

JOURNALISM, PRIVACY, ETHICS AND PRECISION

An address by

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Introduction

In 1971, the playwright Arnold Wesker wanted to write a play set in a newspaper office. The then editor of the *Sunday Times*, Harold Evans, gave Wesker permission to wander freely through the offices of that newspaper to gather material.

Wesker wrote a play, *The Journalists*, and an essay, *Journey into Journalism*, based on the experience.

Leaving aside the artistic merits of the play, both the drama and the essay illuminate – among other things – a recurring theme in discussions about journalism, ethics and privacy. It is the theme of questions acknowledged but under-examined, of imprecision. The usual reason for this is the pressure of deadlines. But Wesker implies another reason: a certain discomfort or reticence among journalists about analysing their role as judges of the ethics of others.

I will return to the theme of imprecision later. I want to suggest that part of ensuring a proper balance between journalism worth respect, on the one hand, and respect for privacy, on the other, is greater precision – by journalists and their critics – about the types of information and the types of people that it may be in the public interest to collect and to disclose.

I believe that journalism and privacy are compatible. I will offer a brief list of ‘types of fame’ that might help in bringing greater precision to the continuing debate about what the proper balance should be. In doing so, I will draw on my recent work on journalism and privacy¹ as well as on a paper that I co-authored with a former colleague from the Communications Law Centre, Jennifer Mullaly².

Wesker’s contribution

First, a taste of how Wesker illuminated the issue through theatre. The main character, Mary Mortimer, is an experienced journalist, tough and rather brittle. Her speciality is described by one of her interviewees, Sir Roland Shawcross, Minister for Social Services. He says –

You’ve created a very unique reputation in journalism. Rightly and properly you’re investigating the minds and personalities of men who shape policy. And you’re doing it in depth, in our offices, our homes and on social

¹ Paul Chadwick *Uses of transparency – journalism and privacy*, an address to the Privacy Issues Forum, Wellington, New Zealand, 28 March 2003, at <http://www.privacy.vic.gov.au/>

² Paul Chadwick & Jennifer Mullaly *Privacy and the Media* (Communications Law Centre, Melbourne) CLC Research Paper No 4 of 1997.

occasions. I'm surprised so many of us have agreed, and perhaps it will prove a mistake. We'll see.³

Mary is particularly irked by a rising political figure, Morgan King. She thinks him holier-than-thou, as she tells Tamara, a colleague, as they both consider his latest speech –

MARY: Really! Who does he think he is? Protesting his imperfections as though we wouldn't believe he had any in the first place. Don't you find something irritating about a good person?⁴

To which Tamara responds –

Not just 'something'. It's perfectly easy to identify: their goodness, by comparison, reveals our shabbiness. Simple!

(MARY, exasperated, leaves.)⁵

Mary thinks she's got something on Morgan King, but she's having trouble convincing her editor, Harvey, to take up the pursuit. The core of their exchange follows:

HARVEY: Mary, some advice.

MARY: Not now, Harvey.

HARVEY: Yes, *just* now. Remember this: a journalist is only engaged in handing on fragments of information. You can spice it with comment but don't fall into the trap of exaggerated pronouncements.

MARY: Harvey, I don't think –

³ Arnold Wesker, *The Journalists: a Triptych* (London: Jonathan Cape, 1979) p 24, 25.

⁴ *The Journalists: a Triptych*, p 63.

⁵ *Ibid.*

HARVEY: Well I *do* think. You can't reveal, you can only inform. Don't simplify what's complex and then imagine you've clarified the truth... The habit of knocking down gods is very seductive and contagious, and we're very good at being spiteful... but I don't want to see the *Sunday Paper* perpetuating it.

MARY: But why *this* – to me – now?

HARVEY: Because each 'god' you topple chips away at your own self-respect. The damage you do to others can boomerang and destroy you. That's why.

MARY: The duty of this paper, since we're handing out advice, is to investigate secret and well-protected misbehaviour – of any kind.

HARVEY: I don't need to be told that. Nor should I need to point out that there's no institution more 'well protected' than a newspaper.

MARY: This is silly. What are we shouting at each other for? Look, Harvey, I believe passionately that there's no other country where the administration of society is carried out more honestly, humanely and conscientiously than here. But that doesn't mean we've got a society so perfect that we can afford to limit democratic scrutiny.

HARVEY: I'm simply warning you. You might want to deflate the egos of self-styled 'gods' but be careful you don't crack the confidence of good men. We haven't got that many. Think about it.

MARY: I don't really think I needed all that. (*She leaves.*)⁶

⁶ *The Journalists: a Triptych*, p 121-122.

