

## Privacy Right, the Family and Entertainment

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**Abstract:** Argentine and American courts have a similar understanding of privacy and Privacy Right. However, the theoretical frameworks and actual rulings in both countries differ in their perspectives and foundations. We provide here a comparative mapping of key conceptual elements of Privacy Right as addressed by the courts of both legal traditions, focusing on family issues. What makes the legal protection of privacy inappropriate, as argued here, is the conceptual framework of Privacy Right. When exploring the causes of this inadequacy, it is found that a largely unconscious process -- whereby privacy is frequently associated with other concepts, feelings and actions, such as integrity, autonomy, identity and data protection--, turns Privacy Right into a conflicted right. Notwithstanding, privacy is considered to be the backbone of Western societies and, in many ways, the actual democratic standing of a nation depends upon the way it is protected. The conflicting status of privacy is particularly clear in the field of Family Law, where a strict conceptualization of privacy is required in order to assure compatibility between the proper functions of the family members and State regulations. While civil tradition seeks the norms that will best address the protection of privacy, common-law tradition struggles to find cases that will provide the background for its adequate protection. Based on civil and constitutional law analysis, we are contending here that privacy can be clearly and properly addressed by establishing a legal standard that will consider illegal to use a person's privacy as entertainment without consent. It is also argued here that a clear conceptualization of Privacy Right will allow for the establishment of legitimate limits in State regulation of the family. The worth of considering privacy as opposed to an object of curiosity, contempt and entertainment is that a clear conceptualization can be drawn allowing an unconditioned protection of privacy, stripped of all other philosophical, political and even social considerations.

### 1. Introduction

The law does not allow States to undertake any kind of inquiry into the privacy of families. This statement gives rise to several questions such as: how can the wide range of legitimate requirements needed to assure the vigorous debate of ideas democratic societies require be compatible with Privacy Right?; or, also, how can the permanent intrusions imposed by security regulations and by social health planning or, for that matter, the necessary limits to privacy required by the investigation of crimes be compatible with Privacy Right?

### 2. What is the difficulty with privacy?

Many aspects of life require constant attention from legal theory. However, as technology offers ever new possibilities of intrusion and surveillance into people's privacy, this right has become an increasingly threatened good, to an extent never thought of previously. Men and women of our time live in a "transparent" world, in a seamless space where the traditional concepts of time and space have been dissolved by technology.

Furthermore, privacy is also at the core of academic debate because societies have developed a general tendency to see every aspects of human experience as an aesthetic object, rendering the individual and the family also an object of observation. The media has nowadays the unprecedented power to know and expose everything. And not only that, since, by the combination of technology and the power of aesthetic attraction --as noted by Vattimo several years ago<sup>1</sup>-- it is difficult to distinguish between what is real and what is just a representation, the latter encrypting the former.

Paradoxically, contemporary societies combine several conflicting elements: on the one hand, new technologies exposing a person's entire life and turning them "transparent"; on the other, everyone's own impulses to display every aspect of one's life in the cyber-world demanding, simultaneously, the right to express themselves and the protection of their privacy by the legal system. To these conflicting elements we should add the normal transparency requirements of modern life in relation to government, health and security.

Contemporary women and men are thus no longer alone, but exposed, like an object, along with everything else. This makes it difficult to conceptualize the notion of "the right to be alone." Indeed, it is virtually impossible for a person to be by him or herself despite the feeling of loneliness that he or she may in fact experience.

The comment above is not meant to be a negative description of the modern world, but aims, on the contrary, at pointing out to the unprecedented potential of the media offer in the way of multiple simultaneous realities. This new reality draws the attention of lawmakers around the world as it requires new and more creative solutions.

### **3. Old and new ways of thinking privacy**

When addressing the concept of Privacy Right, traditional approaches to privacy consider relevant to distinguish, on the one hand, between public or private information and, on the other, between actions either taking place in private or public spaces, or carried out by what are considered to be public figures or private individuals. These categories, I argue, are not very helpful to conceptualize Privacy Right because in our current information technology societies all spaces are transparent, that is to say, public; every person may broadcast himself to the world in a minute, becoming immediately public; and all information must be available for social planning. This new combination of factors requires a new approach to Privacy Right.

