

## Balancing competing rights requires trade-offs

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37

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Elected parliaments should decide where to draw the line, not unelected judges

### COMMENT

HOW would you balance the rather vague, amorphous notions of a "right to respect for one's private life" and a "right to freedom of expression"?

Both these concepts are nebulous enough, and they sound emotively attractive enough, that they finesse disagreement. Put differently, everyone would say that he or she is in favour of both rights. "Yep, I like the idea of a right to privacy and yep, I like the idea of a right to freedom of expression."

Of course, any ideas articulated in those sort of indeterminate terms will only finesse disagreement for as long as they remain moral abstractions.

As soon as you ask more specific questions -- where should we draw the line when it comes to campaign finance rules or hate speech provisions -- all the feel-good agreement evaporates. You have smart, reasonable, nice people disagreeing. You have lots and lots of moral "dissensus".

The same goes for any right that is phrased as an indeterminate moral abstraction, which is to say all the rights in any bill of rights. But there's a different problem that sometimes gets overlooked. You see, any list of moral abstractions-cum-rights will give rise to real life situations where those rights conflict with each other.

One right can be relied on to point one way and a different right to point the other way.

Take the following scenario. (And who can resist making use of it?) Start with the president of the body that oversees Formula One car racing, one Max Mosley.

Make him someone who enjoys sado-masochistic orgies with hookers, lots of hookers, five to be precise. Let there be some question of whether the bondage clothes worn by the women looked like Nazi uniforms. Throw in one of the big British tabloids. And just to round it off, let that president be the son of Sir Oswald Mosley, the politician and baronet who founded the British Union of Fascists in the 1930s.

Now what if one of the five hookers had been paid by the tabloid secretly to video this bondage session? And the tabloid then published it, along with a very racy headline I'll leave you to imagine.

Of course the above scenario has recently played out in fact in London. And the man at the centre of the bondage video (at least one supposes he was at the centre, though with six people involved, who knows?) decided to sue the tabloid.

The regular law of defamation wouldn't work because Max Mosley admitted that the main parts of the story about his long-time involvement in these sort of S&M sex sessions were true. And truth is a defence to defamation proceedings.

So instead he decides to sue by relying on the new statutory bill of rights, which incorporates the European Convention on Human Rights into English law.

The case boils down at its simplest to how to balance two of the articles. Article 8 grandly guarantees the "right to respect for one's private life". Article 10 protects the "right to freedom of expression". Neither right is meant to be absolute. Reasonable limits apply, though of course talk of "reasonable limits" is itself just another vague, amorphous notion that masks disagreement.

What counts as a reasonable limit and when is itself a massively contentious issue about which people disagree.

Anyway, I'm betting that readers will split pretty evenly on this. A lot of you will think this is just bedroom conduct (OK, a bedroom decorated as a dungeon conduct) that really isn't anyone's business save Mosley's and the five hookers. It's not as though the tabloids aren't a pretty distasteful lot themselves. And we know they're out to sell, sell, sell those papers. And talk of their acting in the public interest can reek of hypocrisy, let's be honest.

On the other hand, I'm betting there are also lots of free speech types out there who think this is in the public interest. The stuff caught on film was true. People are clearly interested because they buy millions of papers to read it. And if we start restricting the reporting of this sort of case, what about when Jeffrey Archer does roughly (sorry, no pun intended) the same sort of thing and lies?

Or what about when newspapers want to reveal the goings-on of former Democratic presidential candidate John Edwards? Doesn't a privacy law start to look like it has the potential to squash stuff that suits an awful lot of people in important positions (jobwise I mean)?

Well, the judge sided with the right to privacy crowd and awarded Mosley pound stg. 60,000, plus his legal costs (which may be another million or so pounds). That's a pretty hefty disincentive to publish in future.

I, personally, would have preferred it if the free speech side of the argument had prevailed. I'm a wannabe American in my attachment to wide open, vigorous free speech. I think good consequences for society follow from forcing people to have thick skins. And (as the Mark Steyn saga in Canada shows) a lot of well-intentioned limits on free speech collapse into elites telling the rest of us what we can and cannot say. If we're going to err, I'd err every time on the side of letting you say what you feel like and leaving it to others to rebut you.

Worse than that, though, far worse, is how this came to pass in Britain. Did they have a big debate about where to strike the balance between privacy and free speech concerns? Did they have select committee hearings around the country, or the kind of informed second-reading debate that preceded the liberalisation of abortion laws in Britain? Nope and nope.

In fact there isn't any privacy law in Britain. Or rather, the law that exists flows from the top English courts interpreting the European Convention on Human Rights. It flows from a bunch of unelected judges telling us how they, the judges, happen to think society ought to balance these two rights. The issue was never addressed by Westminster.

It's yet another example of the far-reaching -- and if you like to make these decisions yourself as a voter, then the negative -- effects of a bill of rights.

When proponents of bills of rights are trying to sell these things they only ever deal in vague, feel-good generalities. They never tell you that you're signing over these sort of "how to balance privacy against free speech" decisions, and a myriad others, to the judges. And why is that remotely attractive? As Max Mosley might say, "Beats me".

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