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# Taming the "Feral Beast": Cautionary Lessons from British Press Reform

Lili Levi

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# TAMING THE “FERAL BEAST”<sup>1</sup>: CAUTIONARY LESSONS FROM BRITISH PRESS REFORM

Lili Levi\*

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1. See Patrick Wintour, *Blair: media is feral beast obsessed with impact*, THE GUARDIAN (Jun. 12, 2007), available at <http://www.theguardian.com/politics/2007/jun/13/media.television> (quoting outgoing British Prime Minister Tony Blair’s characterization of the press in his Lecture on Public Life, June 12, 2007).

\* Professor of Law, University of Miami School of Law. I am grateful to Caroline Bradley, Mary Coombs, Mary Anne Franks, Ron Krotoszynski, Bernard Oxman, and Steve Schnably for detailed comments on prior drafts, and to Pat Gudridge and Ralph Shalom for illuminating conversations. Jaime Fromson, Octavia Green, Brian Oliver, and Tashyana Thompson provided able research assistance. All remaining errors are my own.

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## INTRODUCTION

Since the demise of press licensing in Britain 300 years ago, the U.K. has positioned itself as a vanguard of journalistic freedom—featuring a raucous and opinionated press—even in the absence of constitutional speech and press protections.<sup>2</sup> Yet in January 2014, the World Association of Newspapers and News Publishers (WAN-IFRA)—a leading press organization previously known for targeting press

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2. See Editorial Bd., *Britain’s Press Crackdown*, N.Y. TIMES (Mar. 19, 2013), available at <http://www.nytimes.com/2013/03/20/opinion/britains-press-crackdown.html?>.

ensorship in repressive regimes such as Azerbaijan and Myanmar—undertook an “unprecedented” fact-finding mission in the U.K. to investigate governmental threats to British press freedom.<sup>3</sup> It did so because Britain is currently engaged in a press regulation effort that poses a significant threat to press freedom both in the U.K. and far beyond British shores.<sup>4</sup>

The British press reform initiative began after revelations in 2011 that the Rupert Murdoch-owned tabloid *News of the World* had engaged in “industrial-scale”<sup>5</sup> phone hacking, illegally intercepting the phone messages of thousands of unsuspecting people for years.<sup>6</sup> Instead of responding to the phone hacking revelations by focusing on criminal law enforcement failures, however, the British government launched a wide-ranging, year-long Inquiry, headed by Lord Justice Brian Leveson, into the culture, practices, and ethics of the British newspaper press.<sup>7</sup>

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3. Larry Kilman, *International Delegation: UK Press Freedom Mission*, WORLD ASSOCIATION OF NEWSPAPER AND NEWS PUBLISHERS (Nov. 8, 2013), <http://www.wan-ifra.org/press-releases/2013/11/08/international-delegation-uk-press-freedom-mission>.

4. WAN-IFRA recently released a critical report about the reform of British press regulation. WORLD ASSOCIATION OF NEWSPAPER AND NEWS PUBLISHERS, PRESS FREEDOM IN THE UNITED KINGDOM 6 (Mar. 2014) [hereinafter WAN-IFRA, PRESS FREEDOM], available at <http://www.wan-ifra.org/microsites/press-freedom> (“Even the suggestion of a decline in Britain’s regard for press freedom risks serious repercussions in other parts of the world.”).

5. John F. Burns, *Phone-Hacking Charges Seen as Chill on British Journalism*, N.Y. TIMES (July 24, 2012), available at [http://www.nytimes.com/2012/07/25/world/europe/two-ex-editors-for-murdoch-to-be-charged-for-phone-hacking.html?\\_r=0](http://www.nytimes.com/2012/07/25/world/europe/two-ex-editors-for-murdoch-to-be-charged-for-phone-hacking.html?_r=0).

6. See Lili Levi, *Journalism Standards and “The Dark Arts”: The U.K.’s Leveson Inquiry and the U.S. Media in the Age of Surveillance*, 48 GA. L. REV. 907, 909 (2014).

7. LEVESON INQUIRY: CULTURE, PRACTICES AND ETHICS OF THE PRESS, REPORT, 2012, H.C. 779, Executive Summary, ¶¶ 5, 7–9, (U.K.) [hereinafter LEVESON REPORT], available at <http://www.levesoninquiry.org.uk/about/the-report/>. The fallout from phone-hacking is still continuing. See Katrin Bennhold & Alan Cowell, *Ex-Tabloid Executive Acquitted in British Phone Hacking Case*, N.Y. TIMES (June 24, 2014), available at <http://www.nytimes.com/2014/06/25/world/europe/rebekah-brooks-found-not-guilty-in-phone-hacking-case.html> (describing result of phone-hacking trial of former tabloid editors Rebekah Brooks and Andy Coulson and noting potential upcoming legal actions); Martin Hickman, *Revealed: 10 Police Inquiries into Illegal Data Techniques*, INFORMM’S BLOG (July 12, 2014), available at <https://inform.wordpress.com/2014/07/12/revealed-10-police-inquiries-into-illegal-data-techniques-martin-hickman/> (detailing continuing police investigations into various journalism practices).

Having issued an almost 2000-page Report damning much of the newspaper press culture, Leveson called for a new plan of “voluntary” self-regulation backed up by a statutory oversight regime.<sup>8</sup> Under the scheme, newspapers would independently establish a regulatory body, which would in turn seek recognition and continuing certification from a government-established certifying entity charged with ensuring that the press’ self-regulator properly followed the Leveson Report’s recommendations. Currently, the Leveson-recommended press oversight body has been established pursuant to a government-favored Royal Charter.

Press resistance to the Royal Charter regime makes the ultimate contours and details of British press reform uncertain. What *is* certain, however, is that some kind of Leveson-inspired reform is inevitable—certainly in light of Prime Minister David Cameron’s warning to newspapers that, otherwise, the press runs the risk of facing “hideous statutory regulation” in the future.<sup>9</sup>

While designed to be modest and proportionate, the British effort to promote a “responsible” press via the Royal Charter regime in fact effectuates a power play by government and the political class against the press. It introduces the Trojan horse of press control under the guise of “voluntary” self-regulation to restrain the excesses of tabloid journalism. Its structural attempts to insulate such regulation from political influence are unlikely to be effective. The Royal Charter regime leads to predictable chilling effects on the press, without sufficient commensurate benefits in protecting press subjects’ privacy. As a mid-twentieth century regulatory template proposed for a twenty-first century news environment,<sup>10</sup> it ignores the multiplicity of press practices of the “networked Fourth Estate”<sup>11</sup>—raising questions about the scope of regulatory coverage as well as disciplinary uses of approved journalistic codes in today’s

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8. LEVESON REPORT, *supra* note 7.

9. Nicholas Watt, *Cameron warns UK press: sign up to royal charter or else*, THE GUARDIAN (Dec. 26, 2013), available at <http://www.theguardian.com/media/2013/dec/26/cameron-warns-uk-press-regulation>.

10. See WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 16.

11. See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011) (coining the phrase).

diverse media context. At the same time, it invites abuse by legacy press institutions, undermining press innovation by protecting incumbents.

Arguing against the Leveson-influenced Royal Charter regulatory approach does not entail indiscriminate approval of egregious press practices. It simply questions whether less restrictive alternatives to the regulatory option would not better balance the interests at issue.

Regulatory institutions do not typically cede power; politicians hope to control press coverage to their advantage; press failures in accuracy and completeness are inevitable; and moral panics can always be generated in order to justify increased press oversight, when convenient. It is not enough to hope that the new regulatory regime will operate with a light touch.

The Royal Charter system cannot be evaluated without recognizing the interlocking realities against which it will function—diminished press power, and unprecedented efforts by government to intimidate newspapers from reporting on national security matters. Indeed, such regulatory regimes can promote “new school” speech regulation, where governments can achieve their ends through partnerships with private power.<sup>12</sup> The background threat of regulation can enable divide-and-conquer political strategies, effectively inviting journalistic loyalty oaths and generating a divided—and thereby weakened—press. Complex, multi-institutional breakdowns (such as those implicated in the phone hacking scandal) cannot properly be corrected by disproportionately regulating just one of the participant institutions. Doing so is likely to accomplish little more than enhance the relative power of the others—a particularly dangerous development when it comes to the press.

Certainly, misfeasance by government and the mighty is likely to rise even in the ordinary course if the press is not watching. But threats to accountability reporting are more than typically worrisome today, when government actions most demand a powerful Fourth Estate. The rise of the surveillance state, the fetishization of security, and enhanced governmental willingness to assert power all call for a strong

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12. Cf. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014) (describing “new school” techniques to control and discipline speech in light of the digital infrastructure of communication today).

watchdog press operating in the public interest.

This is not merely a local, U.K. matter. A diminution in British press freedom “risks serious repercussions in other parts of the world.”<sup>13</sup> By providing authoritarian regimes with press-repressive examples, Britain significantly diminishes its credibility in attempts to promote a broad notion of press freedom abroad.

Part I of this Article sketches the history of British press regulation, describes the Leveson Report’s recommendations, and outlines the current status of press reform efforts in Britain. Part II outlines the potentially worrisome aspects of the Royal Charter approach for the optimal role of the press, and concludes that the British press reform movement is likely to do more harm than good, both in the U.K. and globally.

### I. BRITISH PRESS REFORM, IN CONTEXT

The “press” is primarily understood in the U.K. to refer to newspapers. Although a number of government inquiries since the mid-twentieth century have sought to promote press responsibility, revelations in 2011 of phone hacking by tabloid newspapers triggered the most expansive assessment of the state of the British press. As a result, a complex system of statute-backed industry self-regulation is currently being developed.

#### A. Overview of the British Press Sector

Britain boasts a large number of national newspapers, as well as regional and local outlets.<sup>14</sup> British newspapers broadly fall into three categories: broadsheets,<sup>15</sup> mid-market “compact” titles,<sup>16</sup> and down-market tabloids.<sup>17</sup> In terms of

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13. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 6.

14. LEVESON REPORT, *supra* note 7, pt. C, ch. 2 (describing eight major publishers); THE NEWS MEDIA ASSOCIATION, <http://www.newsmediauk.org/> (last visited Jan. 12, 2015) (compiling local and regional newspaper information).

15. Broadsheets include The Daily Telegraph, The Financial Times, The Guardian, and The Sunday Times. The term “broadsheet” refers to the size and format of the newspaper, with long vertical pages. *Broadsheet*, WIKIPEDIA, available at <http://en.wikipedia.org/wiki/Broadsheet>.

16. These include The Daily Mail and The Independent. *Compact (newspaper)*, WIKIPEDIA, available at [http://en.wikipedia.org/wiki/Compact\\_\(newspaper\)](http://en.wikipedia.org/wiki/Compact_(newspaper)).

17. The Sun, The Daily Mirror, and the now-shuttered News of the World are examples. Rupert Murdoch closed down News of the World as a result of

content, the broadsheets are associated with serious journalism, in-depth coverage of hard news, and elite style.<sup>18</sup> At the opposite extreme are the “red-top” tabloids, whose coverage is image-heavy, sensationalistic, and focused on celebrity, the private lives of public people, human-interest stories, and “salacious sinfulness.”<sup>19</sup> The black-top compacts sit somewhere in between, using broadsheet style yet also incorporating some entertainment into their pages. The broadsheets represent the “responsible” press and are sometimes referred to as the “quality press,” by contrast to the tabloid “popular press.”<sup>20</sup>

British newspapers are opinionated participants in public debate, with tabloids especially proud of their reputation as spirited and activist.<sup>21</sup> Unlike broadcast news programs, partisanship and opinion are acceptable and expected in British newspapers.<sup>22</sup> The British tabloids also range in their political and party affiliations.<sup>23</sup>

### *B. The British Approach to Newspaper Regulation*

The Leveson Inquiry was not the first official

the Leveson Inquiry into phone hacking. See, e.g., Robert Mackey, *British Tabloid to Close After More Serious Allegations*, N.Y. TIMES (July 7, 2011), available at [http://thelede.blogs.nytimes.com/2011/07/07/more-serious-allegations-against-british-tabloid-editors/?\\_r=0](http://thelede.blogs.nytimes.com/2011/07/07/more-serious-allegations-against-british-tabloid-editors/?_r=0). The mid-market papers are in tabloid rather than broadsheet physical format, but the mid-market offerings are distinguishable by their “black-top” masthead (as opposed to the “red-top” masthead of the down-market tabloids).

18. *Broadsheet*, OXFORD ENGLISH DICTIONARY, available at <http://www.oed.com/view/Entry/23531?redirectedFrom=broadsheet#eid>.

19. Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 1, 2 (1998). Much has been written on tabloid journalism. A WestlawNext search on September 29, 2013 netted 138 titles. See also John Fiske, *Popularity and the Politics of Information*, in JOURNALISM AND POPULAR CULTURE (Peter Dahlgren & Colin Sparks eds. 1992) (describing the complexity of tabloid media).

20. See PAPERBOY BLOG, *UK Newspaper Guide*, <http://www.thepaperboy.com/uk/uk-newspaper-guide.cfm> (last visited Feb. 26, 2015).

21. See, e.g., Karen Sanders & Mark Hanna, *British Journalists*, THE GLOBAL JOURNALIST IN THE 21ST CENTURY 220–21 (David H. Weaver & Lars Willnat eds., 2012); Brett Mills, *Tabloid Tales: Other News, Other Voices*, 2003 J. INST. JUST. & INT'L STUD. 23 (2003).

22. See, e.g., LEVESON REPORT, *supra* note 7, pt. B, ch. 2, ¶ 5.7. See also David Folkenflik, *In London, A Case Study In Opinionated Press*, NPR (Jan. 4, 2011), available at <http://www.npr.org/2011/01/04/132629428/in-london-a-case-study-in-opinionated-press>.

23. For a BBC description of political affiliation of major papers see BBC, *The politics of UK newspapers* (Sept. 30, 2009), available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/8282189.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/8282189.stm).

examination of the standards of the British newspaper press. Scandals regarding breaches of privacy and outrageous newsgathering techniques had led to six official examinations of the British newspaper press since World War II.<sup>24</sup>

Official self-regulation of newspapers in Britain was initiated in 1953, when the newspaper industry established the General Council of the Press in response to a Royal Commission recommendation.<sup>25</sup> Despite numerous subsequent efforts to improve the credibility of the self-regulatory body, criticism persisted and the threat of statutory regulation was bandied about. By 1991, the Home Office minister was warning that “the press—the popular press—is drinking in the Last Chance Saloon.”<sup>26</sup> In response, the newspaper publishers established the Press Complaints Commission (PCC) as an independent body charged with maintaining and promoting a professional Code of Practice<sup>27</sup> by journalists, and dealing with complaints about breaches of the Code by newspapers and magazines.<sup>28</sup> Membership in the

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24. LEVESON REPORT, *supra* note 7, pt. D, ch. 1 (describing the 1947, 1962 and 1974 Royal Commissions, the 1972 Younger Commission into Privacy, and the 1990 and 1993 assessments by a Departmental Committee chaired by Sir David Calcutt). *See also* WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 10–12.

25. The Council had been tasked with defending press freedom and investigating complaints. *See* CULTURE, MEDIA AND SPORT COMMITTEE, HOUSE OF COMMONS, PRESS STANDARDS, PRIVACY AND LIBEL, SECOND REPORT OF SESSION 2009–10, vol. 1, H.C. 362-I, at 115 (U.K.) [hereinafter CMS COMMITTEE SECOND REPORT]. The General Council of the Press was re-formed as the Press Council in 1962. The Calcutt Inquiry in 1990 recommended its replacement with a Press Complaints Commission. *Id.*

26. *See* Roy Greenslade, *A decade of diplomacy*, THE GUARDIAN (Feb. 4, 2001), available at <http://www.theguardian.com/media/2001/feb/05/mondaymedia/section.pressandpublishing>.

27. The Code of Practice enforced by the PCC is written and revised by the Editors’ Code Committee, consisting of the Chairman and Director of the PCC as well as editors of national, regional, and local newspapers. CMS COMMITTEE SECOND REPORT, *supra* note 25, at 115. By contrast to the membership of the PCC, the Editors’ Code Committee has no lay members (except the Chairman and Director of the PCC). *Id.*

28. CMS COMMITTEE SECOND REPORT, *supra* note 25. *See also* LEVESON REPORT, *supra* note 7, pt. D, ch. 2. The self-regulatory system regulating newspapers has consisted of three parts for the past decade: the PCC, the Editors’ Code Committee, and the Press Board of Finance (known as the PressBoF). The PCC disbanded in September 2014, and was replaced by IPSO, the Independent Press Standards Organization. PRESS COMPLAINTS COMMISSION, <http://www.pcc.org.uk> (last visited Jan. 12, 2015). Until then, the board of the PCC had consisted of ten lay members and seven editors. CMS COMMITTEE SECOND REPORT, *supra* note 25, at 115. The system was financed through the PressBoF, with funding by a levy paid by member newspapers and magazines. *Id.* The PCC assessed complaints to determine compliance with the

PCC was voluntary, although most major papers belonged.<sup>29</sup>

The Leveson Report issued a scathing indictment of the PCC, principally on the grounds that it was insufficiently independent of the press industry and not a true regulator.<sup>30</sup> As a result of widespread criticism, the PCC announced in 2012 that it would move into a transitional phase before disbanding.<sup>31</sup> As is further detailed below, the PCC has now been replaced by IPSO, the newspaper industry’s Independent Press Standards Organization.<sup>32</sup>

### C. *Phone-Hacking and the Leveson Inquiry Into the Culture, Practices and Ethics of the Press*

Prime Minister David Cameron appointed the Leveson Inquiry in July 2011 with a wide-ranging remit.<sup>33</sup> Chairman Justice Leveson himself characterized it as “almost breathtaking in its width.”<sup>34</sup> After a year of taking testimony, Justice Leveson issued a four-volume Report of its inquiry into the culture, practices, and ethics of the press.<sup>35</sup> Having diagnosed a systemic cultural problem with the operations of the press—and particularly the tabloids—Leveson sought to resolve it by a series of recommendations designed to be more

Code. If it found a breach, the offending newspaper could offer to resolve the complaint, but if its offer was deemed unsatisfactory, the PCC could adjudicate the case and the newspaper would be obliged to publish the PCC adjudication “with due prominence.” *Id.* at 116.