### **4. Privacy and entertainment**

The first meaning of the word privacy in the Webster refers to "the quality or state of being apart from company or observation". Black's Law Dictionary defines the Right of Privacy as the right to personal autonomy implicit in privacy zones created by constitutional guarantees. While dictionaries are fairly clear on the meaning of the word, regulatory and judicial treatment of privacy has been more than erratic in most Western countries.

Different social circumstances have the power to launch a wide range of ideas concerning the limits that the privacy zone should have. In fact, setting those limits has been a dooming task for legislators, judges and legal scholars in recent years. And results have been at best uncertain. This is why we explore here the relationship between privacy and entertainment so as to be able to establish the proper content of Privacy Right.

The word entertainment is explained as an amusement or diversion provided especially by performers. It is related to the Latin word *spectaculum*, which also refers to something "fun" built or made public in a place where people congregate to watch it. The world of entertainment includes all professional activities related to this fun and inspiring delight, which may also cause wonder, pain or other affections. More

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<sup>1</sup> Vattimo, Gianni, *La sociedad transparente*, Paidós, Barcelona, 1996.

often than not, entertainment is also associated to the action of causing great surprise or scandal. The tension between privacy and entertainment is obvious.

## 5. The Right to Privacy

Aristotle's contributions on this subject are well known. Not only this philosopher but the entire classical antiquity widely distinguished between public and private aspects of life. For them, political/public activities were a necessary element to becoming human. Free and willing engagement in political life made up the Greek *elútheron*, that is, a person dedicated to political action and of formal and orderly expression of thought; the free man, in other words, not the barbarian.<sup>2</sup> The Greeks considered that by exercising his own political virtue a man became human, and thus they defined men as: *zoon logon ekhon* (a living being capable of speech).<sup>3</sup> By contrast, domestic life was only that part of human existence deprived of its public element. To that extent, it was a minor element of being human. Greek political and philosophical thought focused on this cornerstone idea, neglecting the importance of privacy and treasuring public life.

An important precedent of the notion of privacy is Saint Agustin's statement, in his *Confessions*, where he mentions the idea that God dwells in a person's heart.

By the Modern Age, individual privacy started to be valued. Among others, John Stuart Mill focused on the topic distinguishing between the scopes of government as opposed to that of a person's own self.<sup>4</sup> John Locke, in his *Second Treatise of Government*, also addressed the issue. His "state of nature" theory supported the idea that all goods belong to the community of men. Accordingly, men had two fundamental rights: to liberty and to self-defense. Now, in order to ensure their safety, individuals endorsed a social contract waiving their right to self-defense but keeping the right to liberty to themselves as their own sphere of privacy.<sup>5</sup>

Immanuel Kant, in turn, took this idea and developed it up to its most ambitious consequences, leading the world to consider that what is most valuable in a person is what makes him unique, precisely that element he does not share with others because it concerns only his own self: the original character of his personality.<sup>6</sup> The actual emergence of a legal protection of that very specific good is only a logical consequence thereafter.

The concept of privacy, however, did not remain unchanged. From St. Agustin's initial idea to our contemporary notion, there have been many versions of privacy and there will be many new ones indeed.

The classic and most influential work on Privacy Right is Samuel Warren and Louis Brandeis's *The Right to Privacy*.<sup>7</sup> They argued it protects ideas, feelings, emotions and particularly the way in which a person wishes to share them with others. It is important to keep in mind that Warren and Brandeis's *The Right to Privacy* only protects the intangible excluding artifacts or instruments such as homes or correspondence.

