Press Freedom, Privacy and The Public Sphere

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Taking as its starting point the reduction of the News International phone-hacking scandal to a debate on the balance between privacy and press freedom, this article will argue for the recasting of these rights in terms of their mutual significance for the public sphere. After reviewing the history of the legal approach to balancing these two liberal freedoms from the state, the article will assert that each is incapable of recognising the threats posed to the public and the press by the market. Contrasting the theory of press freedom with the concept of the public sphere, and distinguishing between individual, social and political dimensions of privacy, the article will call for a turn to a civic republican approach to press regulation that would more effectively protect the public from both state and market interference, and empower the media to hold both political and economic power to account.

KEYWORDS media regulation; neoliberalism; press freedom; privacy; public sphere

In July 2011, extensive media coverage in the UK of 'the rise of the super-injunction state' and the legal protection increasingly afforded to the privacy of celebrities was superseded by stories (more familiar from the history of the press) of illegal press intrusion into the private lives of individuals. The News International phone-hacking scandal has highlighted issues that go beyond the original claim of the *News of the World* and its proprietor that these were the isolated actions of a single rogue reporter. These issues stretch to the numerous forms of technological surveillance, as well as acts of bribery and 'blagging', undertaken by many at the newspaper and in the rest of the British press, as well as the activities of News International's multimedia and international interests. It has demonstrated the widespread practice of journalists illegally procuring personal information for the purpose of publishing stories that are more revelatory of the private lives of people in the public eye than they are conducive to political or economic debate. And through the related activities of media lobbying and government spin, the scandal has raised questions of influence in the relations between media and political figures, while the effect of the scandal on News International's other activities has emphasised the cross-media stretch of the multinational corporations that run such organisations, as well as the problems posed for national governments by economic and technological convergence in an era of globalisation.

The media frenzy of almost daily revelations about the extent of phone-hacking at the *News of the World*, affecting not just 'public figures' such as politicians and celebrities, but also 'private figures' such as the victims of crimes and their families, led directly to the closure of a 168-year old newspaper, the abortion of its proprietor's attempt to take total control of satellite broadcaster BSkyB, multiple police investigations, House of Commons Select Committees and the setting up of the judge-led Leveson Inquiry, a public government inquiry into the culture, practices and ethics of the press and, potentially, the media as a whole. The public pressure this frenzy was able to apply demonstrated the capacity of the press to act as a form of public opinion, to represent the public interest, and to hold power and authority to account. But in the different ways in which the scandal was reported across the media

spectrum, and in the original behaviour of the tabloid journalists in question, it also acted as a reminder of the ability of the press to influence public opinion and protect the private interests of the powerful.

Attention has understandably turned to the regulatory frameworks that guide journalists' behaviour, and, in particular, to the notion of public interest and the balance between press freedom and the individual's right to privacy in the self-regulatory framework of the press. There are problems, however, with approaching the recent scandal in terms of privacy and press freedom. A problem with the rhetoric of press freedom is that it often serves more the private interests of media proprietors than it does the public interest, harming both the independence of journalists and the right of the public to know. Concomitantly, although it also has the potential to negatively affect the public's right to privacy, the individualisation of that right and its reduction to a material or moral interest rather than anything more fundamental, has meant that privacy rhetoric is also called upon to serve private rather than public interests. More than a question of rhetoric, however, the problem with debating the relationship between privacy and the press lies in the very importance given to these rights in liberal theory. The potential for individual freedom and the public interest to be all too easily conflated with the private interests of the powerful is a threat that is inherent to the liberal perspective, and which, in its neoliberal guise, undermines the legitimacy of the state and the efficacy of public opinion to hold authority to account.

This article will therefore examine the liberal approach to the theories of privacy and press freedom, and offer a critique from what we would now refer to as a civic republican perspective (Fraser 1992, 129) that emphasises the importance of the press and the media as a whole as a public sphere (Habermas 1992), and the political importance of privacy for that public sphere; that is, emphasising freedom not just from the state but from the market, and viewing the citizen as an active political entity rather than as a passive member of a community that resembles too closely the consumer of the market. Further, because most attempts to engage with the press freedom/privacy dichotomy are satisfied to draw on theoretical debates of one and mere description of the other, this article will offer a synthesis of heretofore unsynthesised theoretical accounts, dealing in turn with theories of press freedom and privacy to undermine the dominant legal approach to the balance between the two.