Mary is also acting editor of the insight team called In Depth. She is approached to investigate a claim that a 12-year-old girl was refused an abortion by a gynaecologist on the grounds that, as the gynaecologist put it, “If you play adult games you must expect adult consequences”.

Mary rushes into the In Depth office where Julian and Chris work:

MARY: I want this gynaecologist investigated.

JULIAN: Hell, Mary, it’s a news story not an In Depth exposé.

MARY: It’s more important than a news story. The mother herself has asked us to investigate. Problem is the doctor’s clammed up. Refuses to speak to the press.

JULIAN: I don’t blame her.

MARY: What we want is the story of a guilty gynaecologist. Was she married? Did she have an unhappy love affair, broken marriage? Are there any children?

CHRIS : That’s Harold Robbins, not journalism.

MARY: And get a photograph, even if it’s her peering reluctantly round a door.

...

JULIAN: And basically what you want is all the dirt I can get on her?

MARY: Yes. And get photographs of the girl and her mother. Door-step them if necessary.

JULIAN: How can you take a moral position about the gynaecologist if you start invading people’s privacy?

MARY: I'll worry about that. (*She leaves.*)⁷

In the companion essay, Wesker recounts the anger of the *Sunday Times* journalists when they read the play. He had difficulty getting the essay published. In the essay, he presents the journalists' defence, which includes the following, from *Insight*, about the scene based on the gynaecologist story –

We not only made no mention of the gynaecologist's personal life, love life etc, we in fact undertook no enquiries to find out anything about that side of things. Certainly we enquired about her professional record – what did her colleagues etc think might explain the decision, eg was she Catholic; had she had a gruelling time with abortion requests; any one of a number of things like that which might explain her attitude. Because we found no particularly outstanding personal beliefs etc, we said nothing about her as a person at all – presenting a very flatly written story simply about the conflict between a child and a doctor; and leaving the reader to side with whoever they wished. That may not be art, and it has its massive limitations. But it certainly is not the sort of brutalising, gutter approach that you credit us with.

The *Insight* journalist tells Wesker that Wesker misunderstood the extent to which the journalists he had observed were 'acting' in front of him, and that Wesker had not understood the journalists' 'private language'.

We must leave Wesker there for now. I think part of his contribution to my topic today – both in the play and the essay – is to dramatise for us the way imprecision allows journalists to miss or misunderstand the concerns of those outside media, and to neglect opportunities to examine their choices and to explain them in other than 'private language'.

⁷ *The Journalists: a Triptych*, p 106-107.

Journalism and privacy are compatible⁸

Journalism codes of ethics tend to have a clause in which journalists commit themselves to respect privacy. This is the case whether the code is designed by journalists or proprietors, and whether for print or broadcast media. It suggests that journalists themselves see no fundamental incompatibility between the practice of journalism and respect for privacy.

This seems to me to be both right and necessary. Let me explain. So long as privacy is understood as a right of natural persons – not governments or corporations – and so long as privacy is not read as a synonym for secrecy, then privacy is a value that journalism ought to protect, in part to protect itself.

To be sure, the two values – privacy and revelation; discretion and disclosure – clash in particular circumstances. Balances must be struck. Compromises are made. But this is commonplace in the daily work of law and journalism, of a privacy commissioner and of an editor. Journalists, working usually against the press of deadlines, daily balance values such as privacy with the public interest in disclosure.

Will the reporter just back from interviewing a public figure describe all that he or she saw and heard in the home of that public figure, whose son or daughter is at a particularly delicate stage of the tumultuous journey through the teenage years? Will the TV news producer show that portion of the footage from an accident where a victim is in a particularly undignified state of undress, or distress? This kind of balancing is a fundamental part of the work of journalists worthy of the name. What else is it, if not respect for privacy? In my experience this is not alien to journalism, but rather, it is integral to it.

⁸ This section draws on sections of my recent paper, *Uses of transparency – journalism and privacy*, delivered at the Privacy Issues Forum, Wellington, New Zealand, 28 March 2003, at <http://www.privacy.vic.gov.au/>

Other factors make journalism and privacy compatible. First, the connection between privacy and individuality. At its most elemental, privacy permits and sustains individuality. One scholar's summary will illustrate –

The man [or woman] who is compelled to live every minute of his [or her] life among others, and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his [or her] individuality and human dignity. Such an individual merges with the mass. His [or her] opinions, being public, tend never to be different. His [or her] aspirations, being known, tend always to be conventionally accepted ones. His [or her] feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man [or woman]. Such a being... is not an individual.⁹

For journalists, these words have special significance to professional life. One of the characteristics by which journalists tend to define themselves is their independence. Whether myth or part-myth, a sense of independence sustains the self-image of many journalists. Despite the pressures of spin doctors, of conglomerate or chain ownership of media, and of 'groupthink' among peers, one trait that journalists are supposed to cultivate is independence.

