FREE SPEECH, PRIVACY, PROPERTY AND CONTRACT IN THE ELECTRONIC AGE:

A JOURNALIST'S VIEW

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My discussion of the privacy issue falls into two parts. First, I explain why free media are important and why privacy is best understood in connection with private property and freedom of contract; second, I will discuss some examples of eavesdropping and how corporate and government bodies are involved in encryption controversies.

FREEDOM OF INFORMATION?

Free speech requires constant defence at a time when governments possess ever greater power to restrict individual liberty. Without free media, voters have little information upon which to base their electoral choices. Businesses can sell shoddy goods to uninformed consumers, conmen can commit crimes against the unwary, and minority points of view can be crushed by the mainstream climate of opinion.[1] Exposing crooks and scrutinising what our politicians are up to is a vital task for journalists, and often a difficult one. It has been said that one definition of news is that news is something that someone wants kept out of the newspaper. The battle for free speech has not been wholly won, and what progress has been made was not achieved lightly. In Britain, of course, we do not possess formal legal protection for free speech as in the First Amendment of the US Constitution. It is therefore very easy for us to lose freedoms through piecemeal encroachment in ways that raise little controversy at the time — until it is too late.

Journalists are faced with many hurdles in the course of doing their job. Privacy is one of them. But privacy and its protection need not prevent journalists from going about their job. The issue of privacy is full of grey areas, of course, as a number of recent famous cases illustrate. Covering the dishonest business methods of Robert Maxwell, for example, could involve violations of business confidentiality. Discovering the doings of politicians can also present journalists with a fuzzy ethical area — what may be a private issue to some people can be a legitimate public concern to others. The recent case of former Heritage Minister David Mellor is a case in point.

As a result of some particularly grotesque intrusions into private lives, a number of writers have argued that we need both a formal

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right to freedom of information plus a privacy law with specific exemption clauses relating to public interest cases. There has been the Calcutt Report (1990), which recommended new laws to ban journalists from entering private property or recording conversions without prior agreement. As the journalist Nicholas Elliott has pointed out,[2] the proposal is that these restrictions should apply only to journalism, which is an attempt to violate the principle of equality before the law — a crucial bulwark of our liberties. The Labour MP Clive Soley has proposed extensive legal reforms partly motivated, no doubt, by the often cruel and muckraking invasions of privacy suffered by the Royal Family in recent years. The Royal Family cases have been instrumental in generating recent concerns about privacy — it seems likely at this time that some form of privacy legislation will be enacted.

My argument is that although statutory privacy laws may do some good and meet righteous anger at press thuggery, they can, if badly conceived, also be a potential threat to free speech. The widely differing styles of newspapers and other media organs make it difficult to establish the "correct" way to handle privacy. Under a privacy law establishment-minded judges could be tempted to over-protect the mighty while stroppy juries, if employed to decide such a law, could make decisions which had more to do with the popularity of an individual than the merits of a case. Who would enforce a privacy law? (The "Great and the Good", probably). Who would decide what was in the public interest? One major objection about a heavy-handed statutory approach is that it could become an attempt to control the freedom of expression of others.

The difficulty of answering such rhetorical questions in detailed terms leads me to believe that solutions lie in a better appreciation of the connection between privacy, freedom of contract and private property. By property I don't just mean material possessions — I also want to highlight the concept of self-ownership in general. The great advantage of property rights in this case is they require us to define, fairly precisely, where boundaries lie. I also believe that better enforcement of property rights would help deal with many of the problems of privacy raised at the present time. Further, using a contract model enables us to use a "market" argument, one which recognises the right of people to make their own arrangements, whether it is with the press, credit companies, market research bodies, banks, or data gathering organisations. What I am sure of is that it is impossible to give a completely watertight definition of privacy in all cases. There will always be grey areas with any approach, where argument centres on taste, decency and civilised standards. That no total solution exists, however, is no reason for not attempting a sensible approach to the issue. Certainly, I disagree with members of my own trade who say that privacy, because it is so hard to define, should never be a subject for legal reform.

