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Ostergren v. Cuccinelli

Joshua A. Bennett

OSTERGREN V. CUCCINELLI

The desire for privacy "is a mysterious but deep fact about human personality."[1] In fact, the notion of a right to privacy is so vital that the United States Supreme Court has acknowledged that such a right exists even though it is not expressly stated in the United States Consitution.[2] However, when the desire for privacy has the potential to impinge on another citizen's free speech, how is it balanced against the First Amendment right to free speech? The United States Court of Appeals for the Fourth Circuit recently addressed this question.[3]

Last year, in *Ostergren v. Cuccinelli*,[4] the Fourth Circuit held that a Virginia law prohibiting intentional communication of another person's social security number to the public was unconstitutional as applied to Betty Ostergren, the plaintiff below.[5] Ostergren, an informational privacy advocate, criticized Virginia for making land records containing social security numbers publicly available.[6] After the Virginia General Assembly passed a statute that prohibited intentional communication of an individual's social security number to the general public, Ostergren brought a constitutional challenge based on the First Amendment that eventually led to a Fourth Circuit appeal.[7]

The case began when Ostergren, a Virginia citizen who "advocates for information privacy across the country" and seeks to shed light on Virginia's practice of making land records containing unredacted social security numbers publicly available on the Internet,[8] began posting copies of public records containing social security numbers obtained from government websites.[9] Ostergren's purpose was to pressure public officials for reform and to publicize her cause.[10] Until spring 2008, Ostergren's actions were perfectly legal because Virginia Code Section 59.1-443.2(A), which states that "a person shall not . . . [i]ntentionally communicate another individual's social security number to the general public," included a statutory exception for public records.[11] However,

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1. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1229 (7th Cir. 1993).
2. *See* Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965) (stating that the right to privacy is found in the penumbras of specific provisions in the Bill of Rights).
3. Ostergren v. Cuccinelli, 615 F.3d 263, 273 (4th Cir. 2010).
4. 615 F.3d 263 (4th Cir. 2010).
5. *Id.* at 286–87.
6. *Id.* at 266.
7. *Id.*
8. *Id.* "By July 2008, every county in Virginia had made its land records available on the Internet through secure remote access." *Id.* at 267. Virginia has statutorily addressed the concerns for informational privacy that arise when documents containing social security numbers are placed online. *Id.* Specifically, the Virginia General Assembly has "provided that 'clerk[s] may refuse to accept any instrument submitted for recordation that includes a grantor's, grantee's or trustee's social security number.'" *Id.* (alteration in original) (quoting VA. CODE ANN. § 17.1-227 (2010)). The General Assembly also addressed redaction of existing documents, with most counties having completed the redaction process by July 2008. *Id.* at 268.
9. *Id.* at 268.
10. *Id.* at 269.
11. *Id.* (omission and alteration in original) (quoting VA. CODE ANN. § 59.1-443.2(A)(1) (2010)).

the Virginia General Assembly amended the statute to remove the public records exception, and beginning July 1, 2008, the state could have prosecuted Ostergren for "publicly disseminating Virginia land records containing unredacted [social security numbers]."[12]

Before the amendment took effect, Ostergren filed an action in the United States District Court for the Eastern District of Virginia under 42 U.S.C. § 1983, seeking declaratory and injunctive relief.[13] Ostergren contended that enforcement of the statute would violate her First Amendment rights.[14] The district court agreed with Ostergren and held that the Virginia statute was unconstitutional as applied to her website as it then existed.[15] The next year, after further briefing and argument, the court entered a permanent injunction prohibiting enforcement of the statute "against any iteration of Ostergren's website, now or in the future, that simply republishes publicly obtainable documents containing unredacted SSNs of Virginia legislators, Virginia Executive Officers or Clerks of Court as part as [sic] an effort to reform Virginia law and practice respecting the publication of SSNs online."[16] Thereafter, Virginia's attorney general appealed the district court's constitutional determination, while Ostergren cross-appealed the scope of the district court's injunctive relief award.[17] On appeal, the Fourth Circuit considered both of the challenged decisions.[18]

In its opinion, the Fourth Circuit first reviewed the district court's constitutional ruling.[19] The court began by addressing Virginia's argument that social security numbers are "unprotected speech that may be prohibited entirely"[20] based on the fact that unredacted social security numbers "facilitate identity theft and are no essential part of any exposition of ideas."[21] Although the court noted that the Supreme Court has identified a number of unprotected speech categories,[22] it concluded that the First Amendment protected Ostergren's publication of land records with unredacted social security numbers because the social security numbers were "integral to her message."[23]

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 270 (quoting Ostergren v. McDonnell, No. 3:08cv362, 2008 WL 3895593, at *14 (E.D. Va. Aug. 22, 2008)).
16. *Id.* (alteration in original) (quoting Ostergren v. McDonnell, 643 F. Supp. 2d 758, 770 (E.D. Va. 2009)).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 271.
22. *Id.*
23. *Id.* at 271–72. The court also based this conclusion on the Supreme Court's recognition of the value of drawing attention to the contents of public documents. *Id.* at 272 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975)).

