

WHEN THE MEDIA COMES CALLING: AN ISSUE OF PRIVATE SPACE

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When convicted pedophile Bobby Oatway walked away from a federal penitentiary with a properly signed release notice in his hand, he had no place to hide. Oatway had enjoyed the protection of the law, if such terms could be used, during his numerous altercations with the authorities. Upon his arrests, he knew that the actions of the police, the prosecuting attorneys and the nation's prison authorities were subject to the rule of law. Despite the repulsive nature of his crimes, Oatway's potential punishment had been clearly defined by the statutes of the land. His freedom, however, was not protected by such safeguards.¹

Oatway has been unable to establish residence in either his home community in British Columbia or in Toronto where a dense population could afford anonymity to a recently released offender. In releasing details of Oatway's past, no person was guilty of breaching any Canadian statute. Quite simply, as media scholar and legal authority Robert I. Martin has noted,

[T]here is no general principle of Canadian law which prohibits the publication by the mass media of personal or private information about individuals. Put another way, assuming it can be proven to be true, there is nothing that the mass media may not say about someone.²

The mass media's invasion of personal privacy invokes considerable hostility towards the media and its personalities. It is charged that the mass media has lost its direction as the conscience and defender of liberal democracy. This argument would be lost on the thirty-six journalists around the world who lost their lives in the pursuit of a story in the past year.³ However as more of the mass media fall under the control of fewer players, an ideological concentration in the editorial direction of many journals may be a justifiable concern. We must question how long major media chains will continue to support financially marginal publications alongside sleazy tabloids to give the impression that "true" journalism has a place in twenty-first century society. Before the debate over the efficacy of mass media in society can take place, a number of myths need to be addressed, most notably the concept of media itself.

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¹This point was emphasized by John Kastner in his video study "Hunting Bobby Oatway" aired on CBC Television's *Witness* series ("Hunting Bobby Oatway." *Witness*. CBC Network. 7 January 1997).

²R.I. Martin, *Media Law* (Toronto: Irwin Law, 1997) at 174. Some protections do exist, such as the *Privacy Act* (R.S.C. 1985, c. P-21), a host of similar provincial statutes and the *Canadian Charter of Rights and Freedoms*. See discussion below.

³"38 Journalists Murdered in 1996, Media Group Says", *The [Toronto] Globe and Mail* (6 January 1997) A11.

A recent trend has been to treat the media as if it were one large monolithic entity. From Spiro Agnew on, there has been an increasingly vocal sector of the population which wishes to rein in something it refers to as "the media". For the sake of argument, if the word "media" is treated as a Latin plural and therefore comes to mean a community of media with diverse interests and perspectives, the use of the word is legitimate. However, such linguistic sophistication does not apply in this case and, to this group, the word "media" means a singular entity with a singular set of characteristics.

The reality is that there are distinctions between electronic and print media which are not readily apparent. Within each of the various media, there are clear editorial and ideological directions. The country's *Sun* newspapers are more than transit driven, sensationalist tabloids. They articulate a libertarian, free-enterprise point of view that parallels supporters of the federal Reform party and the right wing of the Conservative party. One would not expect to find a spirited defense of employment equity legislation in any of the *Sun* newspapers.

In the same respect, one would not expect to find support for a renewed emphasis on national social programmes in the *Globe and Mail* until the federal government brings order to its financial affairs. With the exception of columnists such as Rick Salutin and Michael Valpy, the *Globe and Mail* seldom deals with social issues beyond their impact on corporate business. As much as the *Globe and Mail* is among the country's more conservative media, it has little in common with its so-called conservative companion, the *Toronto Sun*. Standing in opposition to both is the *Toronto Daily Star*, a journal often accused of being NDP between elections and of reverting to the Liberal party when the chips are down. Nonetheless, the *Star* regularly advocates positions which could be identified with the "common man". Although its social perspective is vastly different from that of the *Toronto Sun*, the *Star* attempts to address the concerns of many of the same constituents. Thus, in reality, the editorial positions taken in the print media are as different as that taken by the CBC's *Fifth Estate* is from the American show *Hard Copy*, which masks itself as a journalistic enterprise.