29. CMS COMMITTEE SECOND REPORT, *supra* note 25, at 115. Northern & Shell, owners of The Daily Express, The Daily Star and OK! Magazine, withdrew from the PCC in 2011. See WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 12.

30. LEVESON REPORT, *supra* note 7, Executive Summary, ¶¶ 41–46. The PCC system had been subject to critique since its inception, including by its inventor, Sir David Calcutt, who concluded in a second report in 1993 that self-regulation was not working and recommended statutory regulation instead. *Id.* at 116–17. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 11.

31. Press Release, Press Complaints Commission, PCC transition to a new regulatory body (Mar. 9, 2012), *available at* <http://www.pcc.org.uk/news/?article=NzcyNA==>. See also LEVESON REPORT, *supra* note 7, Executive Summary, ¶ 41. The PCC continued to resolve cases and enforce its Editors’ Code of Ethics, and issued a report of 2012 complaint statistics prior to its closure. Press Release, Press Complaints Commission, PCC publishes 2012 complaints statistics, *available at* <http://www.pcc.org.uk/news/index.html?article=ODQ3MA==>.

32. See *infra* pt. I, § D(2).

33. LEVESON REPORT, *supra* note 7, pt. A, ch. 1, ¶¶ 1.2–4.

34. *Id.* pt. A, ch. 2, ¶ 1.9.

35. See *id.* pt. A, ch. 1–3 (describing the inquiry); *id.* pt. A, ch. 4 (describing the Report).

effective than the prior six attempts at press reform. Determined that his Report not find a place “on the second shelf of a journalism professor’s study,”<sup>36</sup> Lord Justice Leveson sought to craft a “genuinely independent and effective system of self-regulation.”<sup>37</sup>

In the meantime, the police continued to investigate possible illegal behavior by journalists (such as phone hacking and bribing officials for information)<sup>38</sup>—and prior investigations began coming to fruition with criminal trials for numerous press defendants.<sup>39</sup>

The British public and politicians mobilized and expressed intense interest—as evidenced, *inter alia*, by the many articles on the subject appearing in the Guardian newspaper alone.<sup>40</sup> Celebrities such as J.K. Rowling and Sienna Miller pushed publicly for press regulation in favor of

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36. John Plunkett & Josh Halliday, *Leveson inquiry: Jeremy Paxman, Andrew Marr, Lord Reid appear*, THE GUARDIAN (May 23, 2012), available at [http://www.theguardian.com/media/blog/2012/may/23/leveson-inquiry-paxman-marr-live?CMP=twf\\_fd](http://www.theguardian.com/media/blog/2012/may/23/leveson-inquiry-paxman-marr-live?CMP=twf_fd) (describing Justice Leveson’s response to witness).

37. LEVESON REPORT, *supra* note 7, Executive Summary, ¶ 51.

38. See, e.g., REUTERS, *Police investigating Trinity Mirror over phone hacking liability* (Sept. 12, 2013), available at <http://www.reuters.com/article/2013/09/12/us-trinity-mirror-hacking-idUSBRE98B06A20130912>; Daniel Miller, *Police investigating 600 new phone-hacking incidents at the News of the World ‘after suspect turns supergrass,’* DAILY MAIL (Mar. 16, 2013), available at <http://www.dailymail.co.uk/news/article-2294305/Police-investigating-600-new-phone-hacking-incidents-News-World-suspect-turns-supergrass.html> (describing Operation Weeting as now likely to extend until 2015).

39. Lisa O’Carroll, *Rebekah Brooks trial over phone-hacking charges delayed*, THE GUARDIAN (Aug. 22, 2013), available at <http://www.theguardian.com/uk-news/2013/aug/22/rebekah-brooks-phone-hacking-trial-delayed>. Recently, former NEWS OF THE WORLD chief executive Rebekah Brooks was acquitted and former editor Andrew Colson convicted after an eight-month phone-hacking trial. Lisa O’Carroll & Patrick Wintour, *Andy Coulson guilty over phone hacking as Rebekah Brooks walks free*, THE GUARDIAN (June 24, 2014), available at <http://www.theguardian.com/uk-news/2014/jun/24/andy-coulson-rebekah-brooks-phone-hacking-trial>; Bennhold & Cowell, *supra* note 7; Alan Cowell & Katrin Bennhold, *Andy Coulson Gets 18 Months in Tabloid Phone Hacking*, N.Y. TIMES (July 4, 2014), available at <http://www.nytimes.com/2014/07/05/world/europe/andy-coulson-to-be-sentenced-in-phone-hacking-case.html>. Phone hacking trials of other defendants continue. See, e.g., Lisa O’Carroll, *Ex-Sunday Mirror journalist charged with phone hacking*, THE GUARDIAN (Oct. 15, 2014), available at <http://www.theguardian.com/uk-news/2014/oct/15/sunday-mirror-journalist-phone-hacking>.

40. For a gateway to THE GUARDIAN’s archive of Leveson and phone-hacking related articles, see THE GUARDIAN, *US media*, <http://www.theguardian.com/media> (last visited Jan. 12, 2015).

privacy.<sup>41</sup> Victim-representing groups, such as Hugh Grant-fronted Hacked Off, emerged with the goal of promoting the passage of press regulatory reform.<sup>42</sup>

Although it acknowledged the importance of a free press and the extent to which the British press had fulfilled its important mission,<sup>43</sup> the Leveson Report found significant flaws in the culture, ethics, and practices of the newspaper press leading to “press behaviour that, at times, can only be described as outrageous.”<sup>44</sup>

The Report identified problems on three fronts: in newsgathering, reporting, and the attitude of the press. Newsgathering too often involved not just phone-hacking, but also covert surveillance, blagging,<sup>45</sup> deception, excessive persistence (through tactics such as door-stepping, chases by photographers, insistent phone calls), illegal trade in personal information, and some instances of police bribery “in circumstances where it is extremely difficult to see any public interest justification.”<sup>46</sup>

As for reporting, the press sometimes “reckless[ly] . . . prioritiz[ed] sensational stories, almost irrespective of the harm [they could cause], all the while heedless of the public interest[,]”<sup>47</sup> published private information without consent, showed reckless disregard for accuracy, and engaged in misrepresentation, embellishment, and distortion.<sup>48</sup>

With respect to the press’ attitude in response to complaints, the Report identified a lack of respect for privacy

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41. See Lisa O’Carroll, *Leveson phone-hacking inquiry: JK Rowling among ‘core participants’*, THE GUARDIAN (Sept. 14, 2011), available at <http://www.theguardian.com/media/2011/sep/14/leveson-phone-hacking-inquiry-jk-rowling>.

42. See HACKED OFF, <http://hackinginquiry.org/> (last visited Jan. 12, 2015) (Hacked Off’s home page).

43. See, e.g., LEVESON REPORT, *supra* note 7, Executive Summary, ¶¶ 5, 8–9.

44. *Id.* ¶ 7.

45. The Leveson Report defines “blagging” as “deception.” *Id.* pt. A, ch. 2, ¶ 1.6. The Oxford Dictionaries online define “blagging” as “obtain[ing] (something) by using persuasion or guile.” *Blag*, OXFORD DICTIONARIES, available at <http://www.oxforddictionaries.com/us/definition/english/blag>.

46. LEVESON REPORT, *supra* note 7, Executive Summary, ¶ 34. Of course, many of these behaviors are illegal and subject to civil and/or criminal punishment (as the criminal trial of Rebekah Brooks and Andrew Coulson demonstrates).

47. *Id.* ¶ 32.

48. *Id.* ¶¶ 32, 38.

and dignity;<sup>49</sup> a “cultural tendency within parts of the press vigorously to resist or dismiss complainants almost as a matter of course[;]”<sup>50</sup> a refusal to investigate even charges of systemic criminality;<sup>51</sup> a propensity of newspapers under attack to attack their attackers (thereby intimidating and deterring complainants);<sup>52</sup> a hesitancy to break ranks and criticize other papers’ practices;<sup>53</sup> and a failure of governance and compliance systems that might have averted misbehavior.<sup>54</sup> The Report highlighted the press’ lack of remorse and defensive failure to self-examine as factors exacerbating the underlying newsgathering and reporting errors it described.<sup>55</sup>

The Leveson Report recommended the establishment of an independent regulatory body tasked with “the dual roles of promoting high standards of journalism and protecting the rights of individuals.”<sup>56</sup> An independent Board, whose chair and members would be selected by an appointment panel, would govern the body. In turn, that Board’s members would be independent of both the industry and government and selected in an independent manner.<sup>57</sup> While the Board should include “people with relevant expertise,” there should be no serving editors on the Board and its majority should be independent of the press.<sup>58</sup>

The new self-regulatory body would have a multitude of roles, including: creating and enforcing a standards code; defining and issuing guidance on the public interest and the code; requiring appropriate internal governance processes; enabling whistle-blowing reporting mechanisms; adjudicating individual complaints; investigating, on its own initiative, serious or systemic breaches of the code and failures to comply with its directives; providing pre-publication advice to editors; directing the nature, extent and placement of apologies; and operating an arbitration service to deal with

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49. *Id.* ¶ 36 (speaking specifically about NEWS OF THE WORLD).

50. *Id.* ¶ 39.

51. LEVESON REPORT, *supra* note 7, Executive Summary, ¶¶ 21–22.

52. *Id.* ¶¶ 34, 39.

53. *Id.* ¶ 23.

54. *Id.* ¶¶ 31, 36.

55. *Id.* ¶ 39.

56. LEVESON REPORT, *supra* note 7, Executive Summary, ¶ 57.

57. *Id.* at Summary of Recommendations, ¶¶ 1–5; *id.* pt. K, ch. 7, ¶ 4.8.

58. *Id.* at Summary of Recommendations, ¶ 4; *id.* pt. K, ch. 7, ¶¶ 4.6, 4.10.

civil law claims.<sup>59</sup> In drafting the code of practice, the Board could be advised by a Code Committee that could include (but not be limited to) serving editors.

In turn, the code to be adopted by the Board would take into account the importance of freedom of speech, the interests of the public (including the public interest in detecting or exposing crime or serious impropriety, protecting public health and safety and preventing the public from being seriously misled) and the rights of individuals.<sup>60</sup>

As for complaints, unlike the PCC’s limited jurisdiction to hear complaints only from the victims of press breaches, the new Board would have the power “to hear complaints wherever they come from” including “a representative group affected by the breach, or a third party seeking to ensure accuracy of published information.”<sup>61</sup>

The Board would have the right to require remedial action such as corrections or apologies, the prerogative to require compilation and public availability of code compliance data,<sup>62</sup> the authority to investigate systemic or serious breaches, and the power to impose “appropriate and proportionate sanctions, (including financial sanctions up to 1% of turnover with a maximum of £1M)” for “serious or systemic breaches of the standards code or governance requirements of the body.”<sup>63</sup>

The Leveson Report also made specific recommendations for consideration by the body. For instance, it suggested a clearer statement of the standards to be expected of editors and journalists than is in the current Editors’ Code of

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59. *Id.* at Summary of Recommendations, ¶¶ 7–20; *id.* pt. K, ch. 7, ¶¶ 4.21–4.36.

60. *Id.* at Executive Summary, ¶ 8; *id.* pt. K, ch. 7, ¶ 4.23. The code “must cover standards of: (a) conduct, especially in relation to the treatment of other people in the process of obtaining material; (b) appropriate respect for privacy where there is no sufficient public interest justification for breach; and (c) accuracy, and the need to avoid misrepresentation.” *Id.* at Executive Summary, ¶ 8. *See also* Royal Charter on Self-Regulation of the Press sched. 3, ¶ 8, Oct. 30, 2013 [hereinafter Royal Charter], available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254116/Final\\_Royal\\_Charter\\_25\\_October\\_2013\\_clean\\_Final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean_Final_.pdf).

61. LEVESON REPORT, *supra* note 7, Summary of Recommendations, ¶ 11; *id.* pt. K, ch. 7, ¶ 4.30.

62. There would also be reporting requirements for the Board. *Id.* at Summary of Recommendations, ¶ 15; *id.* pt. K, ch. 7, ¶ 4.42.

63. *Id.* at Summary of Recommendations, ¶ 19; *id.* pt. K, ch. 7, ¶ 4.38.

Practice adopted under the auspices of the PCC.<sup>64</sup> It indicated that the body “should make it clear that newspapers will be strictly accountable, under their standards code, for any material that they publish, including photographs (however sourced).<sup>65</sup> It also recommended that the new self-regulatory body should provide a service to warn the press, broadcasters, and photographers “when an individual has made it clear that they do not welcome press intrusion.”<sup>66</sup> In addition to requiring the body to “provide guidance on the interpretation of the public interest that justifies what would otherwise constitute a breach of the Code[,]”<sup>67</sup> the Report recommended that when the public interest justification is to be relied on to excuse a breach of the code, “a record should be available of the factors weighing against and in favour of publication, along with a record of the reasons for the conclusions reached.”<sup>68</sup>

As the new regulatory body would lack credibility if the majority of newspaper publishers did not subscribe, the Leveson Report also described “carrot-and-stick” incentives designed to promote participation. The principal carrot for membership in the regulatory body was that, in lieu of expensive litigation, subscription would entitle members to the exclusive use of a “fair, fast and inexpensive arbitration service” operating under the auspices of the regulatory body.<sup>69</sup> On the “stick” side of the model, the Report provided that newspapers choosing not to join the new body would be disadvantaged in three ways. They would not have access to the cheap, expert, and rapid arbitral process.<sup>70</sup> Once in court in defamation, privacy, breach of confidence, or other media

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64. *Id.* at Summary of Recommendations, ¶ 36. *See also id.* pt. K, ch. 7, ¶¶ 4.18–4.24 (discussing the problems with the old code and the need for a clearer alternative).

65. *Id.* at Summary of Recommendations, ¶ 40; *id.* pt. K, ch. 9, ¶ 2.9.

66. LEVESON REPORT, *supra* note 7, Summary of Recommendations, ¶ 41; *id.* pt. K, ch. 7, ¶ 4.35.

67. *Id.* at Summary of Recommendations, ¶ 42; *id.* pt. K, ch. 7, ¶ 4.24.

68. *Id.* at Summary of Recommendations, ¶ 43; *id.* pt. K, ch. 7, ¶ 4.24.

69. *Id.* at Summary of Recommendations, ¶ 26; *id.* pt. K, ch. 7, ¶ 5.5. The Report stated that if an arbitration arm were not created, then qualified one-way cost shifting would be introduced for defamation, breach of confidence, privacy and similar media-related litigation, as proposed by Justice Jackson. *Id.* pt. J, ch. 3, § 6. *See also* Royal Charter, *supra* note 60, sched. 3.

70. *See* LEVESON REPORT, *supra* note 7, Summary of Recommendations, ¶¶ 26, 67. *See also id.* pt. J, ch. 3, ¶¶ 6.7–6.8, 6.10 (describing the benefits of the arbitration process to a publisher and its strength as an incentive).

tort cases, they would be liable for exemplary damages if they lost.<sup>71</sup> If they won, they would not be eligible to receive cost recovery as currently available, and could be required to pay costs.<sup>72</sup>

In its most controversial aspect, the Leveson Report recommended Parliamentary enactment of a statutory underpinning, which would identify the legitimate requirements of an independent self-regulatory body and “provide a mechanism to recognise and certify that a new body meets them.”<sup>73</sup> The requirements for recognition would be the Leveson Report recommendations. An independent recognition body would assess—both at its inception and thereafter as well—whether the self-regulatory body was designed and operated to satisfy the statutory requisites.

#### *D. Where Things Stand Now*

After the Leveson Report’s release, Prime Minister David Cameron quickly rejected the recommended statutory underpinning, saying that statutory press regulation would “cross the Rubicon” and undo centuries of press freedom.<sup>74</sup> Yet Labour and the Liberal Democrats supported Leveson.<sup>75</sup> During cross-party talks, it was suggested that Parliamentary legislation underpinning the recognition body could be avoided if the body were established under a Royal Charter similar to that which established the BBC or the British Council.<sup>76</sup> The ensuing Royal Charter on Self-

71. *Id.* at Summary of Recommendations, ¶ 68.

72. *Id.* ¶ 67–69.

73. *Id.* ¶ 27; *id.* pt. K, ch.7, ¶ 6.4.

74. See, e.g., Lisa O’Carroll, *Leveson report: what happened next – Q&A*, THE GUARDIAN (Feb. 12, 2013), available at <http://www.theguardian.com/media/2013/feb/12/leveson-what-happened-next>.

75. Lisa O’Carroll, *Defamation bill set to be lost due to ‘Leveson’ clause*, THE GUARDIAN (Mar. 05, 2013), available at <http://www.theguardian.com/law/2013/mar/05/defamation-bill-leveson-clause>.

