in empowerment vis-a-vis the more powerful institutions of state and press. The Pennsylvania Public Welfare Code stands as evidence of the popular will and expectation that poor women be so empowered. Where, as here, express statutory privacy provisions do not reach media conduct, the court's common law decision to reverse summary judgment is an effective check on gratuitous inflictions of emotional pain by the press. In reversing summary judgment, the appellate court protected the interests of a vulnerable community in a way that left first amendment guarantees of free press intact.

I would add that Professor Schauer's assertion that the ascription of privacy rights is the allocation of power is correct whether one is speaking of privacy rights under federal or state constitutions,<sup>46</sup> the common law,<sup>47</sup> or statutes.<sup>48</sup> It is correct

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45. *Harris*, 335 Pa. Super. at 162, 483 A.2d at 1388 (citations omitted).

46. *E.g.*, U.S. CONST. amend. IV. The relationship between power and privacy is readily seen in the case of government intrusion of the sort the fourth amendment was adopted to deter. When James Otis complained about British officials' "unreasonable" searches of the American colonists' business papers, he was complaining about abuses of power. *See Paxton's Case*, Quincy's Reports 51 (Mass. 1761).

47. *See, e.g.*, *Phillips v. Smalley Maintenance*, 435 So. 2d 705 (Ala. 1983) (sexual harassment in employment); *Bodewig v. K-Mart*, 54 Or. App. 480, 635 P.2d 657 (1981) (employer strip search of employee in front of third party); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (retailer's stop and search of customer in parking lot); *Harris v. Easton Publishing Co.*, 335 Pa. Super. 141, 483 A.2d 1377 (1984) (newspaper's publication of private facts). Invasions of privacy have also been alleged by the more powerful party in a relationship. *See, e.g.*, *Barr v. Arco Chem. Corp.*, 529 F. Supp. 1277 (S.D. Tex. 1982) (tape recording of alleged discriminatory termination by employee); *N.O.C., Inc. v. Schaefer*, 197 N.J. Super. 249, 484 A.2d 729 (1984) (observation of illegal business

whether the "privacy" in question is freedom from interference with autonomous decision making or freedom from highly offensive intrusion, disclosure of confidences, publication, or commercial appropriation. One who can invade or violate another's privacy is a powerholder. Knowing interference with another's privacy is an exercise of power.

The law of privacy has no unique relationship to power. Even within tort law, privacy claims are not unique in providing courts with occasions for thinking hard about how legal rules influence the allocation of power. The ascription of rights against battery, assault, intentional infliction of emotional distress, false imprisonment, and defamation are also allocations of power. If parents were immune from liability for beating their children or corporations for retaining managers who sexually harass secretaries, the law would allocate powers of exploitation to families and firms. Knowing this, courts weighing their decisions properly consider power relations. Courts in worker harassment cases often expressly consider the relative power of worker, supervisor, and employer. The court easily appreciated that the plaintiff who sued for infliction of emotional distress in *Ford v. Revlon*<sup>49</sup> was a victim of raw power. Inside and outside of privacy law, the allocation and reallocation of power is an important aspect of what courts do when they decide cases. Sometimes they do it, and should do it, explicitly.

### CONCLUSION

Knowledge is power, Professor Schauer reminds us. Our society potentially keeps powerful knowledge away from potential knowers by ascribing legal privacy rights. If gains in knowledge were inherently good, all efforts to decrease knowledge would be facially invalid, even those designed to protect the privacy of the most vulnerable segments of society. Professor Schauer underscores that some gains in knowledge are not worth the price. I concur in his unwillingness to subscribe to an interpretation of the

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activity by private citizen).

48. *E.g.*, *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y. 1977) (construing federal statute to allow community group access to academic records over objections of school officials and individual students); *Humphers v. First Interstate Bank*, 298 Or. 706, 696 P.2d 527 (1985) (physician's disclosure of natural mother's identity in violation of confidentiality statute).

49. 153 Ariz. 38, 734 P.2d 580 (1987) (female plaintiff sued for infliction of emotional distress after male department head fondled her and repeatedly announced "I am going to fuck you").

first amendment that presumes gains in knowledge are always positive contributions to the aggregate good. It is always important to consider how truth arrives at the "marketplace of ideas," who will purchase it, and, after the purchase, how many lives will be nourished by the knowledge it represents and to what extent of fulfillment.