Before looking at the theory behind the rights, however, the article will look at the history of the legal and legislatorial approach to privacy and the press in the UK (see also Dawes forthcoming); an approach which has tended to favour press freedom from state regulation and equate it with the fundamental right of freedom of expression, and to see privacy only as an individual's fragmented set of auxiliary rights.

The Media Law Approach to Privacy and the Press

Although the Universal Declaration of Human Rights [1948] recognised both privacy and the freedom of expression as fundamental rights, no 'privacy law' as such exists in the UK. A legal right to privacy has instead been progressively moulded out of privacy gaps in existing laws (Rozenberg 2004, 227), while a general right to privacy has been protected only indirectly by the piecemeal development of legislation via a 'miscellany of statutory provisions' (Warby *et al* 2002, 8-9). Deficiencies in the protection of personal information by property and contract law, for instance, have been addressed since the decision in the case of *Prince Albert v Strange* [1849] by the law of confidence, which recognises and enforces expectations of trust within non-contractual relationships. But the remaining gaps in common

law and legislation, and the narrowness of court interpretations of the protections available, have affected the extent to which the UK has been able to provide effective remedies for breaches of privacy. This incapacity was highlighted by the notable case of *Kaye v Robertson* [1991], when actor Gorden Kaye was interviewed and photographed by a journalist from the *Sunday Sport* while recovering from brain surgery. Neither the intrusion nor the subsequent publication of personal information could be remedied by existing laws of trespass, harassment, confidentiality or defamation; instead, only a very specific aspect of Kaye's right to privacy – referred to as his 'right to publicity' – could be partially remedied by the tort of malicious falsehood, prohibiting the tabloid newspaper from suggesting the actor had consented to the story. This limited remedy was based upon an equally limited recognition of the privacy violation as a matter of material interests rather than as anything more fundamental; that is, purely in terms of the pecuniary damage that may have been caused by the effect of the publication on Kaye's right to sell his story.

Between the 1970s and 1990s, such examples of unremediated press intrusion into the private lives of public figures, as well as frustration at declining press standards, led to debate over ways in which privacy could be protected and press standards maintained without negatively affecting press freedom. Although the Younger [1972] and Lindop Reports [1978] into the effect of technological developments on privacy and data protection were unconcerned by the press, the intervening McGregor Report [1977] into any aspect of the law which related to the press acknowledged 'overwhelming' evidence of press violations of privacy, and recommended the reform of the regulatory body at the time, the Press Council. Although the Calcutt *Report on Privacy and Related Matters* [1990] found no evidence that privacy violations had, in general, increased over the previous 20 years, it too criticised the tendency of tabloid content over the same time period to be increasingly revelatory of the private lives of public figures, and recommended that the Press Council (which had a conflicting responsibility to adjudicate complaints against the press and to simultaneously protect press freedom) be replaced by the Press Complaints Commission, a non-statutory body with a statutory ombudsman of appeal (something which never came into being) and responsibility simply to adjudicate complaints (Bingham 2007; Warby *et al* 2002, 25-27). Criticising both the continued occurrence of press intrusion and the failure of the PCC to be either as independent of the press or as proactive at initiating its own investigations as the earlier Report had recommended, however, Calcutt's follow-up *Review of Press Self-Regulation* [1993] recommended not only the strengthening of privacy law but also the creation of a statutory press regulator (Warby *et al* 2002, 28); proposals which were rejected by a Conservative government fearing the consequences of either an individual privacy tort or of state regulation for press freedom.

Fortunately, academic and legal debate has since shifted away from a zero-sum game of choosing *either* privacy *or* press freedom. Since the New Labour government's incorporation of the European Convention on Human Rights (passed in 1950, enforced in 1953) into domestic law in 1998 through the Human Rights Act (enforced in 2000), the relation between privacy and the press has been debated in terms of *balancing* twin but often conflicting freedoms (Rozenberg 2004, 252) alongside a consideration of the 'public interest'. When balancing press freedom with the right to privacy via reference to Article 8 (the right to respect for private and family life) and Article 10 (freedom of expression) of the Convention, judges and the PCC are required to refer to Section 12 of the HRA 1998 which requires them (due to a passage added to the Act at the last minute following intensive media lobbying and a PCC request) to refer to the press industry's code of conduct; Section 12(4)(a)(ii) of which, in particular, is where reference to the 'public interest' is made (see also Section 55(2)(d) of the Data Protection Act 1998). Although the scope of Article 8 does not extend to a fully fledged privacy right, which is neither required nor prohibited by the Convention (Warby *et al* 2002,

37), the HRA provides a mechanism for enforcing and for obtaining remedies for breaches of those rights.

