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Freedom of the Press

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Series Preface

Media law issues frequently dominate the news. A libel or privacy action by a politician or celebrity, an investigation into an alleged broadcasting scam, and the use of the Internet for downloading terrorist material or pornography are all stories which attract national, and increasingly international, publicity. Freedom of expression, whether on the traditional press and broadcasting media, or through the new electronic media, remains of fundamental importance to the workings of liberal democracies; indeed, it is impossible to see how a democracy could exist without a free, pluralist media for the dissemination of information and the discussion of political and social affairs. The media also provide us with celebrity gossip and popular entertainment.

But a free media does not entail the complete absence of law and regulation. Far from it. Laws are needed to balance the competing interests of the media, the public whom they inform and entertain and those individuals whose reputation, privacy, or even safety, might be endangered by newspapers, broadcasters and bloggers. All these branches of the media exercise considerable power and they can abuse it to distort the truth and harm individuals. Competition and other laws must be framed to prevent the emergence of media monopolies and oligopolies which are as incompatible with an effective democracy as is the domination of one political party. The Internet has been characterised by little or no regulation, beyond general criminal and civil laws, but it is legitimate to question whether this can remain the case given the ease with which, say, pornographic images can be circulated round the world in a moment. The globalisation of the media exacerbates legal problems, for a communication can be published more or less simultaneously in a number of different jurisdictions; some countries might, for example, protect privacy strongly, while others might not protect it at all because they consider privacy laws inimical to media freedom.

There is now a rich literature on many aspects of media law and regulation. The aim of these four volumes is to present a sample of this literature, grouped round particular themes. Some of them concern topics which have been explored in legal periodicals for decades: freedom of the press, the balance between this freedom and reputation and privacy rights, media publicity prejudicing fair trials. Others deal with more modern aspects of the law, in particular whether and how the broadcasting and electronic media should be regulated. Inevitably, many essays are drawn from United States periodicals, as that country, with its strong attachment to freedom of speech and its powerful media industries, has produced an immense literature on all areas of media law. But we have also included articles from many Commonwealth countries. We have selected those which discuss issues of media law from a theoretical or comparative perspective. Lawyers in all jurisdictions can learn something from the treatment of common problems in other countries. The globalisation of the media means that knowledge of comparative law in this area is now of importance to practising lawyers.

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Introduction

A free press is vital to the maintenance of a liberal democracy. It provides citizens with the information and variety of opinion necessary for them to debate political issues openly and intelligently, and to hold their government to account. Freedom of the press obviously precludes government licensing or the censorship of newspapers, books and other print media; it is also incompatible with punitive or discriminatory taxation which would make it in effect impossible for individuals and corporations to establish or maintain a newspaper. Further, in liberal democracies newspapers (though not the broadcasting media) have been free to support particular political parties and to take sides on social issues which divide their country. These principles lie at the core of press freedom.

But beyond these principles there is considerable controversy about the scope and meaning of press freedom. Almost everyone agrees that the freedom is not absolute; it is not incompatible with press freedom, for example, to prosecute a newspaper which has published information endangering national security for infringement of official secrets laws and, in extreme cases, it might even be right for a court order (a judicial 'prior restraint') to stop it from publishing this information. But there is less agreement on how far the law should limit the freedom of the press to publish defamatory allegations, particularly when they concern public officials and celebrities or when they are of real public interest. It is also unclear how far press freedom should give newspapers and other print media wide immunity from actions to protect the privacy of individuals who object to the disclosure of personal information. These difficult questions equally concern the broadcasting and new electronic media, which enjoy rights to freedom of speech or expression, though they are not strictly part of the 'press'. These questions are discussed in Parts III and IV of this volume.

