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Bloodhounds and watchdogs

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PRIVACY AND THE PRESS. Joshua Rozenberg. 274pp. Oxford University Press. Pounds 18.99. - 0 19 925056 1.

Once every few months in the BBC newsroom in the 1990s, the telephone would ring - normally about the time the shipping forecast was bringing to an end the Radio 4 day - with news of a tabloid newspaper carrying a vivid story about the private life of a public figure. As one of the BBC's editorial panjandrums, my job was to confer with a few other senior colleagues to decide whether or not we could report, even in so modest a place as one of our newspaper reviews, such matters as the Cabinet Minister David Mellor's alleged fondness for a Spanish-born actress, or his Conservative colleague Tim Yeo's less flamboyant dalliance with a Conservative councillor, or perhaps the versatility of a football manager - and here I borrow from the tabloid idiom of the era - who loved "playing away fixtures". With our brains fugged, with programme editors pressing for an instant answer and without recourse to the wisdom of the author of this book - then the BBC's Legal Correspondent and now the Daily Telegraph's Legal Editor - we wrestled with the appropriate questions. Was there any public interest that could justify our reporting the story? Was the story likely to be true? What were our opponents doing with it? If we ran it would we escape legal action, or moral opprobrium, because, after all, we had not run it first?

And anyway why should we care what ITN or Sky or Independent Radio did? We were supposed to have a different, more sober, agenda. Of course, we could all recite the verity that the BBC is animated above all by the need to serve the public interest - and it was not for us to report mere tittle-tattle. But if we didn't publish would the audience think we were protecting the powerful and famous by suppressing a story that many others might see as the rightful exposure of humbug, or the hypocrisy of political rhetoric, or the false image of a happy royal family?

As Privacy and the Press by Joshua Rozenberg shows, the judges too were having a great deal of trouble deciding how best to strike a balance between the right of an individual to have his or her privacy respected - and the right of free expression. There was no Privacy Act to define the legal restraints on the media.

There still isn't. That is at least in part due to the fact that the newspaper industry's self-regulatory body, the Press Complaints Commission, has toughened up its code of practice on privacy. But if the press is no longer "drinking in the last chance saloon" (the image used by the beleaguered David Mellor to attack his tabloid accusers), privacy cases still generate a great deal of heat, and newspaper editors know that they might only be one scandal story away from trouble.

The problem of how to deal with apparent invasions of privacy is, of course, not a new one. Rozenberg trawls through legal opinion across several continents and spanning over 150 years to make the point. In 1890, the great American jurists Louis Brandeis and Samuel Warren complained that: "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relationships are spread broadcast in the columns of daily papers". (Warren and Brandeis had been upset by the way in which Warren's sister's wedding had been invaded by the Boston press.) But for a variety of reasons, the debate about privacy has intensified markedly in the past fifteen years or so. Celebrity stories sell papers. The industry has become more competitive, and advances in technology make for better paparazzi pictures and juicier stories.

Recording devices are easier to conceal. But the famous have taken to retaliation.

One aggrieved star after another has risked the publicity that accompanies a court case to try to attack the unruly fourth estate - either by stopping publication or seeking damages afterwards. Their lawyers have been given more ammunition by some of the country's most senior judges, whose response to the prospect of incorporation of the European Human Rights Convention into a Human Rights Act was to see just how far common law could be stretched to achieve one of the Convention's best-known principles - respect for a person's private and family life.

But as Rozenberg makes clear, judges, plaintiffs and defendants could all take something from the Convention, and then from the Human Rights Act itself when it finally became law in 1998. No matter that the Convention itself had been around since 1953, or that British citizens had for over thirty years been able to complain to a court in Strasburg if its provisions had been breached. The legal profession feasted for much of the 1990s on how to balance the Article 8 privacy section with the hefty competition provided by Article 10 - which espouses the virtue of free speech.

Much of Rozenberg's narrative is driven by the way the existing law of confidence, with its roots in Prince Albert's successful injunction to stop publication of royal etchings, was suborned by those who found cases where the "privacy" Article 8 weighed more heavily than the "free speech" Article 10. Until recently, the law of confidence could only be used successfully if there was some sort of formal relationship between the competing parties. And, of course, some cases are still resolved on the basis that a confidence has genuinely been betrayed. The courts ruled that Lady Archer's special assistant, who had signed a confidentiality agreement, had no right to pass on secrets about Lady Archer's face-lift to a paper. That ruling is hard to argue with.