For these authors, any infringement to privacy would hold the violator accountable in the Common-Law system. The idea was not originally theirs. In fact, in *Millar vs. Taylor*, 1769, cited by Warren and Brandeis, Judge Yates said "It is certain that every man has a right to keep his own sentiments, if he pleases; he certainly has the right to judge whether he will make them public, or commit them only to the sight of his own friends."

Despite the widespread impact of Brandeis and Warren's work, Privacy Right remained an unsettled right for a long time. The reasons offered were the lack of precedent, the purely mental character of the injury, the "vast amount of litigation" that might be expected to ensue, the difficulty to draw any line between public and private figures and the fear of undue restriction of freedom of the press.

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<sup>2</sup> Kitto, H. D. F., *Los Griegos*, Eudeba, Buenos Aires, 1977, p. 10 and Arendt, Hannah, *La condición humana*, Paidós, Buenos Aires, 2005, p. 39.

<sup>3</sup> Arendt, H., *op. cit.*, p. 40.

<sup>4</sup> Mill, John Stuart, *Sobre la libertad*, Alianza, Madrid, 2007.

<sup>5</sup> Locke, John, *Segundo ensayo sobre el gobierno civil*, Losada, Buenos Aires, 2002, p. 9.

<sup>6</sup> Sibila, Paula, *La intimidad como espectáculo*, FCE, Buenos Aires, 2009, p. 125.

<sup>7</sup> Warren Samuel y Brandeis, Louis, "The Right to Privacy", *Harvard Law Review*, 4, Cambridge, 1890, in Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/sum> 2007.

As a matter of fact, some authors are still skeptical and critical about Privacy Right. Judith Thomson, for instance, maintains there is no such thing as privacy right nor is there anything special about it. Instead, she believes it is better to work on property right and personal security as a clearer way of addressing problems generally related to privacy.<sup>8</sup> Richard Posner, himself, dismisses the Right to Privacy as mainly related to concealment and economic inefficiency.<sup>9</sup> Finally, Robert Bork believes Privacy Right is not sustained by any serious legal doctrine.<sup>10</sup>

Quite concerned about the vagueness of the concept, William Prosser wrote in 1960 a highly influential article in the *California Law Review*. From an analysis of American courts decisions he concluded that "What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff in the phrase coined by Judge Cooley "to be left alone." He described these four torts as follows: 1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs; 2. Public disclosure of embarrassing private facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."<sup>11</sup>

Prosser's stance was criticized by another American professor, Edward Bloustein, who considered that he had taken an extremely patrimonial posture and suggested it is better to relate the concept of privacy to human dignity, understanding that the violation of privacy constitutes one piece and encloses a single act.<sup>12</sup>

Especially interesting is the question raised by Catherine MacKinnon's argument whereby granting special status to privacy turns out to be harmful to women as it is used to protect that particular area where the feminine voice is controlled and silenced. According to this author –a true American icon of the feminist movement– the scope of privacy is a construction which covers up the abuse of women.<sup>13</sup>

## 6. Privacy in Argentina

A seminal work on Privacy Right in Argentina is *Derecho a la Intimidad* by Matilde Zavala de González. Her work is of utmost importance. She refers to it as "the right that protects the spiritual sphere of a person's private life, ensuring her free development, her expressions and feelings."<sup>14</sup> To back up her definition Zavala de González quotes leading legal scholars such as Isidoro Goldenberg, for instance, who considers the Right to Privacy as a right allowing individuals to "preserve that part of their existence which cannot be communicated",<sup>15</sup> or Guido Alpa, who speaks of the danger of living in a "house of glass",<sup>16</sup> as well as other Argentine classics such as Jorge Llambias or José Buteler Cáceres.

Zavala de González refers to Article 19, first paragraph, of the Argentine Constitution which keeps private actions away from government intrusion arguing that the first part of this article should be considered together with its last paragraph, which grants the principle of legality. Thus, for Zavala de González the Argentine Constitution protects, not only actions performed in solitude, but also those performed in public, or with others, but which are still private.