PROPERTY CREATES PRIVACY

In researching privacy issues in the general media I was struck by the almost complete absence of reference to property rights and contract. This may be caused by anti-capitalist feeling among many journalists. Yet the more I think about it, the more an understanding of property and contract helps to shed light on the sensible approach to privacy and on how people can control information about their lives.[3] Consider the process of getting a story. The case of those photographs of Sarah Ferguson unwittingly baring all is an example.

If I understand events properly, the shots had to be taken by someone standing on a piece of land somewhere. Now, if the owner of that land consents to photographers standing there and snapping shots *within* the boundaries, then there can be no complaint. But if, under a strict understanding of private boundaries, a photographer shoots pictures of people or things beyond that boundary, then he is violating a property right, and can be sued. In short, strict definitions of boundaries will make it much simpler for privacy-conscious individuals to stipulate where the press can be. If a landowner owns a street, for example, he can evict the gutter press from standing outside his home all day and night. The likes of Madonna deal with privacy simply by buying opulent Hollywood homes with large grounds, defended by guard dogs and top-notch security. Property rights, then, can go a long way to ensuring a large measure of privacy. More recently, of course (November 7, 1993) we have had the case of Princess Diana seen exercising in a gym in the *Sunday Mirror* and the *Daily Mirror*. I understand that these not terribly interesting pictures were taken with concealed cameras, and certainly without the prior consent of the Princess. This is a very clear and unpleasant example. The gym was obviously a private place. The *Mirror* newspapers clearly ignored this, causing the Princess considerable distress and have prompted calls for a new "clampdown" on the media as a result — which will affect us all, muckrakers and responsible papers alike.

And of course, the Princess of Wales and the Prince have both been the victims of snooping on cellular phones. Although users have become aware of the risks of snoopers, the user of a mobile phone is just as entitled to privacy as a sender of a letter. I have heard it said that privacy in the electronic media age is going to be harder to protect and "own" with all this knowledge zooming around. Encryption techniques invalidate this point to a degree, however.[4] Of course, once knowledge about X is out, one cannot stop people like curious journalists knowing about X. Unlike physical matter, knowledge is not diminished by being shared — quite the reverse sometimes. And it is not easy for people to stop things being known about them. I have certain characteristics, and have done certain things, which are known to some people. I can't always stop this knowledge from getting out and it is futile to try. I cannot own a piece of information which has become a public fact. But I can own the territory in which that information is acquired in the first place. By concentrating on property and on the physical circumstances in which information is acquired, we ensure that our definition of privacy is "hard" rather than vague. From vagueness, I believe, comes bad law, often illiberal and dangerous law.

THE MARKET IN PRIVACY

But what of the less lucky persons who cannot afford to defend their privacy through direct ownership of some kind of territory and who find themselves caught in the glare of beastly publicity?

Well, even if a person is in someone else's private area — with the owner's permission, of course — then that person will be protected by whatever rules the owner chooses to operate. If I invite guests to my home for a party, and some news photographer starts snapping away without permission, he is violating the guests' right to privacy, because I have not consented to the photographs being taken. If I tell my guests a photographer is coming from the *Daily Libido* looking for material for a gossip page, then the guests can hardly complain. (Whether anyone would want to come to the party or see me again is another matter!)

Once this point is grasped, the benefit of different rules being decided by different property owners becomes obvious. Some nightclub owners, ski resort owners, bar landlords, football stadium chiefs and others will ban the media in all or part of their territory, while others will take a completely relaxed attitude. People will be able to "shop around" for places depending on how private they are. And of course this goes on already. In a society where all property was privately owned, this would become far more widespread. I understand that in the Princess Diana gym photos case, the gym's boss actually connived at getting secret cameras installed and arranged a financial deal, all without the knowledge of the Princess. This is clearly unjust — the Princess had no idea of what was going on and was clearly not a consenting party. One cannot even argue that there was implied consent: a gym is not the sort of place where publicity is expected. It is not the same as signing a credit card agreement, where it is a commonly known practice for firms to circulate data about their clients.

One important result of having differing approaches to privacy would be greater awareness of the risks. People would make sure areas they entered had privacy-protection, while others who did

not bother about privacy would go to their preferred places. Some firms would operate strict privacy and confidentiality rules, others would be more relaxed. Pluralism of this "laissez-faire" kind makes sense because different people regard privacy as being more important than others do. Some are paranoid and hate publicity, others crave it. Why should everyone conform to one model of what it is right for the public to know?