Nevertheless, press intrusion has continued to occur, as the hacking scandal has demonstrated (for an illustrative discussion of other examples, see Dawes forthcoming); but because phone-hacking is illegal, and because the unlawful obtaining of personal information in these cases is unlikely to be justified as being in the public interest, Article 8 offers a much stronger chance of remediation for the victims. That being said, while press freedom continues to be equated with the freedom of expression, neither retrospective compensation nor preventative measures such as injunctions and super-injunctions are likely to have any more success at preventing press intrusion than was previously the case, and regulatory change is once more on the political agenda. As the Leveson Inquiry has heard, there is a difference in scope and scale between an individual's relatively unrestricted freedom of expression (which only ends where another's begins) and the freedom of an institution to disseminate commercial speech to a large audience via mediated communication (O'Neill 2011; Petley in Leveson 2011, 72-73). If a newspaper had such an unconditional right, they would have the right to "…undermine individuals' abilities to judge for themselves and to place their trust well, indeed [they would have] rights to undermine democracy" (O'Neill 2002). Placing more obligations and limits on the freedom of expression of the press than on that of individuals would help make the press accountable, without conflicting either with the freedom of expression, or necessarily with the freedom of the press, because "the classic arguments for the freedom of the press do not endorse, let alone require, a press with unaccountable power" (*ibid.*).

The issue of regulation is problematic, however, not least because of technological convergence and the internet, and economic convergence and multinational ownership. The media are regulated differently from one country to another, even though publications can be available internationally. And even within nation-states, each medium has its own regulatory framework. While broadcasting in the UK, for instance, has traditionally been regulated in terms of media organisation, funding and ownership, the approach to press self-regulation has for over 150 years been from the perspective of media law.

Press Freedom and the Public Interest

Press freedom

Histories of the press vary from country to country and depending on whether a newspaper is defined in terms of its 'appearance, periodicity, content or format' (Barker & Burrows 2002), but generally they are stories of gradual independence from state power and public authority, with the market in the role of guarantor of its democratic potential. In 1855, the last of the state-imposed taxes on newspapers in England was abolished (for a thorough overview, see Thompson 1995) in the context of increasing literacy and a more universal franchise, whereby public reasoning had become more inclusive of non-business and non-professional classes. The theory of press freedom, whether as an educational or representative ideal, as an influence on public opinion or as a reflection of public opinion and provider of news and facts (Hampton 2001), derives from this mid-Victorian era of newspapers making politics a public affair and the promise of a free market in ideas. Originating as a practical means to combat the secret politics of the absolute state, the free press became the guarantee

of the elimination of secret politics, making the misuse of power unthinkable in a society in which public opinion had such a controlling force. This liberal faith in public opinion and the openness of political life evolved into an absolute value for liberalism (Schmitt 2010, 76-77), but the theory of press freedom also assumes that the press is a property right exercised by publishers on behalf of society, their free-market regulated actions being consistent with public opinion and the public interest, which in turn becomes synonymous with self-regulation and the market (Curran & Seaton 2003, 346-347).

Although the press achieved its freedom from the state in the nineteenth century, and achieved many positive things in making politics a public affair, by the end of that century, the rise of the press barons and the decline in content standards had already weakened press freedom from the market and cast doubt upon its democratic potential and its legitimacy as a form of public opinion. Although institutions such as the press had been originally "protected from interference by public authority by virtue of being in the hands of private people", their critical functions have since been threatened by "precisely their remaining in private hands" (Habermas 1992, 188), so that, owing to commercialisation and concentration, they have become "…the gate through which privileged private interests [invade] the public sphere" (*ibid.*, 185). As conflicts hitherto considered private emerged in public, the public sphere became an arena of competing private interests and reasonable consensus degraded into compromise (Habermas 1992, 132), so that scepticism about the importance of a free press and the political role of public opinion grew. Habermas's history of the press as a decline of the public sphere, in particular, is not only critical of the reality of press content and behaviour, but of the theory of press freedom itself.