However, there are other, more general problems concerning the concept of press freedom. One question is whether its scope is identical to that of the right to freedom of speech (or expression) which is enjoyed by all individuals under many constitutions, such as that of the United States and Canada, and which is guaranteed under international conventions and treaties, notably the International Covenant on Civil and Political Rights and the European Convention of Human Rights and Fundamental Freedoms (ECHR). Or is the press, which might include the broadcasting media in this context, entitled to wider legal rights and immunities, because it performs a distinctive role in investigating and reporting stories of public interest? Another question is whether, to use the well-known words of A.J. Liebling, '[F]reedom of the press is guaranteed only to those who own one' (1964, pp. 30–31).[1] In that case, press freedom might appear to have more in common with a press owner's property and commercial rights than it has with freedom of speech. These broad questions are canvassed by the essays in Part I of this volume.

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1 The quotation is one of the epigraphs to Judith Lichtenberg's essay, 'Foundations and Limits of Freedom of the Press' (Lichtenberg, 1990, p.102).

The essays in Part II are concerned with another topic: self-regulation of the press, here understood to refer to the traditional print media of newspapers and magazines. As noted in the first paragraph of this introduction, government regulation obviously poses dangers to press freedom. Court orders and penalties may also pose this danger, even if the judiciary is genuinely independent of the government and applies, say, libel and privacy law fairly, without any prejudice against the press. The mere threat of a court fine or injunction may deter the press and other publishers from publishing material which legally they are entitled to issue – the so-called 'chilling effect' of the law. Self-regulation might, therefore, be regarded as a more acceptable means of control. Under it the press accepts a degree of regulation applied by a body, some of whose members may be newspaper editors and journalists themselves, able to understand the pressures under which newspapers operate; the press agrees to respect its decisions, although they do not carry with them any prospect of legal sanction. Some of the strengths and weaknesses of this method of control are canvassed in the essays in Part II, to some extent in relation to the informal systems of complaints against the press which have been adopted in the United Kingdom.

Press Freedom and Freedom of Expression

The First Amendment to the US Constitution provides: 'Congress shall make no law ... abridging the freedom of speech, or of the press.' The first three essays in Part I address the question whether the Press Clause of the Amendment adds anything to the guarantee of freedom of speech afforded by its first limb. In what is now regarded as a classic essay (Chapter 1), Potter Stewart, an Associate Justice of the Supreme Court, contended that the Free Press guarantee is a structural provision, uniquely providing constitutional protection to a private business. Newspapers certainly enjoy the same rights to freedom of expression as individuals, but these are conferred by the Speech Clause. The Press Clause must mean more than that, for otherwise it would be redundant. In Stewart's view, the purpose of the provision was to establish an institution, 'the Fourth Estate', to act as a check on the activities of the three official branches of government: legislature, executive and the courts. The press therefore enjoys institutional autonomy. The implications of this argument are potentially considerable. Constitutional access rights for the press to attend and report, say, legislative and court proceedings, or to interview prisoners, might be recognized, and the claim by journalists to keep their sources confidential would be upheld as a matter of constitutional law (see the essays on journalists' privilege in Part IV of *Media Freedom and Contempt of Court*, another volume in the Essays in Media Law series).

Anthony Lewis, author of Chapter 2, was a distinguished columnist for the *New York Times* for more than thirty years. It is therefore particularly striking that he rejected Potter Stewart's argument. In his view, neither history nor the decisions of the Supreme Court provide much justification for the recognition of special constitutional rights for the press. More importantly, it would be wrong in principle to take this step. The recognition of such privileges would lead to calls for press accountability to counter newspaper hubris and irresponsibility. Moreover, it would be necessary to define the 'press' to determine which institutions should enjoy the special rights afforded by the Press Clause.

This last problem has also been raised by David Anderson (2002), in an essay regrettably too long to include in this volume. Anderson points out that news and comment are now distributed

by a vast number of businesses and outlets – online news services, Internet Service Providers, electronic databases, client magazines and personal blogs – which might be able to claim the same rights as the institutional press (and broadcasting) media. Should they be entitled to the institutional autonomy and privileges advocated by Potter Stewart? Anderson concludes that, if the press is to enjoy some preferential treatment, it is better that it is allocated by statute or regulation than as a matter of constitutional right by court decisions. An administrative decision to allow some part of the press special access rights to attend, say, public briefings or meetings can be more easily modified in the light of changing circumstances than a court ruling allocating a newspaper this right under the First Amendment (Anderson, 2002, pp. 515–21).