The "market" aspect of this "shopping around" has other benefits. Some people would become notorious for their love of privacy, and suffer certain adverse consequences. In the case of politicians and business leaders privacy obsession could harm their image, particularly in cases where the person was refusing to disclose details about business or policy. The public is far more likely to trust the company that tells people about its products in a straightforward manner, while the politician who tries to protect himself too fiercely from the public gaze can suffer from the "What has he/she got to hide?" problem. Openness is a marketing and electoral tool like any other. This also ensures that people who choose to put themselves in the public eye and acquire power must, to an extent, lose more privacy than the rest of us.

CONFIDENTIALITY AND CONSENT

There is also the question of what one can call "implied contracts", which I briefly mentioned earlier. One can argue that data collection services, such as those operated by credit organisations, have an implied contract with their clients to release information.[5] If I have a credit card, so this argument goes, then I have given implied consent to the card firm to give data about me to other marketing organisations unless I specify otherwise. I take the *Spectator* magazine, and I have noticed an increase in my junk mail. I don't mind this very much and it is implied that subscribers to magazines will expect such a response. If I really took offence, I could always write to the *Spectator*'s sales staff accordingly. It would make direct marketing very difficult if firms had to get prior consent from each individual. Junk mail is only junk to those who don't want it. In a market some businesses will actually use confidentialilty as a customer tool. Some firms will promise not to release any details in a bid to win over privacy-conscious clients. Others will brazenly state that data will be handed over, and junk mail lovers will buy their services!

Journalists need access to information of all kinds if they are to do their job, and it is very useful to find names, addresses and occupations if one is working on some stories. Sometimes journalists do stories about surveys, and need to test their accuracy. Newspaper companies also carry out extensive market research these days in a bid to shape their products more sensitively. Now if a statutory law makes it illegal for data gathering services to operate in the private sector to protect "privacy", then such research could be impossible. We could end up with a situation where the only body allowed to do such data gathering would be the State — an unpalatable thought. In the United States, the Lotus Development Corp got into difficulties with its Marketplace: Households product, which combined details of about 120 million US consumers. It would have given small firms and non-profit organisations details previously open only to large companies. But following protests from, among others, the American Civil Liberties Union, the Lotus project was scrapped, in 1991. One cannot help wondering if the motive for this was more a case of anti-market prejudice than a genuine love of the right to privacy.

When journalists cover business and politics, there is, of course, the issue of confidentiality to contend with. Once again, however, the issue of freedom of contract cuts through much complexity and confusion. In recent years the law of confidentiality, which is part of the civil law, has been used and extended in a bid to keep information out of the media, particularly by the State. There have been a number of well-known cases, such as the Paddy Ashdown case, and the Spycatcher affair, where court injunctions were used to halt publication or broadcast of a story obtained in alleged "breach of confidence". The great problem with the often complex and shifting laws on this is that if a reporter learns about some newsworthy misconduct from a source who has received this information confidentially, then the journalist will have difficulty checking the facts to avoid being sued for libel. As soon as he approaches the alleged malefactor for his side of the story, he faces the risk that the offending person will immediately get an injunction preventing use of the information.

Although a discussion of this complex subject would take too long, the broad principle in my view should be that voluntary agreements to make information confidential should be honoured like any other contract. If I go to a Swiss bank and secrecy is part of the contract, then this cannot be violated by people trying to use my financial affairs for marketing purposes or a scandal story. Of course, companies, persons and Government organisations who wish to keep everything confidential will pay a cost. Companies and politicians who constantly use injunctions to prevent any information emerging about their doings will forfeit public trust in the form of sales and votes. Once again, this is not a simple black and white issue of "Privacy good, freedom bad," or *vice versa*. Confidentiality may be crucial in large business negotiations for a costly new product, or cabinet discussions about anti-terrorism policy. Without the ability to deal in private — in confidence — many deals we take for granted would be impossible. Trust breaks down if a person cannot keep a secret. We all know of the gossip who ends up being told nothing important by anyone.