Jorge Bustamante Alsina in his article "La violación del derecho a la intimidad y su adecuada reparación"<sup>17</sup> also addressed the issue of Privacy Right accurately. He made his point by distinguishing

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<sup>8</sup> Thomson, Judith, "The Right to Privacy", *Philosophy and Public Affairs*, 4, pp. 295-314.

<sup>9</sup> Posner, Richard, *The Economics of Justice*, Harvard University Press, Cambridge, 1981

<sup>10</sup> Bork, Robert, *The Tempting of America: The Political Seduction of the Law*, Simon and Schuster, New York, 1990.

<sup>11</sup> Prosser, William L. "Privacy", *California Law Review*, 48, 3, 1960.

<sup>12</sup> Bloustein, Edward, J. "Privacy as an Aspect on of Human Dignity. An answer to Dean Prosser", *New York Law Review*, 39, 1964.

<sup>13</sup> MacKinnon, Catherine, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989.

<sup>14</sup> Zavala de González, Matilde, *El Derecho a la Intimidad*, Abeledo Perrot, Buenos Aires, 1982.

<sup>15</sup> Goldenberg, Isidoro, "La tutela jurídica de la vida privada", *La Ley*, t. 1976-A, p. 581.

<sup>16</sup> Alpa, Guido, "Privacy e estatuto dell'informazione", *Rivista di Diritto Civile*, n. 1, 1979, p. 65.

<sup>17</sup> Bustamante Alsina, Jorge, "La violación del derecho a la intimidad y su adecuada reparación", *La Ley*, 1989-E, 40.

the Right to Privacy from the right to one's own image. For him, Privacy Right is a different right than the one every individual holds not to have her or his image reproduced without consent.

Another Argentine author whose work is worth mentioning is Carlos Nino. As in the Spanish language the word *privacy* can be translated as *privacidad* or as *intimidad*, Nino distinguishes two different rights: one referring to "voluntary actions not affecting others" and, another, referred to "that sphere of the person which remains hidden from the general knowledge of others".<sup>18</sup> Specifically, he includes in the latter certain aspects of body images and thoughts, emotions, circumstances experienced, past events, behaviors, writings, paintings, recordings, correspondence and personal items, home, information about one's finance and so on. For Nino, somebody's *privacidad* is out of government reach and may not be limited in any way. On the other hand, *intimidad* lays within legitimate State regulation, in his opinion. It is important to distinguish both aspects of the notion of privacy in Spanish because one position excludes the interference of the State and other individuals in as far as it is the right of citizens to choose their own life plan if it does not affect a third party (*privacidad*); the other position, on the contrary, admits regulations by law in what concerns public or social interest (*intimidad*).

Many scholars in Argentina follow Nino such as Miguel Padilla<sup>19</sup> and Carlos Calautti.<sup>20</sup> Others, like Alberto Bianchi<sup>21</sup> and Santos Cifuentes<sup>22</sup>, differ on the grounds that for them there is no significant language or legal difference between *privacidad* and *intimidad*, since both imply something reserved accessible only to certain people.

Cifuentes rejects the difference between both concepts and adds "it is not exclusively the individual who has the right to be left alone, but also the accompanying circle of love or affection of that person, plus his/her kinship, including therein common activities of all kinds."<sup>23</sup> Thus, Privacy Right falls under what may be referred to as the right to be left alone, or the right to not include someone who is alien, or not to transmit it to others in any sort of way. And he adds "from a legal standpoint *privacidad* e *intimidad* are the same".

Privacy Right is widely accepted in Argentine legal doctrine, but there is still much debate regarding its scope and limits.

## **7. The Argentine Supreme Court rulings on privacy**

A thorough study of American and Argentine Supreme Court rulings regarding privacy shows that, in these legal systems, the State must treat citizens with equal respect and consideration. Both courts consider that Privacy Right protects the space given to the individual to expand his/her being and to exercise freedom without the interference of other people, particularly the States.