76. *Id.* The Royal Charter alternative is widely attributed to Oliver Letwin, a Cabinet Office minister in the Cameron government. See, e.g., Charlie Potter, *Press regulation: all you need to know*, 24 B.J.R. no. 1, 15, at 16 (2013). Royal Charters, granted by the sovereign on the advice of the Privy Council, have a history dating back to the thirteenth century. PRIVY COUNCIL OFFICE, *Chartered bodies*, available at <http://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/>; PRIVY COUNCIL OFFICE, *Privy Council members*, available at <http://privycouncil.independent.gov.uk/privy-council/privy-council-members/>. Membership in the Privy Council is for life, but “only Ministers of the democratically elected Government of the day participate in its policy work.” PRIVY COUNCIL OFFICE, *Overview*, available at

Regulation of the Press ultimately received royal assent on October 30, 2013.<sup>77</sup>

In addition to the Royal Charter initiative, Parliament adopted two pieces of legislation designed to further Leveson's proposed press reform system: (1) amendments to the Crimes and Courts Act 2013 effectuating the costs and exemplary damages incentive provisions proposed by Leveson,<sup>78</sup> and (2) a provision in the Regulatory Reform Act designed to establish a super-majority vote requirement for Parliamentary amendments to the press regulatory system.<sup>79</sup>

### 1. *The Royal Charter*

The Leveson Report did not recommend the Royal Charter. Instead, the Royal Charter approach was a “half-

<http://privycouncil.independent.gov.uk/privy-council/>. By convention, the Queen in Council follows the advice of her ministers on the Privy Council. *Id.* Once the only means of incorporating a body, royal charters are now “comparatively rare.” PRIVY COUNCIL OFFICE, *Chartered bodies*, available at <http://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/>. See also PATRICK O'CONNOR QC, *THE CONSTITUTIONAL ROLE OF THE PRIVY COUNCIL AND THE PREROGATIVE* 7 (2009), available at <http://www.justice.org.uk/data/files/resources/35/The-Constitutional-Role-of-the-Privy-Council-26-January-2009-.pdf>.

77. Royal Charter, *supra* note 60; Patrick Wintour, *Press regulation royal charter given go-ahead by the Queen*, THE GUARDIAN (Oct. 30, 2013), available at <http://www.theguardian.com/media/2013/oct/30/press-regulation-royal-charter-approval>. See also INFORRM'S BLOG, *The Privy Council and the Royal Charters: how does it all work?* (Oct. 8, 2013), <http://inforrm.wordpress.com/2013/10/08/the-privy-council-and-the-cross-party-charter-some-background/#more-22794>; Josh Halliday & Mark Sweney, *Royal charter: political parties reach deal on press regulation system*, THE GUARDIAN (Oct. 11, 2013), available at <http://www.theguardian.com/media/2013/oct/11/royal-charter-press-regulation-final-draft-newspapers>.

78. See Crime and Courts Act, 2013, c. 22, pt. 2, §§ 34–42 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>. See also Potter, *supra* note 76, at 15–23.

79. This measure prohibited amendment or dissolution of the Charter without compliance with its required two-thirds super-majority Parliamentary vote. This was intended as reassurance to the press that the regulatory system would be independent of politicians. See Potter, *supra* note 76. The others were the provisions (now in the Crime and Courts Act, 2013) offering protection to “relevant publishers” who had opted in to the new system from legal costs in certain media civil cases, and permitting courts to impose exemplary damages in such cases on “relevant publishers” who had not opted for membership. *Id.* The cases to which these financial incentives would apply are media-related: libel, slander, breach of confidence, privacy, malicious falsehood, and harassment. *Id.*

way house” alternative,<sup>80</sup> designed to avoid Parliamentary involvement in press regulation while ensuring compliance with the Leveson Report’s recommendations.<sup>81</sup> After a politically-charged year of failed compromise and contending draft Royal Charters,<sup>82</sup> the revised Royal Charter established the legal framework for the regulatory structure recommended by the Leveson Report.<sup>83</sup>

The Royal Charter inaugurates a Recognition Panel charged with recognition of press industry self-regulators in accordance with the terms of the Charter.<sup>84</sup> The Recognition Panel is to evaluate applications for recognition from regulators, review whether regulators granted recognition should continue to be certified, and report on the success or failure of the recognition system.<sup>85</sup> Pursuant to the Charter,

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80. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 12.

81. *Id.* (“The Royal Charter was proposed as a means to ‘take parliament out of the equation[.]’”).

82. After discussions involving all three political parties as well as press regulation activists Hacked Off, a cross-party draft Royal Charter was released in March 2013. Draft Royal Charter on Self-Regulation of the Press, Mar. 18, 2013, *available at* <https://www.gov.uk/government/publications/leveson-report-draft-royal-charter-for-proposed-body-to-recognise-press-industry-self-regulator>. The draft charter largely reflected the Leveson approach. *See generally id.* The newspaper publishers offered their contending proposed charter, which watered down some of the Leveson Report’s recommendations. Society of Editors, Draft Royal Charter for the Independent Self-Regulation of the Press, *available at* <http://www.theguardian.com/media/interactive/2013/apr/25/draft-alternative-royal-charter-press-regulation>. For comparisons of the contending proposed Royal Charters, *see*, for example, Potter, *supra* note 76; MEDIA STANDARDS TRUST, THE CROSS-PARTY ROYAL CHARTER VS THE PRESSBOF ROYAL CHARTER: A COMPARISON (2013), *available at* [www.mediastandardstrust.org](http://www.mediastandardstrust.org). The newspaper industry Royal Charter alternative was ultimately rejected by a committee of the Queen’s Privy Council. *See* Letter from Danny Alexander, Chief Sec’y to the Treasury, and Maria Miller, Sec’y of State for Culture, Media and Sport, Dep’t for Culture, Media & Sport, to Richard Tilbrook, Clerk of the Privy Council (Oct. 8, 2013), *available at* <https://www.gov.uk/government/publications/recommendation-on-pressbof-petition-for-royal-charter-2>. The newspaper industry sought an appeal of that decision. *See* WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 17. Both that appeal and a previous request by the newspaper industry for judicial review of the royal charter process were denied. *See* Lisa O’Carroll, *Press regulation: Newspapers lose court of appeal battle over rival royal charter*, THE GUARDIAN (May 1, 2014), *available at* <http://www.theguardian.com/media/2014/may/01/press-regulation-newspaper-court-appeal-royal-charter>.

83. Because the Royal Charter is designed to effectuate the Leveson Report’s press regulatory structure, this Article refers interchangeably to the Royal Charter and Leveson regulatory approaches.

84. Royal Charter, *supra* note 60.

85. *Id.* ¶ 4.1.

and through the work of an appointment committee established by the Commissioner for Public Appointments,<sup>86</sup> a chairman of the press recognition panel was appointed<sup>87</sup> and the full body installed as of November 3, 2014.<sup>88</sup>

The press' response to the Royal Charter scheme has been overwhelmingly negative, with numerous articles characterizing the Charter's Leveson-reliant approach as the end of press freedom in Britain.<sup>89</sup> In addition to substantive concerns, the newspaper industry has objected to the political process behind the Royal Charter, suggesting that it excluded the press, reflected manipulation at the hands of politicians and interest groups with political agendas targeting the popular press,<sup>90</sup> and evaded parliamentary debate and

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86. See COMMISSIONER FOR PUBLIC APPOINTMENTS, *Press Self-Regulation*, <http://publicappointmentscommissioner.independent.gov.uk/press-self-regulation/> (last visited Jan. 13, 2015). See also Roy Greenslade, *Words of Leveson open to interpretation amid the mud-slinging*, LONDON EVENING STANDARD (Jan. 29, 2014), available at <http://www.standard.co.uk/business/media/words-of-leveson-open-to-interpretation-amid-the-mudslinging-9092913.html>.

87. Dr. David Wolfe, QC was appointed as the inaugural chairman of the recognition panel. Roy Greenslade, *Barrister David Wolfe to chair the press regulation recognition panel*, THE GUARDIAN (June 26, 2014), available at <http://www.theguardian.com/media/greenslade/2014/jun/26/press-regulation-ippo>; PRESS RECOGNITION PANEL, <http://pressrecognitionpanel.org.uk/word/> (last visited Jan. 13, 2015).

88. See, e.g., Roy Greenslade, *Royal Charter's 'press recognition panel' recruits five board members*, THE GUARDIAN (Oct. 31, 2014), available at <http://www.theguardian.com/media/greenslade/2014/oct/31/press-regulation-leveson-report>.

89. See, e.g., Tim Shipman & Gerri Peev, *Approved behind closed doors, curbs that end three centuries of Press freedom*, DAILY MAIL (Oct. 30, 2013), available at <http://www.dailymail.co.uk/news/article-2480676/Approved-closed-doors-curbs-end-centuries-Press-freedom.html>. See also DR. GORDON NEIL RAMSEY, HOW NEWSPAPERS COVERED PRESS REGULATION AFTER LEVESON – MEDIA STANDARDS TRUST ANALYSIS, MEDIA STANDARDS TRUST (Sept. 4, 2014) [hereinafter MEDIA STANDARDS TRUST REPORT], available at <http://mediastandardstrust.org/mst-news/how-newspapers-covered-press-regulation-after-leveson-media-standards-trust-analysis/> (describing extensive, negative and “polarized” coverage of the issue).

90. Newspapers have claimed that the cross-party talks leading to the March 2013 proposed cross-party charter involved Hacked Off, but not the press, and therefore were skewed from their inception. See, e.g., James Chapman, *Unveiled, a tough new watchdog to preserve freedom of the Press: Newspapers launch own Royal Charter with teeth to protect the public - and independence to prevent political meddling*, DAILY MAIL (Apr. 25, 2013), available at <http://www.dailymail.co.uk/news/article-2314971/Freedom-press-Newspapers-launch-Royal-Charter-teeth-protect-public.html>. See also WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 14–15.

opportunity for public consultation.<sup>91</sup> In turn, Charter proponents have vociferously accused the newspaper publishers of failing to cover press regulation fairly and exaggerating the threats posed by the Royal Charter system simply in order to maintain their own unaccountable power.<sup>92</sup> There is a “high level of animosity” between the two positions.<sup>93</sup>

## 2. IPSO and IMPRESS

Against the backdrop of competing draft Royal Charters, the newspaper publishers announced the launching of IPSO—the Independent Press Standards Organization—to which a majority of the industry had pledged to subscribe.<sup>94</sup> Although a few major newspapers, such as *The Guardian*, *The Independent*, and the *Financial Times*, have chosen not to join IPSO at this point,<sup>95</sup> the IPSO organization debuted in September 2014.<sup>96</sup> The IPSO appointments panel has been established and its inaugural chair appointed.<sup>97</sup>

91. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 15.

92. See generally HACKED OFF, <http://hackinginquiry.org/> (last visited Jan. 12, 2015). See also MEDIA STANDARDS TRUST REPORT, *supra* note 89.

93. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 14.

94. See, e.g., Lisa O’Carroll, *Press industry pushes ahead with new regulator despite political deadlock*, THE GUARDIAN (July 8, 2013), available at <http://www.theguardian.com/media/2013/jul/08/press-industry-new-regulator>. See also NEWS UK, *Independent Press Standards Organization* (July 8, 2013), available at <http://www.news.co.uk/2013/07/independent-press-standards-organisation/>. See also WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 17–18.

95. See Editorial, *The Guardian view on the new press regulator, IpsO*, THE GUARDIAN (Sept. 4, 2014), available at <http://www.theguardian.com/commentisfree/2014/sep/04/guardian-view-new-press-regulator-ipso> (explaining THE GUARDIAN’s position); Roy Greenslade, *Financial Times rejects IpsO in favour of its own editorial complaints system*, THE GUARDIAN (Apr. 17, 2014), available at <http://www.theguardian.com/media/greenslade/2014/apr/17/press-regulation-financialtimes> (describing Financial Times’ decision regarding IPSO membership). The papers’ decision to wait seems less due to a preference for a Leveson body under the cross-party Royal Charter as opposed to a concern that IPSO would be controlled by News UK, Associated Newspapers and Telegraph Media Group—the biggest national newspapers. Mark Sweney, *Guardian rejects press watchdog as ‘own goal’ threatening independence*, THE GUARDIAN (Aug. 6, 2013), available at <http://www.theguardian.com/media/2013/aug/06/guardian-rejects-press-watchdog-threatens-independence>.

96. INDEPENDENT PRESS STANDARDS ORGANIZATION, <https://www.ipso.co.uk/IPSO/index.html> (last visited Jan. 13, 2015).

97. See Greenslade, *supra* note 87 (noting appointment of outgoing appeals court judge Sir Alan Moses as inaugural IPSO chair). Newspaper Society, *Appointment Panel Invites Applications for IPSO Chair Role*, SOCIETY OF

Promising that IPSO “will be a complete break with the past, and will deliver all the key Leveson recommendations,” the publishers offered constitutional documents.<sup>98</sup> A press release declared that IPSO would have powers to impose fines of up to £1 million for serious and systemic wrongdoing and ensure that corrections and adjudications were published “whether editors like it or not.”<sup>99</sup> IPSO has a majority of independent members at every level, and no industry veto on appointments.<sup>100</sup>

Nevertheless, IPSO has attracted criticism as insufficiently independent of publishers and insufficiently distinct from the now-defunct PCC.<sup>101</sup> Critics devote much attention to the funding structure of IPSO, which depends on

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EDITORS (Feb. 6, 2014), available at <http://www.newspapersoc.org.uk/06/feb/14/appointment-panel-invites-applications-for-ipso-chair-role>. See also Mark Sweney, *Press regulator Ipso names its board*, THE GUARDIAN (May 28, 2014), available at <http://www.theguardian.com/media/2014/may/28/press-regulator-ipso-board-ros-altmann-charles-wilson>.

98. See O’Carroll, *supra* note 94.

99. *Id.* The final Articles of Association, Regulations, and Financial Sanctions Guidance Independent Press Standards Organization are available at IPSO’s website. <https://www.ipso.co.uk/IPSO/aboutipso.html>.

100. See <https://www.ipso.co.uk/IPSO/whoweare.html#Board>. There are seven non-industry directors on IPSO’s board, with five publishing representatives. See Articles of Association of Independent Press Standards Organization C.I.C., ¶ 22.1, available at [https://www.ipso.co.uk/assets/1/IPSO\\_Articles\\_of\\_Association.pdf](https://www.ipso.co.uk/assets/1/IPSO_Articles_of_Association.pdf). See also Roy Greenslade, *Publishers advertise for chair of new press regulator*, THE GUARDIAN (Feb. 3, 2014), available at <http://www.theguardian.com/media/greenslade/2014/feb/03/press-regulation-ipso>. Former judge Sir Alan Moses is the inaugural chair of IPSO. Lisa O’Carroll, *Sir Alan Moses appointed as Ipso chair*, THE GUARDIAN (Apr. 29, 2014), available at <http://www.theguardian.com/media/2014/apr/29/sir-alan-moses-ipso-chair-pcc>. The appointment of the Chair was made by the Appointment Panel. Newspaper Society, *supra* note 97; Greenslade, *supra* note 87. The current members of the IPSO board are identified on the organization’s website at <https://www.ipso.co.uk/IPSO/whoweare.html#Board>.

101. See, e.g., Jason Deans, *Victims of press intrusion brand new regulator Ipso a sham*, THE GUARDIAN (Sept. 7, 2014), available at <http://www.theguardian.com/media/2014/sep/07/victims-press-regulator-ipso-leveson>; Roy Greenslade, *Press regulation déjà vu: ‘new’ Ipso and the old PCC resemble each other*, THE GUARDIAN (Nov. 4, 2014), available at <http://www.theguardian.com/media/greenslade/2014/nov/04/press-regulation-ipso>; Martin Moore, *New Appointments Further Increase IPSO’s Dependence on Powerful Industry Figures*, HUFFINGTON POST (Mar. 11, 2014), available at [http://www.huffingtonpost.co.uk/martin-moore/ipso\\_b\\_6081726.html](http://www.huffingtonpost.co.uk/martin-moore/ipso_b_6081726.html) (describing representation of powerful publishers on IPSO’s funding board, the appointment of the Editor of the Daily Mail as Chair of the Editors’ Code of Practice Committee, the establishment of a new newspaper industry lobbying group, and the structural limitations on IPSO’s independence, as characterized by the Media Standards Trust, an organization with ties to Hacked Off).

the major publishers, and to the role of IPSO’s funding board—the Regulatory Funding Company (RFC)—in approving key decisions.<sup>102</sup> Hacked Off is continuing its campaign against the IPSO regime.<sup>103</sup>

IPSO need not—and reportedly will not—seek certification from the Royal Charter’s recognition body.<sup>104</sup> It is unclear if IPSO would achieve official recognition even if it were to do so.<sup>105</sup> In theory, this would leave publishers open to threat of exemplary damages in libel and other media-related actions under the Crime and Courts Act 2013. But, pursuant to statute, those provisions become effective only upon the establishment of a recognized self-regulatory body.<sup>106</sup> If IPSO is the only regulatory alternative, then

102. See, e.g., Moore, *supra* note 101.

103. See, e.g., Brian Cathcart, ‘New press regulator will result in more false stories that victimise the weak’, THE GUARDIAN (May 31, 2014), available at <http://www.theguardian.com/media/2014/may/31/press-regulation-ipso-newspapers-media>; Jamie Doward, *Hacked Off says new press regulation body is a stitch-up*, THE GUARDIAN (Apr. 26, 2014), available at <http://www.theguardian.com/media/2014/apr/27/hacked-off-press-regulation-body-stitch-up-claim>; Roy Greenslade, *Hacked Off letter to Ipsy chairman attacks former Sun ombudsman*, THE GUARDIAN (Sept. 8, 2014), available at <http://www.theguardian.com/media/greenslade/2014/sep/08/press-regulation-hacked-off-campaign>.