A different perspective is offered by Edwin Baker in Chapter 3. His purpose is to challenge the general view that existing doctrine does not allow for special rights for the press under the Press Clause. He agrees with Potter Stewart that the Clause bears a different meaning to that of the Speech Clause. The former protects the instrumental role of the press, as a fundamental democratic institution, in providing citizens with information and ideas (see pp. 49–50), while the Speech Clause through its guarantee of individual speech rights reflects a concern for human liberty.[2] Baker, however, does not share Stewart's view that the Press Clause gives the media complete institutional autonomy. Arguably, regulation to compel cable operators to transmit programmes of educational or other merit, perhaps even a law to compel the press to print replies to hostile newspaper articles, might be compatible with freedom of the press.[3] (Right of reply laws have been held compatible with freedom of the press in Germany.) Unlike individual freedom of speech, press freedom does not entail a strong right to keep silent in the face of laws requiring the media to communicate ideas. But the Press Clause clearly gives the media wider communication rights than other private corporations; unlike the latter, newspapers are completely free, for example, to spend their resources on political campaigns. Baker's arguments are complex and subtle; though grounded in United States constitutional law, they raise important issues concerning the scope and meaning of press freedom of relevance to many other jurisdictions. Indeed, courts generally must consider whether the institutional press and broadcasting media are entitled in some contexts to rights which are not conferred by a free speech clause on all individuals.

In Chapter 4 Thomas Gibbons explores a different aspect of press freedom: its association with editorial autonomy. It is this association, in his view, which gives the freedom its special status. In contrast, press proprietors, or barons, rely essentially on property rights when they oppose any attempt at press regulation – for example, to prevent mergers and concentrations of ownership. After chronicling various attempts by press barons, almost invariably successful, to control the content of their newspapers, Gibbons examines ways in which editorial freedom could be more securely protected. He concludes that press freedom entails promotion of editorial values, and that the law has a role to play in this enterprise. Unfortunately, governments in the United Kingdom, and perhaps in other countries, are reluctant to challenge press proprietors on whose support they are dependent for success, particularly during election campaigns.

2 See Baker (1989), where the author develops this view of freedom of speech.

3 Baker (at pp. 61–2), however, appears to accept the Supreme Court decision in *Miami Herald* v. *Tornillo* 418 US 241 (1974), holding a state law providing a right to reply to press articles critical of election candidates incompatible with press freedom. Arguably, however, on his view of press freedom, and its rationale, the decision was wrong.

Self-regulation of the Press

Self-regulation of the press avoids many of the problems associated with legal control, in particular its 'chilling effect'. As John Ritter and Matthew Leibowitz point out in Chapter 5, press councils promote a fair and responsible press, while upholding the guarantee of press freedom (p. 141). Characteristically the councils consider and issue formal adjudications on complaints by members of the public about press misconduct, especially of the publication of inaccurate or misleading stories. Unlike courts, however, they cannot order coercive sanctions against a newspaper; at most they can request newspapers to publish their decisions. The only 'sanction' for a failure to comply with a request is political pressure to institute legal remedies, say, for infringement of privacy or press harassment; press councils are watchdogs that bark, but do not bite (see p. 146). Interestingly, Ritter and Leibowitz regard the British Press Council as some precedent for those established in the United States in the early 1970s. However, unlike the US Councils, the Press Council and its successor, the Press Complaints Commission (PCC) which replaced it in January 1991, have been very informal bodies, preferring to resolve complaints without an oral hearing; they have not allowed the parties to give evidence and cross-examine the other side.[4] The Press Complaints Commission almost always resolves a complaint within a few weeks of its receipt, if possible by an agreed settlement between complainant and newspaper, and that speed would almost certainly be lost if it held oral hearings and allowed legal representation. Another difficulty concerns the composition of the press council or commission. A system of self-regulation means that the press regulates itself, but a council composed entirely or largely of editors and journalists is unlikely to command the respect of the public. Equally, the decisions of a body dominated by lay, non-press members may be disregarded by newspaper editors. The British PCC now has a majority of lay members, with a lay chair, while its predecessor had a parity of press and lay members after 1977.[5]