We can see the compatibility of privacy and journalism also in the role of privacy as an instrumental freedom. The right to privacy appears in the basic human rights instruments, alongside other rights of critical significance to the practice of journalism. What is often neglected is the role of privacy in facilitating the practical enjoyment of other rights. I am thinking of freedom of expression, of freedom of belief or conscience, and of freedom of association.

As journalists go about their work of cultivating confidential sources; of charting and reporting new ideas and dissenting views that test our orthodoxies; and of chronicling the

⁹ Edward Bloustein, cited in Thomas I Emerson's *The System of Freedom of Expression* (Random House, New York, 1970) at 546.

formation of new political movements and parties – as they do all this, journalists rarely reflect on the background role of the right to privacy.

Journalism's most important work is to lubricate the machinery of a democracy. One key aspect of that is transparency.

Many people find it odd to think that privacy protection also requires transparency. But it does. And you will find this notion embedded in some privacy laws. For example, section 5 of Victoria's Information Privacy Act 2000.

Why is transparency so vital to privacy protection? For the oldest reason: because power over information means power itself. And because if privacy is to mean anything in this Information Age it must mean a measure of control – not total control – for the individual over his or her personal information. To check power and to preserve a measure of individual control, transparency is vital. In privacy circles, this is a commonplace. Standard privacy principles include requirements for collection notices, openness about information practices, and access rights. But in journalism, the close connection between this aspect of privacy protection – transparency – and of journalism itself, if noticed, tends to be unremarked and undervalued.

Privacy commissioners commonly work to force information issues into the open, to make transparent certain practices that deal in personal information but which have been opaque, even hidden, from the subjects of that information. Privacy commissioners conduct audits. They strive for the implementation and publication of Privacy Impact Assessments, a sibling of Environmental Impact Statements. They urge the statutory exposition of the purposes and permitted uses of various data sets. They press, not just for prerequisites such as judicial warrants to ensure that certain collections of information are lawful and supervised. They also press for the mandatory reporting of the number of warrants sought and the number granted. In their work, privacy commissioners may at times be assisted by whistleblowers who have become troubled by the privacy-invasiveness of this or that practice in an organisation. Privacy commissioners make submissions to parliamentary committees, as specialists assisting generalists. In their annual reports, they publish. In media releases, they explain or they warn.

All this will be familiar to journalists. Have I not just described, in broad terms at least, much of the nuts and bolts of transparency as accountability? Is this not precisely what journalists ought to do in their service of civil society and of the electorate in any democracy? They too scrutinise; they examine; they analyse; they warn; they disclose.

Journalism, properly understood, is a necessary part of the means by which power is held to account. It is not sufficient. Also necessary are independent courts and legislatures that work well. We need to disperse Executive power wisely, and to check it with various independent statutory watchdogs such as auditors-general, ombudsmen and, in their modest specialism, privacy commissioners.

I have naturally put the focus on transparency as a method to extract accountability from government. But the uses of transparency are legion. Journalism must apply it also to other sources of power. One of these, as Wesker observes through his editor Harvey, is media itself.

Types of fame

At present, Anglo-Australian law protects privacy with a kind of crocheted rug of parts of several doctrines, among them nuisance, trespass, copyright, defamation, and breach of confidence.

In recent cases involving the media, the English courts and the Australian High Court have stopped short of fashioning a new tort of invasion of privacy. I am thinking in particular of the English cases involving the model Naomi Campbell and her drug rehabilitation program,¹⁰ the actors Michael Douglas and Catherine Zeta-Jones and their wedding,¹¹ and the Australian case involving the ABC and a Tasmanian possum abattoir.¹²

¹⁰ *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373 [2002] All ER(D) 177.

¹¹ *Douglas, Zeta-Jones v Hello! Ltd* [2003] EWHC 786 (Ch), Lindsay J.

¹² *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63.

Generally speaking, the courts in these decisions are suggesting that any broad new privacy protection should come from Parliament and not judges.

Under the Commonwealth Privacy Act, media organisations are exempt for acts or practices done in the course of journalism where the organisation is publicly committed to observe privacy standards.

Broadly speaking, protection of privacy in relation to the media remains a matter of self-regulation. How could that self-regulation be improved?