104. Lisa O’Carroll & Josh Halliday, *Press still plans self-regulation despite ministers’ rejection, says Times editor*, THE GUARDIAN (Oct. 9, 2013), available at <http://www.theguardian.com/media/2013/oct/09/press-plans-self-regulation-despite-ministers-rejection-times-editor>.

105. On the one hand, newspaper publishers have consistently claimed that IPSO is structured to be Leveson-compliant. See, e.g., Michael Seamark, *Tough new Press watchdog set up in wake of Leveson Inquiry prepares for launch within months*, DAILY MAIL (Sept. 6, 2013), available at <http://www.dailymail.co.uk/news/article-2414732/Tough-new-Press-watchdog-set-wake-Leveson-Inquiry-prepares-launch-months.html>. On the other hand, the IPSO structure has been criticized as a rebranding of the PCC, and non-compliant with a significant number of the Leveson Report’s recommendations. See, e.g., Roy Greenslade, *Ipsy, the new press regulator, is just the PCC with extra bells and whistles*, THE GUARDIAN (Jan. 8, 2014), available at <http://www.theguardian.com/media/2014/jan/08/ipso-press-regulator-pcc-bells-whistles>; MEDIA STANDARDS TRUST, *IPSO: AN ASSESSMENT BY THE MEDIA STANDARDS TRUST* (Nov. 15, 2013), available at <http://mediastandardstrust.org/mst-news/ipso-an-assessment-by-the-media-standards-trust/>; see also Greenslade, *supra* note 86.

106. The Crime and Courts Act 2013 received Royal Assent on April 13, 2013. Section 34 of the Act addresses exemplary damages and defines “relevant publisher,” section 40 relates to costs, and section 42 provides that the provisions would only apply if a regulator had been recognized by the recognition body established by Royal Charter. Crime and Courts Act, 2013, c. 22, pt. 2, §§ 34, 42 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>.

oversight of the press is likely to be at a standstill. Consequently, an important question for IPSO's future will be its effectiveness at forestalling other self-regulatory organizations from forming and seeking recognition body certification.

Enter IMPRESS, the Independent Monitor for the Press, launched in December 2013 as a "credible, compliant, independent regulator."<sup>107</sup> IMPRESS, whose asserted goal is the development of a Leveson-compliant self-regulator "truly independent of newspaper owners and politicians," has been endorsed by the National Union of Journalists<sup>108</sup> and attracted the support of former *Times* editor Sir Harold Evans.<sup>109</sup> Although IMPRESS has apparently obtained some funding from the Joseph Rountree Foundation and some public donations, no major publishers are reported to have joined the initiative.<sup>110</sup> IMPRESS could emerge as a viable self-regulator if it attracted the remaining unaligned newspapers (such as *The Guardian*, *The Independent*, and the *Financial Times*), as well as small publishers and online news purveyors.<sup>111</sup> If IMPRESS sought Royal Charter certification,

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107. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 18. See also Roy Greenslade, *Impress, the would-be alternative press regulator, appoints chairman*, THE GUARDIAN (Nov. 4, 2014), available at <http://www.theguardian.com/media/greenslade/2014/nov/05/press-regulation-newspapers>; IMPRESS PROJECT, *IMPRESS moves another step closer to launch* (June 30, 2014), available at <http://impressproject.org/2014/06/30/impress-moves-another-step-closer-to-launch/>. The IMPRESS Project was formed in 2013 by Jonathan Heawood, a former director of English PEN. See Roy Greenslade, *Impress, a potential alternative to Ipsos, takes a step towards formation*, THE GUARDIAN (June 30, 2014), available at <http://www.theguardian.com/media/greenslade/2014/jun/30/press-regulation-ipso>; THE GUARDIAN, *Jonathan Heawood*, <http://www.theguardian.com/profile/jonathanheawood> (last visited Jan. 13, 2015) (describing Heawood); Jonathan Heawood, *Why the Impress Project wants to talk about press regulation*, THE GUARDIAN (Dec. 9, 2013), available at <http://www.theguardian.com/media/2013/dec/08/impress-project-press-regulation-ipso>.

108. Heawood, *supra* note 107; Greenslade, *supra* note 86.

109. IMPRESS PROJECT, *The IMPRESS Project Board*, <http://impressproject.org> (last visited Jan. 22, 2015).

110. Greenslade, *supra* note 86; Roy Greenslade, *Impress versus Ipsos - get ready for another press regulation battle*, THE GUARDIAN (Dec. 12, 2013), available at <http://www.theguardian.com/media/greenslade/2013/dec/12/press-regulation-hacked-off-campaign>; IMPRESS PROJECT, *Prospectus*, <http://impressproject.org/prospectus/> (last visited Jan. 13, 2015).

111. See, e.g., Greenslade, *supra* note 110. Cf. Martin Moore, *The topsy-turvy world of newspaper regulation and government spies*, NEW STATESMEN (Nov. 25, 2013), available at

it would trigger the exemplary damages provisions of the Crime and Courts Act. Thus, like David slaying Goliath, IMPRESS could derail the newspaper industry’s attempt to freeze the Royal Charter’s review process.<sup>112</sup> Recently, and in light of such an eventuality, the free speech and literature charity English PEN released a report warning that the Crimes and Courts Act legislation would have a significant chilling effect on freedom of expression.<sup>113</sup>

Against that background, members of the U.K. government have attempted to pressure newspapers to comply with the Royal Charter system, and constraints on press access to information have begun to be put into place.<sup>114</sup>

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<http://www.newstatesman.com/politics/2013/11/topsy%E2%80%93turvy-world-newspaper-regulation-and-government-spies> (making a similar point in the context of an argument rejecting the amenability of the Royal Charter to manipulation by politicians).

112. Some have wondered whether that might be one of the rationales for the introduction of IMPRESS. Both Hacked Off representatives and Heewood have denied that IMPRESS “was some kind of front organization for Hacked Off.” Greenslade, *supra* note 110. Nevertheless, “it is obvious that Impress does amount to a stalking horse for Hacked Off . . .” *Id.*

113. HELEN ANTHONY, WHO JOINS THE REGULATOR? A REPORT ON THE IMPACT OF THE CRIME AND COURTS ACT ON PUBLISHERS 3, ENGLISH PEN (Nov. 2014), *available at* <http://www.englishpen.org/campaigns/who-joins-the-regulator/> (“English PEN is concerned that the lack of consultation and parliamentary debate surrounding the legislation and the Royal Charter has resulted in a confused, contradictory and arbitrary series of definitions [of ‘relevant publisher’ under the legislation] and exemptions that will create uncertainty and chill freedom of expression.”).

114. For example, Prime Minister David Cameron warned the press in a speech that faced “hideous” statutory regulation if it chose not to participate in the Royal Charter process. *See* Watt, *supra* note 9. Cameron is not alone. Numerous members of the House of Commons Culture, Media and Sport Select Committee “generated some heat” during a hearing in which they questioned Lord Hunt, the present PCC Chair and proponent of IPSO. Greenslade, *supra* note 86; Roy Greenslade, *Hunt of the PCC sweats under fire from the Commons Charterists*, THE GUARDIAN (Jan. 29, 2014), *available at* <http://www.theguardian.com/media/greenslade/2014/jan/29/press-regulation-lord-hunt>. Deputy Prime Minister Nick Clegg has publicly predicted high fines for non-compliant newspapers. Rowena Mason & Andrew Sparrow, *Press self-regulation without oversight may lead to higher fines, hints Clegg*, THE GUARDIAN (Oct. 6, 2014), *available at* <http://www.theguardian.com/media/2014/oct/06/press-self-regulation-higher-fines-ipso-clegg> (“I think we should let this system run for a bit because these incentives will increase over time. So let’s just give it a bit of time.”). The Daily Mail Editor recently appealed for press unity in response, *inter alia*, to “suggestions from some politicians that they will ‘finish what they began with Leveson’ after the general election.” Press Association, *Daily Mail editor: unite to fight for press freedom*, THE GUARDIAN (Oct. 28, 2014), *available at* <http://www.theguardian.com/media/2014/oct/28/daily-mail-editor-press-freedom>

Should there be another tabloid debacle before the general elections of 2015—and especially after the expenditure of millions of pounds on the Leveson Inquiry—public opinion might well force candidates to push for even more drastic regulation.<sup>115</sup>

In sum, the future of the Leveson Report's recommendations for press reform in the U.K. is currently unsettled. Despite characterizations of British press reform as at an impasse,<sup>116</sup> what seems certain is that *something* will be done.<sup>117</sup>

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paul-dacre-ripa-eu [hereinafter Press Association]. The Information Commissioner's Office released a draft for consultation. INFORMATION COMMISSIONER'S OFFICE, DATA PROTECTION AND JOURNALISM: A GUIDE FOR THE MEDIA (2014), available at <https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>. Post-Leveson, U.K. police have been less forthcoming in naming suspects and arrests. Roy Greenslade, *Rolf Harris: Mail and Sun blame Leveson inquiry for his 'secret' arrest*, THE GUARDIAN (July 1, 2014), available at <http://www.theguardian.com/media/greenslade/2014/jul/01/ukcrime-national-newspapers> (describing resulting chilling effect). The Government has also begun consultations on press access restrictions in the context of data protection and police relationships. See Peter Preston, *Stephen Lawrence saga shows we still need whistleblowers*, THE GUARDIAN (Mar. 9, 2014), available at <http://www.theguardian.com/media/2014/mar/09/stephen-lawrence-saga-whistleblowers-undercover-policing-mail-guardian> ("Now, after Leveson, police channels of information are closed."); Roy Greenslade, *Journalists face 'fundamental threat to freedom of expression', says lawyer*, THE GUARDIAN (July 8, 2014), available at <http://www.theguardian.com/media/greenslade/2014/jul/08/data-protection-privacy> (on new data-handling guidance now under consideration by the Information Commissioner's Office); Owen Bowcott, *Secret hearings could allow police to seize journalists' notes if bill passes*, THE GUARDIAN (Jan. 31, 2014), available at <http://www.theguardian.com/media/2014/jan/31/secret-hearings-police-journalists-deregulation-bill>; Roy Greenslade, *David Cameron urged not to water down the freedom of information act*, THE GUARDIAN (Oct. 30, 2013), available at <http://www.theguardian.com/media/greenslade/2013/oct/30/freedomofinformation-davidcameron>; Roy Greenslade, *Publishers fear threat to press freedom in new criminal justice bill*, THE GUARDIAN (June 5, 2014), available at <http://www.theguardian.com/media/greenslade/2014/jun/05/press-freedom-medialaw>. But see Owen Bowcott, *Government drops plan to give attorney general power over web news archives*, THE GUARDIAN (June 30, 2014), available at <http://www.theguardian.com/media/2014/jun/30/attorney-general-online-news-archives>; Roy Greenslade, *Supreme court ruling opens door to revelations of secret information*, THE GUARDIAN (Mar. 27, 2014), available at <http://www.theguardian.com/media/greenslade/2014/mar/27/medialaw-thetimes>.

115. Cf. *infra* note 168.

116. See, e.g., WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 10.

117. On the one hand, delay could arguably work in the newspapers' favor. See Damian Tambini, *It's 2014 and We're Still Implementing Leveson Inquiry Recommendations*, LSE MEDIA POLICY PROJECT (Jan. 8, 2014), available at

II. “A GRAVE ERROR”?<sup>118</sup> WORRISOME ASPECTS OF THE LEVESON UNDERTAKING

The Leveson approach to press regulation has been characterized by many proponents as a moderate and proportional response to the unsavory realities of the tabloid press.<sup>119</sup> What at first glance might be modest and sensible, however, is likely to have broad-ranging negative consequences both for the British press and journalism worldwide.<sup>120</sup> Without disputing that the British tabloid press went too far in phone-hacking, blagging, and the rest of the newsgathering “dark arts,” often violating existing law, Leveson-based press regulation in Britain is likely to be overly intrusive on the work of the press in the new media age.<sup>121</sup> It is possible to address unlawful actions by the press

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<http://blogs.lse.ac.uk/mediapolicyproject/2014/01/08/its-2014-and-were-still-implementing-leveson-inquiry-recommendations/> (“The closer the 2015 elections, the more the power balance shifts to the editors and owners. They may be tempted to tough it out, even when the costs threat is a real one.”). On the other hand, companies accountable to shareholders and concerned about public opinion may “weigh risks . . . more prudently.” *Id.* And politicians would find it very difficult to back off from Leveson after the expenditure of extensive resources on the inquiry. Levi, *supra* note 6; Tambini, *supra* (“Whilst it is finely balanced, no front bench politician, and least of all the Prime Minister, will want to go into an election year with nothing at all to show for the Inquiry. The total direct cost of the Leveson Inquiry was £5 442 400. This is likely to be a fraction of the total cost of the inquiry, which heard evidence from 737 witnesses from government, media companies, the police and all sectors of society. Many witnesses had senior legal and PR advice and representation, much of the cost of which will have been borne by the public purse. And that leaves out the lost productivity caused as the Inquiry was streamed into homes and offices up and down the land.”).

118. The outgoing head of Ofcom, the regulator and competition authority for the U.K.’s electronic communications industries, has publicly called any form of statutory regulation of the press “a grave error.” See James Slack, *Grave error to gag the media, says head of Ofcom: Idea of statutory regulation leaves her feeling ‘very nervous’*, DAILY MAIL (Mar. 2, 2014), available at <http://www.dailymail.co.uk/news/article-2571758/Grave-error-gag-media-says-head-Ofcom-Idea-statutory-regulation-leaves-feeling-nervous.html> (quoting Colette Bowe, who also reported at the Oxford Media Convention that she was “very, very nervous about any form of regulation near our press.”).

119. This Article focuses principally on the Leveson Report’s recommendations because the Royal Charter incorporates twenty-three of them.

120. See *infra* pt. II, § E. See also WAN-IFRA, PRESS FREEDOM, *supra* note 4.

121. As The Guardian’s chief legal officer concluded: “What Leveson has come up with is the worst of all worlds. His attempt to please everybody and avoid being a dusty footnote on a shelf somewhere has led him down a road that has proved to be pretty disastrous.” Gavriel Hollander, *Leveson has been ‘disastrous’ says Guardian legal chief*, PRESS GAZETTE (Sep. 18, 2013), available

directly without effectively creating a new regime of press licensing. Although the phone-hacking scandal served as the trigger for the much broader regulatory debate, the two should not be conflated.<sup>122</sup> And press regulation under the Royal Charter cannot be addressed separately from the British government's unprecedented attempts to intimidate national security reporting.

A. "Voluntary Self-Regulation" or "Licensing By Proxy?"

Even though press reform efforts in the U.K. are not hampered by constitutional provisions such as the First Amendment of the United States Constitution (under which the Leveson option would fail in the United States), there appears to be a British consensus that press licensing or direct regulation of the press would not be acceptable.<sup>123</sup> So the Royal Charter approach is self-consciously designed to avoid state licensing and explicit government oversight of journalistic content. Its proponents argue that press freedom is adequately protected under the regime because subscription to the self-regulatory body is voluntary, because the Royal Charter cannot be amended without a supermajority vote,<sup>124</sup> and because the press regulator would exist

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at <http://www.pressgazette.co.uk/leveson-has-been-disastrous-says-guardian-legal-chief>. The approach is overly press-restrictive even in light of the British press/privacy calculus, which is different from the calculus in the United States. See *infra* note 158.

122. See WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 18.

123. It is well to be reminded that different countries weigh the relative importance of free press and reputational values differently, see David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71, 82 (2012), and so one should not unthinkingly apply American free speech norms to the British question. This Article argues that it is far from clear whether Lord Justice Leveson's complex solution in fact reflects the British balance. Even though the U.K. does not have constitutional press protection, it is a signatory to the European Convention on Human Rights, which protects press freedom under Article 10. For an initial discussion of British press reform from the vantage point of Article 10, see *infra* note 203.

124. The Royal Charter is said to be cloistered from political interference because it can only be amended by a two-thirds supermajority vote in both Houses of Parliament. Enterprise and Regulatory Reform Act, 2013, c. 24, pt. 6, § 96 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/24/part/6/crossheading/royal-charters/enacted>. Proponents assert that "[t]he Charter insulates the press from political interference to a degree not seen before." Brian Cathcart, *Why the big newspaper groups hate the Royal Charter*, INFORMM'S BLOG (Oct. 25, 2013), available at <http://informm.wordpress.com/2013/10/25/why-the-big-newspaper-groups-hate-the-royal-charter-brian-cathcart/>.

as a private entity established by the newspapers themselves.<sup>125</sup> Accordingly, the initial question is whether—by making participation voluntary and state involvement indirect—the Leveson approach can side-step the harms of press licensing and direct state oversight.<sup>126</sup>

A major stumbling block is that the regime will not be truly voluntary in practice. Because the system is unlikely to work without the participation of the major players in the newspaper industry, it is structured to create significant pressures to participate. Small publishers with slender purses would obviously perceive those pressures as directly coercive, but they are not alone. Large, well-heeled publishers as well would likely feel compelled to join a certified regulator lest they be inundated with multi-million dollar lawsuits—with the possibility of high exemplary damages and costs obligations—for media torts.<sup>127</sup> Moreover, government officials have threatened statutory press regulation if the press does not accept the Leveson-inspired approach.<sup>128</sup> Realistically, then, newspapers will be compelled to join a certified regulator, if one is established.<sup>129</sup>

Once they submit themselves to the authority of the self-regulatory body, the newspapers will be vulnerable to “proxy licensing once removed”—where a government-established entity will have the discretion to refuse certification or re-

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125. That a self-regulatory entity is to be subject to oversight by a government-appointed body is not, as such, rare in the United Kingdom (and Europe), where co-regulation is not unusual in other industries.