The Fourth Circuit then shifted its focus to Virginia's alternative argument[24] that "the state interest in preserving citizens' privacy by limiting SSNs' public disclosure justifies barring Ostergren's speech."[25] The court recognized that the facts necessitated balancing the right to free speech with the right to privacy.[26] In searching for analogous cases where courts weighed these two rights, the court reviewed *Cox Broadcasting Corp. v. Cohn*[27] and its progeny.[28] In *Cox Broadcasting*, the Supreme Court reasoned that "the interests in privacy fade when the information involved already appears on the public record."[29] From this language and subsequent cases, the Supreme Court articulated a constitutional standard in *Smith v. Daily Mail Publishing Co.*[30] regarding whether a truthful publication about a matter of public significance may ever be punished.[31] In *Daily Mail*, the Court stated that *Cox Broadcasting* and subsequent decisions "all suggest that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[32] Further, nearly a decade later in *Florida Star v. B.J.F.*,[33] the Supreme Court utilized the *Daily Mail* standard and held that publishing a rape victim's name legally obtained from a police report was protected speech under the First Amendment.[34]

After concluding that the *Daily Mail* standard applied to Ostergren's constitutional challenge, two issues remained for the Fourth Circuit: "(1) whether Virginia ha[d] asserted a state interest of the highest order and (2) whether enforcing Section 59.1-443.2 against Ostergren would be narrowly tailored to that interest."[35] In considering the first issue, the court stated that, unlike the district court's application of a subjective standard, "objective criteria [could] be considered when deciding what constitutes a state interest of the highest order."[36] After discussing the serious privacy concerns accompanying the distribution of social security numbers,[37] the court concluded that "Virginia's asserted interest in protecting individual privacy . . . may certainly [have]

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24. *Id.* at 273.
25. *Id.* at 270.
26. *Id.* at 273.
27. 420 U.S. 469 (1975). "In *Cox Broadcasting*, the Supreme Court ruled that the First Amendment prohibits a lawsuit against a television station for broadcasting a rape victim's name when the station learned her identity from a publicly available court record." *Ostergren*, 615 F.3d at 273 (citing *Cox Broad. Corp.*, 420 U.S. at 495–97).
28. *See Ostergren*, 615 F.3d at 273–76.
29. *Cox Broad. Corp.*, 420 U.S. at 494–95.
30. Smith v. Daily Mail Publ'g. Co., 443 U.S. 97 (1979).
31. *Id.* at 103.
32. *Id.*
33. Fla. Star v. B.J.F., 491 U.S. 524 (1989).
34. *Id.* at 533–41.
35. *Ostergren*, 615 F.3d at 276.
36. *Id.* at 277.
37. *See id.* at 278–80.

constituted 'a state interest of the highest order.'"[38] Ultimately, however, the court did not decide the state interest question because its "holding . . . regarding narrow-tailoring suffice[d] to resolve the constitutional challenge."[39]

In determining whether enforcement of the Virginia statute against Ostergren "would be narrowly tailored to Virginia's asserted interest in preserving individual privacy," the court noted that under *Cox Broadcasting* and *Florida Star*, "punishing truthful publication of private information will almost never be narrowly tailored to safeguard privacy when the government itself released that information to the press."[40] However, the court distinguished the present case from *Cox Broadcasting* and *Florida Star* in two ways.[41]

First, it noted that "privacy does not hinge upon secrecy but instead involves 'the individual's *control* of information concerning his or her person.'"[42] Second, it noted that unlike in *Cox Broadcasting* and *Florida Star*, Virginia "face[d] considerable obstacles in avoiding initial disclosure of sensitive information" because of the number of documents and the fact that attorneys filed many of the documents before the state understood the threat of identity crimes.[43] Based on these distinctions, the court held that "Virginia should have more latitude to limit disclosure of land records containing unredacted SSNs than *Cox Broadcasting* or *Florida Star* allowed for protecting rape victims' anonymity."[44] The court concluded, however, that "the First Amendment [did] not allow Virginia to punish Ostergren for posting its land records online without redacting SSNs when numerous clerks [were] doing precisely that."[45] Thus, the court held that enforcement of Section 59.1-443.2 was not narrowly tailored to the state's interest in protecting individual privacy and affirmed the district court's ruling that the statute violated the First Amendment.[46]

After the court resolved the constitutional considerations, it moved on to Ostergren's cross-appeal, in which she contended that the permanent injunction award was too limited.[47] Ostergren argued that the injunction should reach public officials anywhere in the United States because her website included records of non-Virginia public officials.[48] The court held that the district court