As James Curran (1979, 1991; Curran & Seaton 2003) and others (Keane 1991; Thompson 1995) have pointed out, the liberal theory of press freedom makes a series of unconvincing assumptions. The idea of the press as a form of public opinion assumes that a market democracy is representative of the will of the people. This ignores the distorting effects of capital in the marketplace, and the politically charged publishing environment in the UK that, despite the rhetorical independence from politics, has tended to produce newspapers that are biased and partisan and more susceptible to influence from both politicians and political pressure groups than they are objective or neutral. The idea of the press as an agency of information highlights the numerous successes in holding political authority to account, but ignores the reality of the full range of newspaper content and the role of the press as an entertainment industry, not to mention the increasing blurring of the boundaries between information, entertainment and advertising. And the view of the press as an independent watchdog assumes, on one hand, that it is independent of economic interests, ignoring the size of the multinational corporations that own them and the fact that newspapers are often a subsidiary of a much larger network of multimedia and other industries, so can rarely be said to be free of vested interests. And it assumes, on the other hand, a political independence, ignoring the mutual advantage and lack of transparency in the relation between the press and political parties, the role of opaque lobbying and the influence of the media on government policy and on electoral results, which threatens not only the media's independence from government, but government's independence from the media.

Because liberal theory conflates the freedom of the press with that of media owners, it overlooks the employee rights of journalists and disregards their freedom from the restraint and whims of their employers, and fails to recognise the reality of the incentives and constraints inherent to an environment of market competition that guide journalist behaviour. Consequently, press freedom from regulation fails to protect the press from the negative effects of competition and the needs to cut costs and boost profits. It also allows media owners to pursue their own private interests, using their power to influence public policies which, in turn, further deregulate media or other sectors in which they have vested interests,

thus granting them even greater power in the name of press freedom. Such manifestations of market censorship (Jansen 1991; Keane 1991) undermine the liberal theory of press freedom, and suggest that a certain amount of state intervention would, in ensuring that the press met the obligations that attend its right to freedom of expression (Petley 2012, 19), actually empower the press to express itself more freely.

Public Interest and Public Service

At stake is the legitimacy of a market foundation for the theory of press freedom, undermined as it is by the defencelessness of the press against economic power and the breakdown of channels of accountability between the press and politics. Because the legal approach to press regulation presupposes a market and frames debate in terms of the paternalist-libertarian dichotomy of privacy versus free speech, the 'public interest' functions as little more than a defence for particular activities carried out within a market framework. Conversely, broadcasting in the UK has traditionally been regulated from the perspective of media organisation and framed in terms of the debate between public service remits and the invisible hand of the free market (Curran & Seaton 2003). Consequently, while the public interest-supplemented self-regulation of the press views newspaper readers primarily as consumers, the public service remit of broadcasters and the independent regulatory broadcasting environment has, in contrast, traditionally viewed audiences as citizens first, consumers second.

In contrast to the commercially driven US model of broadcasting, which followed more closely the free market approach of press regulation, broadcasting in the UK was, from its inception, protected from market power, while its independence from political influence was theoretically guaranteed via a principle of 'arm's length' regulation (Curran & Seaton 2003). Because of PSB's unique position between public and private, insulating itself from control by both the state and the market, and presupposing political rather than economic social relations (Garnham 1986, 45-47), the UK regulation of both public and commercial broadcasting within a public service framework has been proposed as an effective, if imperfect, embodiment of the public sphere ideal (Curran 1991; Garnham 1986; Scannell 1989).

Over the course of the 20th century, however, this dichotomous relationship between the public service and press freedom approaches to media regulation became less distinct as attempts to address more popular tastes and the representation of minority or marginalised groups and interests coincided with broadcasting’s acceleration into the corporate system (Curran and Seaton 2003; Murdock 1993, 1999). Since the 1990s, economic and technological convergence has weakened justifications for regulating broadcasting differently to other media (Barnett 2002, 36), while consumer choice and market objectives, equated with the 'public interest' (Goodwin and Spittle 2002; Naranen 2002), presuppose broadcasting as a market. Ofcom's aim to balance the interests of both citizens and consumers (Lunt & Livingstone 2012), for instance, sees public service as only one subset of the public interest among others, such as competition and a thriving market (Dawes 2007, 12).

This shift in rhetoric from 'public service' to 'public interest' constitutes a shift in rationale for the regulation of broadcasting, from public service regulation to free market competition, where 'public interest' is the defence referred to when market logic leads media players too far, and 'public service' is reduced to a limit placed on the freedom of the media.