Yet, it is the singular concept of media that is subject to the most public scrutiny and, in recent history, public skepticism. It would appear that we have travelled a significant distance since the most trusted human being in American journalism, Walter Cronkite, surrendered his chair to Dan Rather. We are regularly treated to comments that if only the moral crusades of journalists such as Bob Woodward and Carl Bernstein, the investigators who brought about the downfall of Richard Nixon, were to reappear, all would be well with the state of the media. If one were to accept this premise, one would have to address the questions of why and how we have arrived at such a state of distrust and disrepute. Certainly, the recently-revealed practice by the Washington D.C. press corps of charging five-figure fees for public

appearances has not enhanced the reputation of the press.⁴ The question emerges, "Are we dealing with journalists or performers?" To that, there is no easy answer. Despite this, the media gets its greatest criticism from invading individual privacy.

I am firmly convinced that there are legitimate reasons for journalists to invade the privacy of those they deem worthy of news coverage. Certainly, Richard Nixon was such a case. In the public mind, the media's treatment of the British Royal Family is a memorable example of an invasion of privacy. It is little wonder that the Queen referred to 1995 as an "annus horribilis" after the British press revealed the heir-to-the-throne's infidelity, and the Duchess of York was photographed with her toes firmly concealed by the mouth of her financial advisor.

Both Richard Nixon and the British Royalty are fairly clear cases in any discussion of the invasion of individual privacy. As the Watergate scandal slowly unfolded, it became increasingly apparent that the corruption was coming closer to the Oval Office. Nixon, like all other political leaders in a liberal-democratic society, was expected to set the standard of moral behaviour. When he failed in this, he surrendered his right to privacy. In the same respect, the British Crown is regarded as the moral guardian of the nation. The monarch is both head of state and of the Church of England. Marital infidelity, as widespread as it may be within the common population, has no place within the confines of royal behaviour. Although his transgressions were modest compared to those of Richard Nixon, Prince Charles also surrendered his right to protect his private life from the inquiring minds of the press.

The question of "to report" or not "to report" is seldom this clearly defined. In some respects, the oft-quoted "public right to know" gets confused in the ever-conscious quest for circulation and ratings. Seldom, if ever, is it discussed whether there is any value to society in perpetuating a right to know. In a moral sense, it can be argued that knowing the whereabouts of Bobby Oatway will benefit a community far more than knowing about the extramarital affairs of the Duchess of York. However, to suggest that news should be subjected to some form of public value test brings forth the spectre of censorship. Yet censorship in the form of editorial judgment is part of everyday life in the nation's newsrooms. That which constitutes "news" not only varies from media to media but also within the various media themselves. The collapse of a large financial empire, although attractive to all media, would undoubtedly receive more detailed coverage in *The Globe and Mail's* "Report on Business" than it would in the *Calgary Sun*.

⁴"Why America Hates the Press." *Frontline*. WGBH-TV, PBS Network, 22 October 1996.

As Robert Martin has pointed out, “the common law has not so far recognized a tort of invasion of privacy”.⁵ On the surface, it would appear that the Canadian media have a right to investigate the private lives of people without fear of punitive recourse. In the case of those charged with sexual offenses in the London and Middlesex county crackdown on child pornography, known locally as Project Guardian, names, positions and charges were revealed daily in the London media. Prominent figures, such as the Director of the Regional History Collection at the University of Western Ontario, were not spared the revealing hand of the press. Yet, some nine years earlier, several persons charged with morally questionable activities in the washrooms of London’s central Victoria Park were never exposed in the press. Does this somehow suggest that we who make our livings in the world of news have relaxed our standards?

Reporting alleged sexual offences has often presented a serious dilemma to dedicated journalists. It is safe to say that nearly all journalists are opposed to the concept of closed courtrooms, no matter how vivid or lurid the evidence presented may be. To the journalist, the closed courtroom is a step towards removing a citizen’s right to a fair and public trial. This argument does not specifically include the concept of the camera in the courtroom, although this idea has a considerable following in journalistic circles. The recently concluded O.J. Simpson debacle in Los Angeles revealed some of the more sinister sides of the American judicial system which would have been very difficult to translate into print or short video bites for the evening news.