126. In the United States, the press is seen as a special, and constitutionally protected business. See generally C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007).

127. The history of high defamation awards in Britain would no doubt figure in their deliberations on the question. Libel reform under the Defamation Act, 2013 is not likely to reduce significantly those papers’ concerns about extensive financial exposure in both defamation and privacy-related cases.

128. See Nicholas Watt & Josh Halliday, *Maria Miller tells press: agree to charter or face worse*, THE GUARDIAN (Oct 11, 2013), available at <http://www.theguardian.com/politics/2013/oct/11/maria-miller-warning-press-charter-regulation> (The government has given the newspaper industry a warning “that it risks being subject to full statutory regulation if it refuses to accept the royal charter.”); see also *supra* note 9 (referring to David Cameron’s invocation of “hideous” statutory regulation absent press compliance with Royal Charter).

129. They would be subject to the sanctions imposed over their practices by the regulator. And whatever the sanction, any news organization that did not comply with the regulator’s ruling would potentially be subject to having the regulator’s finding used in a private lawsuit.

certification of a “voluntary” self-regulatory entity as an approved regulator if it is not deemed to satisfy the recognition body’s substantive and procedural criteria. Notably, much like a licensing scheme, the Royal Charter Recognition Panel will engage in both cyclical and *ad hoc* reviews of whether the recognized press Regulator is continuing to meet the Royal Charter’s Leveson-based recognition criteria.<sup>130</sup>

Arguably, this is tantamount to statutory regulation at a remove—where the government will use private parties to achieve its aims indirectly. Even though the recognition body will not directly run the operations of the self-regulatory entity, its oversight and monitoring roles under the Charter will inevitably create incentives for self-regulation—at two levels—in harmony with the substantive standards approved by the government-established body. We can expect the self-regulatory body to regulate with a view to satisfying the explicit or tacit requirements of its certifying entity. And, in turn, the newspaper members of the press self-regulator would have significant incentives to self-censor so as to avoid extensive potential sanctions from their self-regulatory body.

Assurances that the press regulator would not have the power to prevent publication cannot gainsay these layers of likely self-censorship.<sup>131</sup> So the Royal Charter, by holding the press’ self-regulatory entity hostage to the cyclical and *ad hoc* review power of the recognition body, could well achieve results akin to licensing indirectly, without formally accrediting the press. Only two degrees of separation would exist between the government and the operations of particular newspapers.

The ongoing certification requirement and the Recognition Body’s *ad hoc* review authority mean that newspapers will continuously operate under the threat of

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130. Under the Royal Charter, the self-regulatory body is subject not only to cyclical reviews by the recognition body according to a statutory schedule (in order to assure that it continues to satisfy the twenty-three recognition criteria established in the Charter), but also to *ad hoc* reviews whenever the board of the recognition panel thinks it is in the public interest. The recognition factors are grounded on the Leveson Report’s recommendations. Royal Charter, *supra* note 60, ¶ 10. The board’s *ad hoc* review power is triggered if it thinks that there are “exceptional circumstances” calling for *ad hoc* review, including “serious breaches of the recognition criteria.” *Id.* at ¶ 8.

131. See LEVESON REPORT, *supra* note 7; Royal Charter, *supra* note 60, sched. 3, ¶ 17.

compelled self-justification. In addition, the very numerosity of the Leveson-based criteria to be assessed by the Recognition body gives the body extensive discretion. The discretion to hold the regulator hostage to any one of twenty-three different recognition requirements virtually ensures that the Recognition body could find *some* element of non-compliance if it wished to do so.<sup>132</sup> Moreover, the regime will likely lead to one or a few self-regulatory bodies seeking certification. In the absence of greater competition among such bodies, the Recognition body could more easily funnel standardizing norms through its relicensing process.

Because of their threats to press freedom, hybrid models of self-regulation or meta-regulation used in Britain in other contexts should not be applied in the press context.<sup>133</sup>

*B. State Insulation or “Crossing the Rubicon?”<sup>134</sup>*

Proponents of indirect press regulation argue that the regulatory structure was precisely designed to insulate the press’ regulator from politics and government. Yet Charter opponents argue that this is not enough—either in principle or in practice.

First, opponents claim that even though the Royal Charter is not the direct equivalent of full state press control, any form of state input—including a Royal Charter initially crafted to insulate press regulation from state control—would still have crossed “the psychological barrier to state action.”<sup>135</sup> Whether directly through the “front door of Westminster” or

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132. Royal Charter, *supra* note 60, sched. 3.

133. See Adam Tucker, *Press Regulation and the Royal Prerogative* (Nov. 8, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347375) (categorizing the Royal Charter as meta-regulation). For discussion of meta-regulation (audited self-regulation), see, for example, Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in *THE OXFORD BOOK OF REGULATION* (Robert Baldwin et al eds., 2010).

134. Patrick Wintour & Dan Sabbagh, *Leveson report: David Cameron refuses to ‘cross Rubicon’ and write press law*, *THE GUARDIAN*, Nov. 29, 2012, available at <http://www.theguardian.com/media/2012/nov/29/david-cameron-refuses-to-write-press-law> (quoting Prime Minister David Cameron’s description of statutory press regulation).

135. Jacob Rowbottom, *Leveson, press freedom and the watchdogs*, *RENEWAL*, vol. 21, no. 1 (Apr. 23, 2013), available at <http://www.renewal.org.uk/articles/leveson-press-freedom-and-the-watchdogs/>; WAN-IFRA, *PRESS FREEDOM*, *supra* note 4, at 13. For an argument that the Royal Charter approach is an *ultra vires* exercise of prerogative power, see Tucker, *supra* note 133.

“the back door of Buckingham Palace[,]” the Royal Charter system has “introduced an element of political influence—no matter how distant—into the control of the press.”<sup>136</sup> For those who are principally concerned about protecting the press against state power, direct and indirect regulations are both unpalatable.

Critics of Leveson and the Royal Charter also question the effectiveness of the effort to insulate the Royal Charter process from Parliamentary or executive end-run. This is because, they claim, the super-majority amendment requirement does not necessarily eliminate pressure on the press to self-censor.<sup>137</sup> Depending on circumstances, cobbling together political supermajorities to change the Royal Charter is not inconceivable.<sup>138</sup>

Although the Enterprise and Regulatory Reform Act provision is designed as a “protection ‘lock’”<sup>139</sup> against passing more stringent press regulation, it in fact opens the door to statutory controls that did not exist previously.<sup>140</sup> If another press scandal akin to the phone hacking scandal comes to light, or if investigative reporting on Parliament cuts too close to the bone, and if members of Parliament feel public pressure to muzzle the press, then we can anticipate across-the-aisle political agreements that might head toward supermajority amendment.<sup>141</sup> At a minimum, the recognition

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136. Editorial, *Media regulation: a royal seal, with no deal*, THE GUARDIAN (Oct. 28, 2013), available at <http://www.theguardian.com/commentisfree/2013/oct/28/media-regulation-royal-charter-press>. The Guardian editorial makes clear that because the Privy Council consists of ministers from the “government of the day,” the Royal Charter option simply replaces one set of political influences (Parliament) with another (Ministers).

137. See *infra* pt. II, § D.

138. See Telegraph View, *The fight goes on for press freedom*, TELEGRAPH (Oct. 30, 2013), available at <http://www.telegraph.co.uk/comment/telegraph-view/10415103/The-fight-goes-on-forpress-freedom.html> (“Such a scenario is not unimaginable. The Guardian’s recent investigation into state spying is exactly the kind of reporting that could spark a moral panic among politicians and give them cause to limit what the press can publish. If Parliament can find the numbers to impose a royal charter upon the industry, it can also find the numbers necessary to censor it.”).

139. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 15.

140. *Id.* So long as Parliament had a two-thirds majority, it could “vote for stronger controls over regulation.” *Id.*

141. The Sunday Times wrote about the two-thirds majority provision that “[i]t is in fact an open invitation to future politicians to restrain the press from exposing the secrets of the powerful. It is easy to imagine such a majority being constructed in the grip of a moral panic. Anyone who thinks the press is

body created under the auspices of the Royal Charter may fear such developments and therefore have an incentive to regulate in order to avoid them. In addition, clever ways to avoid the limits have already been imagined.<sup>142</sup> Press organizations seeking change in the Royal Charter regime would be constrained to lobby a two-thirds Parliamentary majority to do so, while a future Government seeking to eliminate the super-majority requirement might simply repeal the legislation by majority vote.<sup>143</sup> Moreover, as some have argued, the super-majority requirement might undercut its own goals.<sup>144</sup>

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overreacting should consider blatant attempts made by government aides last year to intimidate The Daily Telegraph over its investigation into the expenses of Maria Miller, the Culture Secretary.” WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 15 (quoting editorial).

142. In addition, the two-thirds Parliamentary vote requirement for Charter amendment might be evaded precisely because royal charters are capable of being issued by the monarch, on the Prime Minister’s advice, without reference to Parliament. Thus, it is possible that the monarch could issue an entirely new charter regulating the press, so long as it does not purport to amend the previous one subject to the supermajority amendment requirement. See Jacob Rees-Mogg, *Royal charter: The press must resist this assault on liberty*, TELEGRAPH (Mar. 26, 2013), available at <http://www.telegraph.co.uk/news/uknews/leveson-inquiry/9954913/Royal-charter-The-press-must-resist-this-assault-on-liberty.html>. For another argument that proceeding with press regulation by Royal Charter, even if it protected against subsequent amendment by the executive, would still permit legislative overriding, see Rowbottom, *supra* note 135. There is also a reasonable argument that the operations of a press regulatory system under Royal Charter would also be less transparent than if accomplished via statute. *Id.*

143. See WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 15–16. Might Section 96 of the Enterprise and Regulatory Reform Act, 2013 itself be amended by a majority Parliamentary vote, even if the Parliamentary two-thirds vote requirement in the Royal Charter cannot be? See Andrew Gilligan, *Royal charter: The men who want to kill our free press*, TELEGRAPH (Mar. 24, 2013), available at <http://www.telegraph.co.uk/comment/9949855/Royal-charter-The-men-who-want-to-kill-our-free-press.html>.

144. The press regulation Royal Charter is likely to need amendment over time, as the media landscape changes. Because such amendment will require political super-majorities across party lines, the need for super-majorities might “forc[e] the press into the kind of give-and-take relationship with politicians so familiar in the statute-regulated world of broadcasting.” Steve Hewlett, *Could the royal charter force the press into political haggling?*, THE GUARDIAN (Nov. 10, 2013), available at <http://www.theguardian.com/media/mediablog/2013/nov/10/press-regulation-royal-charter>. Other Royal Charter opponents have worried that the supermajority requirement could potentially protect a regulator hostile to the press from being removed. See Rees-Mogg, *supra* note 142 (“The ultimate person in charge of the recognition body’s members is the Commissioner for Public Appointments. The Crown selects him, so it is conceivable that a government could appoint someone hostile to the press in an

### C. *Shifting Power*

Proponents of statutory press regulation have argued that journalism and the public interest need protection against the power of private entities, including powerful newspaper publishers. Some ground their position on the central role played by Rupert Murdoch and his *News of the World* newspaper both in the phone-hacking scandal, and—and more importantly—in the British political environment since the Thatcher days.<sup>145</sup> Revelations of former Prime Minister Tony Blair’s role in advising former *News of the World* Editor Rebekah Brooks add to the concerns about improper closeness of press barons and politicians.<sup>146</sup> To the extent that regulation would undermine that kind of outside political influence, it would arguably be democracy-enhancing.

However, the time for the moderate version of the watchdog role is long gone. Whatever one might say about the balance between government and corporate—indeed, press—power in the late twentieth century, it is significantly

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effort to stiffen control. It would then be harder for a successor government to restore press freedom.”).

145. It is true that the Leveson Report characterizes the problem as part of the shared journalistic culture in British newspapers, and admittedly criminal investigations are now revealing phone hacking and other law-violating activity by tabloids other than NEWS OF THE WORLD. But it is not inconceivable that the Murdoch organization was a prime mover whose activities then lead to a snowballing effect as a result of competition. Many in Britain believe that the popular press—especially the Murdoch papers—“has had an improper armlock on the political class—both Labour and Conservative.” See John Lloyd, *The Two Cultures*, in MEDIA AND PUBLIC SHAMING: DRAWING THE BOUNDARIES OF DISCLOSURE 218 (Julian Petley ed., 2013). While Murdoch has antecedents in Britain’s famously powerful press barons of the early twentieth century, he succeeded in turning News Corporation from an ordinary news company into a global conglomerate using its press capabilities as a way of seeking influence. Jay Rosen, *Phone hacking crisis shows News Corp is no ordinary news company*, THE GUARDIAN (July 19, 2011), available at <http://www.theguardian.com/commentisfree/cifamerica/2011/jul/19/rupert-murdoch-phone-hacking>. The Leveson Inquiry itself uncovered significantly cozy relationships between Murdoch, his NEWS OF THE WORLD editors, and the British Government. For a recent example, former NEWS OF THE WORLD editor Andy Coulson served as the communications director for David Cameron. Burns, *supra* note 5. British media analysts conclude that “[i]f the political class is or was to a significant extent in thrall to the Murdoch press, that is clearly a reason for real concern.” Lloyd, *supra*, at 219.

146. See, e.g., Lisa O’Carroll, *Tony Blair advised Rebekah Brooks on phone-hacking scandal, court hears*, THE GUARDIAN (Feb. 19, 2014), available at <http://www.theguardian.com/uk-news/2014/feb/19/tony-blair-rebekah-brooks-phone-hacking>.

different today. Looking to government—or to government hand-in-hand with nominally private parties—to curb private press power is a mistaken strategy both because of the diminution of private press power, and because of the increasing threat of government power (and government power wielded in collusion with private power) over free speech today.

### 1. *The Murdoch Factor*

With respect to the Murdoch factor, it does not deny Murdoch’s past influence to note that Prime Minister Tony Blair’s “feral beasts” are now mostly notable for their “ebbing power.”<sup>147</sup> Politicians have myriad ways to reach the voting public directly, circulation figures even for the national papers are down dramatically, and the press itself is reporting that the newspapers’ grip on the national political debate is slipping.<sup>148</sup> Murdoch himself has been a beleaguered figure since the News of the World scandal.<sup>149</sup>

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147. THE ECONOMIST, *Twilight of the scribblers? Fleet Street’s diminishing power underlies the fight over press regulation* (Oct. 12, 2013), available at <http://www.economist.com/news/britain/21587801-fleet-streets-diminishing-power-underlies-fight-over-press-regulation-twilight>. See also Bernhold & Cowell, *supra* note 7 (quoting John Lloyd, co-founder of the Reuters Institute for the Study of Journalism at Oxford, for the proposition that the tabloids “are losing power all the time.”).

148. THE ECONOMIST, *supra* note 147.

149. According to a recent report, Scotland Yard intends to question Murdoch “under caution” about crime at his newspapers. Nick Davies, *Rupert Murdoch: Scotland Yard want interview about crime at his UK papers*, THE GUARDIAN (June 24, 2014), available at <http://www.theguardian.com/uk-news/2014/jun/24/scotland-yard-want-interview-rupert-murdoch-phone-hacking>. There has also been talk about American prosecution of News Corp. for violations of the Foreign Corrupt Practices Act on the grounds of NEWS OF THE WORLD’s police bribery practices. See Ravi Somaiya, *After 7 Years, No End in Sight to Phone Hacking Scandal*, N.Y. TIMES (May 16, 2012), available at <http://www.nytimes.com/2012/05/17/world/europe/no-end-in-sight-to-inquiry-into-murdochs-media-empire.html>. Indeed, a campaign to push for such prosecution seems to be the *raison d’être* of <http://www.prosecutenewscorp.com/>. News Corp. has been split into two, separating the news and entertainment parts of the company. Amy Chozick, *Shareholders Approve Plan to Split News Corp.*, N.Y. TIMES (June 11, 2013), available at <http://www.nytimes.com/2013/06/12/business/media/shareholders-approve-plan-to-split-news-corp.html?ref=rupertmurdoch>. Huge numbers of civil suits have been brought over phone hacking. See Ravi Somaiya, *News Corp. Slowly Putting Phone-Hacking Scandal Behind It*, N.Y. TIMES (June 29, 2014), available at [http://www.nytimes.com/2014/06/30/business/media/news-corp-slowly-putting-phone-hacking-scandal-behind-it.html?\\_r=0](http://www.nytimes.com/2014/06/30/business/media/news-corp-slowly-putting-phone-hacking-scandal-behind-it.html?_r=0) (noting that News Corp. has settled 718 claims related to phone-hacking). Even activist

Query whether Leveson's implicit focus on Murdoch as the *raison d'être* for an unethical British press culture is an example of misplaced focus in the modern press context.<sup>150</sup> The market conditions that permitted the twentieth century press barons and Murdoch's News Corporation to accumulate vast power are fast fading. Moreover, without Murdoch, the state of the remaining British newspaper press is unlikely to lead to the same kind of influence. Given that much of the press power decried by regulation proponents came from the mutually reinforcing relationships of the press titans with politicians, reductions in the salience of the press inevitably shift the balance of power between those two groups.<sup>151</sup>

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shareholders sued the News Corp. board for violations of fiduciary duty in permitting Murdoch to run the company like a fiefdom, withdrawing the suit in exchange for a \$139 million settlement. Dominic Rushe & Mark Sweney, *News Corp reaches settlement with shareholders*, THE GUARDIAN (Apr. 22, 2013), available at <http://www.theguardian.com/media/2013/apr/22/news-corp-reaches-settlement-shareholders>. One blog headline in THE GUARDIAN—"The Rupert Murdoch era is all but over"—discusses the waning power of the press in general and Murdoch in particular. Steve Hewlett, *The Rupert Murdoch era is all but over*, THE GUARDIAN (Jan. 5, 2014), available at <http://www.theguardian.com/media/media-blog/2014/jan/05/rupert-murdoch-era-over>. Cf. Peter Preston, *Once humbled, but now risen: the Murdochs march ahead*, THE GUARDIAN (June 28, 2014), available at <http://www.theguardian.com/media/2014/jun/29/rupert-murdoch-humbled-now-march-ahead> (noting that "Murdoch certainly has his swagger back, if not his reputation and influence."); Somayia, *News Corp. Slowly Putting Phone-Hacking Scandal Behind It*, *supra* (noting financial benefit of News Corporation split).