While the UK press has maintained its independence from the state and its freedom from constraints such as public service obligations and independent regulation, it has been

defenceless against the market and the associated conflicts of public and private interest. And while PSB in the UK was protected from both the state and the market by independent regulation and public funding, ownership and service obligations, contemporary regulatory trends that confuse public service with a narrowly redefined view of public interest, and the narrative (familiar from the history of the press) of commercialised content and the corporatisation of public life, suggest that its protection from the market is now also being undermined.

Public Opinion

It is not just the media's legitimacy as a form of public opinion that is questionable, however, but the legitimacy of the liberal approach to public opinion itself. This approach is rooted in Francois Guizot's classic 19th Century formulation of the 'rule of public opinion', where the legitimacy of the whole representative democratic system is guaranteed by the incessant search for reason, justice and truth that regulates power in three ways: through parliamentary discussion, the openness, publicness or 'publicity' (very different from the legal 'right to publicity') of these discussions so that they are always under citizen control, and press freedom as a stimulant for citizens to search for these things (Habermas 1992, 101).

But faith in the importance of public opinion assumes a public more rational and better informed than they may be in reality. It also depends on the capacity of the individual to distinguish between the substantive and the particular (Hegel 2010, 10), and their ability to prevent their private and public opinions 'merging insensibly' into one another (Lipmann 2010, 34-5). For Marx, however, because of the contradictory rooting of the public sphere in the private realm of civil society, such distinctions were impossible, and public opinion was nothing more than false consciousness. The birth of a free press, therefore, represented simultaneously the emancipation of civil society from state power and the introduction of new relations of market power (Habermas 1992, 124-5). The threat posed by these relations to the distinction between public and private interests as expressed as 'public opinion' suggests that a press rooted in the free-market is no more an appropriate or legitimate mediating force between state and citizens (*ibid.*, 121) than a state-regulated press.

Some scholars have queried the extent to which a free press is significant for either freedom or democracy (Schmitt 2010, 76-77; Schumpeter 2010, 69), arguing as long ago as 1923 that although there aren't many who are willing to renounce the old liberal freedom of the press, there aren't many who continue to believe that it has maintained its rationale and its power to hold authority to account (Schmitt 2010, 83-84). To renew this rationale and reinvigorate the efficacy of the press as a public sphere, and to free the press from the market as well as from the state, constraints will need to be placed on corporate as well as on government power over public opinion.

While Guizot's liberal triad seeks to legitimise both parliamentary sovereignty and a free press, its Rousseau-inspired view of public opinion sees it as derived simply from a permanent and consensual assembly of passive citizens rather than from any critical debate that occurs there. It was Jeremy Bentham who first explicated the connection between public opinion and publicity, stressing not just the importance of the openness to the public of parliamentary discussion, but firmly positing the public deliberation of parliament as only one part of the deliberation of the public in general; critical political debate could be secured only by publicity both inside and outside parliament (Habermas 1992, 99-100). For Kant, it was precisely the rational-critical public debate of an enlightened public that could form the basis for public opinion (*ibid.*, 99); the public use of reason being not only important for personal

autonomy (guaranteed by the individual's right to privacy), but also as a validation of political legitimacy (*ibid.*, 106).

(Individual, Social and Political) Privacy

Since classical antiquity, the distinction between public and private has been a central preoccupation of Western thought. The most significant of the 'grand dichotomies', according to Norberto Bobbio, its usefulness is in its capacity to comprehensively subsume a wide range of other important distinctions within a binary opposition (Weintraub 1997, 1). In contrast to a totalitarian view that would deny privacy and see the public or political realm as all inclusive (Benn 1984, 239-240), a distinctive emphasis of liberal thought has been upon demarcating the 'public' domain of state from the 'private' domain of the market and civil society (Weintraub and Kumar 1997, xiii), and, in classical liberalism, limiting the power of the state to intervene in the latter. Within this liberal political and philosophical framework, the right to privacy (like press freedom) has therefore traditionally been approached in terms of freedom from state interference (Rössler 2005, 10).