In the marketplace, confidentiality is both part of the rules of civilised behaviour and also a commodity which varies in value. Sometimes it simply is not worth it to keep everything private, and better to let people know about things quickly and straightforwardly. To repeat: the crucial point here is *consent*. Where possible, agreements between employees and bosses, doctors and patients and so on, should spell out the conditions of confidence. Some privacy activists get very— sometimes understandably — angry when doctors give out information about their patients to a snooping medical journalist, for example. But if a client chooses, in a contract, to let his medical condition be made known, then there is no problem. Let us have freedom of choice. Better to let two parties work out a deal than have the lawmakers impose a majoritarian solution on us all.

PRIVACY AND THE STATE

One problem for the market approach to privacy is the existence of Big Government, and of large corporations which share many features of government, largely because of state intervention. Contracts are not things governments are noted for respecting. Their power today is huge. Bureaucracies, recent reforms notwithstanding, still play a huge part in our lives. Can their secrets be treated by journalists the same way as that of a company competing in a market or a person trying to win social approval? I don't think so, and so a measure of statutory reform for both freedom of information and privacy is needed here. (The best thing that could happen would be a hefty cut in the size and role of the state.) The question arises of democratic accountability and the right to know what our representatives are up to. As long as government is here to stay — as a libertarian I hope it is not forever — we need to know what is going on, and journalists are crucial in making this possible. A private company obsessed by privacy cannot coerce us to buy its products or work for it as governments can. You cannot sign an individual contract with the Inland Revenue about concealing or releasing certain financial details.

Of course, the issue of whether a journalist should ever reveal his sources is also affected by the difference between leaks from government and leaks from private individuals and firms. Government rules such as the Official Secrets Act have, in theory at least, been approved by our democratically elected representatives. Are journalists entitled to use information leaked in contravention of the law, and if so, are they entitled to protect a source who has committed a criminal act? This is a serious ethical dilemma, and one hard to resolve in an age when investigative journalism can play a crucial role in exposing government wrongdoing. As a matter of editorial policy, I am told never to reveal sources. What happens if

a journalist gets a tip-off about a terrorist incident or a criminal act? If he discloses a source, he will never get such information again and be useless as an investigator. On the other hand, disclosing a source may be necessary to catch criminals who have committed serious acts. In my view, the rule should be that journalists are no different from other members of the public as far as their rights and duties to uphold the law are concerned. If we demand the privilege to protect sources from the police or other authorities, then the demand will soon come to turn journalism into a state-licensed profession — an ominous thought.

To sum up so far. I believe free speech is vital in scrutinising those in power, particularly the State, the foremost violator of our freedom. I believe privacy is best understood by thinking of people as self-owners, and private property helps give a hard definition of privacy that can shape law, preferably common — not statute — law. I believe people should, as much as possible, be allowed to make what agreements they like about how much of their lives should be known to the public, while understanding that information can never be completely controlled, even were it desirable. I believe politicians and bureaucrats, who do not operate in an open system but in one which forces others to support it by compulsory taxation and law, must be subject to a different discipline in the form of Freedom of Information and Privacy Laws.

ENCRYPTION AND SNOOPING

I have mentioned already the problems posed for the journalist by governments and big firms with close government links. An excellent example is the telecommunications industry. In the UK, British Telecom, the country's largest telecommunications firm, has recently been at the centre of controversy about encryption standards, and the ability to make cell phones "snoop proof".[6]

BT has denied that it wants to downgrade the code of a new mobile phone system and protect surveillance powers of Government security services like GCHQ. Calls on a system known as GSM can be scrambled so well that security agencies like MI5 cannot intercept conversations. As a result, spy-masters in several European countries are forcing manufacturers of the system to make it more vulnerable to eavesdroppers, according to some press reports, including an article by Jamie Dettmer in the *Times*.

In fact, some of the most advanced research on encryption is being carried out in my own news patch of Suffolk, at the BT research labs at Martlesham Heath, near Ipswich. It has been alleged that GSM was inspected at Martlesham and that MI5 and GCHQ engineers thought the system too difficult to crack. But when I checked the *Times story*, a BT spokesman dismissed this as "speculation". He said claims that BT had insisted on downgrading of phone codes was unfounded. Because of our libel laws I will not say if I believed him!

