

Privacy and the Press: Is state regulation in the public interest?

Winston Churchill's remark that 'a free press is the unsleeping guardian of every other right that free men prize' reflects the vital role our newspapers play in holding the government to account. Maintaining a free press is therefore central to the continuing health of our democracy and unquestionably in the public interest. However, in light of the evidence of press intrusion presented to Lord Justice Leveson, it is plain that the press is also capable of riding roughshod over the rights of free men, and that it is additionally in the public interest to protect individuals' privacy. This essay will consider whether a free press and the protection of privacy are mutually exclusive, before addressing the age old conundrum at the heart of this debate: who will guard the guardians?

The British conception of a free press does not equate to allowing the press to act entirely unconstrained. On the most basic level newspapers are subject to the rule of law. Indeed, many opponents of state regulation are right to point out that the existing criminal law covers many of the press's recent worst excesses, including phone hacking.

More significantly, though, laws on inciting racial hatred, contempt of court and libel reveal a readiness to kerb the press's freedom of expression. It seems that the British take a typically pragmatic approach to press freedom, valuing it primarily for the constitutional advantages it confers rather than for ideological or philosophical reasons. Thus, provided the press's ability to hold to account is not affected, limits to freedom of expression are accepted in order to pursue other important public policy objectives, such as racial harmony, a well-functioning legal system and the protection of individuals' reputations.

There is therefore nothing inherently inconsistent with our notion of press freedom and protecting privacy by placing limits on freedom of expression. It clearly serves a desirable public policy objective; indeed, the Editors' Code of Practice, written by the press itself, accepts that 'everyone is entitled to respect for his or her private and family life'. The

question is how these or similar rules can be enforced without threatening the press's constitutional role.

For many the answer remains self-regulation. This despite the broad consensus that the Press Complaints Commission (PCC) has been a failure; its strongest sanction of requiring the publication of an adverse decision lacks bite and *The Daily Express* and others have simply opted out. Lord (Guy) Black's proposals for a beefed up form of self-regulation seek to address some of the PCC's failings but an inherent flaw persists.

It is a rigorously enforced principle of our legal system that no man may be a judge in his own cause, and rightly so. Without it, perceived bias would undermine public confidence and actual bias would undermine justice. Of the 17 members of the PCC resolving complaints, seven are serving editors. Unsurprisingly, public confidence in the PCC's impartiality is almost non-existent. Worse still, according to its own statistics for 2011, in only 20 of 7341 complaints did the PCC find that the Editors' Code of Practice had been breached and a suitable remedy not offered.¹ Statistics do not always tell the whole story but these figures are stark, and seem to support the considerable anecdotal evidence that the PCC treats complainants unjustly. There is no reason why this should be any different under Lord Black's proposals in which five of the 13 members of the commission would be serving editors; or indeed under any form of self-regulation, which by definition is not impartial.

The situation is exacerbated by the commercial context. Newspapers are operating in an increasingly difficult market, with circulation threatened by the internet and other new media. With intrusive photographs and stories seemingly a sure way to boost sales, we can no more expect the newspaper industry to enforce privacy rules, than turkeys to vote for Christmas.

The alternative is a regulator with statutory powers to impose sanctions on the press. Certainly, such a regulator would be more effective in protecting privacy. However, opponents warn that it would damage press freedom and introduce the spectre of state

¹ http://www.pcc.org.uk/assets/80/PCC_Complaints_Statistics_for_2011.pdf

interference in journalistic output. These are serious objections but they do not stand up to scrutiny.

A statutory regulator would be independent. Simply because a body is created by statute, it does not follow that it is open to influence by the executive. Otherwise, the position of the Electoral Commission, which regulates the funding and finance of political parties, would threaten our democracy. Indeed, the very Act of Parliament creating the Electoral Commission provides the statutory safeguards to ensure that it operates independently. A press regulator could have similar or stronger statutory safeguards to preserve its independence and prevent political interference.

Furthermore, there is no suggestion that the regulator should have the power to issue injunctions preventing the publication of stories. Crucially, therefore, editors would retain full control over the content of their publications, with the state no more able to suppress stories than it is now. Retrospective sanctions might follow but the story would already be in the public domain. In addition, any rules would inevitably include a provision akin to the *Reynolds* defence to libel, allowing the press to publish stories which otherwise breached rules where it was in the public interest. Finally, if the regulator did become draconian the press would be able to perform its ordinary constitutional role of holding it to account by publicising its activities, criticising its decisions and campaigning for reform.

Protecting privacy and maintaining a free press are both in the public interest. Self-regulation has failed to strike the right balance thus far and cannot realistically be expected to do so in the future. An independent regulator on a statutory footing would provide effective redress for the individual and, with the appropriate statutory safeguards and subject to the scrutiny of the newspapers themselves, need not threaten the press freedom we rightly prize.

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