150. Even if that is too optimistic an assessment, neither the Murdoch phenomenon nor the sensationalist character of the tabloids suffices to justify the multi-layered structure of press reform envisioned in the Leveson Report. To the extent that the U.K. press problem is attributable to the influence-seeking behavior of the Murdoch organization and its malign influence elsewhere in the media sector, then query whether other ownership limits, for example, might serve as more effective and targeted solutions than the Leveson Inquiry's preferred bureaucratic structures? Media ownership rules could potentially offer an alternative more sensitive to press values.

151. It might be argued that the diminishing economic security of the press will lead to increased misbehavior, thereby justifying regulation. Arguably, phone-hacking itself resulted from ruthless competition in an industry that is both democratically necessary and financially in free-fall. See generally Tim Luckhurst, *Missing the Target and Spurning the Prize* in THE PHONE HACKING SCANDAL: JOURNALISM ON TRIAL (Richard Lance Keeble & John Mair, eds. 2012) (arguing against press regulation and contending that hacking occurred in a context of ruthless competition that often drove journalists to break rules); Cf. Lyrrisa B. Lidsky, *Prying, Spying and Lying: Media Intrusions and What the Law Should Do About Them*, 73 TUL. L. REV. 173, 179 (1998) (attributing increases in media intrusions to competition). But the misbehavior could be controlled through means other than overarching attempts to promote

## 2. *Hacked Off and Fears of Increased Media Irresponsibility*

Proponents of the Leveson-recommended independent regulatory structure argue that, whatever its hypothetical dangers, it is preferable to the alternative: publishers whose economic incentives to sensationalize coverage and cut corners will inevitably undermine truly voluntary self-regulation.<sup>152</sup> Admittedly, reduced resources, fierce competition, and the 24-hour news cycle have already led many news purveyors down the path to sensational, overwrought, inaccurate, acontextual, and “he said-she said” reporting.<sup>153</sup> Victim groups such as Hacked Off predict continuous declines in press ethics in the absence of effective regulation.<sup>154</sup> Critics worry that things will only deteriorate, as participants in the digital Fourth Estate do not all necessarily share the professional journalistic norms and practices of the traditional, high-brow institutional press of the twentieth century.<sup>155</sup> On this view, moderate press regulation such as the Leveson approach, while perhaps inconsistent with a strong version of the watchdog

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“voluntary” regulation. Moreover, query whether the diversity of press outlets in the digital Fourth Estate, even enabling misbehavior, could also enhance accountability?

152. See, e.g., Rowbottom, *supra* note 135.

153. Criticism of the current media and its coverage incentives is legion. Popular books of that stripe include HOWARD ROSENBERG & CHARLES S. FELDMAN, *NO TIME TO THINK* (2008); For critiques of “he said she said” journalism (referring to reports in which journalists report polarized extremes on factually verifiable matters without attempting to assess truth claims), see, for example, Jay Rosen, *He Said, She Said Journalism: Lame Formula in the Land of the Active User*, PRESSTHINK, (Apr. 12, 2009), available at [http://archive.pressthink.org/2009/04/12/hesaid\\_shesaid.html](http://archive.pressthink.org/2009/04/12/hesaid_shesaid.html); Linda Greenhouse, *Challenging ‘He Said, She Said’ Journalism*, NEIMAN REPORTS, (July 6, 2012), available at <http://www.nieman.harvard.edu/reports/article/102769/Challenging-He-Said—She-Said-Journalism/>.

154. Hacked Off and its supporters have pointed to what they take to be post-Leveson press failures. See, e.g., Greenslade, *supra* note 103; *Brooks Newmark Complaint is Dropped. So What About IPSO?*, HACKED OFF, (Oct. 21, 2014), available at [http://hackinginquiry.org/comment/brooks-newmark-complaint-is-dropped-so-what-about-ipso/\(discussing+tabloid+sex+sting+involving+MPs\)](http://hackinginquiry.org/comment/brooks-newmark-complaint-is-dropped-so-what-about-ipso/(discussing+tabloid+sex+sting+involving+MPs)). See also Gerry McCann, *Leveson Has Changed Nothing—The Media Still Put ‘Stories’ Before The Truth*, THE GUARDIAN, (Oct. 2, 2014), available at <http://www.theguardian.com/commentisfree/2014/oct/02/leveson-gerry-mccann-media-stories-before-truth> (critique of newspaper coverage by parent of disappeared toddler Madeleine McCann).

155. See *infra*, pt. F. See also AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPAZZI THREATEN A FREE PRESS* (2015).

justification for a free press, should be deemed consistent with a moderate form of the watchdog argument.<sup>156</sup>

Predictions of further large-scale press misbehavior are not necessarily accurate, however. Indeed, there may be aspects to the evolving media landscape that will lead to increased accuracy and accountability.<sup>157</sup> Moreover, there may be much less intrusive ways of addressing tabloid excesses than an overarching regulatory system such as that contemplated under the Royal Charter.<sup>158</sup>

More significantly, complaints about media excess and warnings of future journalistic irresponsibility are far from new. What makes movements for journalistic accountability particularly credible and effective now, however, is the diminution in the power, status, and cohesion of the institutional press today. The phone hacking scandal and other press misbehavior in fact worked to reduce the status and power of the press and to mobilize public opinion against British tabloids. Explaining phone hacking by reference to the pressures created by the diminution in the press' fortunes does not negate the shift in the power relationship between politicians and the press. The press' power is inevitably reduced as politicians both fear and need the press less. It is no surprise that calls for press regulation have begun to gather momentum at the very moment that technology and economics have upended the twentieth century business model—and concomitant power—of traditional news organizations.<sup>159</sup> Warnings about increased press irresponsibility serve as convenient and under-examined

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156. See, e.g., Rowbottom, *supra* note 135 (distinguishing between strong and moderate versions of the watchdog justification for press freedom).

157. See *infra*, text accompanying note 281.

158. For example, more effective regulation of wiretapping, trespassing, phone hacking and other intrusive newsgathering techniques, and even the recognition of a privacy tort as such could constitute more balanced and tailored responses to journalistic misbehavior. Ultimately, less restrictive alternatives are available to control the worst of the tabloids' problematic newsgathering behavior. If the Leveson Report's only goal were to minimize violations of criminal law by the press, it could certainly have achieved that by far less editorially-intrusive means.

159. This proposition is by now so commonly accepted as to require no extensive support. See, e.g., Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUMBIA JOURNALISM REVIEW, Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, 28 (October 19, 2009); Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1536–47 (2012) and sources cited therein.

excuses for powerful non-press actors to tether the watchdog press.

3. *The Surveillance State and The Guardian’s Snowden Woes*

The diminution in press power described above is accompanied by increasing use of state power to intimidate the press and public. Whatever our concerns about abuse of private power, the reality of the era of the surveillance state is that protection from government (and particularly government in combination with private power) should have primary salience.<sup>160</sup> The continuing saga of *The Guardian’s* news coverage based on NSA contractor Edward Snowden’s leaked national security documents serves as an object lesson here.

Against the backdrop of ongoing press reform, the British government has been actively seeking to constrain *The Guardian’s* reporting of these materials.<sup>161</sup> From effectively requiring *The Guardian* to destroy computer hard drives containing Snowden material,<sup>162</sup> to detaining journalist Glenn Greenwald’s partner at Heathrow airport,<sup>163</sup> to subjecting *Guardian* Editor Alan Rusbridger to Parliamentary committee testimony in which he was asked whether he loved Britain,<sup>164</sup> to making public assertions that the paper’s reporting was definitively harming national security,<sup>165</sup> the

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160. Jack Balkin has argued that “the greatest threat to freedom of speech today is not simply that of public power or private power. It is their potent combination.” Jack M. Balkin, *The First Amendment Is An Information Policy*, 41 HOFSTRA L. REV. 1, 28 (2012).

161. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 19–26.

162. See, e.g., Luke Harding, *Footage Released Of Guardian Editors Destroying Snowden Hard Drives*, THE GUARDIAN, (Jan. 31, 2014), available at <http://www.theguardian.com/uk-news/2014/jan/31/footage-released-guardian-editors-snowden-hard-drives-gchq>.

163. See, e.g., Owen Bowcott, *David Miranda Lawyers Argue That Heathrow Detention Was Unlawful*, THE GUARDIAN, (Nov. 6, 2013), available at <http://www.theguardian.com/world/2013/nov/06/david-miranda-lawyers-heathrow-detention-high-court>.

164. See, e.g., Jack Mirkinson & Alan Rusbridger *Got Asked Some Ridiculous Questions At Parliamentary Hearing*, HUFFINGTON POST, (Dec. 3, 2013), available at [http://www.huffingtonpost.com/2013/12/03/alan-rusbridger-parliament-questioning-ridiculous\\_n\\_4377928.html](http://www.huffingtonpost.com/2013/12/03/alan-rusbridger-parliament-questioning-ridiculous_n_4377928.html).

165. See, e.g., James Slack, *Guardian Has Handed A Gift To Terrorists’, Warns MI5 Chief: Left-Wing Paper’s Leaks Caused ‘Greatest Damage To Western Security In History’ Say Whitehall Insiders*, DAILY MAIL, (Oct. 8, 2013), available at <http://www.dailymail.co.uk/news/article-2450237/MI5-chief-Andrew-Parke->

U.K. government has threatened *The Guardian's* political reporting on numerous fronts. It has deployed the rhetoric of terrorism as a lever to control press coverage of national security matters. The Government's actions have been characterized as "an unprecedented level of political interference in the freedom of the press . . . ." <sup>166</sup> They are doubtless calculated acts of intimidation.

In addition to the Royal Charter regulatory regime and direct government censorship of national security reporting, press watchdogs have identified potential misuses of DA-notices,<sup>167</sup> journalist arrests, proposed changes to legal safeguards for journalistic materials, proposed Internet legislation, and threats to change data protection legislation to reduce protections for journalistic activity as additional concerns for press freedom in the U.K.<sup>168</sup>

Whatever the asserted power of the press, this kind of coordinated and blatant state effort to censor reporting on government's activities is directly threatening and far more worrisome than the waning power of the traditional tabloid press.

Moreover, some have argued that media serve as a significant element in a new model of separation of powers that can serve to constrain executive power.<sup>169</sup> If that is the case, then all the more reason to be concerned about chilling effects on the media (and on the leaks on which they often rely). The national security state can undermine the

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The-Guardian-handed-gift-terrorists.html (recounting MI5 chief's claims that the Guardian's reporting helped terrorists).

166. WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 23.

167. DA-Notices—Defense Advisory Notices—are official governmental requests to publishers and broadcasters not to publish information for reasons of national security. See *Frequently Asked Questions*, THE DA-NOTICE SYSTEM, (2012), <http://www.dnotice.org.uk/faqs.htm> (for a UK government description of the notices).

168. *Frequently Asked Questions*, THE DA-NOTICE SYSTEM, (2012), <http://www.dnotice.org.uk/faqs.htm>. Revelations last fall of police accessing journalists' phones without judicial review prompted an outcry for reform of RIPA, the Regulation of Investigatory Powers Act 2000. Patrick Wintour, *British Police's Use Of Ripa Powers To Snoop On Journalists To Be Reined In*, THE GUARDIAN, (Oct. 12, 2014), available at <http://www.theguardian.com/world/2014/oct/12/police-ripa-powers-journalists-surveillance>.

169. See, e.g., JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (arguing, *inter alia*, that an aggressive press, a watchful public and the legalization of warfare can serve in combination to constrain executive power).

effectiveness of the “stochastic mélange”<sup>170</sup> on whose success the “new” separation of powers rests.

#### 4. *A Divided Press*

Government attempts to intimidate the press need not be direct. Last fall, a number of major tabloid newspapers joined public officials in criticizing *The Guardian* for its Snowden reporting.<sup>171</sup> Why have rival publishers been critical or silent, despite “the apparent need for solidarity within the media fraternity”?<sup>172</sup> Whatever its competitive origins, this fissure in the press ranks cannot but be read against the backdrop of press regulation.

At a minimum, the papers’ positions can be said to send multiple messages. The more right-leaning tabloids might have criticized *The Guardian* because of their ideological and substantive disagreements on national security issues with the left-sympathetic *Guardian*.<sup>173</sup> Or they might be reluctant to support the newspaper responsible for breaking the phone hacking story.<sup>174</sup> Or they might have seen an opportunity in the controversy to boost short-term readership. But, regardless of ideological position, surely they recognized that the government’s high-handed tactics vis-à-vis their press colleagues endangered the press as a whole. Editors worldwide came to *The Guardian*’s defense.<sup>175</sup> So it can be

170. Neal K. Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990, 991 (2013).

171. For examples of articles criticizing The Guardian for its Snowden coverage, see, for example, Chris Blackhurst, *Edward Snowden’s Secrets May Be Dangerous. I Would Not Have Published Them*, THE INDEPENDENT, (Oct. 13, 2013), available at <http://www.independent.co.uk/voices/comment/edward-snowdens-secrets-may-be-dangerous-i-would-not-have-published-them-8877404.html>; Daily Mail Comment, *The Paper That Helps Britain’s Enemies*, DAILY MAIL, (Oct. 9, 2013), available at <http://www.dailymail.co.uk/debate/article-2451557/Daily-Mail-Comment-The-Guardian-paper-helps-Britains-enemies.html>; Rod Liddle, *Guardian Treason Helping Terrorists*, THE SUN, (Oct. 10, 2013), available at <http://www.thesun.co.uk/sol/homepage/suncolumnists/rodliddle/5192001/Guardian-treason-is-helping-terrorists.html>.

172. WAN-IFRA, PRESS FREEDOM, *supra* note 4 at 23.

173. See WAN-IFRA, PRESS FREEDOM, *supra* note 4 at 23.

174. *Id.*

175. See, e.g., Carl Bernstein, *An Open Letter From Carl Bernstein To Guardian Editor Alan Rusbridger*, THE GUARDIAN, (Dec. 3, 2013), available at <http://www.theguardian.com/media/2013/dec/03/open-letter-carl-bernstern-alan-rusbridger>; *Editors On The NSA Files: ‘What The Guardian Is Doing Is Important For Democracy’*, THE GUARDIAN, (Oct. 11, 2013), available at <http://www.theguardian.com/world/2013/oct/10/guardian-democracy-editors>.

surmised that these newspapers, so heavily criticized by the Leveson Inquiry and inclined to resist complying with the Royal Charter on press reform, had incentives to signal submission to the state with respect to issues publicly identified as critical by the government.<sup>176</sup>

It would be naïve to think of these as isolated developments unrelated to looming press regulation and the alteration in power of the institutional press. All this highlights the acute character of the dangers facing the press in performing its checking function today.

##### 5. *The Power Impacts of Institutional Selectivity*

It is no surprise that, after the Leveson Report was issued, revelations of phone-hacking by a wide swath of other, non-press institutions—including corporations, banks, and lawyers—led to public outrage, press crowing, and criticism of Justice Leveson’s laser-like focus on the press in his Report.<sup>177</sup>

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176. In the context of addressing the dangers of the Royal Charter, for example, THE TELEGRAPH argued that “[t]he Guardian’s recent investigation into state spying is exactly the kind of reporting that could spark a moral panic among politicians and give them cause to limit what the press can publish.” Telegraph View, *The Fight Goes On For Press Freedom*, THE TELEGRAPH, (Oct. 30, 2013), available at <http://www.telegraph.co.uk/comment/telegraph-view/10415103/The-fight-goes-on-forpress-freedom.html>. On the divided UK press, see, for example, Kenan Malik, *Britain Needs a First Amendment*, N.Y. TIMES, (Nov. 8, 2013), available at <http://www.nytimes.com/2013/11/09/opinion/malik-britain-needs-a-first-amendment.html>.

