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# The Press and Privacy: A Clash of Constitutional Values

## **Cover Page Footnote**

This talk was presented at Sacred Heart University on April 17, 1991, sponsored by the Freedom Institute and the Continuing Education Council.

ARTHUR R. MILLER

*The Press and Privacy:  
A Clash of Constitutional Values\**

This is a very patriotic period we are living in. Patriotism was certainly a major part of the Gulf War. Thank God it turned out alright — at least the shooting part. And the war has accentuated a period of patriotism, which I think actually started a few years ago. And of course, it is also the 200th anniversary of the promulgation of our Bill of Rights in 1791. So it's good to be patriotic: it's good every once in a while to remember our blessings. We, after all, are blessed by the fact that we have more rights than any other people on the face of the earth. I bet you don't wake up in the morning and say that to yourself. You should, because it's true: we Americans probably have more rights than any other people who ever inhabited this planet. Understand I'm not saying that we've got enough rights, nor am I saying that we've done the perfect job of distributing those rights. But just to have more rights than any other people is a feather in our cap, and we should be pleased by that. It's a part of a justifiable patriotism at the moment.

But there's a problem: the more rights you give people, the more likely it is that those rights will come into conflict, that they will bump into one another. After all, my freedom to swing my arm ends at the tip of your nose. And one of the facts of American life — it has always been a fact of American life — is that we go through numerous instances in which two or more of our rights are in conflict: they rub up and cause abrasion between them. One of the hallmarks of this country is the fact that with the exception of the Civil War we have always been able to accommodate those rights in conflict peacefully. Somehow we've balanced them out. That's why we call the PBS Constitution series "That Delicate Balance": because if you study the Bill of Rights, you will see that this country spends a great deal of its time striking some sort of a

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“delicate balance” between competing interests and competing rights.

What I'd like to do this evening is talk to you about one of those conflicts. It's not a conflict that draws front-page attention in the media. You probably rarely think about it. It will never cause bloodshed or revolution, but it is a very important conflict of rights in our society, and thinking Americans should consider it. As the title of this evening's remarks indicate, I'm talking about the conflict between the press and privacy. Maybe it's not immediately apparent to you what that conflict is. What is the price of freedom of the press? Some people focus on the public's right to know. And the media like to say that they're in the business of protecting the public's right to know. What's the right of privacy? The right of privacy is called by many people the right to be let alone. Listen to those words again: the public's right to know and your right to be let alone. Maybe the tension is starting to become more apparent.

Let me give you an illustration. Years ago our President was Gerald Ford. He was giving an outdoor speech in California — I think it was at Union Square in San Francisco — to a large crowd. In the middle of the crowd, an arm raised up and at the end of the arm was a gun. It was the arm of Sara Jane Moore, and she was about to shoot the President of the United States. Fortunately, next to her was a 25-year-old ex-Marine. Seeing the gun, he instinctively lunged forward and struck the arm just as she was firing two shots. The two shots missed. We don't know that the two shots would have hit. Maybe she was a lousy shot. But we do know instinctively that the act of that young ex-Marine was heroic. Instantly he became an American hero, and Americans are very generous: we love our heroes. We love George Washington and Joe DiMaggio, all of our heroes. And not surprisingly, the press filled their pages and their airways with stories of this heroic act.

Three days after the event, in Herb Caen's column in the *San Francisco Chronicle*, there appeared an item. Because Caen's column is syndicated, it was immediately pumped into two, three, four hundred other newspapers. Because it's a syndicated column, it's picked up on the wire services, and that means it's pumped into every radio station and every television station, so by that evening when Jennings and Brokaw and Rather said goodnight, approx-

imately 125 to 130 million Americans had been told, courtesy of print and electronics, that the 25-year-old ex-Marine was gay. Now to me that's always symbolized the conflict between freedom of the press and the right of individual privacy. The people had a right to *know lots of things: the President had almost been shot. The people had a right to know who did it, whether the person was apprehended, was it a conspiracy, where was the secret service, how was he saved?* But the 25-year-old ex-Marine, it seems to me, had a right of privacy. He had a right to be let alone. Is the price of heroism in our society such that you will be stripped bare, naked, by the media and 125 million Americans told something that perhaps your mother doesn't even know?

