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Tim Luckhurst

Responsibility without Power

Lord Justice Leveson's constitutional dilemma

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Cover image - Prime Minister David Cameron at the Leveson Inquiry (© AP)
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“A free press is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny.... Under dictatorship the press is bound to languish, and the loudspeaker and the film to become more important. But where free institutions are indigenous to the soil and men have the habit of liberty, the press will continue to be the Fourth Estate, the vigilant guardian of the rights of the ordinary citizen.” **Sir Winston Churchill**

Introduction

Any Briton who doubted the place of newspapers in our national culture need only have watched the glorious closing ceremony of the London 2012 Olympic Games. As the show began, artistic director Kim Gavin's magnificent set was plastered with a giant Union Jack formed from huge sheets of magnified newsprint offering snippets from literature in glorious monochrome. The message was plain: news is one of the things that unites us; it helps to create a shared national narrative. Today, the tradition that creates that narrative is less secure than at any time since the Second World War.



Kim Gavin's newsprint set for the closing ceremony, London 2012 (© Gretel Ensignia)

As Britain awaits recommendations from the Leveson Inquiry into the culture, practice and ethics of the press, newspapers anticipate a moment that will define for the future the appropriate relationship between free speech and accountable government. The phone hacking scandal has exposed the depths some journalists plumbed in pursuit of sellable stories. These actions have taught Britons that newspapers can deprive people of their rights and dignity as well as speaking truth to power. Journalism faces a crisis from which it will not escape unchanged. Yet to be seen is whether the rights of Winston Churchill's 'ordinary citizen' can be preserved.

Journalism has been vilified and careers and reputations in the press, politics and the police swept away by a wave of opprobrium. And the scandal has spawned a growing list of criminal charges.ⁱ Small wonder then that appreciation of the service newspapers provide has been undermined and a consensus has emerged in favour of reforming press regulation. Responsible for defining that reform is the Leveson Inquiry, the two-part, judge-led inquiry established by the Prime Minister in July 2011 under the chairmanship of Lord Justice Leveson. He is charged with ensuring that British journalism's most deplorable excesses are brought to an end by 'making recommendations for a new, more effective way of regulating the press'.ⁱⁱ It is a daunting challenge, but we know he will do his duty promptly. Closing his last scheduled hearing on 24 July 2012, Brian Leveson made it plain that he will make detailed proposals 'as soon as I reasonably can'.ⁱⁱⁱ

One might reasonably ask, as has Richard Shillito of the law firm Farrer & Co., why Britain should have press regulation at all.^{iv} America has none, and its newspaper culture is committed to accuracy and ethical reporting. But that option is not on the table, and so one question about the nature of the anticipated proposals looms above all others: will they recommend self-regulation or statutory regulation? It is of fundamental constitutional significance.

Since 1949, when the first Royal Commission on the Press proposed a General Council of the Press to encourage responsible journalism and adjudicate reader complaints,^v

Parliament has consistently upheld the view accepted by Clement Attlee's radical Labour government that independence from the state is essential to the health of a free press. Now, in the wake of the hacking of Milly Dowler's telephone, that view is challenged. The Prime Minister sounded the death knell for the Press Complaints Commission, the newspaper industry's current self-regulatory body, when he announced the creation of the Leveson Inquiry.^{vi}

National newspaper editors acknowledge that a case has been made for regulatory change, but they remain committed to the ideal of self-regulation. Alan Rusbridger of *The Guardian*, the newspaper that exposed the hacking scandal, proposes a Press Standards and Mediation Commission capable of combining the mediation work of the Press Complaints Commission with a new role handling complaints that might otherwise go to court.^{vii} Paul Dacre, Editor-in-Chief of Associated Newspapers, suggests that an independent Ombudsman should head a board to replace the PCC. It should preside over a Complaints Committee and a Standards and Compliance Panel. The panel would have powers to investigate scandals, summon journalists and editors to give evidence, and issue reports that could result in fines.^{viii}

Regional newspaper editors who gave evidence to the inquiry expressed their support for self-regulation and highlighted their newspapers' record of ethical conduct.^{ix} They fear the imposition of complex and burdensome regulation designed to prevent behaviour they have neither committed nor contemplated.

And hostility to state involvement in the conduct of newspapers extends into the broadcasting industry too. Mark Thompson, the outgoing Director General of the BBC – which in common with all British broadcasters is subject to a regulatory code backed by statute – is not persuaded that similar strictures should be applied to newspapers: 'Plurality of regulation is itself an important safeguard of media freedom,' he explains. 'It is not obvious to me that newspapers that people can choose to buy or ignore — and which, should they break the law, can always be prosecuted after the fact — should be held to the

same level of continuous supervision and accountability as broadcasters who reach out into every household in the land.’^x

To the Roman poet Juvenal’s question: ‘Quis custodiet ipsos custodes?’ (‘Who will guard the guards themselves?’), journalists reply that the guardian must not be the institution over which newspapers are obliged to exercise scrutiny in the public interest. If the government holds journalism to account, then who will hold government to account?

