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Bryan Schwartz makes public some thoughts on legislation to protect a person's privacy

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THE truth can hurt - even more than lies. Falsehoods may be disbelieved in the first place, or dispelled by the disclosure of the truth. The disclosure of embarrassing facts can wound deeper and more permanently. You may be excused or forgiven; but the damage can never be fully undone. Still, our legal system has always been readier to protect people from defamation than from the invasion of privacy. We see little value in falsehood, whereas the truth is usually edifying or amusing.

In the United States, privacy law began just over a century ago with a celebrated law journal article by two prominent Boston lawyers, Samuel Warren and Louis Brandeis. (The latter ended up on the Supreme Court). The pair denounced the press for its enthusiasm for reporting gossip about celebrities. They felt that judges should be ready to smack the press hounds with a new tort - breach of privacy.

Common-law judges like to make every development appear a mere refinement of the existing law, rather than something they freely invented to suit the occasion. Warren and Brandeis argued that the courts had already protected privacy interests in certain specialized contexts, such as copyright law. It would be a merely evolutionary step, they implied, to recognize a general right of privacy. Some U.S. courts have done so; but the growth of privacy rights in the United States has been severely constrained by the tradition of free speech.

In Britain, the press-versus-privacy debate has been intense. It heightened in 1990 over the Gordon Kaye episode. A television actor was lying in a hospital room, recovering from a serious car accident, when a tabloid photographer intruded into his room and took his picture. Kaye sued. English law has not recognized a general right to privacy, so the courts anxiously rummaged through the common law, looking for some way to help him. Citing the tort of "malicious falsehood," the judges ordered the tabloid to drop its claim that Mr. Kaye had authorized the pictures. The judges felt unable, however, to block their publication outright.

The British authorities have warned the press that it could face direct government regulation unless it improves its behaviour. To forestall that possibility, the newspapers co-operated in establishing a self regulatory body, the Press Complaints Commission. It has made some dubious judgments. The commission rebuked the papers over their intensive coverage of the Charles and Di marital hostilities. But what did the papers do wrong?
Probably nothing. The Princess apparently condoned the leak of the information, sources confirmed its accuracy, and at issue was the state of a family in which membership confers high authority and privilege.

The British minister whose responsibility includes "press-versus- privacy issues" is David Mellor. He recently found himself at the wrong end of press intrusion. A third party apparently eavesdropped and

taped a phone conversation he was having with "the other woman." The tabloids told all. The Press Complaints Commission found the "public had a right to know" because the affair might be affecting Mr. Mellor's public activities. Why? In one call, Mr. Mellor said the romance had left him exhausted and he was worried because he was not prepared for a couple of speeches he had to do the next day. My own view is that the newspapers should have backed off; eavesdropping is nasty, reproducing a verbatim conversation inflicts a special humiliation, and the "public interest" involved seems marginal.

While the press cannot be counted on always to make the right judgment calls, the best policy for both Canada and Britain is still to rely primarily on self-restraint and self-criticism by the press. Direct regulation by government may limit press freedom unduly; in particular, it may stifle legitimate disclosures that would embarrass the political establishment.

Tort law can only be of limited use. Many Canadian provinces have passed laws that make invasion of privacy a civil wrong. The statutes set out a few principles and leave the judges to interpret and refine them on a case-by-case basis. In practice, there have been almost no lawsuits. One limiting factor may be that litigation can make matters worse. In its routine procedures, our system strongly values truth over privacy; litigants and witnesses are generally compelled to answer relevant questions, even if they are personal and embarrassing. An admirable principle of our legal system is that if there is a wrong, there must be a remedy. Sometimes, the truth is otherwise.

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