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38. *Id.* at 280 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).
39. *Id.*
40. *Id.*
41. *Id.* at 281.
42. *Id.* at 283 (quoting Nat'l Cable & Telecomms. Ass'n v. FCC, 555 F.3d 996, 1001 (D.C. Cir. 2009)).
43. *Id.* at 285.
44. *Id.*
45. *Id.* at 286.
46. *Id.* at 286–87.
47. *Id.* at 287.
48. *Id.* The court held that the issue of whether the First Amendment prohibited Virginia from enforcing Section 59.1-443.2 against Ostergren for publishing non-Virginia public records containing social security numbers was not ripe as she had not established an evidentiary record, she had not developed a legal theory, and no underlying dispute existed because the Attorney General stated that Section 59.1-443.2 did not reach out-of-state public records. *Id.* at 288.

did not tailor the injunction "to fit the nature and extent of [Virginia's] constitutional violation"[49] because the injunction failed to protect Ostergren in publishing Virginia land records containing social security numbers of both private individuals and non-Virginia public officials.[50] Thus, the court reversed the permanent injunction and remanded the case for further proceedings.[51]

Judge Davis concurred in the opinion to express his views regarding "the appropriate test for identifying and assessing in First Amendment cases the existence of 'a state interest of the highest order.'"[52] Judge Davis opined that "courts must consider and weigh heavily the state's expressed views and its conduct or they risk denuding First Amendment rights."[53] He did not disagree with the majority entirely, as he stated that objective data may play some role in determining whether an interest is "of the highest order."[54] He noted, however, that it should not "supplant a fact-intensive inquiry into the state's view and its actual conduct in furthering its asserted interest."[55]

Taking privacy dangers resulting from the dissemination of social security numbers and coupling them with free speech concerns, this case confronted what happens when two important rights collide. Although the Fourth Circuit's analysis of how the First Amendment should trump the right to privacy on this set of facts is interesting, courts have faced this issue many times before.[56] *Ostergren* itself analyzes cases in which courts dealt with the clash between free speech and privacy rights.[57]

However, the importance and relevance of this case comes to light in the Fourth Circuit's discussion of whether enforcing the Virginia statute against Ostergren would be narrowly tailored to Virginia's asserted interest in preserving individual privacy. In that analysis, the court explains that distinctions between the present case and *Cox Broadcasting* and *Florida Star* could possibly change the court's narrow-tailoring analysis.[58] Thus, although the Virginia statute was found unconstitutional as applied to the facts of this case, a future litigant could

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49. *Id.* at 290 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977)) (internal quotation marks omitted).

50. *Id.* at 289 (quoting Ostergren v. McDonnell, 643 F. Supp. 2d 758, 770 (E.D. Va. 2009)).

51. *Id.* at 290.

52. *Id.* (Davis, J., concurring).

53. *Id.*

54. *Id.* at 291 (quoting *id.* at 277 (majority opinion)) (internal quotation marks omitted).

55. *Id.* at 291.

56. *See, e.g.*, Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 830–34 (1978) (holding that Virginia could not penalize a newspaper for publishing correct information that had been leaked about confidential proceedings concerning the investigation of a state judge's conduct); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 309–12 (1977) (holding that a trial court could not bar newspapers from publishing a juvenile offender's name learned during a court proceeding open to the public).

57. *Ostergren*, 615 F.3d at 273–76.

58. *See id.* at 285 ("The factual differences between this case and *Cox Broadcasting* and *Florida Star* suggest the need for a more nuanced analytical approach to the *Daily Mail* standard's narrow-tailoring requirement.").

use the court's language to overcome the "stringent standard regarding narrow-tailoring."[59]

In conclusion, *Ostergren v. Cuccinelli* provides an excellent example of the analysis required when one pits the recognized right to privacy squarely against the right to free speech that the First Amendment protects. Not only does the Fourth Circuit's opinion contain a thorough discussion of the *Daily Mail* standard, but it also gives a seemingly downtrodden privacy advocate a new argument against a historically stringent narrow-tailoring requirement. In this case, that new argument came up short, and the Fourth Circuit's entire constitutional determination seemed to turn on the fact that Virginia allowed public access to the same documents with unredacted social security numbers that it was trying to prevent Ostergren from posting.[60] Thus, should Virginia ever try to combat the practices of Betty Ostergren in the future, it must heed the advice given by Judge Davis in his concurrence and not only "talk the talk, but [also] walk the walk."[61]

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59. *Id.* at 280.

60. *See id.* at 286 ("We cannot conclude that prohibiting Ostergren from posting public records online would be narrowly tailored to protecting individual privacy when Virginia currently makes those same records available through secure remote access without having redacted SSNs.").

61. *Id.* at 291 (Davis, J., concurring).