Ranged against this candid hostility is an alliance determined to persuade Lord Justice Leveson that no objection, constitutional or moral, exists to statutory regulation of the press. This, its most determined members seek to achieve by asserting that statutory regulation and self-regulation are not really different at all.

Professor Brian Cathcart, founder of the Hacked Off campaign that sought a formal inquiry and has contributed energetically to the debates aired before Lord Justice Leveson, thinks the case has been made: ‘[T]he old, binary view of self-regulation versus statutory regulation was no longer accepted [by most participants in the inquiry]. The many shades of grey in-between – expressed in terms of diverse models of regulation borrowed from a great variety of spheres, or under general headings such as independent regulation or co-regulation – were recognised.’^{xi}

Among the clearest examples of such blurring of distinctions is ‘*A Free and Accountable Media*’,^{xii} the plan submitted to the Leveson Inquiry by the Media Standards Trust. It proposes self-regulation backed by statute and supervised by an independent auditor with statutory authority. Martin Moore, director of the trust, describes statutory underpinning as ‘a genuine solution to the problem of how to maintain self-regulation, within a statutory framework that ensures independence, both of government and industry’.^{xiii}

One member of the inquiry team has hinted that he may take a similar view. Questioning Lord Hunt, interim chairman of the residual PCC, Robert Jay QC, lead counsel to the

inquiry, declared that attempts to draw a distinction between statutory and non-statutory regulations were ‘tilting at a windmill, frankly, which simply doesn’t exist’. Mr Jay said that, if primary legislation specified precisely which aspects of newspaper journalism it sought to control and which it did not, ‘then this wouldn’t be censorship, it would merely be doing that which your [enhanced self-regulatory] system aims to do in any event’.^{xiv}

Such sympathy for regulation backed by statute seems to be based on three assumptions:

- i) The belief that newspapers are worse than they have ever been and must therefore be controlled in a manner that Parliament has regarded throughout the age of mass suffrage and representative democracy as incompatible with fundamental liberties;
- ii) Elitism stemming from a conviction that readers of popular newspapers that interest themselves in celebrity culture should be encouraged to read less entertaining fare instead; and
- iii) Certainty that an emphatic distinction can and should be drawn between the public interest and what the public is interested in.

Dreadful newspapers...

The notion that modern newspapers are uniquely dreadful is simply wrong. British national newspapers have committed occasional appalling errors throughout their recent history. Among the most regrettable was committed by a prestigious broadsheet, *The Times*, between 1935 and 1939. Geoffrey Dawson, its editor, was a fellow of All Souls College, Oxford; a gathering place for senior establishment figures who promoted friendship with Germany.^{xv} So determined was Dawson to champion Prime Minister Neville Chamberlain's zealous appeasement of Hitler that *The Times* cut and distorted despatches from Norman Ebbut, its Berlin Correspondent,

Appeasers united - Geoffrey Dawson of *The Times* sees Prime Minister Neville Chamberlain off to meet Hitler in Munich, 1938



in which Ebbut described the brutality of the Nazi regime.^{xvi} In its enthusiasm for appeasement, Dawson's *Times* betrayed the most cherished principle of public interest journalism – that newspapers should hold power to account – by making itself a meek and compliant tool of government policy. Its failure was particularly damaging because it was regarded as the authoritative voice of the British establishment.

The Times recovered from this shameful episode without external regulation and emerged a stronger and more widely respected newspaper. Other examples suggest that its ability to correct error was neither unique nor exceptional. The abject failure of British newspapers to provide an accurate depiction of the mechanised slaughter that killed millions during the First World War is widely recognised by historians. Self-censorship was rife. Ernest Hemingway captured it when he wrote: '[I]t was the most colossal, murderous, mismanaged butchery that has ever taken place on earth. Any writer who said otherwise lied. So the writers either wrote propaganda, shut up, or fought.'^{xvii} Readers were not impressed and, again, the press learned from its own failure. Between 1939 and 1945 British newspapers did more to challenge orthodoxy and reveal error, so performing their duty to the public.

...and attempts to control them

In the years following the American Declaration of Independence in 1776 and the French Revolution of 1789, revolutionary ideas of democracy and the rights of man swept Britain. The ruling elite faced the terrifying possibility that bloody anarchy would spread to these shores from Lexington, Massachusetts and Paris. Britain's ruling class lived in fear of what the poet Alfred Tennyson (1809-1882) called the 'red-fool fury of the Seine'^{xviii} Would the 'mad, bad and dangerous people'^{xix} of Britain, gathered in unprecedented numbers in the growing towns and cities and emboldened by alcohol, guillotine them and seize power too?