That's the conflict. Both of the rights are constitutional rights. I consider them absolutely essential rights to a free society. I view this as a conflict between heavyweights: I don't think of this as a flyweight match, this is Evander Holyfield vs. George Foreman. Let's look at the two rights, so that we can get a profile of the contestants.

Free press: we all know the importance of a free press. Indeed, I've always said that if somebody were to wake me up in the middle of the night, shake me by the shoulders and say "Arthur, Arthur, what's the most distinctive American right of all?" I would instantly reply "free press." It truly is. We practice free press like no one else. We took great pains to write it down in the Constitution, and because we did that we kept the faith for two hundred years about free press. We inherited it from the British. The British didn't write it down, and because they didn't write it down, they hedge it in with libel laws, contempt laws, official secrets laws, all of which would be unconstitutional in the United States: they'd be struck down instantly by our Supreme Court.

The truth is, free press has worked wondrously well in this country. If you think back over your lifetime at things the press has done, you will see that it is the press in this country that has ventilated information to allow us to make up our minds and impact policy the way a democracy should work. Not always comfortably: we had Watergate. Watergate was a press phenomenon. It was the press that unearthed the Watergate business. We weren't very comfortable, regardless of political persuasion, at seeing an

American president resign in shame, for crimes in high places, but as a nation you can't help but say "Thank goodness for free information flow." No other nation on earth could ventilate in that fashion and come out stronger as a result of it. We had Vietnam. No one liked death and destruction over the dinner-table. But it was a free press that brought us the story of Vietnam, allowed us to think about Vietnam — indeed *made* us think about Vietnam. We didn't like Vietnam. We didn't like any of that, but in a free society you are supposed to think and be informed and make up your mind for better or for worse.

More recently we had the nomination of Robert Bork to the United States Supreme Court. I happen to be a great admirer of Bork. Everywhere I traveled during that period, courtesy of television and the recognition it sometimes gives you, people would stop me and say they'd been watching the hearings or they'd been reading about the nomination, and they wanted to talk to me about whether or not Bork should be on the Supreme Court. It struck me that there again the American press, courtesy of the First Amendment, was doing its job: it was informing. Imperfectly, yes, but better imperfectly than not at all. And if you think about it, for two hundred years whatever mistakes they've made, whatever bones they've broken — which they have from time to time — have been the price of doing business with a free and unrestricted press. This is a powerful right, although not quite as absolute as journalists believe it to be. If you give journalists a martini they talk about freedom of the press as though it's holy scripture. After all, they say, it is in the First Amendment, isn't it? It's not something buried way down in the Sixth Amendment, let alone a double-digit Amendment, it's in the First Amendment. Journalists are lousy historians. What is now the First Amendment was through all the drafts save the last the third.

Now what about that right on the other side of the ring, the other contestant, privacy? Privacy is a right that is entirely different than free press. First of all, it's not explicitly written down: it doesn't have its own amendment. It has to be teased out of the text. Second, it's a very subjective right. It's what you think is private. Maybe I like to yell from the rooftops. Or maybe I'm like Greta Garbo: "I want to be alone." Or is it something more than that?

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Well, to me privacy is something more than that, a good deal more than that. To me privacy is autonomy, it's freedom, it's the ability to close the door, the ability to be private, to think what I want to think. It's part of my personality. I can't be an individual unless I can be private, unless I can control the flow of information and things about me.

