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Foreword

Hugh Tomlinson QC

In the first decade of this century the appetite of the British tabloid press for private information appeared to be insatiable. Large sums of money were expended on private detectives or ‘kiss and tell’ informants. Information was often gathered by illegal means. The public interest in individual privacy was consistently ignored and the voices of the victims of press intrusion were largely unheard. The close relationship between the press and politicians meant that there was no political will to take remedial action. When criminal misuse of data and interception of voicemail messages were exposed, compliant or intimidated prosecuting authorities confined themselves to minimalist responses.

The Human Rights Act provided the means for the victims to fight back. In a number of landmark cases – particularly those brought by Naomi Campbell and Max Mosley – the tabloid press suffered reverses. A body of privacy law began to develop. One important consequence – which continues to be of political significance – was the resulting sustained press attack on human rights. The judiciary were not spared. The conflict between the tabloid press and the law was at its most intense during the so-called ‘Super-Injunction Spring’ of 2011. Over a period of a few months the granting of a small number of anonymised privacy injunctions led to a press campaign of civil disobedience, supported by Twitter leaks and compliant Parliamentarians. Although the rhetoric was of press freedom, the press rarely sought to argue that the information was not private or that there was a public interest in disclosure. Rather, the argument was ‘might is right’: this information has been forced into the public domain so it ought to be there.

Everything changed during a ten-day period in July 2011. This began with the *Guardian*’s disclosure that the *News of the World* had hacked

Milly Dowler's mobile phone and ended with the setting up of the Leveson Inquiry into the culture, practices, and ethics of the press. Since then privacy intrusion – and privacy injunctions – has become increasingly rare. At the time of writing, politicians are still considering how to deal with the recommendations of the Leveson report. A new phase may be about to begin in which, for the first time, the press is subject to a proper and effective regulatory regime, a development which, predictably, most newspapers are resisting with all their might.

This valuable and important book comes, therefore, at a pivotal moment. The essays which it collects were prepared during the 'Leveson truce'. The book's editor, Julian Petley, has gathered an impressive array of scholars who reflect on the privacy intrusion issues which were thrown into sharp focus by the events of 2011. The book was prompted by the 'Media and the Boundaries of Disclosure: Media, Morals, Public Shaming and Privacy' conference organised by the Reuters Institute for the Study of Journalism, University of Oxford, in February 2012.

The practicalities of privacy injunction procedures have meant that English lawyers and judges have often had to deal with complex issues of policy and balance at short notice, and with very limited time for reflection. The press megaphone has meant that the terms of the debate have often been skewed and distorted – with privacy interests often being downgraded when measured against unexamined assumptions about public attitudes to morality and the value of 'entertainment journalism'.

Any new press regulator must grapple with the important issues which are analysed in these essays. It will have to recast the balance between the general, democratic, interest in a vibrant and challenging press on the one hand and the public interest in individual privacy on the other. These issues have, over many years, been distorted by a self-interested tabloid press. They are thoughtfully and insightfully considered in this book, one which needs to be placed on the regulator's reading list.

Careful academic reflection has a crucial role to play in the privacy debate. If these issues are to be properly analysed, then discussion of the kind found in this book is crucial. I commend it to lawyers, judges, and all students of the law of privacy.

Matrix Chambers
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Introduction

Julian Petley

The genesis of the idea for this book lay in what has come to be known as ‘Super-Injunction Spring’, a period in the first half of 2011 when most of the UK press (and vast swathes of the blogosphere) claimed that an increasing number of celebrities were successfully applying for super-injunctions in order to prevent the press from exposing details of their private lives. As it turned out, the stories (of which there were 200 in the national press in one week alone in April) were wildly inaccurate. Either through ignorance or, more likely, wilfully – in order to exaggerate the alleged threat to press freedom and to agitate yet again against any form of privacy law being introduced – the papers had confused super-injunctions (an injunction which prevents the reporting of its own existence, as in the *Trafigura* case) with anonymised privacy injunctions, in which the media are prevented, either temporarily or permanently, from naming the person who has applied for the injunction. In point of fact, as was stated in the *Report of the Committee on Super-injunctions*,¹ which was published on 25 May 2011 largely as a result of the press hullabaloo: ‘The recent case law shows that far from becoming common place super-injunctions are rarely applied for and rarely granted.’ Indeed, the Committee discovered that only two super-injunctions had been granted since January 2010, one of which was set aside on appeal, and the other was in force for a mere seven days.