The birth of radical newspapers such as *Destroyer*, *Republican* and *Northern Star* greatly intensified the fears of the rich and powerful. These titles promoted radical ideas and reached large audiences. Men who were literate would read them to groups who were not. Pubs rented out newspapers at a fraction of the cover price to people who could not afford to buy them.^{xx}

Government responded as it had responded since Gutenberg's printing press arrived in this country at the end of the 15th century. It tried to crush the radical press, this time using laws prohibiting seditious and blasphemous libel, which made it possible to prosecute almost any criticism of the prevailing social order. When juries proved reluctant to convict in what were blatantly political trials, ministers tried a different approach: they imposed greatly increased taxes - stamp duties - on newspapers with the intention of making them so expensive that their readership would be restricted to classes of the population who could be trusted to support the status quo.^{xxi}

This failed too. The radical newspapers refused to pay stamp duty and continued to promote their demands. The poor declined to have their access to opinion denied by a hierarchy that despised them. They consumed avidly what were now illegal publications that promised, in the words of Henry Hetherington, editor of *Penny Papers for the People*: 'It is the cause of the rabble we advocate, the poor, the suffering, the industrious productive classes... We will teach this rabble their power - we will teach them that they are your master.'^{xxii}

After 1815 there emerged in Britain a range of illegal newspapers determined to promote radical political ideas to working-class audiences.^{xxiii} Government repression increased their popularity. They contained little news, relying on polemics written by activists to achieve unprecedented circulations. But enthusiasm for opinions that were widely disparaged as un-British did not destroy them. Newspapers would not be as popular again until parliament abandoned repression in the belief that a free market in newspapers might help high-quality titles to reach a wider audience and educate working-class opinion away from revolutionary politics and towards reform.

The failure of elitism

Parliament repealed stamp duty in 1855 and a tsunami of new titles flowed onto the market. But Victorian daily newspaper editors did not immediately grasp the opportunity to achieve mass circulations: where politicians before them had tried to censor opinion, editors now sought to preach. The result was dull newspapers. Dense with verbatim reports of parliamentary speeches and wordy exegeses on foreign policy, they made little sense to millions of potential purchasers who had not studied Latin at a public school. Describing his impression of them R.D. Blumenfeld, a future editor of the *Daily Express*, wrote: ‘When I first came to Fleet Street in 1887, the morning papers were great heavy-sided blanket sheets full of dull advertisements and duller news announcements. They all looked alike and were equally heavy.’^{xxiv}

Women’s interests were ignored entirely. Worst of all, most newspapers were slavishly wedded to one or other of the two political parties that dominated Victorian politics, the Liberals and the Conservatives. In *Iolanthe*, their 1882 comic opera, W.S. Gilbert and Arthur Sullivan wrote: ‘Every boy and every gal that’s born into the world alive is either a little Liberal or a little Conservative.’^{xxv} They might as well have been describing newspapers.

Alfred Harmsworth, founder of the publication that would do more than any other to define the characteristics of mass-market journalism, described the flavour of these titles in scathing terms: ‘*The Times* went on its own mysterious way in the island of Printing House Square; *The Daily Telegraph* continued its gentle rivalry with the *Standard*; the *Morning Post* was aloof; the *Daily News*, political and literary, was the leading radical organ... Their lack of initiative and their subservience to Party were a direct invitation to the assault administered by the *Daily Mail*.’^{xxvi}

Harmsworth did not invent the New Journalism, a term coined by the British poet and cultural critic Matthew Arnold who instantly chided it for being ‘feather-brained’,^{xxvii} but he did it more successfully than any of his predecessors. The



Alfred Harmsworth,
later Lord
Northcliffe, founder
of the *Daily Mail*
(© Daily Mail)

Daily Mail sold 397,215 copies of its first edition and by 1902 had the largest circulation in the world, selling more than one million copies a day. Competition was inevitable, and in April 1900 it arrived in the form of C. Arthur Pearson's *Daily Express*. Pearson's launch promise emphasised the value of political autonomy. He said: 'It will be the organ of no political party nor the instrument of any social clique.'^{xxviii}

These pioneers of popular journalism invented the art of selling news, opinion and entertainment to huge readerships. They helped make Britain a country in which, for a penny or less, millions of hard-working people

could become better informed than they had ever been. They prepared the emerging electorate for transition between the partial suffrage of the Victorian era and the universal suffrage of the twentieth century. Above all, they made newspapers independent. They broke the sordid tradition of state subsidy and bribery that had tainted the industry since the young William Pitt first attempted to manipulate newspapers in his favour.

The tradition they invented has served this country admirably. Commercially successful, popular journalism has been a crucial bulwark of British democracy for more than a century. Freed by profit from reliance on state or party it has represented public opinion courageously and without deference. Among the boldest examples is the conduct of the left-of-centre *Daily Mirror* during the darkest days of the Second World War.