The PCC has attracted very little scholarly commentary, though its merits have been extensively canvassed in reports of House of Commons Committees as well as in the press itself. Chapter 6, by Sir Louis Blom-Cooper (who was the last chairman of the old Press Council) and Lisa Pruitt, is unusual in its careful, but highly critical, analysis of early PCC decisions on complaints that newspapers had infringed privacy. In their view these were poorly reasoned and inconsistent; in particular, the Commission had failed to make clear its understanding of 'an individual's private life' (the term used in the first PCC Code) or the scope of the crucial 'public interest' defence which protected the freedom of the press to report matters of importance to the general public, even when the report infringed personal privacy. These particular problems may have lessened over the last fifteen years; the Code has frequently been redrafted to give more precision to its key terms, and there are now many more decisions to guide editors and journalists. But the authors' criticism raises the larger question of whether it is right to hold an informal complaints body to the same high standard

4 Cf. the account given by Ritter and Leibowitz of the procedures of the Minnesota Press Council and of the National News Council at pp. 146, 153 and 164.

5 At its inception in 1953 the British Press Council was composed entirely of press members, but lay members, including the chairman, were appointed from 1962, and parity of press and lay members was achieved in 1977: see Report of the Committee on Privacy and Related Matters (Calcutt *et al.*, 1990), ch. 14.

of intellectual rigour as one expects of the courts when they consider defamation or privacy actions. It is perhaps inherent in a system of self-regulation that, in its understandable concern to provide quick and informal rulings, it will fail, *pace* Blom-Cooper and Pruitt, clearly to 'delineate the boundary between freedom of expression and editorial responsibility' (p. 194).

In Chapter 7 Herdís Thorgeirdóttir draws attention to another type of control on press freedom, which has been almost entirely ignored in legal literature; journalists, like other professionals, are subject to economic and social pressures from their peers and more importantly from their superiors – editors and press proprietors. They are expected to produce stories which sell papers, and they know instinctively which topics to cover and what editorial line to take. A press journalist may not in practice, therefore, enjoy the same freedom as an independent writer or academic to publish what he conceives to be the truth of the matter. Thorgeirsdóttir explores these constraints in the context of media pluralism and the vital role of the press in informing the public; attention is drawn to a Council of Europe Resolution emphasizing the importance of journalists' independence from the ideology of press barons.[6] She contemplates a positive role for states to ensure that newspapers do present the truth as journalists see it. These are important issues, but it is unclear how far the law – however worthy its aims – could properly interfere with the management of newspapers and magazines without interfering with press freedom, at least as that freedom is usually understood.

Freedom of the Press and Libel Law

Libel law is widely regarded as the most important legal restriction on the exercise of press freedom, though of course it also impacts on the broadcasting and other media, including now use of the Internet. Defamation actions are not only brought to protect the reputations of politicians and other public figures, but may be used to defend the commercial standing of trading corporations, such as McDonald's or Tesco, when their business conduct is criticized by newspapers and other media. For a long time, it used to be thought, even in the United States, that defamatory allegations fell entirely outside the scope of press freedom, but in its landmark decision in *New York Times* v. *Sullivan*[7] the Supreme Court held that libel law was subject to limits imposed by the constitutional guarantees of freedom of speech and of the press. In the Court's view, the common law defences of truth and fair comment did not satisfy the requirements of the First Amendment, since a newspaper could not be sure that it would persuade a jury that the story was accurate. So it formulated the rule that a public official could not recover libel damages, unless he could show that the allegation had been published with 'actual malice' – that is, that the press knew that its story was false or was reckless whether it was true or false. The principle in *New York Times* (*NYT*) was subsequently extended to cover actions brought by public figures.[8] But as a result of the Court's decision in *Gertz* v. *Robert Welch* private individuals may recover damages if they prove that the newspaper published

6 Resolution 1003 (1993) of the Parliamentary Assembly of the Council of Europe on the ethics of journalism, Principle 13.