It therefore seemed timely to try to cut through the fog of disinformation and self-interest which characterised most press reporting of ‘Super-Injunction Spring’ and to attempt to tease out the many issues around privacy which this affair raised. For example, are these merely parochial concerns, or do they find resonance elsewhere in the world? In a European context, how can the individual’s right to privacy, enshrined

in Article 8 of the European Convention on Human Rights, be reconciled with the media's right to freedom of expression under Article 10? Do new forms of media, and especially social media such as Twitter and Facebook, make it impossible to protect privacy online, and, furthermore, do they constitute 'unfair' competition to older forms of media, and especially the popular press, when it comes to reporting matters pertaining to people's private lives? Can invading somebody's privacy ever be justified in terms of serving the public interest, and, if so, what is generally meant by the public interest? If the media publicly shame individuals who, they claim, have behaved immorally, are they acting in the public interest? And, finally, what can the analysis of individual cases of public exposure of private lives contribute to attempting to answer the broad questions raised above?

Shaming is the subject of Jacob Rowbottom's chapter, which usefully unpacks the various meanings which attach to the notion of 'naming and shaming' so beloved by newspapers of a certain kind. As he explains, this activity can have three different functions: to punish informally a named individual; to inform the public about their actions or conduct; and to criticise and express disapproval of them. In practice, Rowbottom argues, the three are difficult to separate and all may arguably be served by the same media campaign. However, each can be separated analytically and each poses its own difficulties, which Rowbottom explores with the aid of various recent examples taken mainly from the British press.

Newspapers frequently argue that each of these 'naming and shaming' functions is in the public interest, whilst their critics claim that such stories merely appeal to what interests sufficient numbers of people to make it profitable to publish them. Meanwhile, newspapers themselves (along with the odd judge) are apt to claim either that the public interest is impossible to define, or that that the distinction between the public interest and what interests the public is a spurious one, not least because if papers did not publish stories which are 'merely interesting', they would be out of business and therefore unable to publish stories which are genuinely in the public interest. A discussion of what actually constitutes the public interest is thus clearly called for, and this is provided by my first chapter, which argues that there already exist various workable definitions of the public interest which could be drawn upon in order to introduce a public-interest defence for serious journalism in all laws which pertain to media content of one kind or another. I also draw attention to a number of empirical studies (almost wholly ignored by the press) which suggest

that when newspapers claim that they are merely ‘giving the public what it wants’, they are actually on very shaky ground.

As both Rowbottom and myself point out, newspapers are keen to claim their right to freedom of expression under Article 10 of the European Convention of Human Rights. But the Convention also protects, under Article 8, the individual’s right to privacy – and this includes privacy from media intrusion. The scene is thus set for a clash of conflicting rights in which, increasingly, the courts are the final arbiter. Stories which involve ‘naming and shaming’ are particularly prone to becoming embroiled in such a legal conflict, although stories which are ‘merely’ intrusive frequently do so too. However, Simon Dawes suggests that reducing the privacy issue to a legal question of balancing the right to a free press and the right to privacy fails to address a more fundamental issue. Liberal theory concerning both the freedom of the press and the freedom of the individual to lead a private life conceives of freedom as primarily freedom from the state; a freedom that is guaranteed and protected by and within a free market. But, according to Dawes, what the phone hacking scandal demonstrates has less to do with insufficient freedom from the state than with insufficient freedom from the market, since it was the demands of market-driven journalism which led journalists to behave unethically and, indeed, illegally. He thus suggests replacing a liberal approach to balancing the rights to privacy and freedom of expression with a civic republican approach that takes both the market and the state into its account of freedom. In particular, this approach recognises that there are occasions when the state needs to regulate the press in the interests of press freedom – when, for example, that freedom is threatened by oligopoly or overweening proprietor power. Dawes argues that press freedom is best defended by recourse to Jürgen Habermas’s concept of the public sphere, a realm free from both state and market influence, in which the democratic role of the media is privileged over its commercial function, and the public is seen as being composed of people who are first and foremost citizens. Crucially, this emphasis on citizenship also has the effect of drawing attention to the private realm’s importance for the public realm, avoiding the tendency to reduce privacy to simply an individualistic and depoliticised value.