The winter of 1940/41 was a harsh and ominous time for ordinary Britons. Invasion and defeat remained live possibilities; enemy aliens were interned; British fascists

imprisoned; and 'Fifth Columnists' suspected. In January 1941 night-time temperatures frequently fell below zero, freezing the water in firemen's hoses as they fought the consequences of German bombing. This was intense. Harbours, port installations and housing were hit in Cardiff, Bristol, Portsmouth, Southampton and London. The casualty toll for the month was 922 dead and 1,927 seriously injured. Intensifying the misery was an acute shortage of food. The Lend-Lease agreement with America would not deliver its first consignment of food to these shores until May. The diet available in early 1941 was the worst of the war. In January the meat ration was cut from two shillings and twopence per week to one shilling and twopence.^{xxix}

The outlook for newspapers was similarly sombre. On 23 December 1940 the Home Secretary, Labour's Herbert Morrison, had submitted to the War Cabinet a memorandum proposing suppression of the Communist newspaper, the *Daily Worker*.^{xxx} A ban was imposed on 21 January 1941 and lasted until 7 September 1942. But, despite such vivid evidence that the government was prepared to suppress criticism it deemed liable to have 'a bad effect upon the morale of the people',^{xxxi} the *Daily Mirror* did not hesitate to speak truth to power on behalf of its readers. Listing its demands, the mass-market title insisted that ministers: make rationing scrupulously fair; cut food prices; nationalise railways and coal mines; increase wages; enhance air-raid shelter provision; and improve welfare services for armed forces personnel and their families. Lest Conservative members of the wartime coalition imagine the criticism was directed exclusively at them, the *Mirror's* political correspondent left no room for ambiguity. Working people had 'too many grievances the Government leaves unanswered,' he explained. 'They expected Labour Ministers in the government to be their champions. They are disappointed in them. Labour Ministers behave like pale imitations of Tory Ministers.'^{xxxii}

Such independence at a time of national crisis made the *Mirror* immensely popular. Its circulation rose from 2.5 million in 1939 to 3.7 million after the war. Other mass-circulation titles that proved willing to accept security censorship (their

duty not to reveal facts that might assist the enemy) but not policy censorship, made similar gains.^{xxxiii}

Lessons modern legislators might take from these giants of popular journalism include that public opinion likes its newspapers to be entirely independent of the state. Beyond that core requirement British readers demand more than high culture, politics and abstract theory. We like to be entertained as well as informed. J.A. Spender, editor of the *Liberal Westminster Gazette* which did not adapt to the challenge of the era of expanded suffrage and mass literacy into which the *Mail* and *Express* were born, said Harmsworth was ‘the only completely convinced democrat that I ever knew. He did really believe that things ought to be decided by the mass opinion about them, and to find out what that was or what it was going to be and to express it powerfully, seemed to him not only profitable, but right and wise.’^{xxxiv} Spender was right in one important respect: popular newspapers could not afford to take their readers for granted. Future owners of the *Daily Express* and the *Daily Mail*, Lords Beaverbrook and Rothermere, were to have that message forcefully rammed down their throats in famous circumstances.

The most notorious example of abuse of power by popular newspaper owners occurred during the St George’s parliamentary by-election of 1931. Not content with influencing politics, Beaverbrook and Rothermere backed their own candidate against the Conservative nominee. It was this that prompted Stanley Baldwin, the Conservative leader, to borrow a choice phrase from his cousin Rudyard Kipling and accuse the newspaper owners of seeking ‘power without responsibility – the prerogative of the harlot throughout the ages’. Voters were equally unimpressed. Despite a ferocious barrage of propaganda from the most popular newspapers in the country they elected Baldwin’s Conservative candidate, not the newspaper barons’ sponsored poodle. Again the message was emphatic: readers did not just prefer their newspapers to remain independent, they wanted titles that would pursue their interests not just their owners’ whims and prejudices. A fresh source of news was to make this additionally important.

The relationship with broadcasting

Among the weaker arguments put forward by supporters of newspaper regulation backed by statute is that statutory underpinning of the regulation of broadcasting has not destroyed the quality of British broadcasting, so it should not harm newspapers.^{xxxv} This case is flawed in two crucial respects. First, it overlooks the different roles played by newspaper and broadcast news. Second, it ignores entirely the symbiotic relationship between newspaper and broadcast journalism.

The BBC learned the price of a formal relationship with government in its infancy. The 1926 General Strike disrupted newspaper production and offered the new broadcaster a chance to show that it could report news in a way that was valuable to the public. But government, which had licensed the BBC as the only broadcaster permitted to use the airwaves, put it under immense pressure to back the state against the strikers. John Reith, the first Director General, is rightly credited with resisting ministerial attempts to seize control of radio. Less frequently acknowledged is that he did so by defining impartiality in a manner calculated to avoid offending the state.^{xxxvi}



Photographers in Downing Street during the General Strike, 1926 (© TOPIX)

Winston Churchill, Chancellor of the Exchequer in Prime Minister Stanley Baldwin's Conservative administration, yearned to commandeer the BBC and place it under government control. Reith avoided this fate by doing nothing to challenge the government's version of events. The BBC reported what was happening in the country, but Labour and TUC leaders were denied access to the airwaves as was the Archbishop of Canterbury. Reith wrote that: '[S]ince the BBC was a national institution, and since the government in this crisis was acting for the people...the BBC was for the government in the crisis too.'^{xxxvii}