The truth is, privacy is constitutional: not explicitly the way free press is. Stop for a moment and think about it. Here you are sitting quietly this evening. Is anybody here worrying that some policeman is breaking down your door? Nah. Why? Because you know that you've got protection against search and seizure in the Fourth Amendment to the Constitution. That's privacy. You have the privacy of your home. You are protected against governmental search and seizure. I don't see anybody here worrying about who they're sitting next to. I mean, who is that person next to you? Maybe it's a Democrat! Maybe it's a Commie! a Bull Mooser! You have freedom of association. That's guaranteed to you, by the way, in the same amendment that free press is, the First. The First doesn't belong to the media: only one-fourth of it belongs to the media. Freedom of association is a privacy right. I can associate with whomever I want, without fear of intrusion on that relationship. It's my relationship. And there you are, sitting there daydreaming, because you know you can think anything you want, can't you? You can think the moon is made of green cheese. You can think the Celtics are going to win the N.B.A. championship, the Red Sox are going to the World Series, any fool thing you want to think. That's because you have ideological privacy. You have privacy of the mind: no one can go in there without your permission. That's also protected by the Constitution.

And finally, what is perhaps the biggest domestic issue of our time, women have freedom to choose, and as of a year ago each of us has a freedom to decline medical treatment, which is a polite way of saying we have a right to die. Both of those rights — to choose and to refuse — are based on a constitutional right recognized as you know in *Roe vs. Wade*, of individual privacy of the body. The Court had trouble locating it: which amendment — First, Fifth, Ninth, Fourteenth? Oh what the hell, it's there. But they said it was there: they said that we have bodily privacy. We

don't know where that one's going to take us. We really don't. But it's privacy, and when you put it all together, look at what you've got: you've got spatial privacy, your home; you've got associational privacy; you've got ideological privacy; you've got physical privacy. And the right we are talking about tonight, which we've set off against freedom of the press, is a fifth form of privacy, which we loosely call informational privacy, the right to control the flow of information about us. It hasn't yet gotten the status of the other four elements of privacy. Maybe it never will. But it's part of that same notion that in a free society a free human being should have free choices about privacy.

Those are our two contestants. Why are they fighting? They've been around a long time, yet they seem to be at each other's throat more these days. Well, I don't know the answer to this. I can only guess, so I suppose that makes me for the next few minutes a sociologist. Let me put my guessing to work on each of the two. Let me guess first about the media. Let me take you back to Vietnam and Watergate, those two great events for America's media. These events developed, in my judgment, a very aggressive mentality among the media. Hard-edged journalism became the norm: you know, investigative journalism. We didn't used to have that, we used to just have journalism. We used to just have reporters; now we have "investigative" reporters. We have "I" teams and "spotlight" teams. And look at television: *60 Minutes*, *20/20*. And then we slip to Sally Jessie, and Donahue, and Oprah, and Geraldo. That's journalism: tough elbows, Pulitzer fever. Everyone wants to be Dan Rather, and the way to do it is to be investigative. Now if you just think about it you realize that that mode of journalism, whatever its merits — I'm not saying it's bad — works at cross-purposes with privacy. It is intrusive journalism.

A second phenomenon of the media, obviously more germane to electronic journalism, is the technology of journalism. Stop and think about that: when you go home and see "Live at Five" they're not kidding you. They're showing you a building burning, or a car crash; they're showing you people dying, they're showing you victims. The waxen reporter holds a mike under the snout of the survivor: "What's it like to see your spouse die?" That's technology plus intrusion. The truth of the matter is, in this day and



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age there's no place on earth immune from journalism. You watched the President and the Pope embrace in Alaska live some years ago, you watched the Gulf War live: remember SCUD attacks in the middle of the night? You were there. You watched them put on their gas masks. You watched astronauts die in space on live TV. The technology means that there is no place on earth that is private from the media. We have the ability to move sound and pictures and information anywhere on the planet in under two seconds. It changes the scale of privacy totally.

Now let me make some observations about privacy. When I first got interested in privacy in the 60s, if you walked up to somebody, tapped them on the shoulder and asked them "What do you think about privacy?" they'd stare at you. "You mean wire-tapping?" Or if you got some real sophisticate, he'd say, "Privacy, yes: that's a white, middle-class, suburban value. Rich people buy their privacy with big limousines with smoked glass and white fences, and the poor are so dependent on the dole that they can't even think about privacy," and then walk away. There's something funny about privacy. Each year — you probably notice this early in January — Field and Roper and Yankelovitch, the researchers, publish attitudinal studies about what Americans are thinking, what they like and what they dislike. And starting in the 60s, every single year a larger number of Americans have expressed concern about loss of privacy. In one of the three, the magical year of 1984, privacy became a majoritarian concern in the United States.