7 376 US 254 (1964).

8 By the decisions in *Curtis Publishing Cp* v. *Butts, Associated Press* v. *Walker* 388 US 130 (1967).

the allegations negligently, at least when they can show that they have suffered some loss as a result of their publication.[9]

These developments are discussed by David Anderson in Chapter 8. He points out that the *NYT* principle did not, as the Court had envisaged, prevent self-censorship by the press, or rather by its lawyers, as it did little to reduce the costs of defending libel proceedings. Defamation law in his view continued to exercise a 'chilling effect' on press freedom. He is also critical of *Gertz* for withdrawing the protection from libel actions conferred by an earlier Court decision,[10] under which defendants enjoyed immunity under the *NYT* principle whenever they published a story of public concern irrespective of whether it implicated a private individual or a public figure. The impact of *Gertz* was that the law gives more freedom to newspapers investigating, say, the probity of a politician or a major industrialist, who are characterized as public officials or figures, than it does to the press, typically popular magazines and the tabloid papers, when they publish material about ordinary people, characterized as private figures. The latter can recover damages if they can prove that the tabloid was careless or irresponsible in the way in which it investigated or wrote its story, while it is very difficult now for a public official or figure to win a libel action in the United States (see Anderson, 2007, pp. 865, 873).

In contrast to the position in the United States, courts in Commonwealth jurisdictions have been much less willing to extend press freedom in this context. Nevertheless, in the last fifteen years, decisions in most of these countries have significantly extended the freedom of the press and other media to publish defamatory allegations; that at least is the case when the stories concern politics and perhaps other matters of public concern, and when they have been published responsibly – that is, provided the newspaper or other media defendant has, say, asked the claimant to comment on the allegations and taken some steps to verify them before publication. Developments in India, Australia, South Africa, Canada, the United Kingdom and New Zealand are reviewed by Adrienne Stone and George Williams in Chapter 9. For the most part these jurisdictions have extended press freedom in this context, without embracing the principle in *NYT*; only in Canada has the leading court declined to give the media more protection than that afforded by the common law. The authors show how common law courts have carefully assessed the United States rules and have concluded that they do not place adequate weight on the important public interest in protecting the right to reputation.

Chapter 10, by Andrew Kenyon, another leading Australian scholar in this area of law, closely examines the reasoning of the appellate courts in two major recent free press and libel cases: that of the House of Lords in *Reynolds* v. *Times Newspapers*[11] and that of the High Court of Australia in *Lange* v. *Australian Broadcasting Corporation*.[12] In *Reynolds* the House of Lords held for the first time that the media in England could enjoy a qualified privilege defence in respect of inaccurate defamatory allegations communicated to the general public. The House rejected a generic defence which would immunize from libel proceedings the communication of any allegations concerning politics; that would not give politicians and other public officials any right to protect their reputation. Instead, it formulated a flexible

9 418 US 323 (1974).

10 *Rosenbloom* v. *Metromedia Inc.* 403 US 29 (1971).

11 [2001] 2 AC 127.

12 (1997) 189 CLR 520.

privilege for the communication of any matters of public interest, provided the press or other defendant satisfied the requirements of 'responsible journalism'. As Kenyon mentions (p. 298, n. 42), Lord Nicholls in the leading speech identified ten factors which courts should take into account in determining whether a newspaper has satisfied this standard. In *Lange* the High Court of Australia fashioned a narrower defence on the basis of the implied constitutional freedom of political communication. The privilege applies only to political communications, relatively narrowly defined, and only when the defendant has satisfied a 'reasonableness' test. Kenyon discusses some court decisions, subsequent to *Reynolds* and *Lange*, in which the implications of these rulings have been worked out.