ITV leads the way - Bruce Forsyth and friends on Sunday Night At The London Palladium, 1955

The BBC has matured into a glorious national asset since 1926, but only after a long struggle. Until the demands of wartime morale compelled it to entertain, with shows such as ITMA (It's That Man Again) and its colourful cast led by Tommy Handley as the Minister for Aggravation at the Ministry of Twerps,^{xxxviii} it was dull and not widely trusted. Its post-war television services were lifeless until the upstart challenger, ITV, taught it new tricks by wowing viewers with shows such as Beat The Clock and Sunday Night At The London Palladium, which provided an early opportunity for the young Bruce Forsyth. ITV's early success offers another example of the popular beating the condescending, not just in terms of profitability, but by its willingness to innovate and adapt.

Of course, the BBC has learned that lesson too. Its coverage of London 2012 showcased broadcasting excellence that is recognised around the world. But the corporation's relationships with governments of all parties remain delicate. It is perpetually anxious to secure renewal of its charter and to

obtain a generous licence fee settlement. This sensitivity creates a cautious editorial culture. The BBC produces news to rival or beat the best made by broadcasters anywhere, but it breaks relatively few original stories and is constrained in what it can do to obtain them. Mark Thompson acknowledges that: ‘[The BBC] would never have paid for the stolen information that helped *The Daily Telegraph* to uncover the MPs’ expenses scandal. The privately-owned *Telegraph* took a different view and was able to publish a series of stories that, taken as a whole, were clearly in the public interest.’^{xxxix}

It is one example. There are many others. The BBC could not have sent the ‘cod fax’ which allowed *The Guardian* to prove that Jonathan Aitken, the Conservative cabinet minister, had lied in court – an offence for which he was jailed for 18 months following his conviction for perjury and perverting the course of justice.^{xl} It could not have undertaken the investigation through which the *News of the World* exposed match fixing by the Pakistan cricket captain Salman Butt and bowlers Mohammad Asif and Mohammad Amir. It would not have identified a senior IRA commander and arms smuggler in the way my friend and colleague, the late Alan Ruddock, did for *The Sunday Times*.^{xlii} It could not have named those it considered guilty of murdering Stephen Lawrence, as the *Daily Mail* famously did.^{xliii}



Such restraint does not harm the public’s access to information because a diverse range of independent newspapers operates

according to different rules. The partnership between newspapers and broadcasters provides a vital service to British democracy.

In the second half of the 20th century, all Britain's licensed broadcasters learned to hold establishment figures and institutions to account. When evidence supports their case, they stand up to government and confront power with courage and confidence. They have developed particular expertise in the reporting of major events, news analysis and investigation of social and consumer problems. They specialise in current affairs debate and discussion and play a crucial role in promoting representative democracy. The prime ministerial debates broadcast for the first time in British history during the general election of 2010 offer a particularly fine example. These reached audiences of: 10.3 million for ITV on 15 April 2010; 4 million for Sky on 22 April; and 8.6 million for the BBC on 29 April.^{xliv}

From timid beginnings British broadcast journalism has matured into world-class excellence, but familiarity with its internal culture and practice reveals that, throughout its journey, it has been immensely strengthened and assisted by newspaper journalism. When Mark Thompson writes about plurality of regulation as 'an important safeguard of media freedom', he is not making a trivial point. Broadcast journalism constantly picks up from newspaper journalism stories the broadcasters themselves would not originate.

Some newspaper editors resent this as parasitism. They are entitled to be angry when broadcast newsrooms borrow newspaper reporters' original work and fail to give the author credit. But there is immense value to the public sphere in the cross-fertilisation that occurs when good newspaper stories are brought to wider attention. Even more benefit accrues when radio and television interviews and analyses advance and develop newspaper stories creating a virtuous circle of revelation and understanding.

This interplay between printed and broadcast news is essential to top news and current affairs outlets such as Radio 4's Today

Programme, Channel 4 News and BBC 2's Newsnight. Their journalists consume newspapers as voraciously as whales eat plankton. But it would be deluded to assume that broadcasting benefits only from weighty news in intensely serious newspapers. As an output editor on the Today Programme it was made plain to me that the *Daily Mail* was the most popular title among our listeners.^{xlv} I knew that for excellent coverage of topics including crime, popular culture and sport I had to read successful, popular newspapers. Mass-market journalism also helped me understand the political priorities that motivate a majority of my fellow citizens.

Popular newspapers invariably set the news agenda with regard to human-interest stories about celebrities and people who are in the public eye. From the glamour of Royalty to the intricate functioning of the football transfer market, they are the first port of call for radio and television journalists seeking stories that will entertain, engage and hold their audience. Upmarket radio and television outlets turn titillating tabloid scoops into issues, thereby satisfying themselves that they have converted a story the public is interested in into one that is in the public interest.

