

## Privacy and the Press: is state regulation in the public interest?

**Earl of Sandwich:** "Sir, I do not know whether you will die on the gallows or of the pox,"

**John Wilkes:** "That depends, my lord, on whether I embrace your lordship's principles or your mistress."

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On the 10th May 1768 the crackle of musketry tore through a crowd that had gathered at St. George's Fields. The imprisonment of John Wilkes for seditious and obscene libels had helped to trigger widespread protests against the government and the St George's Fields Massacre was but another bloody milestone in the broader struggle for civil and political liberties on the British Isles.

Wilkes was not a wholly sympathetic character. A bawdy womaniser, occasional MP, and radical journalist, his writing veered between passionate criticisms of the government and downright obscenity. A practical joke of his involving a baboon dressed as the devil started a feud with the Earl of Sandwich who, in retaliation, read a pornographic poem in the House of Lords and attributed it to Wilkes. Wilkes fled to Paris, was convicted *in absentia*, and on his return was incarcerated. However, that he found himself in prison was not the result of his pranks but because of journalism that the government wanted to silence.

In short, freedom of the press was not won overnight, but built over many years in the face of state interference and intimidation. The strong and independent press that this freedom guarantees is a vital part of a free society as a means of ensuring – and enforcing – transparency and accountability. It is a freedom that is inherently linked with the freedom of speech and should not be bargained away cheaply.

Despite the near Maoist zeal for permanent revolution inherent to contemporary British political culture it is important to remember that an aversion to the status quo is not sufficient justification for change: rather, a positive case for that change must be made. Whilst the uncovering of wide-scale journalistic phone-hacking in 2011 raised questions about the culture, practices and ethics of the press, the resulting clamour for something to be done risks obscuring several important issues.

Firstly, it is important to recognise the extent to which the behaviour in question is already regulated by statute: indeed, much of the activity under scrutiny was plainly criminal and should be dealt with accordingly. Furthermore, there already exist multiple grounds on which a civil remedy may be sought. Developing this theme, we must question the sufficiency of this existing legal landscape and the rights contained therein: certainly, the cost of litigation is a barrier that militates against the individual bringing a civil action but does this make the range of rights themselves inadequate? Crucially, we must ask what state regulation would look like and whether it would serve the public interest.

It is possible to describe three distinct components of state regulation: (1) a set of rules; (2) a regulator to enforce them; and (3) remedies to punish breaches. Assuming that rules are most likely to govern practices, what practices should be *verboten* beyond those that are already criminal, what additional civil actions should be available, and who is to be subject to these rules?

In answering the request for new rules and rights we must be careful. France enjoys some of the most stringent privacy laws in the world yet they were entirely useless in preventing the widespread dissemination and eager inspection of pictures of the Duchess of Cambridge's breasts. Indeed, here we uncover a fundamental problem: an abstract right is useless when set against a real inability to enjoy or enforce it.

The reality then is not that we need new rights but rather better means of enforcing existing ones. In this context, a state regulator as guarantor and enforcer is not without problems. Recently, the regulation of ITV by Ofcom did nothing to protect the rights of people falsely linked with child sex offences by a presenter on *This Morning*. However, where a state regulator was ineffective, the prospect of multiple libel suits has subsequently ensured more stringent editorial procedures.

After we consider the state's ability to punish criminal acts, grant injunctions, and award damages what additional remedies, if any, would we like to exist? Gifting the state a right to censure and censor the press would be intolerable. As with rights, the argument must instead focus on the law as it stands and ensuring that individuals whose rights have been infringed are able to seek a remedy. Whilst problems surrounding access to justice are well-documented, they are a function of poorly thought-out reforms to legal aid that cannot be rectified by state regulation.

The overarching trajectory of contemporary journalism is one in which the line between mainstream and social media is becoming blurred to the extent that anyone with an internet connection can now be a journalist. The role of social media in highlighting the plight of Mohamed Bouazizi, the Tunisian fruit-seller whose death helped catalyse the Arab Spring, only reinforces this fact and on a simple point of principle, attempting to regulate what is otherwise normal public discourse is wholly undesirable.

Whilst it is perhaps ironic that the modern press has been accused of wielding the kind of unaccountable power that early journalists used to rail against, to fix on this is to miss the point. Power is best kept in check by individuals who are able to enforce their rights against its misapplication rather than a state regulator empowered to sanction, silence, and suppress. A free press, much like John Wilkes, may be occasionally bawdy, frequently provocative, and sometimes offensive: it is nevertheless a vital part of a free society.

Today, an anonymous roundabout in Southwark is all that marks the site of the St George's Fields Massacre. However, the freedom of the press established in the intervening years is a fitting memorial to those who died there and it is this freedom, not any illiberal attempts to curtail it, that best serves the public interest.