Both Rowbottom and Dawes mention the importance of John Stuart Mill to debates about privacy and press freedom, and Mill looms large in my second chapter, which explores the contribution which philosophy can make to these debates. It does so in two ways. First, it examines Samuel D.

Warren and Louis D. Brandeis's 1890 essay 'The Right to Privacy', which is as much a philosophical as a legal text, in that it explores the fundamental issues underlying such a right and is thus as relevant today as when it was first written. Since this article actually gave birth to the legal recognition of privacy in the US, it also usefully gives the lie to British journalists' frequent claims that there is no privacy legislation in that country. Second, it examines Max Mosley's case against the *News of the World* in the light of Mill's *On Liberty*, asking in particular whether the newspaper's actions could be considered as so harmful in Mill's terms as to warrant legal sanction. It also asks to what extent Mill's ideas on freedom of expression are still valid in the modern media age.

The new media are the subject of both Hanne Detel's chapter and that by Jingwei Wu and Heng Lu. The former is concerned with how the internet and other digital technologies have helped to bring about a condition known as the 'new visibility', something which affects not only prominent people such as politicians but ordinary citizens as well. Under the conditions of this new form of mediated visibility, the features of shaming processes and scandals have been significantly transformed. First, a much wider range of people than journalists, the former gatekeepers in this area, are able to disclose transgressions, as well as to determine who and what kinds of behaviour are susceptible to shaming. Second, the diffusion of scandal-inducing content evolves as an interplay between the traditional and the new media. Although the former have lost their monopoly on invoking and perpetuating scandals they still play a major role by intensifying the impact of the transgressions first disclosed on the internet. Third, the audience is no longer passive, but can intervene by expressing moral outrage directly via the new media. Finally, compared to scandals in the traditional media, the scope of shaming processes has become less predictable and the potential damage to reputation more extensive. This is because shaming content can be accessed from anywhere in the world, and can be spread and shared extremely rapidly. Moreover, because this kind of material can remain indefinitely on the internet, transgressions revealed there can ruin reputations for years.

Discussions of privacy and the new media frequently revolve around the issue of whether certain users effectively 'invade' their own privacy by making so much material about themselves publicly available. In their chapter, Jingwei Wu and Heng Lu are concerned with self-disclosure on social networking sites, and reveal the results of research which they undertook to try to discover whether there are gender differences in self-

disclosure on such sites and, if so, whether these vary across cultures. They found that the users from cultures which they term ‘individualistic’ are more willing to disclose themselves online than are users from cultures which they describe as ‘collectivist’. They also found that, unlike in offline situations, men are more willing to disclose themselves online than are women. They conclude that gender differences in online self-disclosure do indeed vary across different cultural contexts, in that within individualistic cultures, men are more willing to disclose themselves, whilst within collectivist cultures, women are more willing to do so.

The above two chapters also introduce a useful international element to the debate about privacy which, in the UK, can sometimes seem distinctly parochial. This element continues in two cross-cultural studies of press journalism. The first, by Romaine Smith Fullerton and Maggie Jones Patterson, compares the attitudes to personal privacy displayed by crime reporting in Sweden, the Netherlands, and the UK. The research on which this is based involved four strands: a close reading of the reporting of certain high-profile crimes by news organisations in the three countries concerned; in-depth interviews with journalists and scholars about press practices and cultural values in their particular countries; analysis of prevailing ethics codes and accountability practices of national professional organisations, press councils, and journalists’ unions; and an exploration via the interviews and already-existing literature of the pressures that threaten to iron out national story-telling differences and to lead to a default tell-all style. At the same time, however, the authors make clear that there still exist significant differences in crime reporting in papers that adhere to the North Atlantic liberal model (in this case, those of the UK) and those that adhere to the North/Central European corporatist model (here, those of Sweden and the Netherlands).