Why are Americans who twenty to twenty-five years ago never thought about privacy, suddenly very concerned that they are losing their privacy? Another guess: technology. In particular, computers. Computers. How many things that you do in your daily life end up computerized? I'll give you an autobiographical day. I travel a lot, so I go out to Logan Airport. Maybe I want to fly the Friendly Skies of United. (I used to be able to put on the wings of man, but now they are in Chapter 11.) I walk up to the counter. There is this beatific face shrouded in brown hair, and the face says to me "Good morning." And I start saying "Good morning" back and then I realize that before I can respond the face disappears. The head is rotated downward. I now see brown hair, and I realize that

the face is totally preoccupied with a computer screen, and it begins to dawn on me: my ability to fly the Friendly Skies of United doesn't depend on the fact that I have a ticket and I'm waving the ticket in the brown hair. It doesn't depend on the fact that I'm standing there. It depends totally on what's on the screen.

I begin to sweat. I realize I do not exist. The only truth is the screen. If the screen does not recognize me, I do not exist. I am a mere three-dimensional embodiment of the screen. I am no longer autonomous or an individual. I then begin to realize that what is on the screen is a dossier. It has my name, often my address, my telephone number, a credit card number, who I'm flying with, where I'm going, where I'm going after I'm going, whether I've rented a car or a hotel room through them, and if I've ordered one of those special meals. God help me if I'm on the same plane as a Mafia capo because that dossier does not disappear when I leave the Friendly Skies of United. Those files, those computer tapes, are maintained for six months, a year, or longer and are periodically monitored by such organizations as the Organized Crime Strike Force of the Department of Justice. Anyone they or any similar organization has under surveillance — that means organized crime, terrorists, and so on — has his or her travel patterns monitored, and anytime you are on a plane with a person under monitoring, by cross-referencing you are monitored.

So I get off in Chicago, and I do my O.J. Simpson thing through the terminal, and I show up at Avis. And it happens again. "You want that Plymouth, Mr. Miller? Well, you've got to give us your name, address, your driver's license number [which in Massachusetts is your social security number] . . . Who else will be driving that car, Mr. Miller? And where will you be leaving it?" You see, the process continues: you drive off into the sunset, headed for a Sheraton or a Hyatt or a Hilton. What has Sheraton done for you lately? It's made another file, because you're not going to put your head down on a Sheraton pillow unless you've left distinctive tracks in the computer. And if you think about your lives, you will realize that much of what we do in life is recorded. We are the freest, most righted people on the planet, and we are the most recorded, we are the most dossiered. There is more information about us than any other folk on this earth of ours. 1984 was

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Big Brother on a screen. Brave New World's was the womb to tomb dossier. The womb to tomb dossier exists. The question is, whether Big Brother is looking at it.

We know that in this mass society of ours decisions about us are increasingly made on the basis of files we have no access to, do not even know exist: insurance, credit, governmental benefits, certain vocational opportunities, are made in accordance with pre-set computer parameters, based on what the record shows. Every time I get turned down for credit, I sweat. I say, "What do they know about me? What do they know about me?" Or maybe they have me confused with a deadbeat playwright of the same name. You just don't know why your credit card is being turned down, and when you write to Mr. Beasley of Visa: Did you ever try to write to Mr. Beasley at Visa? Mr. Beasley doesn't exist. You are writing to a computer file. They know it, you don't: you think you're writing to a human being who's addressing your concern. If you study the responses you get from Mr. Beasley, you find he has a certain repetitive vocabulary. Well, all of this, all of these realizations about the womb to tomb dossier plus a few paranoid thoughts, contribute to this apprehension: Americans feel they don't quite understand about losing their right of privacy. The ability to control my own destiny, to be the captain of my own ship, seems to have been lost. It seems to me these kinds of things create the tension.

