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PRIVACY AND THE PRESS: IS LAW THE ANSWER ?

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The press, like every story it prints, has two sides. On the one hand, intrepid reporters work feverishly to uncover concealed truths and guilty secrets. From Watergate to the Guardian's naming and shaming of Jonathan Aitken and Neil Hamilton, the fourth estate has proved its value as a ferocious watchdog. On the other hand the press seems ready to sink its sharp teeth into ill-chosen, defenceless targets. From the journalist rooting through the bins of television presenter Judy Finnegan to the Sunday Sport photographer trespassing by Gordon Kaye's hospital bed, the hounding of supposedly newsworthy figures has become a peculiarly urban bloodsport.

When dealing with its two-sided press, a society should act like a journalist with a two-sided story, and seek a balance. Whilst endeavouring to curb its worst excesses, we cannot afford to rob the press of its vital power to discover uncomfortable truths. This much is recognised by The European Convention on Human Rights; whilst Article 8 proclaims that "Everyone has the right to respect for his private and family life, his home and his correspondence", Article 10 secures press freedom. In short, we must ensure that freedom *from* the press lives alongside freedom *of* the press.

Traditionally, we have put our faith in the press's powers of self-restraint. However, self-regulation has failed. In 1990, after the Calcutt Report into Privacy and Related Matters exposed the inadequacies of the Press Council, the Government gave the press "one last chance" to put its own house in order. However the Calcutt committee returned the same damning verdict on the new body, the Press Complaints Commission. The public clearly lacked confidence in the Commission, just as it did in MPs setting their own salaries; for no matter how pure a person's intentions, self-interest will always undermine self-regulation.

So can the law succeed where self-regulation has failed ? Both the National Heritage Select Committee and the Lord Chancellor's Department have published reports advocating some form of legal intervention. Further, Lord Justice Glidewell believed that the Gordon Kaye affair was a "graphic illustration" of the need for measures "to protect the privacy of individuals". Most importantly, the public mood, in the wake of the death of the Princess of Wales, has swung decisively in favour of legal regulation; an ICM poll conducted in November revealed that 87% of people supported a privacy law.

The key point is that we need effective press regulation. Without the threat of legal sanctions, the press's Code of Practice is a dead letter. In November 1993, the Sunday Mirror infamously published pictures of the late Princess of Wales exercising in a private gymnasium. The chairman of the Press Complaints Commission issued a swift condemnation of this clear breach of the Code. On the very next day, however, the Daily Mirror printed more of the photographs. As long as newspapers are happy to treat integrity to the Code of Practice as just another casualty of the circulation war, more effective sanctions are necessary.

It is not enough, however, to decide in the abstract that the law has a role to play without deciding both how legal changes will be implemented and what their content should be. In the Kaye case, Lord Justice Legatt said that "This right [to privacy] has so long been disregarded here that it can be recognised now only by the legislature". The alternative possibility, contemplated recently by the Lord Chancellor, would be for judges to develop a privacy law on a case by case basis. Such judicial law-making has its drawbacks. First, judges are only presented with arguments from the counsel of plaintiff and defendant, whereas a statute can be drawn up after extensive consultation. Secondly, judges deal only with the special problems of a particular case, whereas Parliament can lay down a comprehensive statutory scheme.

However, the Home Secretary has made clear that the present Government does not intend to introduce a statutory privacy law. Aside from the difficulty of finding legislative time, any politician will think long and hard before advocating a measure which will anger the press. In contrast, as judges are not elected, they need not live in such fear of a vengeful press. Moreover, judges do have the ability to develop complex areas of the law, as they have done in evolving the rules of administrative law to regulate governmental decision-making. Indeed, the German law on privacy is largely judge-made, and judges will be able to draw on German and French jurisprudence, as well as experience gained in applying the privacy provisions of the Human Rights Act, which will incorporate the ECHR into British law, but which will only bind public bodies.

Any law on privacy should distinguish between the two forms of press behaviour which cause concern. The first consists of the way in which information is gathered, the second in the publication of that information. Regulation is most clearly needed in the first area; as the original Calcutt Report noted, the most blatant forms of physical intrusion, such as bugging, "door-stepping" and the use of long-range lenses to take pictures in private places should be prohibited. This would not require anything as innovative as a judicial recognition of a right to privacy. The law of private nuisance already protects the peaceful enjoyment of property; by analogy, the law of trespass could be expanded to prohibit the causing of mental distress by interfering with one's peaceful enjoyment of life. If the intrusive activity were made a crime, which could only be done by statute, then the State could take on the responsibility of preventing and reacting to such a behaviour. Otherwise, the onus would be on the aggrieved party to bring a potentially expensive civil action themselves.

It might also seem necessary to prevent the press from using information obtained in a prohibited manner. However, it would be enough if the law were changed to prevent the defendant in a libel action relying on wrongfully-obtained information, ensuring that any justification relied only on properly-obtained evidence. Apart from this, the law should not concern itself any more than it does at present with true information, whether published in the public interest or simply because it is of interest to the public. The primary reason the press oppose a privacy law is because they fear it might be too widely cast, allowing a latter-day Maxwell to obtain injunctions at short notice prohibiting publications. A balanced law would avoid such a result as keenly as it would protect any right of privacy.