Confronting Dogma: Privacy, Free Speech, and the Internet

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'Thou shalt have no other gods before me.' First Commandment

Champions of free speech frequently treat the First Amendment as if it were the First Commandment. If assumptions need challenging, this is plainly one of them, though (especially as a non-American),[2] one is cognisant of the charge of heresy that will inevitably follow.

And worse: the indictment is bound to include the offence of wimpishness. In the present context, only wimps are for privacy. Tough guys go for free speech. Freedom to impart and receive news is cool. It's what democracy is about. In our brave new digital world, news no longer awaits editor or compositor; it flashes on screens within seconds of its creation. The privacy of victims caught up in this mercurial helter-skelter cannot be allowed to spoil the fun.

Privacy postponed

It is no longer controversial that in many jurisdictions, most conspicuously the United States, freedom of expression has significantly eroded, if not wholly destroyed, the right of privacy.[3] Expansive notions of 'public interest', 'public domain', and dominant theories of free speech (premised on arguments as diverse as truth, democracy, rights, and self-government) ensure that privacy is inevitably trumped. Yet those who might have regarded privacy concerns as wimpish or quaint are now in the vanguard of the large movement in support of online privacy and anonymity. This paper merely outlines why this position could be inconsistent.

The failure of the law satisfactorily to reconcile 'privacy' and 'press freedom' may be explained in a number of ways. But perhaps the simplest, and most plausible, explanation is that, while the media frequently acknowledge the iniquity of unsolicited intrusions into private lives, commercial considerations may drive them to pander to the expectations of their readers. Is it too cynical a view to suggest that many newspaper editors are moved by the interests of their shareholders who may exhibit less interest in what appears in the paper than what is reflected in the balance sheet? Even if privacy advocates could be tendentiously described as enemies of free speech, it is surely the case that among their opponents lurk self-interested media proprietors.

There is nothing novel in this assertion, but it must be borne in mind when confronting the interminable problem of how best to protect the interests of individuals against violations of their private lives that are justified by a contrived 'public interest'. My own attempts to over many years to clarify, or at least, identify, the core of our concern about privacy, have met with little success,[4] but I believe that the argument may have come full circle. In our information society, new life appears to have been breathed into my old argument that at the heart of the right to privacy is the protection of personal information. The Internet is a digital marketplace for personal data. Devising means to protect privacy in cyberspace is proving to be a gruelling test of our legal and technological ingenuity. And on the Internet we are all publishers, editors, media owners.

The right of privacy, enshrined in international declarations, conventions, and domestic bills of rights, fares poorly when confronted by the overarching right of free speech. Privacy invariably yields when 'balanced' against this, and indeed other, rights. Why should this be so?

Glorifying free speech

Several difficulties attend the attempt to formulate a coherent theory of free speech which is both sufficiently broad to capture the complexities of the exercise of the freedom, and sufficiently specific to account for its variable applications.[5] Moreover, they frequently neglect the question of whether free speech is a policy or principle. The Madisonian argument from democracy appears to attract considerably more support than the Millian, Miltonian, or autonomy-based theories. But while it provides a sensible framework for the exercise of political speech or support for a market-place of ideas, it offers at best only the most general guidance in respect of the legitimate controls on the public disclosure of *personal information.* This point plainly requires further elaboration which I hope the panel will pursue.

In mediating between the competing interests of privacy and press freedom, the American Supreme Court has resorted to the process of 'balancing' by which the interest in free speech is weighed against other interests such as national security, public order, and so on. If such interests are found to be 'compelling' or 'substantial' or where there is a 'clear and present danger' that the speech will cause a significant harm to the public interest, the Court will uphold the restriction of free speech.

But it is important that the public interest in the freedom of expression must fit in to a 'more comprehensive scheme of social values and social goals'.[6] Where there is a genuine conflict between the two values, how, according to this technique, is privacy to be protected? Or, in other words, why should free speech be subordinated to the protection of personal information? Emerson identifies three factors that diminish the need to protect freedom of expression absolutely. The first is where the injury to the individual is direct and peculiar to him, rather than one suffered in common with others. Secondly, the interest may be an intimate and personal one, embracing an area of privacy from which both the state and other individuals should be excluded. The third consideration is whether or not society leaves the burden of protecting the interest to the individual himself or herself by; for example, recognising that he or she has a legal cause of action.