The second cross-cultural chapter is Julia Lefkowitz’s study of coverage of the Dominique Strauss-Kahn scandal in *Le Monde* and the *New York Times* (*NYT*), a study which, utilising the concept of authenticity, reveals significant differences in journalistic norms between the two papers, as well as wider cultural and ideological differences between France and the US. Lefkowitz argues that the *NYT*’s claims to authenticity are based on the appearance of accurate and neutral reporting, but that the authenticity which the *NYT* purports to offer is one which is in fact very much in line with the dominant cultural values of its US audience. Accordingly, it repeatedly depicts Strauss-Kahn as inauthentic, drawing attention to mismatches between surface and reality, or words and actions, so that he

comes across as not only a hypocritical socialist who is linked with acts of sexual misconduct, but a French 'other'. By contrast, *Le Monde's* coverage is more overtly polemical and, in this sense, subjective; however, because of the transparency of the ways in which these qualities are conveyed, they are apparent to the reader. So whereas the *NYT* uses language in such a way as to disguise its various subjectivities and viewpoints, *Le Monde* encourages audience engagement through openly presenting opinions which can serve as a stepping stone for wider public debate. *Le Monde* thus puts authenticity to an end that is more democratic, encouraging readers to come up with their own and, in this sense, authentic, viewpoints.

The next three chapters are studies of specific cases of privacy intrusion. Kevin Rafter provides a cross-cultural overview of media attitudes towards reporting politicians' states of health before focusing on the revelation in December 2009 by Ireland's TV3 channel that Irish Finance Minister Brian Lenihan had been diagnosed with pancreatic cancer. The broadcaster was the subject of considerable criticism and censure, although there were a number of supportive voices too, and complaints to the Compliance Committee of the Broadcasting Authority of Ireland were not upheld. Rafter himself concludes that politicians have a right to be sick in private but, because of their role and their responsibilities to citizens, lose the right to withhold disclosure of their medical condition.

Following this, Tim Dwyer turns his attention to a specific case of media 'outing', in this instance that of David Campbell, the transport minister in the former New South Wales Labour government led by Kristina Keneally, who was outed as a gay man by Channel Seven, a commercial, free-to-air television station. The incident quickly became a *cause célèbre* for privacy and gay rights advocates, and also served to highlight the fact that Australia has no general tort for breach of privacy either at common law or in statute. Dwyer himself argues that the journalist concerned (and Seven Network in broadcasting the item) had acted unethically in assembling a patchwork of assertions and smear in order to carry out a media scalping. However, he also notes that the Australian Communications and Media Authority, which supervises the *Commercial Television Industry Code of Practice*, refused to uphold the complaints which it received about the broadcast; although it agreed that Campbell's privacy had indeed been breached, it found this to be justified on the grounds that there was 'an identifiable public interest' for doing so. This again raises the whole question of the public interest which is

the subject of my first chapter, but does so in an Australian context and with regard to a specific case, which is extremely useful. Dwyer concludes that the whole affair exposed a convenient alliance of commercially competitive media interests, regulatory supervision, and moral judgement that shelters behind the rhetoric of acting in the public's interest.

The final case study is Adrian Quinn's detailed analysis of the 'naming and shaming' of the former television presenter John Leslie in the closing months of 2002 for being the perpetrator of a 'date rape' which Ulrika Jonson describes (but without naming the rapist) in her autobiography *Honest*. Once Leslie had been inadvertently fingered as the culprit by Matthew Wright on his Channel 5 show *The Wright Stuff*, 30 other women came forward with similar claims, and what the *Observer* journalist Mary Riddell called 'the alternative tribunal' and *Independent* editor Simon Kelner 'the most powerful court in the land' swung into action. The *Sun* even published an appeal headlined in capital letters: 'HAVE YOU BEEN A VICTIM OF JOHN LESLIE? CALL THE SUN NEWS DESK.' What emerges from this chapter is a frightening picture of Leslie being tried by the media, effectively for failing to defend himself against an allegation of sexual assault for which he never faced charge or trial. Few, including Leslie himself, emerge with much credit for this story, but it also demonstrates that the laws on both libel and contempt are of little practical help to victims of this kind of 'naming and shaming'.

Finally, John Lloyd returns us to some of the more general themes explored in the opening chapters of this book. But if the focus there was on issues raised by 'Super-Injunction Spring', Lloyd's concern is with those emanating from the phone-hacking scandal and the consequent Leveson Inquiry into the culture, practices, and ethics of the press. Borrowing from C. P. Snow, Lloyd argues that there are essentially two quite different cultures at work in the British press, and indeed in the wider society. One sees personal privacy as something needing to be preserved, by regulation and by law, from intrusion by the press. The other sees such intrusion as desirable, since its object is to expose moral turpitude. The first view is held, broadly speaking, by the 'establishment' – politicians, the judiciary, the upmarket press; the second by the tabloids. But as Lloyd makes clear, the division between the two cultures of journalism lies deeper than in simply their different attitudes to privacy – what we have here, in many people's eyes, are two quite different, indeed conflicting, kinds of journalism: the one responsible, truthful, reliable, evidence-based, and concerned with the serious issues facing society; the other irresponsible,

untruthful, unreliable, gossip-based, and concerned only with the trivia of celebrity culture.

