

No. 72159-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

JOHN and JANE DOES 1-15,
SEATTLE PACIFIC UNIVERSITY,
Appellants,

v.

KING COUNTY, et al,
Respondents

RESPONDENT WEST'S
REPLY BRIEF

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II. ARGUMENT

A. Disclosure of public records of the investigative files of law enforcement such as the “SPU” video records serves a legitimate public purpose; to safeguard the integrity of the criminal justice system

The appellants seek to obscure the critical fact that the video records at issue are records used and retained by King County as part of a criminal investigation and prosecution. As such, the public has a legitimate and historic right to these records. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), The Supreme Court held:

A responsible press has always been regarded as the handmaiden of effective judicial administration, over several centuries. The press does not simply furnish information..., but guards against the miscarriage of justice by subjecting police, prosecutors and judicial processes to extensive public scrutiny and criticism.

The preservation of the integrity and regularity of governmental process is a legitimate public interest one that secrecy prohibits. the clear language of Article 1, Section 10 of the Washington State Constitution requires that

Justice in all cases shall be administered openly and without unnecessary delay.

Our Own Supreme Court has held that "Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are `of the very essence of a scheme of ordered liberty.' They are essential

not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. Adams v. Hinkle, 51 Wn.2d 763, 322 P.2d 844 (1958)

As the recent decision of the State Supreme Court in State v. Walker demonstrates, our system of criminal justice is not so infallible that oversight of the actions of our public prosecutors is unnecessary to ensure that justice is indeed administered in a fair and impartial manner.

While it is hoped that the abuses of former prosecutor Farina and the (now) Honorable Judge Costello are isolated aberrations, the fact remains that if the appellants in this case had their way, grossly “offensive” abuses such as those the Supreme Court identified in January 22, 2015 Opinion in the Odies Walker case might very well continue to go unnoticed behind a veil of secrecy. This would not be in the public interest.

B . Neither SPU nor the anonymous John and Jane Does have any historically recognized privacy interest to be free from depiction in the media that is cognizable under Article I, Section 7 to be balanced against the public's right to know.

It should not even be necessary to mention that depiction in the media of controversial and unpleasant events (and even such offensive depictions as “The Bloody Massacre in King Street” in the engraving by Paul Revere), has been the historic norm in America since before there even was an America or a Public Records Act.

The primary purpose of the PDA (now partially re-codified as the PRA) has been recognized by the Courts to “ensure the sovereignty of the people and the accountability of the governmental agencies that serve them” by providing full access to information concerning the conduct of government. Amren v. City of Kalama, 131 Wash.2d 15, 31, 929 P.2d 389 (1997).

The intent section of the PRA also contains strong language about the people’s right to know being essential for control over the instruments they create. As Juvenal noted in Satire 6, the question of who shall guard the guardians is as old as infidelity or western civilization itself.

Appellants’ answer to this question, that the public guardians and law enforcement officials should be free to act without oversight or accountability when disclosure of the records of their investigations might be offensive to some is contrary to common sense, operational realities, and the manifest intent of the public records act, that the public remain informed so they may retain control over the instruments they have created.

It is evident that the type of nebulous “privacy interest” that SPU attempts to assert on behalf of unnamed principals is not one the people have held or should be entitled to hold if we are to enjoy the benefits of popular sovereignty and the sound governance of a free society. As the Supreme Court held in State v. Surge, 160 Wn.2d 65, (2007)...

(t)he protections of article I, section 7 and the authority of law inquiry are triggered only when a person's private affairs are disturbed or the person's home is invaded. Carter, 151 Wn.2d at 126.... The "private affairs" inquiry focuses on " 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" Surge, citing State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984))

The key and critical distinction that defendants attempt to obscure is that nondisclosure of criminal investigation files and graphic depictions of massacre are simply not a legitimate "privacy interests" which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

Historically, no legitimate privacy interest has been recognized in the secret conduct of the people's business by public officials. The Courts have repeatedly denied recognizing the "privacy" interest asserted by the defendants in this case.

Recently in Predisik, this Court clearly expressed that a public official's "right to privacy" is limited to the type of private facts described in the Restatement of Torts...

Therefore, a person has a right to privacy under the PRA only in "'matter[s] concerning the private life.'" Id. at 135 (quoting § 652D). To explain how that standard is applied in practice, we looked to the Restatement's summary of the right to privacy:

"Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at

most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." Id. at 136 (quoting § 652D cmt. b, at 386).

This comment "illustrates what nature of acts are protected by this right to privacy," id. (emphasis added), and taken in context makes clear that the PRA will not protect everything that an individual would prefer to keep private. The PRA's "right to privacy" is narrower. Individuals have a privacy right under the PRA only in the types of "private" facts fairly comparable to those shown in the Restatement. Predisik v. Spokane School District No. 81, ___ Wn.2d ___ (4/2/2015)

In addition, the PRA is clear in its rejection of any type of balancing test that balances privacy against the public's right to know in the manner suggested by the appellants in this case...