Examples of this process are legion. Newspaper reporters and photographers pursued Princess Diana for pictures and gossip that would sell copies. The Today Programme discussed the damage her behaviour inflicted on the Royal Family's public image: would it undermine popular support for the monarchy? Popular journalism provokes outrage among its readers by depicting drunken hedonism among undergraduates at top universities. The broadcasters discuss morality and privilege. Popular journalism applies the sanction of public opinion^{xlvi} to individuals and their conduct by telling compelling stories about people. Elite news programmes – and newspapers – use these tales as pegs upon which to hang debates and discussions about economic and social trends.

This relationship undermines simplistic distinctions between the public interest and what the public is interested in. It is plain, as the newspaper and periodical industry's code of conduct explains, that detecting or exposing crime, protecting

public health and safety and preventing the public from being misled by individuals or organizations are all in the public interest.^{xlvii} Less widely acknowledged but equally true is that reporting about the activities of celebrities and public figures may also serve these purposes and often does. Issues brought to public attention through stories about people blend the public interest with what the public enjoys.

This matters immensely because many supporters of statutory regulation argue that public interest journalism would not be damaged in any way by imposing on popular newspapers an equivalent of the OFCOM Broadcasting Code's rules for public service broadcasting. But it would be damaged. Imposing such a straitjacket would prevent or delay rule-breaking in the public interest. It would neuter the capacity of popular newspapers to do what they do best, namely, to pursue their readers' interests passionately and sometimes aggressively within the law – which includes the obligation to balance respect for private and family life imposed by Article 8 of the European Convention on Human Rights with the right to freedom of expression guaranteed by Article 10.^{xlviii}

Conclusion

The Leveson Inquiry's meticulous work has made stark one conclusion that is profoundly inconvenient to proponents of stricter regulation underpinned by statute. The lawyer Richard Shillito expresses it well: 'All or virtually all the egregious behaviour which has given rise to calls for better press regulation is either actionable or contrary to the criminal law. Breach of privacy, copyright, confidence, harassment, data theft, forgery, hacking of computers and phones, contempt of court/Parliament – these are all covered by existing law.'^{xlix}

It is infinitely regrettable that the Metropolitan Police did not pursue energetically additional evidence that emerged from the convictions in 2007 for phone hacking of Clive Goodman, royal editor of the *News of the World*, and Glenn Mulcaire, private investigator.^{li} Former Assistant Commissioner John Yates has apologised for that failure. Had it not occurred, the crisis that turned the hacking of Milly Dowler's telephone into a moral panic and spawned the Leveson Inquiry might not have taken place.

So, one immensely powerful argument against state-sponsored regulation of the press is that appropriate remedies – and severe penalties – exist already for all of the offences that have been discussed at the Leveson Inquiry. Journalists are not at fault for the initial failure to apply them, though their editors are keenly aware that the police are unlikely to repeat their mistakes.

But the milk is spilt. There will be stronger regulation. The Press Complaints Commission's abject failure to investigate effectively hacking at the *News of the World* – compounded by its ill-judged criticism of *The Guardian* for pursuing a story of luminous importance – guaranteed it. Lord Justice Leveson's observations during the inquiry suggest that he accepts entirely the need for absolute independence from government, Parliament and state. They also suggest that he is not yet persuaded that such independence is incompatible with a statutory backstop.

It is hard not to sympathise with his dilemma. Leveson has responsibility without power. He can only recommend: Parliament must decide. He may be tempted towards a solution that three Royal Commissions since 1945 have rejected. A unique alliance of celebrities, academics and innocent victims of atrocious journalism is urging him in that direction.

This pamphlet has sought to remove the debate from the atmosphere of crisis in which it was framed. By taking the long view, it shows that state involvement in the regulation of journalism does not engender public trust. In the world before the internet, newspapers were trusted most when they stood apart from the state and spoke on behalf of their readers. Today the internet is cherished for the same reason. And, cherish it or not, pragmatists should certainly note that its power and reach renders statutory regulation of professional newspapers an almost absurdly old-fashioned idea.

Supporters of state regulation castigate its opponents as 'first amendment fundamentalists'. They mean that we support the U.S. Constitution's categorical guarantee that government may make no law abridging the freedom of the press. But our history suggests that if Britain had a written constitution this country might long ago have adopted a similar guarantee. It might reasonably have done so because state supervision of newspapers offends their readers and journalism serves democracy best when its ethics are those the public consider decent.

Regulation underpinned by statute might satisfy a short-term appetite to avenge the suffering of innocent victims. It might please the few misguided MPs who still imagine that the press was wrong to shine light into the murky world of parliamentary expenses. But no matter how benignly intended or carefully designed it would have consequences infinitely worse than any good it could do.