I think greater precision would help. When privacy and media are in issue it is common for journalists to argue that the public has a right to know and that the public interest outweighs the privacy interests of the person involved. But this argument tends to be applied in an all-purpose, rushed way – rather in the way Wesker portrayed Mary and her colleagues.

It is worth considering the remarks of Chief Justice Gleeson of the High Court in his judgment in *ABC v Lenah Game Meats*, the Tasmanian abattoir case –

[para 40]

The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy ...

[para 41]

But the lack of precision of the concept of privacy is a reason for caution in declaring a new tort ... Another reason is the tension that exists between the interests in privacy and interests in free speech ...

[para 42]

There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private... The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

The UK Court of Appeal cited with approval this formulation in the Naomi Campbell appeal case.¹³

How might journalists adapt and apply that test in their daily balancing of privacy and disclosure in relation to people in the news?

The Chief Justice suggests that a useful practical test of what is private is whether –

*the disclosure or observation
of information or conduct
would be
highly offensive
to a reasonable person
of ordinary sensibilities.*

The first step, I think, is for journalists consciously to note when they are lapsing into that ‘private language’ that so confounded Wesker at the *Sunday Times*.

A second step is to be precise about the type of information in issue and the type of fame attaching to the person involved.

I think there are at least five types of fame,¹⁴ and in particular circumstances you may get varying responses to the question: ‘Does the public interest in disclosure outweigh the privacy interest of the persons involved?’

¹³ *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373 [2002] All ER(D) 48.

Those types of fame are:

- Fame by election or appointment
- Fame by achievement (or notoriety)
- Fame by chance
- Fame by association
- Royal fame

Fame by election or appointment is acquired by politicians, judges and others in public office who trade privacy for power. In a democratic system, accountability justifies some privacy loss.

Fame by achievement comes to film stars, TV presenters, sporting heroes and leaders in business. Many invite publicity, earn money in exchange for privacy, and then use wealth to protect their privacy. A variant is the infamy acquired by wrongdoers because of the seriousness of their acts. They do not trade privacy, they forfeit it.

Fame by chance happens to previously anonymous people randomly caught in tragedy, disaster or, less often, good fortune. Australian examples include Lindy Chamberlain, Stuart Diver and Frank Gilford. A variant is the kind of fame acquired by those who are said to be 'typical' of a particular phenomenon (for example, the Paxton family). At least at first, they do not trade their privacy, but rather have it taken from them.

Fame by association is enjoyed/endured by those close to the famous, such as a politician's spouse, a sports champion's children or the parents of a criminal. It is reflected fame, but not always glory. Privacy may be traded (for example, James Hewitt, former lover of Princess Diana), or it may be breached justifiably because of the kind of fame with which the person is associated (for example, disclosure of the share dealings of the spouse of a political leader).

¹⁴ This section draws on my 1997 paper, *Privacy and the Media*, co-authored with Jennifer Mullaly (Communications Law Centre, Melbourne) CLC Research Paper No 4 of 1997.

Royal fame is a category on its own. It is much more difficult to decide where to separate the public from the private in the lives of those who are born into, or marry into, the Royal family. This is because the Royals exist to be in the media. For all those in other categories of fame, what makes them famous is one aspect of their lives – they act in heavily promoted movies, they present a nightly TV show, they play tennis better than anyone else in the world, they run the government, their baby has disappeared, their brother has committed murder. For all these people we can fairly readily draw a ‘private zone’ for, say, their particular sexual practices, parenting style or health problems. By contrast, the Royal family has shrunk the zone to almost nothing. Because they have not been elected or appointed, nor wield any remaining legislative, executive or adjudicative powers, nor achieve anything except membership of the Windsor family, it is much harder to preserve a private zone by bringing them within the ‘public interest’ criteria which might justify the breach of part of the privacy of a person whose fame fits another of the types I listed earlier.

Of course, there are other formulations than these five categories, other steps, other methods, by which journalists could deal better with the inevitable tension between privacy and journalism in the context of fame. But I think everything points towards the need for greater precision among journalists about how they make, and then explain, their balancing of the right and value of privacy with the right and value of disclosure.

Conclusion

Let us finish by returning to Wesker’s Mary Mortimer, this time in conversation with colleague Norman Hardcastle. Mary is still on the trail of the politician, Morgan King:

MARY: ... *that’s* the function of journalism – to protect society from shabby little charlatans like him.

NORMAN: And who will protect society from shabby little journalists? We traffic in human blemishes, Mary. Don't you find it washing over your own life?

MARY: I'll take you on some other time. (*Rushes out.*)¹⁵

Thank you for the invitation to address the conference. Thank you for your attention.

I must rush...

¹⁵ *The Journalists: a Triptych*, p 48.