A person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.17.255. Under these provisions, the use of a test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted. Brouillet v. Cowles Publ'g Co., 114 Wash.2d 788, 798, 791 P.2d 526 (1990).

As Chief Justice Rhenquist noted in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) in demonstrating the scope of judicial restraint and constitutional avoidance...

There is no merit to Justice Blackmun's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as Griswold v. Connecticut, 381 U. S. 479, (1965).

Clearly, the "Avoidance Doctrine" requires that the courts to "avoid" rather than rush into entertaining the very type of unnecessary, wanton, unsubstantiated and freewheeling assault upon a duly enacted statute that the appellants seek to bring in this instance, particularly when the targeted statute furthers a compelling State interest in the manner of the Public Records Act.

Similarly, there is no merit to appellants' contention that this Court should entertain a "great issues" review in regard to an unenumerated, extra-textual and nebulous penumbral right to privacy to be free from depiction in the media. (See also Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services; Crain, Christopher A, 13 Harv. J. L. & Pub. Pol'y 263 (1990)

Crispus Attucks had no privacy right to be free from depiction in the media as a victim of a public and bloody massacre, which our founding fathers took pains to depict in as bloody and offensive a manner as was possible in the primitive media of the day. Similarly, while our sympathy goes out to SPU and the victims of the recent tragic events on the SPU campus, there is no historically recognized privacy right to keep

even the records of the videos that display the acts committed by Ybarra concealed, particularly in the proposed partially redacted form.

C. Appellants' arguments concerning terrorism response records fail to acknowledge that Aaron Ybarra was not a terrorist, and that the Jean Clercy Act, in any event, requires disclosure of campus security response procedures

Seattle Pacific University (SPU) argues that the 3 minute video tape is exempt under the terrorism planning and response exemption of the Public Records Act (RCW 42.56.420(1) (a) (b) and (c)) However, this exemption is narrowly drawn, and must be interpreted in accord with the express language that the Legislature chose to employ in enacting the exemption. The Statutory exemption is expressly restricted to...

(1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety,...

A campus security videotape, recorded in the ordinary course of business, simply does not meet either the primary definition of RCW 42.56.420(1), or any of the 3 related subsections of the exemption. In addition, Mr Ybarra's actions, while productive of terror, do not meet the definition of "Terrorism" in that they did not "significantly disrupt the conduct of government or of the general civilian population of the state or

the United States”. Nor is there a credible argument that the disclosure of a three minute video tape “would have a substantial likelihood of threatening public safety.” Obviously, the location of a single camera is not a security issue or no security videotapes would ever be public.

Significantly, the appellants also completely fail to address the public policy of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, (20 USC § 1092(f)) in their arguments.

In accord with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, (Clery Act), all colleges participating in federal Title IV student aid programs are required to maintain and publish campus crime statistics and their emergency response plans. (See Office of Postsecondary Education, U.S. Department of Education, *The Handbook for Campus Crime Reporting* (2005). A primary purpose of the Clery Act is to make campus crime statistics available to the campus both to raise awareness of crime among current students and employees as well as to provide information so prospective students and employees can make informed decisions when choosing a university. Bonnie S. Fisher, Jennifer L. Hartman, Francis T. Cullen, Michael G. Turner, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 *Stetson L. Rev.* 61 at 71 (2002). A second major purpose of the law is to encourage colleges to institute adequate security policies. Both the public policy of the Clery Act and the

requirement of open court administration are incompatible with the scope of the “terrorism” exemption claimed in this case.

On September 11, 2001, hijacked commercial jet liners brought down the twin towers of the World Trade Center, not the Constitution and the Bill of Rights. The mere recitation of the word “terrorist” should not become a totalitarian mantra that transcends all other practical, legal, and constitutional considerations.

D. A Prior Restraint upon disclosure of records to prevent their publication in the media is an impermissible prior restraint

Another critical consideration in this case is that the appellants seek to enjoin disclosure of the records at issue to prevent their publication by the media, in a classic form of prior restraint.

Of all the protections accorded under the First Amendment, the prohibition against prior restraint is perhaps the most secure. For there is a heavy presumption that any prior restraint on publication of information or ideas is constitutionally invalid. This doctrine has been firmly established for 60 years, since the U.S. Supreme Court decided *Near v. Minnesota*, 283 U.S. 697 (1931).

Chief Justice Warren Burger, in delivering the opinion in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), reviewed prior decisions of the Court and concluded that: The thread running through all these cases is

that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.

Prior restraints restricting disclosure of information have often been successfully challenged. The issue of prior restraint has been present in many widely publicized cases. The government unsuccessfully sought to enjoin publication of the "Pentagon Papers" in *New York Times, Co. v. United States*, 403 U.S. 713 (1971).

CBS successfully challenged a prior restraint barring litigants in a group of civil suits arising out of the antiwar demonstrations at Kent State University from discussing the cases with the news media. *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975). In another CBS case, a temporary restraining order preventing CBS from broadcasting the government's undercover videotape of John DeLorean was struck down in *CBS, Inc. v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1984). Former Panama Leader Manuel Noriega unsuccessfully attempted to restrain CNN from broadcasting recorded conversations between him and his defense counsel in *U.S. v. Noriega*, 917 F.2d 1543 (11th Cir. 1990).