Britain's democracy is distinctive because executive and legislature are not legally separate as they are in the United States of America and other constitutional democracies. Our ministers sit in the House of Commons and lead a parliamentary majority. This hybrid arrangement gives a British government unparalleled power to ensure its legislation is passed; a level of executive power that is absent from other democratic traditions. To balance that power this country has evolved a system in which additional checks and balances are exercised in the public interest by the courts and the press. Statutory regulation of British newspapers would create a constitutional absurdity: parliamentary scrutiny of a body the electorate depends upon to scrutinise parliament. The danger could not be reduced by the false compromise of statutory underpinning. Any state involvement in the regulation of newspapers would restrict their capacity to play their historic role as a bulwark of our fundamental freedoms.

The details of statutory regulation are infinitely less important than this precious British constitutional principle. *The Times* made this plain in a leader column published on the day its editor, James Harding, gave evidence to the Leveson Inquiry. 'If any future regulator is run, overseen, empowered or appointed by government,' it explained, 'then politicians will loom over the press... And even a rewriting of the regulatory system recognised by an Act of Parliament has its dangers: a Leveson Act would give Westminster a mechanism for legal control over the press. If MPs decide they do not like the press they are getting, they could easily amend the Act. It gives politicians a foot in the door.'^{lii}



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State intervention in the regulation of the British press would delight them

As Sir Christopher Meyer, former British Ambassador to the United States of America, explained in his admirably combative testimony to the Leveson Inquiry: ‘Once you allow the state into this area, whatever the best intentions may have been, you are by definition standing on the top of a slippery slope. Twenty, twenty-five years later, things change, politics change. It is quite possible a less permissive and liberal state, less conscious of our freedoms, might try to take advantage of that legislation to do things that would be offensive to the principle of freedom of expression.’^{liiii}

Soldiers call it mission creep, and statutory regulation would not just provide a tool for illiberal politicians at home. Authoritarian rulers everywhere would exploit the slightest hint of state involvement in the regulation of the British press. Westminster’s statutory backing for a Press Ombudsman would become President Putin’s State Censorship Committee, Robert Mugabe’s Ministry of Truth or Mahmoud Ahmadinejad’s Board of Righteousness. Look, they would gloat, the mother of democracy understands the need for the state to ensure that journalists behave. We agree.

Surrendering to the alliance that favours the maximalist position would be easy. There is almost someone for everyone in this unique coalition of good intentions, fringe activism and Hollywood glamour. And Hugh Grant has been impressive in his role as celebrity front man for the Hacked Off campaign. But, beyond noting that this is among the

most incongruous pairings since Quasimodo met Esmeralda, it is important to remember that he is an actor who has not hesitated to use popular newspapers for publicity when the deal suited him.

In the debate this pamphlet hopes to inform, nobody should be astonished to see emerging alliances of convenience in favour of censorship. The authoritarian right and the ideological left hold several prejudices in common; though their similarities are rarely as apparent as on the question of press regulation. Potentially shocking though is the possibility that sincere liberals may soon find themselves blamed for an outcome they would despise. Were

the superb work *The Guardian* did to expose phone hacking to result in state-supervised regulation of British newspapers, the injustice would be grotesque. An outcome that great newspaper deplors in every corner of the world could never be described as a fitting conclusion to its most courageous and laudable campaign.

An officially regulated press is the glib, easy, dangerous solution. It would spell the slow, painful death of a raucous, audacious and impertinent press able to speak truth to power on behalf of its readers and entertaining enough to secure their loyalty. A few individuals who already have our collective sympathy and who have received or will receive richly deserved compensation might enjoy the spectacle. We would all be the losers.



Hugh Grant and Elizabeth Hurley
(© Tim Rooke/
Rex Features)

Notes

- ⁱ <http://www.bbc.co.uk/news/uk-18961228>.
- ⁱⁱ The full terms of reference can be found at: <http://www.levesoninquiry.org.uk/about/terms-of-reference>.
- ⁱⁱⁱ <http://www.bbc.co.uk/news/uk-18975682>.
- ^{iv} Richard Shillito, “Why Regulate the Press and Media at all”, 5 July 2012, <http://www.farrer.co.uk/News/Briefings/Why-regulate-the-press-and-media-at-all/>.
- ^v Royal Commission on the Press (London: HMSO, 1949), Cmnd 7700, paras 682-4.
- ^{vi} “David Cameron sounds death knell for PCC”, *Press Gazette*, 8 July 2011, <http://www.pressgazette.co.uk/story.asp?storycode=47456>.
- ^{vii} Alan Rusbridger, “Hacking away at the Truth: Alan Rusbridger’s Orwell Lecture”, University College, London, 10 November 2011, <http://www.guardian.co.uk/media/2011/nov/10/phone-hacking-truth-alan-rusbridger-orwell>.
- ^{viii} Paul Dacre, “Proposals for the Regulation of the Press: Submission to the Leveson Inquiry”, June 2012, <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Submission-by-Paul-Dacre1.pdf>.
- ^{ix} <http://www.newspapersoc.org.uk/19/jan/12/regional-editors-appear-at-leveson-inquiry>.
- ^x Mark Thompson, “Journalists must be allowed to break the rules”, *The Times*, 22 July 2011, <http://www.thetimes.co.uk/tto/opinion/columnists/article3101534.ece>.
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- ^{xii} <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/06/MST-A-Free-and-Accountable-Media-21-06-12.pdf>.
- ^{xiii} Martin Moore, 21 June 2012, <http://mediastandardstrust.org/mst-news/a-free-and-accountable-media-report-by-the-media-standards-trust/>.
- ^{xiv} Leveson Inquiry, transcript of morning hearing, witness Lord Hunt, 10 July 2012, <http://www.levesoninquiry.org.uk/hearing/2012-07-10am>.
- ^{xv} A.L. Rowse, *All Souls and Appeasement* (London: Macmillan, 1961).
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- ^{xviii} Alfred Tennyson, *In Memoriam*, <http://www.netpoets.com/classic/poems/064097.htm>.
- ^{xix} Boyd Hilton, *A Mad, Bad and Dangerous People? England 1783-1846* (Oxford: Oxford University Press, 2006).