But is it right that the law of confidence could have been used - with some success - by Naomi Campbell in her case against the Mirror? She had lied about her drug addiction, and neither she nor anyone else knew who was the source for the initial story. It was assumed it was one of her fellow patients. On this basis Mr Justice Morland concluded that the Editor of the paper and his journalists were "clothed in conscience with the duty of confidentiality" when they published a photograph of her in the street on the way to her rehab clinic. The Court of Appeal differed - but the case will only be resolved by the House of Lords later this year.

Rozenberg is generally not sympathetic to celebrities who seek publicity one day and then complain when their fall from grace becomes a tabloid

scoop. Jamie Theakston, the former children's television presenter who was caught in a brothel, gets short shrift. The footballer Gary Flitcroft is "an unattractive figure" who managed for a year to stop publication of his affairs with lap-dancers. In both cases Rozenberg believes there was enough of a public interest in publication to advance the case for free speech over the protection of privacy, even if you feel that Rozenberg himself would never dream of buying a tabloid paper for personal pleasure.

But this book examines other, more solemn cases, where Rozenberg supports judicial restrictions on the right of the press to publish something that is true though he frets about the potential consequences. Dame Elizabeth Butler-Sloss has stopped the press - in perpetuity - from identifying Jon Venables and Robert Thompson, the boys who killed three-year-old James Bulger, because she feels that there is a real risk to their lives if they are discovered. Rozenberg reluctantly agrees with this logic. But he is critical of the same judge for allowing a similar injunction preventing the identification of another child-killer, Mary Bell. Bell had cooperated in a book project about her life and, further, the judge accepted that her life was not at risk from vigilantes. But still she felt that Bell's privacy should be protected.

It is a decent liberal instinct that people should be given a second chance, and maybe Butler-Sloss was merely being compassionate when she granted Venables, Thompson and Bell special legal privileges to be left alone - but Rozenberg sees a larger liberal principle under threat. He does not have much faith that the judgments in these morally complex cases won't end up knocking a hole in open justice and restricting free speech. Liberal principles can clash with other liberal principles. "Anonymity for defendants is a seductively slippery slope. Once we start to slide it will be hard to avoid granting widespread anonymity to all who have been convicted of serious crimes, child and adult alike."

Most of Rozenberg's cases are not concerned with libel. But he does devote an important chapter to recent legal developments in libel law which have done something to redress a state of affairs that was heavily loaded against newspapers. English libel laws have traditionally made life very difficult for journalists. It might seem unarguable that if a court decides a newspaper has got its facts wrong, and ends up defaming someone, there should be no defence. But in law it is for the journalist to prove that a story is true rather than the claimant. After years of pleading from newspaper editors, Lord Nicholls came to the rescue in the House of Lords in 1998 - animated by an admirable sense that the libel laws as they stood militated against free speech. His judgment in the case of Albert Reynolds (the former Irish Prime Minister) v the Sunday Times is one of the most important blows ever struck both for press freedom and for responsible journalism.

The Sunday Times had published a piece suggesting that Reynolds, who was then Prime Minister, had deliberately and dishonestly misled the Irish Parliament. The courts ruled that the article was untrue. Once upon a time that would have been that, but the Sunday Times argued that it was in the public interest for it to publish a defamatory report that its reporters had good reason to believe to be true. Nicholls's great service to the press was to list the factors - ten of them - that might justify a defence of qualified privilege - in effect allowing a journalist to publish something defamatory if, and only if, the journalist has behaved responsibly. Nicholls's ten points are a compendium of good editorial practice and should be chiselled into the walls of every newsroom. As it happens, Nicholls did not think that the Sunday Times had done enough to win the particular case, but his judgment has significantly tilted the balance in favour of free speech. Rozenberg quotes admiringly from Nicholls's conclusion:

Above all the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as watchdog. The court should be slow to conclude that a publication was not in the public interest and therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubt should be resolved in favour of publication.

Rozenberg is a trained solicitor and has a good legal brain. He does not sit on the fence. He does not, for example, agree with Gerald Kaufman's Select Committee that Parliament should pass a Privacy Act and curtail press self-regulation. Nor does he want a new tort of privacy.

He allows himself to be tickled by newspaper excess, yet he knows that the British press can behave tastelessly.

But Joshua Rozenberg is more of a journalist than a lawyer and in Privacy and the Press he does a fine job defending his chosen trade from those judges and politicians who want a more orderly and well-mannered world. That may be an understandable desire - but it has its dangers. We are not entitled to know everything about everyone, but if the powerful are given too much protection even inadvertently, we will lose more than we currently do from the chase for tabloid sensation.