Now how will you notice this kind of tension? When the fighters come to the center of the ring, what should you look out for? Well, one of the confrontation points is about access: the media demand access. People have a right to know: that means that we have to have access to everything, because the people have a right to know. Remember the Gulf War? Remember some of the media complaints? They were about access. They weren't permitted to go everywhere. They believe there's a constitutional right to go everywhere where there might be something that you in their judgment have a right to know. So a lot of the controversy between the media and the right of privacy involves access. Do they have a right of access to your files, to my files? Right now the media in San Francisco are claiming that they have access to the death chamber in San Quentin prison. KQED, one of America's great

PBS stations, says "We want to televise the next execution in California." Do they? Do you have a right to know that? Do the media have a right of access everywhere? To the war? To the jury room? To your house?

The next battlefield is a variant of that. The media claim not only the right of access but if necessary by whatever means they choose to pursue. That was what the Pentagon Papers was all about. If there's something in those files, we can steal them, or we can receive stolen goods. Or if there are Teheran hostages, we can trample on their family's front lawn to get shots through the window. Son of Sam? We can go into his apartment. The end justifies the means; after all, it is the public's right to know. Think about the primaries preceding the last election. Remember Gary Hart? I hold no brief for Gary Hart, the man who uttered the two dumbest words in political history: "Follow me." And they did. But is the First Amendment a license to wear a trench-coat and binoculars? Access by whatever means?

Finally, the battlefield will be the base question: what is newsworthy? What is it that you have a right to know? We are seeing that played out due south of here, in Palm Beach, Florida. Do you have a right to know the name of a woman who claims she's been raped? Or does a rape victim — not simply this woman in Florida — have a right of privacy? I realize that from some Olympian perspective it would be good if rape victims discussed with the public the horror of rape, but I still think an individual has some sort of a right to choose about certain aspects of their innermost self — let's say religion, philosophy, their finances, their sexuality. And we are always dealing with a lowest common denominator phenomenon: some dinky little rag in Palm Beach publishes the name. That immediately justifies NBC repeating it. Well, the people in Palm Beach know; that means that people everywhere can know. Says who? I mean, who made up that rule? And then the vaunted *New York Times*, says, "Well, if NBC can tell its viewers, certainly the people of New York are entitled to know through our pages." That's to me nothing more than self-justification.

We have had instances in which the media were very good about that: in the New Bedford rape case they were very good

about that, and in the New York jogger case. With this latest case, though, they just seemed to say all bets are off. Why, because a Kennedy is involved? But why should this woman's privacy swing on the fact that there's a Kennedy in the story? It's her right to privacy we should be thinking about. We can understand the story without knowing her name. And just stop and think about whether it adds anything to the story to know the name of the victim. The information is the same. You can understand the story, you can make up your judgment about Palm Beach, Au Bar, the Kennedy compound, the Kennedy clan, without knowing the name of the woman. And whether it's true or false will depend on whether it's true or false, not the name of the woman.

As we sit here tonight, a great TV station in Minneapolis-St. Paul is claiming a right of access to twelve hours of videotape held by the police in those cities. The public has a right to know what's on those tapes. What's on those tapes? Twelve hours taken by a sado-masochist rapist of what he did to his victim. The public has a right to know? All that cliché does is cause you to ask further questions: The public has a right to know? Know what? "When?"

These are the points of contest between the two heavyweights. I don't know how the bout is going to come out. I hope it's a good bout: they're always fun to watch. I hope there's fancy footwork, a couple of low blows, and some scoring shots to the head. I mean, let's face it: it's fun to watch rights in conflict. What we don't want, though, is a KO. Maybe we do in Holyfield vs. Foreman, but we don't want either one of these rights to knock out the other, because then we all lose, don't we? We need both. What we have somehow miraculously achieved by and large for two hundred hundred years with these constitutional rights and conflicts is that, after the full fury of the bout the referee in the sky, the Supremes, brings the fighters to center ring and says "It's a draw."