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- ^{xx} See *inter alia* James Curran and Jean Seaton, *Power without Responsibility*, Sixth Edition (Oxford: Routledge, 2007) 6-17.
- ^{xxi} Cited in George Boyce, James Curran and Pauline Wingate (eds), *Newspaper History from the 17th Century to the Present Day* (London: Constable, 1978), 20.
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- ^{xxiii} Mick Temple, *The British Press* (Maidenhead: McGraw-Hill, 2008), 16.
- ^{xxiv} Cited in Dennis Griffiths, *A Century of Journalism 1900-2000* (Oxford: Coranto Press, 2012), 3.
- ^{xxv} W.S. Gilbert and Arthur Sullivan, *Iolanthe, or the Peer and the Peri*, first produced 25 November 1882, libretto, <http://diamond.boisestate.edu/gas/iolanthe/iolib.pdf>.
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- ^{xxvii} Kate Campbell, “W.E. Gladstone, W.T. Stead, Matthew Arnold and a New Journalism: Cultural Politics in the 1880s”, *Victorian Periodicals Review*, 36, no.1 (2003): 20-40.
- ^{xxviii} Dennis Griffiths (2012), *op.cit.*, 197.
- ^{xxix} Angus Calder, *The People’s War: Britain 1939-45* (London: Jonathan Cape, 2008), 230-1.
- ^{xxx} WP (40) 482, 23 December 1940.
- ^{xxxi} *Ibid.*
- ^{xxxii} *Daily Mirror*, 13 January 1941.
- ^{xxxiii} See Tim Luckhurst, “Excellent but Gullible People: the Press and the People’s Convention”, *Journalism Studies*, 1 May 2012, <http://www.tandfonline.com/doi/abs/10.1080/1461670X.2012.680810>.
- ^{xxxiv} Cited in Peter Catterall, Colin Seymour-Ure and Adrian Smith (eds), *Northcliffe’s Legacy: Aspects of the British Popular Press 1896-1996* (Basingstoke: Macmillan Press, 2000), 19.
- ^{xxxv} See *inter alia* Steven Barnett, *The Rise and Fall of Television Journalism* (London: Bloomsbury Academic, 2011).
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- ^{xli} <http://www.bbc.co.uk/news/uk-15185353>.

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- ^{xlii} [http://en.wikipedia.org/wiki/Thomas_Murphy_\(Irish_republican\)](http://en.wikipedia.org/wiki/Thomas_Murphy_(Irish_republican)).
- ^{xliii} <http://www.dailymail.co.uk/news/article-2080159/Stephen-Lawrence-case-How-killers-finally-brought-justice.html>.
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- ^{xlv} Tim Luckhurst, *This is Today: a Biography of the Today Programme* (London: Aurum Press, 2001).
- ^{xlvi} The concept is from utilitarian philosophy. See *inter alia* Adam Smith's *Theory of Moral Sentiments*, Jeremy Bentham's *Theory of Legislation* and J.S. Mill's *On Liberty*.
- ^{xlvii} http://www.editorcode.org.uk/the_code.html.
- ^{xlviii} <http://www.hri.org/docs/ECHR50.html>.
- ^{xlix} Richard Shillito, *op.cit.*
- ⁱ <http://news.bbc.co.uk/1/hi/uk/6301243.stm>.
- ⁱⁱ <http://www.bbc.co.uk/news/uk-14080775>.
- ⁱⁱⁱ <http://www.thetimes.co.uk/tto/public/article3289130.ece>
- ⁱⁱⁱⁱ Cited in <http://www.telegraph.co.uk/news/uknews/leveson-inquiry/9051823/Leveson-Inquiry-state-regulation-of-the-press-offensive-says-Sir-Christopher-Meyer.html>.