As Blackstone himself noted, The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.

Professor Emerson has more recently recognized...

The form and dynamics of such systems tend strongly towards over-control-towards an excess of order and an insufficiency of liberty

It is human nature for individuals involved in traumatic public spectacles to be wary of repetition of such traumatic events. However, the circumstances of this case and the weight of experience and history does not support a credible fear of retaliation or harm to the victims of this horrible tragedy from the publication of the video or the disclosure of the journal.

To assert that publication of a video will lead to persecution of the victims or copycat attacks at SPU ignores the fact that there is not a single historic basis for such a claim, and the centuries of legal precedent denouncing prior restraints on public ation in whatever form they may take.

There are many examples of shocking and horrific videos of wanton acts of violence in the media, but none have ever resulted in further attacks on the same victims. The Courts of our democratic republic should not be transformed into the modern day equivalent of the Privy Council of the Star Chamber with a modern day Cato in charge of censoring what is not fit for the public to view. Such a principle needs no advanced argument to reduce it to absurdity.

Goethe's Novel, *Die Leiden des jungen Werthers*, (The Sorrows of the Young Werther) precipitated a series of suicides; should it be

proscribed? The Book of Judges in the King James Bible contains some rather shocking and horrifying language -should it too be censored? The Life of Aeschylus tells that children fainted and women had miscarriages at the sight of the Furies in his plays. Should performances of Greek Tragedies be banned? The Statute by Giambologna, in the Loggia dei Lanzi in Florence would be horrifying and traumatizing to a victim of sexual assault; should it be required to be covered in draperies?

Documentaries and manifestations

The horrors perpetrated by the NAZIs (such as those shown in the Holocaust Museum in Washington D.C.) upon Jewish citizens, Roman Catholics, Jehovah's Witnesses, Poles, Eastern European Gypsies, communists, trade unionists, and the disabled are horrific and could lead to further persecution and pogroms-should we close the holocaust museum and deny the holocaust ever occurred?

We, unfortunately, live in a society where a very small minority of sociopaths like Brenda Ann Spencer or Aaron Ybarra commit terrible crimes for no rational reason whatsoever. To maintain that the SPU videos must be suppressed in order to safeguard the privacy and security of the students at SPU would be tantamount to proscribing the performance of the Boomtown Rats "I don't like Mondays" in the deluded belief that that would protect the children at Cleveland Elementary School in San Diego. Regardless these are not the type of clearly established interests that

present the imminent danger of real and substantial harm that Tyler Pipe or the doctrine of prior restraints require.

If the video were released and shown it would generate a short span of media coverage, and then fall into obscurity. Further, the vast majority of those watching it would discover just how distasteful, unheroic and unromantic the reality of shooting human beings really is. In many ways, the heightened notoriety caused by the withholding of the video is counterproductive to the very ends the plaintiffs purport to be fostering, and should lead inquisitive observers to question whether the motives of SPU in this case may be clouded by risk management related concerns other than the legitimate privacy interests of the students of SPU.

Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration. As Milton long ago observed,

No adequate study seems to have been made of the psychology of licensers, censors, security officials, (Mr. Addler, Mr. Bull), and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses....it occurs in all areas where officials are driven by fear or other emotion to suppress free communication.”

The system of prior restraints in the english licensing act of 1662 is typical. As Emerson describes, it was abolished after 30 years because the system in operation had become generally unwieldy, extreme, and even ridiculous. Lord Macaulay reports that in the House of Commons

They pointed out concisely, clearly and forcibly, and sometimes with a grave irony which is not unbecoming, the absurdities and iniquities of the statute...

The absurdities and iniquities of allowing any official to impose prior restraints upon what the media can publish remain as convincing today as they were three and a half centuries ago. The SPU videos should be disclosed to the media and the public.

IV. CONCLUSION

The Supreme Court of the United States, in John Doe No. 1 v. Reed, 561 U.S. 186, 130 S.Ct. 2811 (2010), recognized that “Public disclosure also promotes transparency and accountability...to an extent other measures cannot.” Conversely, the Appellants seek to subvert the policy of the Public Records Act to an extent that prudent actions in conformity with the Doctrine of Prior Restraints could not. As a result, the proceedings in this case appear to have have taken on aspects of both the abuses described by Emerson and the tragedy and farce described by James Madison in his letter to Mr. Barry of 1822.

This court should affirm and remand this case back to the Trial Court for further proceedings in accord with its ruling.

No new legal ground need be harrowed and no difficult constitutional questions need be considered in order to resolve this issue.

Respectfully submitted this 26th day of May, 2015.

By: s/ Arthur West
ARTHUR WEST

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Respondent, Arthur West **by Email** on the 26th day of May, 2015, to counsel of record at their addresses of record:

s/ Arthur West
ARTHUR WEST

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