At this point, and by way of a conclusion, I would suggest that those seriously concerned with the future of journalism really do need to grasp the normative nettle and to argue that there is a clear distinction between good and bad journalism. Or rather, between journalism and non-journalism. As Brian Cathcart has put it, there is actually a vast gulf between journalism, which is demonstrably valuable to society in that 'it tells us what is new, important and interesting in public life, it holds authority to account, it promotes informed debate, it entertains and enlightens' (2011: 35), and simply intruding into people's personal lives for the purpose of profit. In the latter case:

The subject matter is almost never important – except to the victims, whose lives may be permanently blighted – and while a story may entertain, it does so only in a way that bear-baiting or public executions used to entertain. The whole activity exists on the border of legality, skipping from one side of the line to the other at its own convenience and without sincere regard for the public interest. (Ibid. 36)

As the government ponders its response to Lord Justice Leveson's Report, making this distinction and acting on its consequences are of fundamental importance. Even before Leveson had reported, the entirety of the newspaper press had drawn its wagons tightly in a defensive circle, national press lined up firmly with local, tabloid with broadsheet, journalist with privacy invader. In the early days of Leveson the old Fleet Street bruisers Paul Dacre and Kelvin McKenzie were loudly in evidence, but, as publication of the report neared, the megaphone was increasingly handed to journalists perceived to have more gravitas, such as Peter Preston, Nick Cohen, Simon Jenkins and Raymond Snoddy, all now getting hot under the collar in a Melanie Phillips vein. The bitter enmity between the liberal and illiberal press seemed to have been conveniently forgotten in the greater battle against what was grossly misreported by the papers as 'state regulation'. However, once the report was published, and the government came up with the idea of a royal charter to underpin a new self-regulatory system, dissent broke out in the ranks, with the *Guardian*, *Independent* and *Financial Times* showing themselves willing at least to consider the idea, whilst the rest of the press stamped its feet and threw its toys out of the pram. At the time of writing, what is going to happen next is unclear.

However, the end of the unholy alliance between the liberal and the illiberal press is wholly to be welcomed, since this was a tactic fraught with danger for journalism. As Cathcart argues: ‘If journalists, for reasons of nostalgia, inertia, confusion, or misplaced loyalty, choose to keep swimming with the privacy invaders, they may well drown with them’ (2011: 45). The press may well succeed in bullying the government into kicking Leveson’s recommendations into the long grass, but it cannot escape the following facts: the British public has an extremely low opinion of journalists and journalism *as a whole*, its members are buying ever fewer papers, and a significant proportion of it would support forms of privacy legislation which, even if inadvertently, would almost certainly hamper serious investigative journalism along with the prying and snooping of the privacy invaders. Another press scandal of phone-hacking proportions, or perhaps further shocking revelations from the numerous phone-hacking trials, could make it impossible for the government to resist demands for such regulation – and one very much doubts that it would be unduly concerned about the dangers to investigative journalism, which it all too obviously regards as a thorn in its side.

There is a pressing need, then, to be clear about what journalism actually is, and how best to go about defending it. In this, as in so much else, we are most emphatically not ‘all in this together’. Lines have to be drawn, and judgements and choices made. Non-journalism threatens the existence of proper journalism, and for the latter to throw in its lot with the former in the face of an alleged ‘threat’ to press freedom, which is actually no such thing, is little short of suicidal. These tasks are particularly urgent in the UK in the wake of Leveson, but, as various contributions to this book make clear, the problems facing journalism in Britain are hardly unique, even if they exist in a particularly exacerbated form there. If the chapters in this book help readers, wherever in the world they may be, to think about what should be the functions of journalism, and about how journalism which serves the public interest can best be protected and promoted, then they will have served their purpose.

Note

- 1 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>.

Reference

Cathcart, Brian (2011) 'Code breakers', *Index on Censorship*, 40(2): 35–45.