The history of liberalism and its critiques shows, however, that the public-private distinction is fundamentally contradictory, often controversial, constantly open to renegotiation and anything but clear-cut (Rössler 2005, 20). A core tension in the liberal approach to privacy is between a *legal-conventional* conception which concerns the boundary between public and private interests and which is founded on rights and liberties hypothetically equal to all, and a *quasi-natural* conception that equates the private realm with domesticity and seems to preclude women from many of the rights and liberties espoused in the former conception (Rössler 2005, 20-21). That is to say that while the spatial idea of privacy as the passive freedom of the individual from the state is applicable to both men and women, the more active conception of the autonomy of the individual and their freedom from 'anything that prevents [them] doing something they want to do, or that requires them to do what they do not want to' (Benn 1984, 226), has tended to be limited to men only. This inherent contradiction between the protection of all individuals in the private realm from interference by the state and the protection only of men from other actors in the private realm has, for example, been blamed for legitimising the harm done to women in the marital home (MacKinnon, 1987). Because this inequality in the rights and liberties afforded individuals in liberal theory is gender-coded to the detriment of women, many feminists, in particular, have tended to critique and frequently dismiss privacy as anti-democratic. The way in which the inequality in the *quasi-natural* conception undermines the egalitarian aspirations explicit in the *legal-conventional* conception is, however, important from another perspective more relevant to the relation between privacy and the press.

Individual Privacy

The stress upon the privacy of the personal relations of the morally autonomous and politically free individual that this individualist conception of society presupposes (Benn 1984, 234) is too often invoked 'to rationalise a selfish economic individualism' more appropriate to the market (Benn 1984, 240), so that the privacy of the free citizen is indistinguishable from the sovereignty of the autonomous consumer. The liberal distinction

between *private* freedom and *public* regulation focuses on an individualistic and privatised aspect of privacy that is fundamentally associated with the market and that disconnects the individual from their public roles, reducing the social and political dimensions of privacy to a question of political participation via the electoral vote (Rössler 2005, 12). Although the liberal demarcation of state from market and civil society simultaneously legitimates and limits the state (Foucault, 2010), it also just as simultaneously legitimates and unfetters the market, legitimising power inequalities in the private realm, not just between men and women, but between individuals and corporations.

This individualisation of privacy is evident in the ineffectiveness of the law to protect it, and has been particularly apparent in US jurisprudence. Although there had been no major philosophical debate on privacy until the late 1960s, and no explicit or sustained legal discussion of the right to privacy until the end of the nineteenth century, many aspects of privacy had long been recognised, whether in terms of control or access, and protected under other names, through laws of property, copyright, contract and breach of confidence (Schoeman 1984a, 1-15). However, the lack of a specific privacy law is demonstrative of the perception of its limited value as an instrumental right, essential only as a guarantee of other more fundamental rights, but lacking intrinsic qualities of its own. Further, this catalogue of laws fails not only to recognise privacy as a fundamental right in itself, but also, as we have seen, to see it as anything more than material interest, and consequently to protect the public from intrusion by the press. Concerned with the correction of these failings in the US legal system over a century ago, Warren and Brandeis (1890) highlighted the importance of recognising privacy as a fundamental right guaranteeing an individual's identity or 'inviolate personality'. But in reducing privacy to a matter of dignity and the 'right to be let alone', they too privileged only a specific aspect of privacy, failing to recognise it as a complex of different rights (Prosser 1984), some with more active and less individualistic connotations than the 'right to be let alone' would suggest. And in limiting their critique of privacy violations to the publication of embarrassing facts, they failed to engage either with the effect of a privacy tort on press freedom or with the intricacies of the distinction between newsworthiness and public interest.

Efforts to develop a right to privacy in the US have, consequently, been largely preoccupied with elaborating a very limited type of privacy that is both individualistic and impotent with regard to intrusions by the press and private actors. Although many protections of privacy have come indirectly from amendments to the Constitution and the Bill of Rights, this has tended to be in terms of a rudimentary reading of the public-private distinction, protecting individuals from the government but not from corporations (Nissenbaum 2010, 92-93). Because the Privacy Act 1974, for instance, failed to take into account calls for limits on the private sector to be brought within its scope, the laws restricting the use of social security numbers applies only to government, so that there is consequently a *de facto* national identity system in the hands of private corporations (Solove 2008, 122). Privacy law is also enforced retrospectively in the US through individual law suits, placing the onus on affected individuals to prove that a violation has occurred, rather than on the powerful corporations or state departments carrying out potentially problematic practices to demonstrate the anticipatory lengths to which they’ve gone to prevent such violations occurring (Rössler 2005, 125). Similar to the use of the 'public interest' rhetoric in media regulation, therefore, the legal protection afforded an individual's right to privacy tends to only supplement a market framework that privileges the rights of corporations over those of the public, and to see the public more as consumers than as citizens.