Nevertheless, the journalist must remain conscious that a trial is a clinical and procedural affair. Although the presumption of innocence prevails within the proceedings themselves, it is not always as apparent in the court of public opinion where, more often than not, the premise of “where there is smoke there is bound to be fire” prevails. Senator Joseph McCarthy, in his role as chairman of the U.S. Congress’ House Un-American Activities Committee in the early 1950s, used his quasi-judicial position to ignite the flames of fear and hatred against people he suspected of being disloyal to the state. In that era of paranoia, many were considered guilty of crimes against the state just by being mentioned in one of McCarthy’s missives. Most of those accused, such as journalist and humourist John Henry Faulk, lost prestigious positions which they never regained.⁶

McCarthy was created and destroyed by a new medium called television. As a young child growing up in southwestern Ontario during the early 1950s, I watched the only channel we could receive — an independent operation based in Erie, Pennsylvania. Like all kids of my age, I was mesmerized by the black and white

⁵*Supra* note 2 at 175.

⁶J.H. Faulk, *Fear On Trial* (New York: Simon and Schuster, 1964).

spectres crossing the screen in a box with enough candlepower to heat the entire floor of the lawyer's home where a gang of us met daily after school to watch television. Content in those days was immaterial. McCarthy, along with Richard Nixon and Roy Cohn, became a household word to us in the way that today's children remember the names and actions of their favourite Disney characters. We truly believed that those persons being pilloried by McCarthy were guilty of the most sinister crimes against humanity.

It was a journalist and a television producer who decided to reveal the truth about the senator's activities. The series of programmes that appeared on CBS's *See It Now* series, hosted by Edward R. Murrow and produced by Fred W. Friendly, did not single-handedly put a halt to McCarthy's ravings. However, the programmes did set a tone; they broke the cycle of fear that gripped the U.S. media of the day and put into motion the process that eventually led to McCarthy's censure.⁷

I think it is safe to conclude that Donald Marshall, David Milgaard and Guy Paul Morin would still be incarcerated had it not been for the interest shown in their cases by various actors in the Canadian media, who believed that these three were victims of miscarriages of justice. In many respects, investigative reporting and invasion of privacy are one and the same. By putting the justice system under the microscope, Toronto journalist Kirk Makin posed a series of difficult questions regarding Guy Paul Morin that did not appear to have ready responses. When CBC Television's *The Fifth Estate* exposed jurors in London, Ontario to previously banned evidence in the Morin trial, it became apparent that Morin would have had no less than a hung jury, and possibly an acquittal, had the material been presented in a court of law.

In the final analysis, there is nothing to prevent anyone in any of the media from disseminating information about anyone else provided that information is true. If it is not, the perpetrator may be subject to action under the laws of libel and slander. What protection exists in Canadian law in the *Charter of Rights and Freedoms* prevents the state in certain respects from invading the privacy of citizens but, as Martin points out, these restrictions apply strictly to the behaviour of the state.⁸

Journalists have a fair amount of freedom when it comes to the invasion of someone's private sphere. For example, as long as the action by a journalist does not amount to trespass or harassment, taking a person's photograph does not constitute an invasion of privacy. As well, journalists are under no obligation to advise an interviewee that his or her remarks are being tape-recorded unless the journalist plans to use recorded remarks as part of an on-air presentation. In that case, the *Canadian Broadcasting Act's* regulations clearly state that interviewees must be advised in

⁷J. Merron, "Murrow on TV: *See It Now*, *Person to Person* and the Making of a Masscult Personality", (July 1988) Journalism Monographs.

⁸*Supra* note 2 at 174.

advance of the taping and that their permission must be given before the record button can be pressed.

There are many more invasions of privacy beyond those practised by journalists. I suggest that all persons concerned with this issue place their names in a search engine on the Internet. You may be surprised by the results. As well, choose one credit card and identify yourself with a specific mark. I chose to register my VISA card with the prefix "Doctor" which I seldom use beyond my university setting. I soon found myself the target of telemarketing campaigns and various charity fundraising drives in which my formal title was used. Beyond internal memoranda, the only place where my title appears is on my VISA card. You may draw your own conclusions.

For those who treasure their private domain, the law in Canada provides clearly inadequate protection from invasion by telemarketers, charity fundraisers and, of course, journalists. As the Internet grows in sophistication and acceptance, those in our profession who seek to know something about your time and place will only have to turn on a screen, press a mouse button, and much, if not all, of your life may be revealed. Perhaps the time has come for a national debate on this issue.