In the first two circumstances the harm in each case will be probably be direct and irremediable, and hence almost approximating to an 'action'. Moreover, if the individual has the burden of establishing his case, the resources of the state are less likely to be marshalled into a coherent apparatus for the restriction of free speech. He suggests that 'so long as the interest of privacy is genuine, the conditions of recovery clearly defined, and the remedy left to the individual suit, it is most unlikely that the balance will be tipped too far toward restriction of expression.'[7]

Even in the context of the First Amendment, this approach is compelling. And no less so in the context of the English law's constitutional silences as to safeguards for free speech. Our courts

periodically recognise the importance of freedom of speech and of the press. In *Schering*, Lord Denning MR said,[8]

> Freedom of the press is of fundamental importance in our society. It covers not only the right of the press to impart information of general interest or concern, but also the right of the public to receive it. It is not to be restricted on the ground of breach of confidence unless there is a 'pressing social need' for such restraint. In order to warrant a restraint, there must be a social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of the press.

Lord Hoffmann has put it even more forcefully:[9]

> It cannot be too strongly emphasised that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention [for the Protection of Human Rights and Fundamental Freedoms], there is no question of balancing freedom of speech against other interests. It is a trump card, which always wins.

He recognises, however, that 'a right of privacy may be a legitimate exception to freedom of speech'.[10] And Lord Denning MR in *Schering* acknowledged that there are 'exceptional cases, where the intended publication is plainly unlawful and would inflict grave injury on innocent people or seriously impede the course of justice'.[11] Similarly, Lord Templeman LJ remarked that 'Blackstone was concerned to prevent government interference with the press. The times of Blackstone are not relevant to the times of Mr Murdoch'. [12]

In seeking to measure what is 'highly offensive' the American courts have developed what Prosser calls a 'mores test'.[13] But the leading cases fail to provide reliable guidance as to where the line is to be drawn.[14] In neither *Melvin* or *Sidis* is a real attempt made to consider the extent to which the information divulged was 'private'. The conceptually vague notions of 'community customs', 'newsworthiness', and the 'offensiveness' of the publication, render these and many other decisions concerning 'public disclosure' singularly unhelpful in an area of considerable constitutional importance.

And this is equally true of the attempts by the Supreme Court to fix the boundaries of the First Amendment in respect of publications affecting the plaintiff's privacy. Thus, in *Time, Inc v Hill*[15] the Court held that the plaintiff's action for invasion of privacy failed where he (and his family) had been the subject of a substantially false report. The defendant had published a description of a new play adapted from a novel which fictionalised the ordeal suffered by the plaintiff when he and his family were held hostage in their home by a group of escaped prisoners. Adopting the test that it had applied in respect of defamation,[16] the Supreme Court held, by a majority, that unless there was proof of actual malice (i.e. that the defendant knowingly or recklessly published an untrue report) the action would fail. Falsity alone did not deprive the defendant of his protection under the First Amendment - if the publication was newsworthy. And, since the 'opening of a new play linked to an actual incident is a matter of public interest'[17] the plaintiff, because he was unable to show malice, failed. Yet the decision was not really concerned with the public disclosure of 'private information' whether or not it was even a defamation action!

In so far as this issue has arisen in England, for example, the conventional analysis has received a certain acceptance. In cases of the equitable remedy of breach of confidence involving personal information have adopted a 'balancing' of the interests in confidentiality against the public interest in receiving certain information. Equally, in dealing with complaints concerning alleged invasions of privacy by the press, the Press Council and Press Complaints Commission have attempted, with little success, to strike a balance between these interests.[18]

This conceptual incoherence (which also afflicts the concept of 'free speech') shows few signs of abating. The fragility of privacy under these circumstances is obvious. But this is not to say that the data protection approach (which I cannot develop here)[19] is not innocent of the same twin problems of ambiguity and broad exceptions. In respect of the first, I readily acknowledge that the data protection principles provide only the outline of a new approach. And the statutory exceptions could, I suppose, be regarded simply as competing rights in thin disguise. But I am reasonably sanguine about its prospects as a better road to take towards a more effective method by which to reconcile these rights.