Kenyon's essay is important in that, in addition to its doctrinal analysis, it summarizes his empirical research into the consequence of these decisions. Interviews with media lawyers established that *Reynolds* is regarded as a significant ruling, even though there is some uncertainty how the factors listed by Lord Nicholls are to be applied. Two of them were identified as particularly important: the need to contact the subject of the article for him to comment on it, and the overall tone of the article. The defence is more likely to succeed, it is felt, if defamatory allegations are presented cautiously and in a balanced manner, without the shrill headlines which characterize much tabloid journalism. Interestingly, therefore, Kenyon echoes the view, implicit in David Anderson's essay, that libel law, as developed by the courts, may discriminate against radical or innovative journalism. (Whether that discrimination is wrong is another matter; on one view, it is right to protect people from the publication of defamatory allegations that are not only untrue, but published in an intemperate or hostile manner.)

In contrast to the English defence, Kenyon finds that the privilege formulated by the Australian High Court in *Lange* has not proved very useful for the media, largely because it is confined to political communication – it does not apply, for example, to allegations implicating business or industry – and because of the 'reasonableness' requirement. But the privilege has apparently led to a reduction in the number of actions brought by politicians. Interviewees in Australia argued that *Lange* should be reconsidered, and they preferred the more flexible approach provided by the House of Lords in *Reynolds*. Kenyon's essay shows the importance of conducting empirical research to assess the significance of judicial rulings and the reaction of the media to them (see also Kenyon, 2006; Weaver *et al.*, 2006).

Freedom of the Press and Privacy

While the press has for long had to contend with the restrictions imposed by the law of libel, privacy law in most countries has only recently begun to pose problems for the exercise of press freedom. The reason is that the common law in England and in other Commonwealth jurisdictions has been reluctant to formulate an explicit right to privacy. However, in the context of infringement by the media, other torts, notably trespass to land and breach of confidence, have provided protection, when, say, journalists enter property to take photographs or a newspaper publishes a story obtained through a leak by the claimant's employees. It is only in the United States, and in continental Europe, that courts have for decades balanced the rights to freedom of speech and of the press against explicit privacy rights. To a large extent, the press, even in the United States, has exercised self-restraint in disclosing private matters, even when there was a good argument that they involved questions of legitimate

public concern. For example, newspapers and other media in the United States were silent about John F. Kennedy's sexual affairs, both while he was a candidate for the Presidency and later while he occupied that office, and English newspapers said very little about the health of Winston Churchill when he suffered a stroke during the Second World War and when he was in effect unable to act effectively as Prime Minister in 1954.

The picture today is very different, particularly in England and other Commonwealth jurisdictions where privacy is now explicitly, or through the development of the breach of confidence action, quite strongly protected. Revelations about the private life of celebrities, particularly their sexual affairs, sell tabloids and magazines, so these publications find any restrictions imposed by privacy laws much more irksome than those imposed by libel law. One threshold question is whether the free press principles applied to defamation law by, for example, the US Supreme Court in *New York Times* v. *Sullivan* (discussed in the previous section) should be applied to privacy law. On one view, there is a good case for their application; indeed, it could be argued that the press should never be liable for the disclosure of accurate stories revealing details of a politician's or a celebrity's private life, because it should always be free to publish the truth.

The first two essays in Part IV point out the fallacies of these arguments. In a classic essay (Chapter 11), Melville Nimmer, who was a distinguished commentator on free speech and free press law in the United States, contends that it would be wrong to extend the strong free speech/press principle formulated in *New York Times* to privacy actions (or for that matter to libel actions brought by private individuals involved in public issues). The rationale for the *NYT* ruling was that it is crucial for the public to have information about the conduct of public affairs, even when it defames politicians or public officials. Later the principle was extended to cover public figures, about whose behaviour the public was also entitled to be informed. Moreover, people in those positions enjoy access to the media to put over their version of events in order to counter defamatory allegations. These arguments do not apply to the disclosure of private information about, say, an individual's sexual life or preferences, or his health. These are not generally matters of real public interest, so speech about them has little value. Moreover, a person complaining that his privacy has been infringed does not want media access to reply to the disclosure, which would only give the revelations wider currency; he wants the law to deter their publication in the first place.

