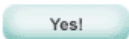


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Online Lessons on Unprotected Sex

By Andrew J. McClurg

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Kiss-and-tell is as old as love itself. Fortunately, most indiscreet paramours limit their blabbing to a few confidants. Not Jessica Cutler. In May 2004, she spilled out the graphic details of her sexual exploits on Capitol Hill on a blog accessible to hundreds of millions of Internet users.

Now a federal lawsuit by one of her past lovers has set up a potentially high-stakes battle between privacy and speech rights and could give new meaning to the idea of safe sex in a wired world.

Cutler's blog, written under the pseudonym Washingtonienne, was a daily diary of her sex life while working as a staffer for Sen. Mike DeWine (R-Ohio). It recounted, entertainingly and in considerable -- sometimes embarrassing -- detail, her ongoing relationships with six men, including plaintiff Robert Steinbuch, a lawyer who also worked for DeWine. Although Cutler never used his full name, and usually referred to the plaintiff by his initials, Steinbuch alleges the blog revealed sufficient information, including his first name, physical description and where he worked, to identify him.

The Internet gossip site Wonkette published excerpts from Cutler's blog, touching off a media "feeding frenzy" in which Steinbuch was repeatedly identified by his full name. Cutler capitalized on the publicity. She gave print, broadcast and online interviews, posed nude for Playboy and reportedly received a \$300,000 advance for her just-published book, a veiled fictional account of a Senate staffer's sexual adventures on Capitol Hill.

Steinbuch's argument is compelling. By any normative standard, he suffered a genuine wrong. As he asserts in his complaint, "It is one thing to be manipulated and used by a lover, it is another thing to be cruelly exposed to the world."

The law, however, appears to be against him. This is because Steinbuch does not allege that any of the statements about him are untrue. False statements that damage one's reputation can be actionable as defamation. The essence of Steinbuch's claim is: You humiliated me by publicizing these true details about my private life.

His case hinges on a century-old privacy tort claim known as "public disclosure of private facts." In theory, the tort provides a remedy when one publicizes private, embarrassing, non-

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newsworthy facts about a person in a manner that reasonable people would find highly offensive. But while Cutler's actions may meet this standard, courts have long been hostile to such lawsuits because of a fear of inhibiting free speech. The Supreme Court has never upheld punishment, based on a privacy theory, for the publication of true information.

In 1989 the court tossed out a lawsuit against a newspaper for publishing a rape victim's name in violation of Florida law. While it stopped short of ruling that a state may never punish true speech, the test it adopted for when that can be done without violating the First Amendment is so stringent Justice Byron White lamented in dissent that the court had "obliterate[d]" the public disclosure tort.

One might think the non-newsworthiness of Steinbuch's sex life would save his privacy claim from a free-speech defense. It could, but newsworthiness has proved to be a broad and elusive legal test in privacy lawsuits. The rape victim's name in the 1989 Florida case, for example, was deemed to be sufficiently related to the public's interest in crime to doom her claim.

Steinbuch's case spotlights the inadequacy of privacy law -- developed back when gossip mostly traveled across backyard fences -- for responding to the challenges of the Internet age. Today's technology grants any person -- no matter how selfish, irresponsible or malicious -- the power to invade privacy globally, at almost no cost. All it takes is a computer and Internet access. Some blogging companies offer free services.

And blogs are just the tip of the iceberg. In May an Oregon woman sued Yahoo after her ex-boyfriend posted nude pictures of her on the site and Yahoo failed to remove them. Expect more litigation.

While we wait to see if old law can adapt to new realities, don't forget the C-word when making safe-sex inquiries. No, not condoms or contraceptives. Ask potential partners if they own a computer.

The writer is a law professor at Florida International University.

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