Grasping the Net

The rights-based, individual-centred analysis of privacy has failed. I believe that it is time to move towards an information-oriented, control-based account, which is located in the now widely accepted normative framework of data protection. It is no part of my argument to advocate a retreat from rights; the recognition of a constitutional or common law 'right of privacy' can only enhance its protection. But the substance and interpretation of the right can no longer rely on the rhetoric of the past.

But though the advent of the Internet compels us to re-conceptualise both 'privacy' and 'free speech', and the tension between them, the central questions are unlikely to change in our digital age.[20] The problem of 'balancing' these competing rights has, in any event, become something of a cliché to be approached with caution.[21] I want to suggest that the regime of Privacy Commissioners spawned by the European Directive on Data Protection[22] although fashioned to achieve a rather different, more modest, objective the may turn out to afford a more promising route towards effective protection of this enigmatic right.

Using the model of Hong Kong's Privacy Commissioner for Personal Data may help to make this alarming assertion a little less so. The norms of so-called fair information practice are contained in Hong Kong's Personal Data (Privacy) Ordinance (PDPO) of 1995. They are to be found, in one form or another, in the legislation of some 30 jurisdictions. I think they could provide the basis of protection against media intrusion, though few would agree.

The first data protection principle (DPP 1) establishes three important limitations or controls over the collection of personal data. First, that personal data collected should not be excessive. Secondly, that such data may not be collected unless they are to be used for a lawful purpose directly related to the activities of the data user. And thirdly, that the collection itself must be lawful and fair.

DPP 3 provides:

> Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than -
>
> (a) the purpose for which the data were to be used at the time of the collection of the data; or
>
> (b) a purpose directly related to the purpose referred to in paragraph (a).

It is clear that reports of news, photographs, videos, e-mail, and Internet sites fall within the definition of personal data. A victim of intrusion or disclosure by the media (or indeed anyone else) may complain to the Privacy Commissioner for Personal Data of a contravention of these principles. He has the power to issue an 'enforcement notice' to compel compliance with the law. Failure to comply with such a notice is punishable on conviction by a fine and two years' imprisonment. The ordinance provides also for compensation, including damages for injury to feelings.

A vital feature of the legislation is the power vested in the Privacy Commissioner to approve codes of practice to provide practical guidance both to data users and data subjects. Those issued so

far by the Commissioner are substantial documents which are a product detailed and lengthy consultation with the appropriate parties. Moreover, while the ordinance provides that a failure by a data user to observe any part of a code shall not render it liable to civil or criminal proceedings, an allegation in such proceedings that a data user has failed to follow the code is admissible as evidence. This contravention will constitute proof that the ordinance has indeed been contravened in the absence of evidence that the data subject complied with the requirement other than by way of observance of the code.

In other words, the formulation of codes of practice is a fair, transparent, and effective way of translating the principles into practice.

How can these principles be applied to the archetypal privacy complaints against the news media?

Intrusion

To what extent can DPP 1 adequately deal with the increasingly pervasive - but mostly lawful - practices of media intrusion: zoom lenses, deception, spying. In pursuit of profit or diversion, the media seek to obtain intimate details of private lives: sexual adventures or proclivities, medical details, financial secrets, dirty laundry. Is it naive to imagine that DPP 1 (or its counterparts in the laws of other jurisdictions) is remotely up to the job?

Consider the three elements specified in DPP 3. The postulate that personal data collected not be excessive provides a novel, helpful way of determining the propriety of a good deal of media conduct. How many photographs of the actress need be taken? How much information is it necessary to have in the politician=s file? Does the collection exceed the purpose - the reporting of news or even the entertainment of readers, viewers or listeners - for which it is being collected?

The second limb, that data may not be collected unless they are to be used for a lawful purpose directly related to the activities of the data user, could exert a similar influence over the multifarious methods of invading private lives. It concentrates media minds on the justification for watching and besetting, intruding on private grief, raking up the ashes of an individual's past. Though I suggested above that intrusion and disclosure be evaluated separately, it does not follow, as this principle implies, that in determining whether an intrusion is acceptable, a journalist should not be required to consider the purpose to which its fruits are likely to be put.