Some proponents of press regulation “a la Leveson” argue that the tabloids’ reactions to the Snowden reporting are a far bigger danger for press freedom than self-regulation pursuant to Leveson and the Royal Charter. See, e.g., Martin Moore, *Part 2: The Topsy-Turvy World of Newspaper Regulation and Government Spies*, LSE MEDIA POLICY PROJECT BLOG, (Nov. 29, 2013), available at <http://blogs.lse.ac.uk/mediapolicyproject/2013/11/29/part-2-the-topsy-turvy-world-of-newspaper-regulation-and-government-spies/>. But this point does not take a bird’s eye view of the situation. It may well be precisely because of the Leveson Report, the Royal Charter, and pending exemplary damages and costs under the Crimes and Courts Act 2013 that the tabloids have turned their backs so overtly on the free speech implications of The Guardian’s reporting on Snowden matters. See also *supra* note 106. Whatever their intentions, these papers’ critique of The Guardian’s national security coverage might be interpreted by government not only as an argument that broadsheets are more harmful and dangerous than the tabloids criticized by Leveson, but also as an offer of a subtle *quid pro quo* on press reform. Their stance could reasonably be seen as an implicit assurance by public proclamation that the press is to be trusted to be docile and amenable on matters important to the state even if it has sometimes gone overboard in the individual privacy context.

177. See *supra* note 115. Public outrage could be attributed to the revelation

On this view, the Leveson Report unfairly highlighted the press’ failures, rather than situating them in perspective, as merely a part of a multi-institutional failure.<sup>178</sup> After all, the institutional press today is part of a complex web of organizations existing in a “complicated symbiosis with the news media.”<sup>179</sup> The Leveson Report, although recognizing the involvement of the police and politicians in the phone-hacking affair, sought principally to repair the press piece of the puzzle.<sup>180</sup> It also did not address the use of “dark arts” by non-press private industry.

We should hesitate to solve interpenetrating, multi-institutional problems by regulating—or at least disproportionately regulating—just one of the affected institutions. Each participant is compromised in such situations. Singling out unethical action in only one of the interacting institutions (press, politicians, and police) “while keeping the broader agents of responsibility afloat . . . rais[es] fundamental questions about which ethics matter and to whom.”<sup>181</sup> Attempting to improve matters by placing the

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that unethical behavior was more prevalent across institutions than had been thought to be the case. On the press side, the revelations fueled arguments that the tabloids had been unfairly targeted for behavior common elsewhere. Critics also focused on the revelation that Justice Leveson had apparently been apprised of such widespread phone-hacking in Britain but had chosen not even to mention it in his report focusing on the press. *Id.*

178. See, e.g., Press Association, *supra* note 114 (quoting Daily Mail Editor Paul Dacre: “I note with some irony that Leveson had barely a word of criticism for the police and the politicians. Well, if the first had done their job properly and the second had not so sycophantically fawned upon Murdoch, Leveson would never have occurred.”).

179. Barbie Zelizer, *When Practice Is Undercut By Ethics*, ETHICS OF MEDIA 277 (Nick Couldry, Mirca Madianou & Amit Pinchevski eds. 2013).

180. The disclosure-focused recommendations proposed by Leveson for the police and politicians appear to be far less directive and onerous than those for the press.

181. Zelizer, *supra* note 179, at 278. Indeed, Professor Zelizer muses, “the intimacy across institutions might merit as close attention as that being paid to the interiors of the News of the World.” *Id.* For example, the apparent cover-up of Serious Organised Crime Agency’s awareness of, and failure to act on, phone-hacking by many other blue-chip British institutions practices seems to reveal governmental misconduct. See, e.g., Helen Warrell & Cynthia O’Murchu, *Soca Failed To Act On ‘Blue-Chip Hacking’*, FINANCIAL TIMES, (Aug. 21, 2013), available at <http://www.ft.com/intl/cms/s/0/8b40feb4-09bf-11e3-ad07-00144feabdc0.html#axzz3HyF4V5WV>; Tom Harper, ‘Bigger than phone hacking’ - Soca sat on blue-chip dirty tricks evidence for years, THE INDEPENDENT, (July 25, 2013), available at <http://www.independent.co.uk/news/uk/crime/exclusive-bigger-than-phone-hacking—soca-sat-on-bluechip-dirty-tricks-evidence-for-years-8730861.html>. Under those circumstances, one might wonder whether

principal burden on the press may ironically recalibrate the balance of power among the participants and reduce the press' comparative institutional position as a whole, and therefore further erode its ability to act as a watchdog over other institutions.<sup>182</sup> This is particularly the case when, whatever criminality and ethical excess were attributable to a segment of the British press, there were certainly many newspapers that did not participate.

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selectivity in focusing on the unsavory newsgathering practices of journalists would serve strategic interests in muzzling the press.

Moreover, one might question the appropriateness of targeting the press rather than other participants in circumstances when multi-institutional unethical behavior "relativize[s]" particular practices (such as paying for information), or naturalizes practices (such as phone hacking) that might otherwise have raised ethical qualms. See Zelizer, *supra* note 179, at 279. See also Daniel Bennet & Judith Townend, *Press 'Omerta': How Newspapers' Failure to Report the Phone Hacking Scandal Exposed the Limitations of Media Accountability* at 149, THE PHONE HACKING SCANDAL: JOURNALISM ON TRIAL, BURY ST EDMUNDS: ABRAMIS, (Jan. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2000768](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000768) (describing news organizations' failure to report phone hacking scandal as due partly to the "cultural socialisation of a norm of behavior . . . that justified the use of the 'dark arts' as a way of holding power to account in the public interest. The normalization of these practices within the press corps led to their diminishing significance as an issue that might be deemed 'unexpected' and thus 'newsworthy.'"). To the extent that enforcing criminal rules sends a signal as to their social importance, it should primarily be the responsibility of the police to send that signal. The absence of such a signal while the behavior becomes increasingly common in the industry (or in business in general, as phone hacking seems to have become in England) is tantamount to a counter-message.

182. One might wonder why that might be the case. To the contrary, wouldn't a press better guided by ethical principles improve in its ability to ensure the accountability of other powerful institutions? If the phone-hacking affair revealed a "one hand washes the other" symbiosis, then the press would implicitly have conspired with the police and politicians to exchange favors. Under those circumstances, isn't it counter-intuitive to suggest that a self-regulatory regime would make the press *less* able to be the watchdog that it had agreed not to be in the first place?

The first response to this is that not everyone in the British press participated in the multi-institutional failures. Yet regulation would undermine their status as potential watchdogs as well. Moreover, the text attempts to flag an issue of comparative power. Participants in multi-institutional wrong-doing presumably negotiate their exchanges of benefits from relatively equal, if dynamic, positions of power. At any point, each participant is free to change the deal. If political wrongdoing were obvious enough, even a compromised press would have incentives to reveal it. And if press illegality were glaring enough, police and government would have to address it at some point regardless of implicit *quid pro quo* arrangements. When one of the participants submits to licensing by the other, however, that presumptive equipoise in negotiating power no longer exists. And government has the upper hand because the regulatory body can increase the difficulty of going after other institutions' abuses of power.

*D. Will Leveson’s Model Predictably Lead to Press Self-Censorship?*

Lord Justice Leveson rejected concerns about the chilling effect of his Report’s recommendations by saying: “I simply do not accept that these provisions will have a chilling effect on free speech or press freedom . . . I reject the suggestion that it will cause a degeneration of the rights of the press or a descent into state control.”<sup>183</sup> However, such robust assertions are optimistic declarations that cannot negate the multiple ways in which the Report’s suggestions could foreseeably intimidate press coverage.<sup>184</sup>

It would be reasonable for the press to fear regulation because of the various incentives to regulate inherent in the Royal Charter approach. The press’ “voluntary” self-regulatory body would have a continuing desire to maintain its Royal Charter certification and therefore face distinct incentives to abide by the Recognition Body’s directly or indirectly expressed preferences. It would operate in the shadow of Lord Justice Leveson’s decimation of the PCC.

Stripped to its core, the Royal Charter model calls for the creation of a regulator uncomfortably balancing values of independence and professionalism, and under the continuing oversight of a body in whose membership the press does not even have any representation. Excessively press-restrictive rules and increased litigation can be predicted as a result. A former editor of *The Guardian* concludes that the Leveson approach is “misguided” and will inevitably lead to a chilling effect on reporting.<sup>185</sup> Indeed, he asserts that some of the most significant investigative reporting of his *Guardian* tenure might well have been deterred if a Leveson regulatory regime had been in place.<sup>186</sup>

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183. LEVESON REPORT, *supra* note 7, at vol. IV, pt. K, ch. 7, ¶ 7.8, 1782.

184. Indeed, even if the press industry’s proposed charter had been accepted, British press reform would still pose challenges to freedom of the press. This is because the phone-hacking scandal and attendant Leveson process created the baselines against which press reform must be measured. Mere tinkering around the edges would be insufficient in such an atmosphere.

185. See Peter Preston, *Peter Preston: ‘Leveson Sees Journalism As An Exercise In Providing Cases For The Courts To Examine’*, PRESS GAZETTE, (Feb. 25, 2013), available at <http://www.pressgazette.co.uk/content/peter-prestonleveson-sees-journalism-exercise-providing-cases-courts-examine>.

186. *Id.*

1. *Structural Bias: Regulator Composition Requirements*

The structure of the Recognition Panel established under the Royal Charter precludes participation of publishers and editors on the Board or staff,<sup>187</sup> and the Royal Charter's recognition criteria in turn require the majority of the board of an acceptable press regulator to be independent of the press.<sup>188</sup> Although the Leveson Report reiterated its commitment to freedom of speech and press, the two levels of required independence from the press predictably risk unduly press-restrictive rules. Under this structure, the Recognition Panel undervalues journalistic and editorial expertise. This in turn is likely to influence the decisions of the recognized press regulator. Whatever the journalists on the board of the regulator would say, the final votes to be taken by the regulator are likely to reflect the views of the non-press majorities, and their predictions of what the press-independent Recognition Panel would think of their decisions.<sup>189</sup> Finally, the structure of the standards Code Committee, by reducing the role of serving editors, is likely to lead to a less press-protective code.<sup>190</sup>

The rationale for the Leveson Report's recommendation—that the decision-making members of the body be independent of the press—was that a non-press board would represent a “balanced” view of press freedom and privacy. However, the talismanic invocation of the notion of balance here is not particularly helpful. How is such a majority-lay body to balance those interests, which are often

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187. Royal Charter on Self-Regulation of the Press, *supra* note 60, at 5.2, 7.3 & sched. 1. That politicians are also precluded from Board membership does not minimize the negative effect of the press exclusion. That the Charter requires every Board member to have “an understanding of the context within which the Regulator will operate” (*id.* at 3.2(a)(ii)(emphasis supplied)) is a requirement more anodyne than meaningful. Moreover, since Board members can be terminated simply if “the Board is satisfied . . . that a Member is unwilling, unable or unfit to discharge” his/her functions (*id.* at 6.2), there is ample opportunity for a Board suspicious of the press to censure dissent and ensure lock-step.

188. Royal Charter on Self-Regulation of the Press, *supra* note 60, at sched. 3, 3–5.

189. Indeed, the Report's proposals might unintentionally cede control not just to the self-regulatory body, but also to press targets themselves. With control tipping toward privacy, news subjects could evade journalistic attention simply by advising the press that they did not wish to be covered.

190. Royal Charter on Self-Regulation of the Press, *supra* note 60, sched. 3, at 7, 8.

incommensurable? Moreover, if the body were effective, would the public interest really benefit from the transformation of a cacophony of voices into the milquetoast of neutral and balanced homogeneity?

The problem is particularly acute with respect to the reporting aspect of the Leveson recommendations, as opposed to its newsgathering proposals. Even if the self-regulatory organization as structured by Leveson could reach consensus with regard to the inappropriate use of surreptitious newsgathering techniques (especially in the infotainment context of tabloid coverage), second-guessing editorial and publication decisions is more problematic. The Leveson Report itself un-self-consciously adopts a judicial stance, rejecting publication decisions as to which reasonable minds could disagree. Its suggestion that the press claiming a public interest defense should make available the details of its weighing of interests is unrealistic in light of the time pressures of reporting today, and constitutes an invitation to Monday morning quarter-backing.

Many publication decisions have to be made quickly, on the basis of inadequate information, without a clear understanding of their possible impacts, on the basis of an assessment of their apparent importance at that moment. Editors could differ among themselves as to publication choices, and the same editors could even make different choices on another day. While the Leveson recommendation of internal governance and compliance systems might be helpful in journalistic self-assessments on this score, legalistic external review is likely to have a chilling effect far beyond the precincts of the tabloid newsrooms which are the true targets of the Leveson Report.<sup>191</sup>

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191. The Ed Miliband controversy is a useful lens through which to look at this question. The Daily Mail published an article impugning the loyalty to Britain of Marxist theorist Ralph Miliband, opposition leader Ed Miliband's deceased father. See, e.g., Jamie Doward & Toby Helm, *How The Mail Blundered Into A Vicious Battle With Labour*, THE GUARDIAN, (Oct. 5, 2013), available at <http://www.theguardian.com/media/2013/oct/05/daily-mail-battle-labour-lord-rothermere>. It is undisputed that the Daily Mail, under editor Paul Dacre, is an opinionated Conservative voice with a strong anti-socialist stance and a penchant for shrill and attention-grabbing headlines. Although many Britons seem to agree that the paper's headline accusing Ralph Miliband of "hating" Britain on the basis of a snippet of teenage writing was inaccurate and would warrant an apology from the paper, there is true disagreement both as to the meanings/claims of the story and as to its newsworthiness. On one narrative, it is important for the public to know the political views of the

## 2. Cyclical Review and Systemic Ad Hoc Review Power

The Board of the Recognition Panel must review the recognition of a regulator according to a cyclical schedule established in the Charter.<sup>192</sup> It may also review the recognition of a regulator under “exceptional circumstances” in the public interest.<sup>193</sup> Finally, it can withdraw recognition not only when the regulator is not meeting the Recognition Criteria, but even when the Recognition Panel has “insufficient information to determine” whether it is doing so.<sup>194</sup>

The speech-detering effect of this Scheme of Recognition is obvious on its face. Exceptional circumstances are not defined in the Charter. The Report is not clear about how to define systemic misbehavior despite the new press regulator’s

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outspoken father of a politician possibly in line to be Prime Minister because they may raise questions about the politician’s own commitments. On the contrary narrative, the Mail’s story was little more than a trumped-up political hatchet job using irrelevant and over-interpreted information about his parent in order to undermine a rising politician from the paper’s competitor party. On yet another set of contending narratives, the Mail either engaged in an outrageous personal insult, or chose to report on a sensitive personal topic in pursuit of the public interest. To one degree or another, any or all of those explanations may be “true”—although most would agree that Dacre suffered a lapse of judgment (and the headline overstated the story). See Roy Greenslade, *Ed Miliband’s Challenge To Daily Mail Exposes Editor Paul Dacre As A Bully*, THE GUARDIAN, (Oct. 2, 2013), available at <http://www.theguardian.com/media/greenslade/2013/oct/02/edmiliband-pauldacre> (arguing that even though the issue of Ralph Miliband’s views was a legitimate topic for the paper, its headline conclusion was “over the top” and made the paper a bully). But because the “truth” of the story can be assayed at different levels and with different results, this argument cannot be dismissed simply as an analogy to the false equivalence of “he said-she said” journalism decried by journalism theorists. See, e.g., Jay Rosen, *He Said, She Said Journalism: Lame Formula in the Land of the Active User*, PRESSTHINK, (Apr. 12, 2013), available at <http://pressthink.org/2009/04/he-said-she-said-journalism-lame-formula-in-the-land-of-the-active-user/>. Which of the various narratives offered above (and there are of course others as well) is objectively “true” is not a question that should be decided by a government-backed private regulator. It should be noted that the paper printed Ed Miliband’s response to its article in its entirety. (The Mail was hoisted on its own petard—Dacre’s mistake ironically re-invigorated the press regulation movement). In any event, when Mr. Miliband himself escalated the story to be not about a bad call on a particular editorial decision, but an example of a problematic journalistic culture—harking back to the language of the Leveson Inquiry—he ironically demonstrated the problem inherent in Leveson’s regulatory hybrid.

192. Royal Charter on Self-Regulation of the Press, *supra* note 60, at sched. 2, 5–6.

193. *Id.* at sched. 2, 8–9.

194. *Id.* at sched. 2, 11.

ability to impose very significant fines for systemic misbehavior or failure to comply with its rulings.<sup>195</sup> The PCC is faulted for not having seen that phone-hacking had become a systemic press activity and for having believed the representations of the *News of the World* staff that phone-hacking there had been limited to one rogue reporter. How will the new press regulator make sure not to fall into the same trap? Will every complaint potentially be seen as evidence of systemic malfunction?<sup>196</sup> Will history impel the Recognition Panel and the regulator to intrude into editorial decisions with roving consistency simply to ensure that any given complaint does *not* present a systemic problem?

A fundamental difficulty with the inquisitorial power over systemic problems is that, structurally, the Recognition Body faces significant incentives to regulate. In addition to the oft-noted institutional incentives of regulators to regulate, the press regulatory bodies face the additional pressures of transparency requirements<sup>197</sup> that place their activities under the microscope of groups with regulatory agendas. Knowing that the Charter’s transparency requirements would open its decision-making to public oversight and challenge by interest groups such as Hacked Off, both the Recognition Body and the press self-regulator operate under distinct incentives to appear effective by engaging in broad-scale investigation.

### 3. *Third Party Complaints*

By retaining the cost-free character of the PCC complaint review process, but by permitting third party complaints to be brought against press coverage, the Leveson Report opens the floodgates to complaints about press coverage. It also invites politicization of press regulation—responding to the ideological commitments of complaining interest groups. Moreover, by inviting advocacy groups to bring claims about what it characterizes as “discriminatory” news coverage to

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195. The possible chilling effect of million pound fines imposed on those newspapers that are deemed by the self-regulatory body to have failed to comply with the body’s requirements is self-evident. Royal Charter, *supra* note 60, sched. 3.