In Chapter 12 Eric Barendt argues that the public is not always entitled to know the truth, just because it is the truth. As Fred Schauer (1991) has pointed out, it is important that the public has access to arguments about truth on matters about which it should form a view; but there are some matters on which it is not entitled to hold any belief at all. Ignorance about, say, the private life of a neighbour, or even a public figure or official, is good; there are some matters about which anyone is entitled to say to a journalist: 'Mind your own business!' Barendt also challenges the familiar argument that it would be wrong for Parliament or the judges to formulate an explicit right to privacy, because there are difficulties in defining 'privacy': does it cover, for instance, an individual's income or tax affairs? But definitional difficulties have not prevented the development of libel law, or for that matter the right to freedom of the press (see the arguments canvassed earlier in this Introduction). Moreover, the English Press Complaints Commission has developed some 'jurisprudence' about the scope of private life and the public interest defence, when it has applied the provisions in the PCC Code concerning complaints about the infringement of privacy, intrusion into grief and shock,

and harassment (see Chapter 6 in this volume). The PCC cannot therefore oppose, as it has done, the introduction of privacy rights with spurious arguments about definitional problems. The courts can surmount these difficulties and draw a line between press freedom and privacy, just as well as the PCC has done itself.

Of course, there remain powerful free speech/press arguments against privacy laws. These are particularly strongly held in the United States, where the First Amendment guarantees press freedom, while the Constitution only protects privacy against infringement by government, not against press intrusion. Eugene Volokh (2000) has argued, for instance, against privacy laws that they entail a right to have the government intervene to stop a newspaper, or indeed anyone, speaking about individuals, though that also applies to defamation law, and in some circumstances to copyright law, which are allowed to limit press freedom. A more persuasive argument has been made by Fred Schauer (2000, p. 293), though it may only apply in the context of privacy suits by politicians. His argument is that some people may think that they are entitled to know everything about a candidate for public office – including details of his current or past intimate sexual life – before deciding how to vote. They argue that, if that candidate has cheated on a spouse or partner in his private life, he may be equally unreliable in public office. In Schauer's view, there may therefore be good free speech and press grounds for allowing newspapers to communicate information which some voters consider relevant to their democratic choices. The difficulty is that we would then have to accept that politicians have no privacy rights at all against the media.

In Chapter 14 Paul Gerwitz challenges that conclusion. His essay takes as its starting point the recent decision of the Supreme Court in *Bartnicki* v. *Vopper*,[13] in which it held that a radio broadcaster was free to play the tape of an illegally intercepted conversation between two union officials, because their conversation involved a matter of public concern – how the union should handle negotiations concerning school teachers' pay. In much of the essay Gewirtz points out that the case, properly understood, does not elevate media freedom over privacy. Of more general interest is his strong argument that press freedom should not in principle trump privacy whenever public interest is invoked. Too rigid an adherence to press freedom allows entertainment values to drive out serious news coverage. Paradoxically, stronger protection for privacy would enhance public debate by encouraging the media to focus on the official actions of politicians and their policies, rather than on their private lives. Most radically, he rejects the argument made by Schauer and others (see, in particular, Post, 1989, pp. 999–1002) that privacy should give way to democratic accountability: '[a]ccountability ... should not trump all other values. ... If public figures should have some zone of protected privacy, then some limits on the media's leeway to invade privacy will have to be accepted, even if this also means some limit on accountability' (p. 466). Unusually for the author of a United States law review article, Gewirtz draws on comparative law. He refers to cases in other jurisdictions, notably Germany and Canada, where privacy has been protected, even when it clashed with free press arguments. Courts in the United States should abandon, in his view, their unique, general preference for press freedom whenever it conflicts with privacy rights.