In fact BT is one of up to twenty operators involved in GSM, which is designed to allow mobile phone subscribers use the system across Europe. There have been no moves to make mobile phones easier to crack although the idea has been discussed in trade publications, say Cellnet. I spoke to William Ostrom, head of public relations at Cellnet. In June this year he told me: "There have been no definite moves to downgrade the system — there has just been a lot of talk about it. There are 1.5 million mobile phone users in the UK, but only a maximum of about 30,000 users have expressed an interest in encryption." He added that no-one was entitled to intercept communications of any kind without a proper warrant — which sounds a pretty open-ended proviso to me.

This story, even if one accepts the arguments and explanations, clearly suggests that BT, a quasi-monopoly with a few smaller competitors, has a close relationship with Government, and allegedly with security services. Phone-tapping undoubtedly goes on, and any research into making tapping more difficult must therefore mean governments will try to make deals with companies in this field, possibly with some kind of threat.

In this case, governments will no doubt cite the need to fight terrorism, organised crime and subversion. These are often legitimate targets, but one wonders how the public interest arguments in defence of such snooping will be interpreted in practice. Many snooping powers acquired in wartime, for example, have a habit of staying permanent during peacetime. I don't have a firm idea of what the real answer is where government snooping is concerned, but in general the "market for privacy" approach works best — those who crave privacy will attract some suspicion. Snoop-proof systems have a cost, if only because they will make people wonder what a person is trying to hide.

No doubt some journalists, whether they are investigating organised crime or getting the latest on Princess Di's love life, would love to snoop at will or get people to do it for them. But anyone caring for privacy should be allowed to buy phones with total protection, if such products are technically possible.

After all, journalists have a lot to lose both from a situation where encryption is universal and one where it is banned or limited. We hacks use phones a great deal, and sometimes get told many things "off the record". If snoopers working for firms or government can listen in, then a journalist's tip off man can be landed in hot water. Sometimes people are quoted anonymously to protect people's feelings, even though the journalist can verify the person quoted. If journalists can't have private conversations and win the trust of a source, we could face great difficulties. This is just one example of how the privacy issue cuts two ways.

As a parting shot, I have repeatedly tried to get a Home Office statement on this issue, and to find out more about what is happening at BT. So far, the response has been one of polite silence.

CONCLUSION

Journalism faces many threats in Britain. We live at a time when the European Community has more powers than ever before, and who knows what heavy-handed laws may be imposed on us from Brussels? The Royal Family stories are sure to prompt renewed calls for a clampdown on the press, which also faces the prospect of VAT. It is not an easy time for the Fourth Estate. Getting the balance right between freedom of speech and privacy is a difficult one, particularly for anyone conscious of the need to curb and scrutinise State power. But I am sure my libertarian approach, with its stress on property and consent, is the most fruitful approach for getting the balance right.

NOTES

1. Nicholas Elliott, *The Value of a Free Press*, Libertarian Alliance, Political Notes No 52, London, 1990.
2. Ibid.
3. A very good discussion of privacy issues in the electronic age, and the advantages of the consent or market approach, is Jacob Sullum, "Secrets for Sale", *Reason*, April 1992, Vol. 23, No 11, The Reason Foundation, Los Angeles.
4. Chuck Hammill, *From Crossbows to Cryptography: Thwarting the State Via Technology*, Libertarian Alliance, Scientific Notes No. 9, London, 1992.
5. Sullum's *Reason* article discusses the whole idea of implied contracts and the difficulties companies would face if they had to get prior consent from every consumer before putting them on a mailing list. Implied or explicit, consent is the issue here.
6. See Jamie Dettmer, "Spymasters Pull Plug On Snoop-Proof Telephones", *The Times*, May 29, 1993. See also Tom Burroughes, "Snoop-Proof Phones' Code Stays Secure, BT Insists", *East Anglian Daily Times*, June 9 1993, page three of Business Scene, Ipswich.

FURTHER READING

Mary Eisenhart, "Encryption, Privacy and Data Security", *Microtimes*, March 8, 1993.