Drawing from Dworkin's idea, it can be argued that the Argentine and U.S. courts consider that there is no general right to freedom as such, but instead a right to some important freedoms.<sup>24</sup> Likewise with privacy, as courts protect certain privacies not privacy as a whole.

The main argument in my work here is that one aspect of privacy always protected by the law is actually that one in tension with entertainment.

There are several Argentine leading cases granting this, such as *Mieres vs. Safrar*, in which the Argentine Court considered that exposing a person's home front in a commercial photograph violates his Privacy Right because "it implies he is offering it as an advertisement, when in fact he is not."<sup>25</sup>

In *Ponzetti Balbin vs Editorial Atlántida*, the point was made when a tabloid published the picture of a famous politician dying in his intensive-care unit bed. The Court rejected the defendant's position on the grounds that publishing that photo was not a legitimate way to provide information about this public figure's health situation without "sensationalism, cruelty or morbid intentions."<sup>26</sup> The Court considered

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<sup>18</sup> Nino, Carlos, S., *Fundamentos de Derecho Constitucional*, Astrea, Buenos Aires, 2005 p. 304.

<sup>19</sup> Padilla, Miguel, "Fuentes constitucionales del derecho a la intimidad", *La Ley*, 1998-F, 911.

<sup>20</sup> Calautti, Carlos, "Reflexiones preliminares sobre Hábeas Data", *La Ley*, 1996-C, 917.

<sup>21</sup> Bianchi, Alberto, "Hábeas data y derecho a la privacidad", *ED*, 161-869.

<sup>22</sup> Cifuentes, Santos, *Derechos personalísimos*, Astrea, Buenos Aires, 2008, p. 618.

<sup>23</sup> Cifuentes, S. *op. cit* p. 587.

<sup>24</sup> Dworkin, Ronald, *Los derechos en serio*, Ariel, Barcelona, 2002, p. 216.

<sup>25</sup> *Fallos*: 298:723.

<sup>26</sup> *Fallos*: 306:1892.

the photo showed the intention to broadcast a show, not to inform the public about the health of the political leader.

In the case *Costa, Hector vs. MCBA*, the Court considered “the language used by the tabloid is sufficient evidence to show that everything had been set up as a TV show with complete disregard of the facts.”<sup>27</sup>

In *Lambrechi, Norma B. vs. Wilton Palace Hotel* it is noted that “it cannot be said a film essentially commercial holds a social interest justifying an improper use of a person’s image without her consent.”<sup>28</sup>

In *Cancela, Omar J. vs. Artear UPS* the Supreme Court considered violation of privacy the TV sketch that “made a parody to the functioning of the administration of justice in family matters”, “where the display of the judge’s name was used because it was instrumental for the purposes of the satire.” The Court stated “the TV show intention was not to censor through parody the Judge’s performance, but to make a show with his name.”<sup>29</sup>

In *S. V. vs. / M.D.A. s /* precautionary measures forbidding to mention the name of a minor are legitimate, because broadcasting his name represents a privacy unwarranted intrusion, even when in the news it has already been made public, because the repetition, obviously aggravates the minors situation. For the Court, the “reiteration in this case implied the notion of making a show of it and not simply spreading a newsworthy fact.”<sup>30</sup>

In *Perelmuter, Isaac c / vs. Art Argentine Radio and Television*, a TV program showed the image of a minor in his kindergarten room, mistakenly identified as the son of a prosecutor who was conducting a “resonant investigation”. The Court considered that the need to make a show out of the news, led the journalist to work carelessly, imprudently and unprofessionally, all very important elements particularly when dealing with minors.<sup>31</sup>

In *Keylián, Luis A. vs./ Santillán, María Laura* the Court considered there was no need to include the photo of a child on the TV Show news program, the only one possible explanation is to add drama to the show.<sup>32</sup>

In *Franco, Julio Cesar vs. Morning Journal*, the Court considered it is not necessary for the purpose of reporting the death of a person to display the photo of a dead body lying on the floor, nor can it be claimed that public interest demands such publication. Doing so is an unwarranted violation of privacy, because it makes a show out of it.