Social Privacy

Because of the reductive reading of the public-private dichotomy in legal discourse and, in particular, the reading in US jurisprudence that sees privacy as a protection of the individual from the state and not from the market, some scholars have emphasised the need for individual privacy to be protected as much from corporations as from government, and by more obviating measures than those provided by private law. Concomitantly, because privacy tends to be balanced with other values, such as security or press freedom, which are invariably constructed as *social* values that outweigh in court proceedings the *individual* freedom guaranteed by privacy protection, these same scholars highlight the social importance of privacy in terms of its affect on social life; with some going so far as to insist upon the imbrication of privacy with other social values (Nissenbaum 2010) to repudiate even the possibility of weighing one social value against another. While not denying the value of privacy for individual integrity, this critique of the individualist tendency argues that there is no necessary conceptual link between the protection of privacy and an atomistic self, because rather than separating the individual from society, privacy rights actually provide conditions for interaction with others (Cohen 1997). The seclusion of the individual, or their right to be let alone, is an uncharacteristic, incomplete and misleading part of privacy, a right which actually emphasises our connection and facilitates our association with others (Schoeman 1984a, 8). Privacy is therefore as valuable for the formation of social personality (Fried, 1984) as it is for individual integrity, and vital in its function of regulating both individual and social life (Schoeman 1984a, 4).

But while diagnosing the individualism of legal discourse on privacy is germane, remedying it by socialising the concept of privacy fails to address the political importance of privacy for the public realm. Indeed, recent attempts (Nissenbaum 2010; Solove 2008) to divert attention away from individual rights and towards more fundamental social rights have tended to suggest dispensing with the term 'privacy' altogether, as if it is unable to accommodate the socially important values we think of when we feel that our privacy has been violated. Critics of the dominant approach to privacy misunderstand, however, the difference between the particular liberal and individualistic interpretation of privacy so typical of the legal approach in the US, with privacy as a multi-dimensional concept that incorporates individual, social and political elements. By avoiding reference to either privacy or the public-private dichotomy (Dawes 2011), they neglect the political function of privacy and the link between public and private realms, and unwittingly continue the same process of depoliticisation that they claim to critique.

This is because socialising privacy is not incompatible with the neoliberal 'government' and depoliticisation of civil society, which presupposes a market environment (Foucault 2010, 141) and addresses problems such as privacy rights from a market perspective. Although classical liberalism, in limiting the scope of its power, individualised privacy and conflated the autonomous citizen with the atomistic, self-interested consumer, the neoliberal approach has reconfigured the relationship between the individual and society as a whole, concerning itself with social rights and retrospective compensation for market excesses, but only as a supplement to a perspective modelled on the principles of a market economy (Foucault 2010, 131).

That privacy rights protect the preconditions for having an identity of one's own is, therefore, not merely a matter of individual or social significance. Rather, because the political capacities of individuals are nurtured through their non-political activities (Lever 2006, 142-143), violations of such constitutive identity needs affect an individual's capacity to participate in the public spaces of civil and political society (Cohen 1997, 153). Beyond the liberal and neoliberal marginalisation of this political dimension of privacy, the civic

republican emphasis on the mutual significance of public and private realms offers an alternative approach to the protection of privacy.

Political Privacy

The difference between liberal and civic republican approaches can be traced back to their Roman roots. While the model of the public realm as a self-governing *polis* of active citizens derives from the Republic, the model of sovereign power over a society of private and passive individuals, who bear rights granted to them by the sovereign, comes from the Empire (Weintraub 1997, 11). Although a tendency in other civilisations and in some periods of Western history has been to approach politics from the same perspective as the Empire and assume a separation of the rulers and the ruled, classical moral and political philosophy has tended to approach politics from the perspective of the Republic, focusing on participation and defining the citizen as one who is (in Aristotle's words) capable both of ruling and of being ruled (*ibid.*, 12). In contrast to the liberal conflation of citizenship with community membership, for the republican approach, citizenship entails the active participation and collective decision making of equal members of a 'willed community' (*ibid.*, 13).