Thirdly, the requirement that the collection of personal data must be lawful and fair is an elementary canon of ethical media practice. Many intrusive activities may be lawful (spying or electronic surveillance without trespass, interception of communications with the consent of one of the parties, certain forms of deception). But they must, in addition, be fair. This simple precept is crucial; it provides an essential basis for the development of a code of practice that could effectively regulate most of the sleazier forms of media conduct.

This trio of norms if incorporated into an enforceable code of practice comprises a workmanlike framework for regulating privacy-invading conduct by the media. Remedies will need to be enhanced, and the exemptions narrowed, but among the numerous advantages of codes of practice are that they can be swiftly adapted to changing needs.

Public disclosure

DPP3 embodies a pivotal concept of data protection, the notion that, save with the consent of the data subject, personal data should not be used for a purpose other than, or directly related to, that for

which the consent was given. Though subject to inevitable exceptions in most statutes (including national security, law enforcement, the protection of journalistic sources, medical data), this principle provides a useful means by which to assess the acceptability of media disclosures of sensitive information.

The conventional approach is a paralysed, one-sided contest between privacy and frees speech, with the latter inevitably the heavyweight. I suggest that the enquiry shift from the current preoccupation with the meaning of 'public interest' and analysis of whether the terms 'public' and 'private' are being used descriptively or prescriptively, to a consideration of whether the use of the personal data is consistent with the purpose for which the individual's consent was given.

This is not to say that the approach proposed here is not innocent of the same twin problems of ambiguity and broad exceptions. In respect of the first, I readily acknowledge that the data protection principles provide only the outline of a new approach. And the statutory exceptions could, I suppose, be regarded simply as competing rights in thin disguise. But I am reasonably sanguine about its prospects as a better road to take towards a more effective method by which to reconcile these rights.

The rights-based, individual-centred analysis of privacy has failed. I believe that it is time to move towards an information-oriented, control-based account, which is located in the now widely accepted normative framework of data protection. It is no part of my argument to advocate a retreat from rights; the recognition of a constitutional or common law 'right of privacy' can only enhance its protection. But the substance and interpretation of the right can no longer rely on the rhetoric of the past.

Self-regulation

These proposals, if they have any value, offer a fresh perspective on privacy in our information society, reflected in law and policy. This is perhaps a forlorn hope, and the more modest project adumbrated here envisages an expanded role for our Privacy Commissioner in regulating the intrusive activities of the media.

An immediate response to this suggestion is to propose self-regulation. Is journalism a profession? Most professions police themselves. Can the approach advanced above not be achieved by the establishment of a statutory media council with powers to regulate journalists? A code of practice along the lines suggested above could be adopted and enforced.

Though the past experience of press councils inspires little confidence it would not be impossible to devise a council charged exclusively with matters of privacy, which could deal effectively with the alleged privacy-invading conduct by the media.

These issues are, however, more congenially located under the purview of the Privacy Commissioner who has the requisite powers, responsibility, expertise, and experience.

Conclusion

The lofty constitutional questions of free speech and privacy are not normally conducted in the prosaic context of data protection. There will be those who will so this argument is reductionist or minimises the importance of both rights. But the history of this debate has produced ambiguity and incoherence that has obstructed the proper legal protection of personal information.

Placing *control* at the heart of our deliberations about privacy achieves what the orthodox analysis has conspicuously failed to do. It postulates a pre-emptive entitlement accorded to all that

their personal data may be collected only lawfully and fairly and that once garnered it may be used for only purposes for which consent has been given. But it must not be allowed to inhabit the media's right to gather news fairly and publish what is in the public interest. In most cases the consent of subjects will be implied by their position or the circumstances of the case. It is only the most flagrant, the most hurtful intrusions into private lives that should be of concern.

This uncomplicated principle of control, or what has been called 'informational self-determination' seems to me to be a formidable weapon by which privacy can be understood, preserved, and sustained.

Notes

[1.] Raymond Wacks is Professor of Law and Legal Theory at the University of Hong Kong. He has been writing about privacy for too long. I draw here on Raymond Wacks, 'Privacy and Press Freedom: Oil on Troubled Waters?' (1999) 4 Media and Arts Law Review 259.