As suggested by the above jurisprudence, it is clear the Argentine Supreme Court has established a legal standard for privacy protection whereby making an unauthorized show out of private matters is wrong and improper.

## 8. The American Supreme Court view on privacy

The Supreme Court of the United States has important rulings regarding Privacy Right. Well known are the cases: *Griswold vs. Connecticut* in 1965; *Eisenstadt vs. Baird* in 1972; *Stanley vs. Georgia*, in 1969; *Roe vs. Wade* in 1973, and *Lawrence vs. Texas* in 2003. These cases follow a long reasoning started with *Pierce vs. Society of Sisters* in 1925 and *Meyer vs. Nebraska* in 1923 ruling on parenting and children education; *Prince vs. Massachusetts* in 1944 on family relations; *Skinner vs. Oklahoma* in 1942 on procreation; and *Loving vs. Virginia* in 1967, on matrimony. All these cases base their rulings on the autonomy of the individual.

There are other cases that consider it an unwarranted action to entertain with a person’s privacy, without consent. In *United States Department of Justice vs. Reporters Committee for Freedom of the Press* the Supreme Court ruled: “the main use of the information is to assist in the detection and prosecution of offenders; it is also used by courts and corrections officials in connection with sentencing

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<sup>27</sup> Fallos: 310:508.

<sup>28</sup> Fallos: 311:1171.

<sup>29</sup> Fallos: 321:2637.

<sup>30</sup> Fallos: 324:975.

<sup>31</sup> Fallos: 326:4638.

<sup>32</sup> Fallos: 327:3536.

and parole decisions.”<sup>33</sup> It also added: “We have also recognized the privacy interest in keeping personal facts away from the public eye.”<sup>34</sup>

Also, in *National Archives and Records Administration, Petitioner vs. Allan J. Favish*<sup>35</sup>, 2004, the Supreme Court considered that there is such a thing as “the right to control information about oneself”, but it “does not mean it cannot encompass other personal privacy interests as well, i.e. the interests of the family. The Court valued particularly a family member statement saying: “the family had been harassed by, and deluged with requests from, [p]olitical and commercial opportunists seeking to profit from Foster’s suicide,” as well as the fact that “she was horrified and devastated by [a] photograph [already] leaked to the press.” The ruling transcripts show Sheila Foster Anthony writing: “I have nightmares and heart pounding, insomnia as I visualize how he must have spent the last few minutes and seconds of his life.” The objection of the family was to have Favish’s photos disclosed because they feared the release of [additional] photographs would certainly set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. “Once again my family would be the focus of conceivably unsavory and distasteful media coverage.” [R]eleasing any photographs would constitute a painful unwarranted invasion of my privacy and that of all my family members”.

## 9. Conclusion

As stated by Marcos M. Córdoba, legal scholarship plays, regarding the law, a similar role public opinion plays in political science, “through the strength of its arguments it prepares and anticipates future changes of the law, and new judicial interpretations.”<sup>36</sup> Privacy Right took off with a very powerful scholarly work. Nowadays both the law and court rulings in the U.S. and in Argentina implicit and explicitly protect the citizens’ privacy. There is strong evidence of a growing interest in setting the legal boundaries of privacy, its autonomy and whether States should regulate family relations as it is still problematic to establish a clear and clean concept of what is an unwarranted invasion of privacy. In this work, I have argued, and offered evidence showing the invasion of privacy that makes of it an object of entertainment has been once and again considered unwarranted.

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<sup>33</sup> 489 US 749.

<sup>34</sup> 489 US 749.

<sup>35</sup> U.S. 02-954.

<sup>36</sup> Córdoba, Marcos, “Última y próxima evolución del derecho de familia”, conferencia pronunciada con motivo de la ceremonia de entrega del Premio Academia, 16/09/2008.

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*Fallos*: 306:1892.  
*Fallos*: 310:508.  
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