Going back even further, the private realm in Ancient Greek thought was the realm of necessity and 'privation', whereas freedom and individual excellence were seen as political values belonging to the public realm. Although liberalism can be credited for having enriched the private realm for the better of all, the importance attached to intimacy and individual freedom is diametrically opposed to this Aristotelian perspective (Rössler 2005, 22), and, in the eyes of Hannah Arendt, a simultaneous overestimation of the true value of privacy (Arendt 2003, 193) and a reduction in its true function (*ibid.*, 208). Because, for Arendt, although privacy was nothing more than a temporary refuge from the *polis* or *res publica*, too long spent in which would be deprivation, equating privacy with intimacy and freedom meant ignoring its political function and its importance for the public realm. Similarly, for Hegel, liberal freedom was nothing but an abstraction that split individuals from their communities and incapacitated them from distinguishing between their public and private roles; to be concretely free, by contrast, required individuals to also pursue their lives as active citizens of the state. It is this publicity or freedom to make 'public use of one's reason in all matters' (Kant 2010) that guarantees not only individual autonomy, but also the rational-critical public debate of an enlightened public that forms the basis for public opinion (Habermas 1992, 99). Viewed from a civic republican perspective, therefore, the political legitimacy of the state is guaranteed by the public sphere, which in turn is dependent upon privacy.

This is not to say that privacy should only ever be valued for its political function, or that all aspects of privacy should always have a social or political purpose (Schoeman 1984b, 413); individual freedom must be morally recognised. Recognition and protection of both personal and collective dimensions of privacy – as well as their value for individuals, society and politics – are essential to a democratic conception of privacy (Lever 2012, 68). But an individualist conception of privacy that supports self-interested consumerism at the expense of active citizenship, and that sees privacy uniquely in terms of freedom from government and the state while ignoring the threat from corporations and the market, should be avoided. Likewise, a socialisation of privacy that legitimises the futile balancing of rights such as privacy and press freedom that fails to address the distinction between public and private in terms of politics, is an ineffective alternative.

Conclusion

Although 18th Century liberalism contrived a free space of the market within an already given political society (Foucault 2010, 131), pursuing a laissez-faire approach to press freedom and the privacy of the 'person who must be let alone' (*ibid.*: 270), neoliberalism assumes an already given market upon which it seeks to exercise permanent state intervention according to the model of the market economy itself (*ibid.*: 131). Consequently, while the liberal state was legitimated by press freedom and the individual within the market, the neoliberal state is legitimated by the ability of the state to ensure the spread of the market across the whole of civil society, tempering market ubiquity with compensations for market excess.

When the realities of the history of liberalism have involved the reigning in of democratic power, the application of market logic to all areas of everyday life, the individualisation of society and the depoliticisation of the public sphere, however, arguments for either press freedom or the individual's right to privacy are limited in the effect they can have on redressing the problem of the market itself. What is more, when we expose how the two rights are reductively read from the perspective of liberal theory, both the pre-2000 approach that saw them as antagonists, "locked in a zero-sum game, in which gains to the one can only come at the expense of costs to the other" (Lever 2012, 41), and the post-2000 approach that sought to find an appropriate balance between them, seem equally ineffectual. This is because the liberal theories of press freedom and privacy are dependent upon the market as guarantee of their freedom from state power. As such, neither efforts to balance privacy and press freedom with recourse to the public interest, nor proposals for independent media regulation or the socialisation of privacy that fail to disenfranchise the market, address the root cause of the crisis of public communication illustrated by the phone-hacking scandal. What is needed instead is an approach that does not presuppose a free market, but that addresses problems of market excess in terms of the balance between freedom from the state and freedom from the market.

Once it is market power itself that is recognised as a culprit of both harms done to privacy and the free press, as well as harms done in the name of privacy and the free press, the flawed liberal theories should be recast in terms of a civic republican approach that privileges the political importance of privacy for the public sphere. This would be more capable than liberalism at addressing the political freedom of the public realm from the private interests of the market. It would also be able to decouple the rhetoric of press freedom from the interests of media proprietors, as well as the rhetoric of privacy from the kind of individualism that reconstructs citizens as consumers, and that promotes private interests over the public interest.

Only an approach that considers the freedom of both the press and the individual from the market as well as the state, and that underlines the active freedom to hold both political and economic power to account as well as the passive freedom from political and economic intervention, can ensure that the press and the public are truly free.

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