[2.]Hostility, or at least, edginess towards the adoption of First Amendment jurisprudence in common law jurisdictions is a constitutional fact of life. A distinguished English judge, for instance, recently opined that the abandonment of constraints on freedom to publish in favour of a an uncontrolled market-place of ideas and calumny 'would not be the enhancement but the dilution of human rights …' Stephen Sedley, 'The First Amendment: A Case for Import Controls?' in Ian Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (Oxford: Hart Publishing, 1998) 27.

[3.] David A Anderson (1999), 'The Failure of American Privacy Law' in Basil Markesinis (ed)

Protecting Privacy, Clarendon Press, Oxford. See too Elizabeth Paton-Simpson, 'Private Circles and

Public Squares' (1998) 61 MLR 318.

[4.]See, in particular, Raymond Wacks, 'The Poverty of "Privacy"' (1980) 96 Law Quarterly Review 73; Raymond Wacks, *Personal Information: Privacy and the Law*, Clarendon Press, Oxford).

[5.] For intelligent attempts see F Schauer, *Free Speech: A Philosophical Enquiry* (1982), F Schauer, 'Reflections on the Value of Truth' (1991) 41 *Case Western Reserve Law Review* 699; E Barendt, *Freedom of Speech* (1985).

[6.] Thomas I Emerson, 'Toward a General Theory of the First Amendment' (1963) 27 Yale Law Journal 877.

[7.] Thomas I Emerson, *Toward a General Theory of the First Amendment*, Vintage, New York, 1966.

[8.] *Shering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848, 865.

[9.] *R v Central Television plc* [1994] 2 WLR 20, 30.

[10.] At 31.

[11.] At 861.

[12.] At 881.

[13.] Suggested by the lower court in S*idis v F-R Publishing Corp* SDNY 1938, 34 F Supp 19, see *Prosserand Keeton on Torts* (5th ed, 1984), 857.

[14.] *Melvin v Reid* 112 Cal App 285, 297 P 91 (1931), *Sidis v F-R Publishing Corporation* 34 F Supp 19 (SDNY 1938).

[15.] 385 US 374 (1967).

[16.] *New York Times v Sullivan* 373 US 254 (1964).

[17.] At 388.

[18.] The Press Council's decisions, though compared by a former chairman, Lord Devlin, to the methods used by 'generations of judges who produced the common law of England,' (H P Levy, *The Press Council: History, Procedure and Cases* (1967), p xi) were usually terse, unreasoned, and often difficult to understand. Successive Royal Commissions on the Press have shown little sympathy for the council's claim that it is 'respected, feared and obeyed', Rt Hon Kenneth Younger, *Report of the Committee on Privacy*, Cmnd 5012, 1972, paras 147 and 151). After the publication of the infamous *Kaye* photographs, the *Sunday Sport*, in a front page headline, left readers with little doubt of its view; it read 'Bollocks to the Press Council.' See too Royal Commission on the Press 1977, para 20.75; and R Wacks, *The Protection of Privacy* (1980), pp 106-9; and, Wacks, *Personal Information*, pp 164-6. For a comprehensive indictment of Press Council performance, practice and procedure, see G Robertson, *People Against the Press: An Enquiry into the Press Council* (1983).

[19.] For an outline of my case see Raymond Wacks (1999), 'Towards a New Legal and Conceptual Framework for the Protection of Internet Privacy' (1999) 2(4) Irish Intellectual Property Review 13. It is hoped to present a more detailed analysis of the argument in a forthcoming article.

[20.] See Raymond Wacks, Privacy in Cyberspace: Personal Information, Free Speech, and the Internet' in Peter Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) pp 93-112; Raymond Wacks, 'Towards a New Legal and Conceptual Framework for the Protection of Internet Privacy' (1999) 3 *Irish Intellectual Property Review* 1-5.

[21.] On the problems of 'balancing', see Charles D. Raab, 'From Balancing to Steering: New Directions for Data Protection' in Colin J. Bennett and Rebecca Grant, (eds.), *Visions of Privacy: Policy Choices for the Digital Age* (1999

[22.]. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities, 23 November 1995, No L 281, p 31.