There remain hard questions about the proper scope of privacy protection when the media publish details, particularly in photographs, of what individuals consider their private activity – for instance, dining with a partner or with friends, shopping, or sun-bathing on a beach or in

13 532 US 514 (2001).

a garden. The media may argue that no individual has a right to privacy when he is in public, whether or not he is a celebrity. Their arguments are considered, but rejected, in an interesting comparative essay by Elizabeth Paton-Simpson (Chapter 13). She argues that people do not surrender their expectation of privacy when they enter public places such as the streets or parks. Further, the values which underlie privacy rights – individual dignity, the space and freedom to develop individual thoughts and to cultivate intimate relationships and friendships – are just as much at stake when people are out on the streets or using public transport as when they are at home. A privacy law which only protected people when they were on private property would wrongly discriminate in favour of the rich who are not dependent on public spaces for their recreation. Paton-Simpson also reviews how these issues have been resolved by courts in the United States, Canada and New Zealand. While American judges have tended to conclude that privacy is lost when the claimant is in public, Canadian and to some extent New Zealand courts have limited the freedom of the press in these circumstances. Particularly striking is the well-known decision of the Supreme Court of Canada upholding a Quebec judgement awarding damages to a young girl whose photograph was published in an arts magazine; the photograph had been taken without her consent, while she was sitting on the steps of a public building.[14] While admitting that the balance between press freedom (and artistic expression) and privacy was hard to strike in this case, the author concludes in favour of the decision (see pp. 421–2).

The subject of the final essay is the controversial ruling of the European Court of Human Rights in the Princess Caroline case.[15] The Court held there that Germany infringed the right to respect for private life, guaranteed by ECHR, art. 8, because its courts had failed to protect the privacy of Princess Caroline of Monaco when tabloid magazines had published photographs of her engaging in a variety of activities – for example, horse-riding, shopping, on holiday. The Court held that it had to balance her privacy rights against the magazines' freedom of expression, guaranteed by art. 10 of the ECHR; that freedom did not give the press carte blanche to publish photographs of a celebrity, who had not given her consent to their taking or publication, when they did not contribute to any discussion of real public importance. It would be different if the photographs had shown the Princess discharging some public duty. In Chapter 15 M.A. Sanderson explores some of the difficulties of this ruling. In his view the Court took too restrictive a view of the public interest in this sort of story, and it failed to explain why the German courts had been wrong to treat Princess Caroline as a public figure for the purpose of privacy law. The pictures taken of the Princess did not depict her engaging in any embarrassing conduct. Sanderson concludes that if the photographs had had a more revelatory content, then there might have been a stronger case for freedom of the press to publish them. The Court, in his view, reached its decision just because the information was too anodyne to contribute to any public debate. But equally the Princess would have had a stronger case for privacy protection, if the photographs had, say, shown her engaged in some aspect of her intimate, private life.

What is interesting about many of these essays is that the arguments over the correct balancing of freedom of the press (and of the other media) with privacy rights have not changed much since the publication of the seminal essay by Samuel Warren and Louis Brandeis in 1890. They

14 *Aubry* v. *Éditions Vice-Versa Inc.* [1998] 1 SCR 591.

15 *Von Hannover* v. *Germany* (2004) 16 BHRC 645. 77.

argued then that the introduction of privacy laws should impel the press to abandon celebrity gossip of little or no value and to concentrate on the investigation and reporting of real news of public importance. At the same time they pointed out that too strong an application of these laws would curtail press freedom; a privacy right should be balanced by due consideration for free speech and free press arguments. The question now, as then, is how the balance should be struck without sacrificing the core values of either freedom. The relationship of press freedom to privacy remains one of the most complex and intractable issues of media law. Moreover, it goes to the heart of what we understand by, and require of, press freedom.

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