Should people in the public eye have a right to privacy?

In 1859 John Stuart Mill wrote that "the time, it is to be hoped, is gone by when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government". This essay will assume, as Mill did 150 years ago, that freedom of the press is a cornerstone of democratic society and will thus not embark on a lengthy exposition of why this is so. Instead it will be argued that the courts in developing a right to privacy for people in the public eye, risk undermining this fundamental democratic safeguard.

Max Mosley, speaking from personal experience, stated that "to expose in a newspaper the most private elements of someone's personal life is to impose on them and their family a terrible penalty. No civilised community should do this without very good reason". An individual's right to a private and family life is undoubtedly essential and some limitations on newspapers' freedom of expression must be accepted. Indeed it is enshrined in domestic law, by virtue of the Human Rights Act 1998, that the competing rights to freedom of expression (Article 10) and to privacy (Article 8) must be balanced; publication of private information must be proportionate and in accordance with the public interest. Mosley concluded that the courts should always conduct this balancing exercise. This essay disagrees and argues that the judiciary have gone too far in supervising the minutiae of editorial decision making.

In the wake of Max Mosley's successful action against the News of the World, one of the few public voices to defend press freedom was Paul Dacre, editor of the Daily Mail. He advanced two arguments, neither of which is convincing, but which highlight underlying

difficulties presented by judicial control of free expression. In his first argument Dacre attacks wholesale the Human Rights Act and perceived judicial activism. His criticism is inaccurate and moreover misses the point. The Daily Mail would be equally enraged if statute had prohibited the reporting of celebrities' private lives. It is not that judicial control lacks democratic legitimacy, but that any State restriction of free expression, be it legislative or judicial, constitutes a form of censorship. The remedies of injunctive relief and damages act as such censorship and must be convincingly justified.

Dacre's second argument maintained that celebrity gossip increases his paper's circulation, thus enabling its engagement in political discourse. Although the value to society of a vibrant and varied press cannot be understated, this approach treats privacy as a commodity that can be sold to make political speech commercially viable; such commodification of rights is objectionable. Broadsheet newspapers cover political debates without infringing fundamental rights. All newspapers however engage in both political discourse and other less-valuable expression. The distinction between such forms of expression was identified by Baroness Hale in *Campbell*. The form of speech most deserving of protection was said to be political speech, which is "crucial to any democracy". Intellectual, educational or artistic speech requires comparable protection. Commercial speech, such as celebrity scandal, necessitates a proportionately less extensive safeguard.

Baroness Hale in attempting to categorise forms of speech nonetheless recognised the difficulty involved in this task. She accepted that the Mirror's publication of details of Naomi Campbell's treatment at Narcotics Anonymous arguably had an educational dimension, but concluded that the form of reporting ultimately made the article

commercial. The *Campbell* case vividly illustrates this problem; their Lordships were split three to two as to whether the Mirror was exposing an important deceit by a public figure or intruding on the intimate medical treatment of a troubled individual. For Lord Hope, only the inclusion of photographs tipped the balance against the newspaper. Although clearly the result of careful and considered reflection, the drawing of such fine distinctions as to appropriate journalistic presentation should cause us concern. Faced with a difficult presentational choice, an editor cannot reasonably be expected to second-guess which particular approach a court will take. Editors understand their readerships' demands, the commercial realities of journalism, and must work under the pressure of deadlines which cannot easily be accounted for in court. If free expression is to be truly respected, finely-balanced editorial decisions should primarily be made in the newsroom, not the courtroom.

How then are the judiciary to continue to balance personal privacy with press freedom as the Human Rights Act requires? The answer lies in affording editors a "margin of appreciation". In marginal cases newspapers must be free to decide what to print and how to present it – otherwise we risk a "chilling effect", whereby newspapers report with undue caution for fear of judicial sanction. Mill's 'harm principle' can guide the courts in striking the correct balance. Mill perceived free speech as protecting against corrupt or tyrannical government. It can only be limited where clear and serious harm, in this case to the individual's private life, is likely to result, or arguably where the speech in question is far removed from political discourse. The judiciary should therefore intervene where the invasion of privacy is gross (photographs of Sienna Miller obtained through paparazzi harassment) or where there is only a spurious public interest justification (reporting Max

Mosley's private sexual activities to protect public morality). Where the analysis of the extent of the harm or the strength of the justification relies on fine distinctions, as in *Campbell*, judges should not interfere with the newspaper's assessment. Although it would be made easier if journalists always exercised their rights responsibly, a free press must ordinarily be trusted with the decision of what to print.

People in the public eye have a right to privacy – so too the press have a right to free expression. Part of living in a free society is that, even though we might disagree, we must allow the press scope to determine what is suitable for publication. Although the courts might disapprove of the occasionally trivial, frivolous and vindictive stories in the tabloid press they must, following Voltaire, defend the right to print it.

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