196. The recognition body is also granted significant investigatory leeway and power to command the production of documents and information in its convenience under the proposed Royal Charter. *See generally* Royal Charter, *supra* note 60, sched. 2.

197. Royal Charter, *supra* note 60, at 13.1 & sched. 3.

the press regulator, the Report transforms the press regulator into a super-editor, deeply embedded in the fundamental editorial decisions about what gets covered and how. It is highly likely that opinionated, partisan papers will cover news in ways that various advocacy and affinity groups would see as discriminatory, insufficient, insensitive, and inaccurate. If questions of truth and accuracy—which are sufficiently difficult to ascertain with respect to isolated facts and events—are to be freely brought with respect to a paper’s entire coverage, style, and editorial stance, then the press regulator will have succeeded in becoming a private censor of the newspaper industry, protected under the rubric of public power.<sup>198</sup>

#### 4. *Pre-Publication Review*

The “offer” of pre-publication review by the regulator further exacerbates concerns about chill.<sup>199</sup> Although the proposal recommends that such a review service be entirely voluntary, there is a non-trivial danger that it could become a factor in later litigation in assessing the newspaper’s

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198. The Leveson Report noted that the Inquiry had received evidence from public interest groups indicating that the need to have a victim come forward made “generic” kinds of complaints about inaccurate press coverage effectively “unchallengeable.” LEVESON REPORT, *supra* note 7, vol. I, pt. A, ch. 2, at 22. That seems to overstate the problem, at least in many cases.

The authority to direct the placement of retractions, corrections and apologies has also been criticized as leading to chilling effects. *See, e.g.*, Right Hon. Peter Lilley MP, *Royal Charter on Press Conduct*, RT HON PETER LILLEY MP, (Mar. 18, 2013), *available at* <http://www.peterlilley.co.uk/parliamentaryspeeches/1729/royal-charter-press-conduct> (criticizing charter’s provisions as creating a “mini, self-appointed Ministry of Truth.”); Index on Censorship, *Leveson, The Royal Charter, And Press Pegulation*, INDEX ON CENSORSHIP, (Apr. 11, 2013), *available at* <http://www.indexoncensorship.org/2013/04/index-on-censorship-leveson-royal-charter-and-press-regulation/> (the power to direct the wording and placement of apologies and corrections opposed as an “effective transfer of editorial control [representing] a level of external interference with editorial procedures that would undermine editorial independence and undermine press freedom.”). *Cf.* Article 19, *UK: Draft Royal Charter on Self-Regulation of the Press*, ARTICLE 19, (Apr. 2, 2013), *available at* <http://www.article19.org/resources.php/resource/3687/en/uk:-draft-royal-charter-on-self-regulation-of-the-press> (recommending a narrowed scope for the press regulator’s ability to direct the nature, extent and placement of corrections and apologies).

199. More indirectly, so does the Charter’s directive that the Recognition Panel “publish policies, guidance and information . . . .” *Royal Charter on Self-Regulation of the Press*, *supra* note 60, at sched. 2, 13.

behavior.<sup>200</sup> If a newspaper either did not seek pre-publication clearance or decided to act contrary to the advice given, negative inferences could be drawn, thereby making the voluntary advisory service an affirmative requirement "through the back door."<sup>201</sup> Is it not predictable that refusals to take advantage of such an offer could be interpreted as reckless? If so, then the editorial function would have been outsourced to a non-journalist body likely to be skeptical of press decisions in perhaps the most difficult cases.

Pre-publication review also brings into sharp relief the potential conflicts in the complex regulatory scheme under Leveson. The self-regulatory body is assigned a multiplicity of tasks and roles under the proposed regulatory system. It would not be irrational for newspapers to fear that if they did not comply with pre-publication review recommendations, arbitral consequences against them could foreseeably ensue.<sup>202</sup>

### 5. Exemplary Damages and Costs

The exemplary damages<sup>203</sup> and costs aspects of the

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200. The Royal Charter does not make this Leveson Report recommendation mandatory and states that a failure to comply with this specific recommendation (among a few others) will not lead the regulator to lose its Royal Charter accreditation. Charter on Self-Regulation of the Press, *supra* note 60, at sched. 2, no. 4. Nevertheless, it permits the Board of the Recognition Panel to take the availability of pre-publication review into account. *Id.* See *also id.* at sched. 3, no. 17. Such a service can all-too-easily be transformed into a behavioral expectation non-compliance with which could be considered culpable by courts or arbitrators in press complaint cases.

201. David Hooper & Brid Jordan, *Phone Hacking and the Press: The Leveson Report*, at 43.

202. The newspaper industry also objects to the forced apologies and retractions contemplated by the Royal Charter system. See, e.g., WAN-IFRA, PRESS FREEDOM, *supra* note 4, at 15. The potentially chilling effect of such remedies is obvious and need not require further elaboration here.

203. Although it is unlikely that British press regulation would be rejected *vel non* under the European Convention on Human Rights, some have argued that a narrower ground for appeal might be the exemplary damages provision in the Court and Crimes Act. If, for example, a court in a media tort action were to impose exemplary damages on a newspaper that had not joined a certified self-regulatory body, the paper arguably could claim a violation of Article 10 of the Convention.

It is beyond the scope of this Article to discuss the contending views on whether liability for exemplary damages would be unlawful under Article 10 of the European Convention on Human Rights. See Potter, *supra* note 76 (referring to contending legal opinions on the subject). It should be noted, however, that the British newspapers are reportedly planning an appeal to the European Court of Human Rights in the event that they are subject to

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exemplary damages in media tort actions simply because they have not subscribed to a self-regulatory body recognized under the Royal Charter. Lisa O'Carroll, *Papers Plan European Legal Action If They Are Penalised For Regulation Stance*, THE GUARDIAN, (Oct. 10, 2013), available at <http://www.theguardian.com/media/2013/oct/10/newspapers-appeal-europe-press-regulation> (quoting a press industry source as saying “[y]ou have to go to Europe as the consequences are so bad in terms of costs and exemplary damages that you can’t just sit there and take them.”).

Of course, the papers would first have to exhaust local remedies—the U.K. courts—before they could appeal to the European Court of Human Rights. See ANDREW NICOL, GAVIN MILLAR & ANDREW SHARLAND, *MEDIA LAW AND HUMAN RIGHTS* 75 (2d ed. 2009). In any event, it should be noted that the prospect is distant in time because a number of time-consuming steps need to be taken before such a test could arise—including the full establishment of the recognition body under the Royal Charter, a lawsuit lost by the press, and the judicial imposition of exemplary damages on the newspaper seeking to appeal on Convention grounds.

Interestingly, recent reports indicate that the culture and media department of the UK government has rejected the Telegraph’s freedom of information request to disclose “a paper which ‘is thought’ to set out advice on whether the government-sponsored royal charter breaches European law.” Roy Greenslade, *Government Refuses To Disclose Legal Opinion On Press Regulation*, THE GUARDIAN, (Jan. 15, 2014), <http://www.theguardian.com/media/greenslade/2014/jan/19/press-regulation-freedomofinformation>. A legal opinion previously commissioned by the newspaper publishers apparently concluded that the exemplary damages provisions were incompatible with the ECHR. *Id.* The Department of Culture and Media argued that “premature disclosure” of the legal advice “might close off better options” for ministers and officials. *Id.* A government spokesman apparently stated that legal advice was not routinely disclosed by the government and that “[w]e are clear that independent self-regulation of the press is entirely consistent with the European convention on human rights [sic].” *Id.* This is far from a full and transparent answer to a question on such a fundamental issue.

Contending views have been expressed on the issue, although none have been made public in detail. In its terms, Article 10 is a qualified right that, under the Convention, must be balanced against other rights. It is said that “context is all-important” in deciding the lawfulness of a restriction on expressive freedom under Article 10. Article 8, which protects the right to privacy, is one of the contending obligations in the Convention. The European Court of Human Rights has noted the need to balance the Article 10 right to free expression and the Article 8 right to reputation. See, e.g., *Cumpana and Mazare v. Romania*, (2005) 41 EHRR4 (GC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67816>[113] (“[T]he Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention . . . [t]o regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals’ reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to a parent or suspected misuse of public power.”). Where a regulation invokes a conflict between Convention provisions, courts must bring “intense focus” to the analysis of the comparative importance of the claimed rights in the individual case. HUMAN RIGHTS REVIEW, *supra* note 203, at 349 (quoting *In Re S (A Child)*, IDENTIFICATION: RESTRICTIONS ON PUBLICATION (2005) 1 AC 593, ¶ 17, per Lord Steyn). The

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Article 8 and Article 10 balance has also taken into account the public stature of the individual in question, the degree of interference with privacy, and any breach of law or professional ethics by the reporters. *Article 10: Freedom of Expression*, HUMAN RIGHTS REVIEW *supra*, 349–50 (2012).

Moreover, under Article 10(2) itself, restrictions on expression are permitted if they are “necessary in a democratic society” “for the protection of the reputation or rights of others.” To the extent that the Leveson approach is seen as nothing more than accountable self-regulation of the press in a manner analogous to the laws of other Convention member states, a win for the newspapers is far from inevitable. Article 10 is set to protect political and public interest speech more than reporting on matters of “largely prurient interest.” HUMAN RIGHTS REVIEW at 349. Moreover, a recent report asserts that the European Court of Human Rights “has in recent years paid increasing attention to the extent to which journalists have complied with professional ethics in determining the parameters of article 10, particularly in cases in which serious issues of reputation and/or privacy are at stake.” *Id.* at 349.

Analysts have addressed the question of whether compulsory regulation of the print media would be compatible with Article 10 ECHR. See Hugh Tomlinson, *Is Compulsory Regulation Of The Print Media Compatible With Article 10 ECHR?*, UK HUMAN RIGHTS BLOG, (Aug. 22, 2012), available at <http://ukhumanrightsblog.com/2012/08/22/is-compulsory-regulation-of-the-print-media-compatible-with-article-10-echr-hugh-tomlinson-qc/>. Tomlinson concludes that “the answer may not be as entirely straightforward.” The Court has never addressed the issue of “self-regulation” versus state regulation from the point of view of Article 10. *Id.* Tomlinson’s analysis: “The basic position seems clear. First, a system of compulsory media regulation is a prima facie interference with the right to freedom of expression and must, therefore, be justified under Article 10(2). Second, such a system would, if enacted by statute, plainly be in accordance with law and would serve a legitimate aim (for example, the protection of the rights of others). As a result, third, the crucial question would, therefore, be whether the system was “necessary in a democratic society”—whether it was proportionate to the legitimate aim pursued.” *Id.* Tomlinson also notes that international human rights case law finds compulsory registration of journalists to be an unjustified interference with the right to freedom of expression. In his reading of the cases, “the international human rights jurisprudence makes it clear that any requirement which made the practice of journalism dependent on statutory licensing would be a violation of the right to freedom of expression.” *Id.* Yet compulsory regulation of large publishers is not necessarily the same thing as licensing journalists. *Id.* It has also been established that broadcast media regulation is not problematic under Article 10, so long as it is necessary and proportionate, and therefore compulsory regulation of the print media would not necessarily be problematic as such, according to Tomlinson.

Despite all that, however, it is possible that under precedents like the Naomi Campbell decision, the European Court of Human Rights might find that the cost and exemplary damages provision of the Court and Crimes Act 2013 should be considered disproportionate and therefore violative of Article 10 in principle. The European Court has in the past found British press decisions to violate Article 10. See *Article 10: Freedom of expression*, HUMAN RIGHTS REVIEW, 330, 339–40 (2012) (citing to *Goodwin v. UK*, 22 Eur. Ct. H.R. 123 (1996), in which the European Court of Human Rights ruled that a House of Lords decision requiring a journalists to disclose the identity of a source breached the journalist’s Article 10 rights, and the national media being granted access to private hearings before the Court of Protection). And, in 2011,

carrot-and-stick inducement mechanisms recommended in the Leveson Report also pose a financial threat to the press, particularly to smaller and less commercially established entities.<sup>204</sup> Exemplary damages could be extraordinarily expensive. As for costs, publishers not members of an approved regulator and therefore not participating in arbitration might have to pay the plaintiff's potentially expansive costs in media tort suits even if the publishers were substantively vindicated—again raising the likelihood of chill. Moreover, for any news organization, the decision whether to join the regulatory system will depend on comparing the costs of participation with the possibility of exemplary damages or no cost reimbursement. Publishers who choose to forego joining a regulator are also “more likely to self-censor in order to minimise their exposure to the risk of being sued, even if they believe that it would be lawful to publish.”<sup>205</sup> Despite attempts to ensure clarity of coverage, the structure of the proposed regime reflects uncertainty as to both those factors. The vagueness of the defined category is likely to pose a problem for a broad range of intermediate entities.<sup>206</sup>

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the European Court held that the 100% success fee that the court required the defendant to pay in a breach of confidence action, *Naomi Campbell v. MGM*, was out of proportion to the extent of damages awarded to the plaintiff, was disproportionate, and violated Article 10. HUMAN RIGHTS REVIEW, *supra*, at 362.

Ultimately, each inquiry under Article 10 is “fact specific,” requiring judicial analysis of the precise features of the regulatory scheme at issue. Tomlinson, *supra*. “The nature of the regulator and the code which it applied would be relevant factors in the proportionality exercise, as would be the extent of the application of the compulsory regime. The Court would also take into account the “mischief” that the regulatory system was intended to deal with. *Id.* According to one analyst addressing a compulsory approach prior to the issuance of the co-regulatory Leveson report, “[a] system of compulsory regulation for large publishers recommended by the Leveson inquiry would be designed to deal with the ‘mischief’ of wholesale invasion of rights identified by the Inquiry. If the regulator was independent of all government influence and applied a Code drawn up with substantial import from the media and journalists these would all be factors which the Court would take into account in the ‘justification exercise.’ ” *Id.* See also Anthony Lester, *Two Cheers for the First Amendment*, 8 HARV. L. & POL’Y REV. 177, 191 (2014) (contending that the system’s punitive sanctions are unlikely to pass muster in the ECtHR).

204. Although small entities have the most to fear, it should not be forgotten that the entire newspaper sector has been struggling financially world-wide, to greater and lesser degrees.

205. Anthony, *supra* note 113, at 5.

206. Bloggers have noted this concern. See, e.g., Cory Doctorow, *Act Now To Stop The UK Leveson Press-Regulations From Applying To Blogs And Individuals Online!*, BOINGBOING, (Mar. 22, 2013), available at

Depending on the specific costs of joining the new system, an online news provider could face a financially onerous choice either way.

### 6. Arbitration

As for arbitration, a free arbitral process for all media disputes—especially when joined with a recent possible government proposal for “cost protection” in defamation and privacy claims to protect those of “modest means”<sup>207</sup>—could induce the filing of many five- or six-figure damage claims over privacy complaints or inaccuracies against the quality press (not to mention the tabloids).<sup>208</sup> This has been a

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<http://boingboing.net/2013/03/22/act-now-to-stop-the-uk-leveson.html>; Cory Doctorow, *UK Press-Regulation Defines “Press” So Broadly As To Include Tweeters, Facebook Users, Bloggers*, BOINGBOING, (Mar. 18, 2013), available at <http://boingboing.net/2013/03/18/uk-press-regulation-defines.html>; Cory Doctorow, *More On The Impact Of UK Press Regulation On Blogs, Websites, Tweeters, And Social Media*, BOINGBOING, (Mar. 19, 2013), available at <http://boingboing.net/2013/03/19/more-on-the-impact-of-uk-press.html>. See also *infra* notes 212–14.

207. The British government issued a consultation paper on such a cost protection proposal. See Ministry of Justice, *Costs Protection in Defamation and Privacy Claims: The Government’s Proposals*, (Nov. 8, 2013), available at [https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/supporting\\_documents/Costsprotectionindefamationandprivacyclaimsconsultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/supporting_documents/Costsprotectionindefamationandprivacyclaimsconsultationpaper.pdf).

208. Admittedly, having identified this issue, the Leveson Report recommended that any free arbitral process include “a system to allow frivolous or vexatious claims to be struck out at an early stage.” LEVESON REPORT, *supra* note 7, at 1769. This is not a sufficient safeguard, however.

Recent suggestions designed to achieve that goal make the problems self-evident. Some suggest that such a system could be adopted without conflict with Article 6 of the European Convention of Human Rights, and could include, for example, “a mandatory, 28-day ‘fast track’ adjudication process . . . [akin to one introduced for the construction industry in 1996].” Sir Charles Gray & Alastair Brett, *Press Regulation: Speedy Adjudication Could Help Break Leveson Impasse*, THE GUARDIAN, (Sept. 29, 2013), available at <http://www.theguardian.com/media/2013/sep/29/press-regulation-fast-track-adjudication>. Whatever the ease with which construction disputes can be resolved on a fast-track basis, it might be questioned whether Gray and Brett’s proposal for an independent arbitrator would in fact “enable[] most [press] actions to be settled within days.” *Id.* Identified “key issues” such as “the meaning of the words complained of, or if they are an honest comment or statement of fact or in the public interest,” are not often likely to be susceptible of such quick and easy resolution. *Id.* Moreover, to the extent that this proposal would have the new press regulator use “a small group of experienced independent lawyers to filter claims”—even as to whether they would go forward to the twenty-eight-day fast track adjudication—the choke-point problem would be rendered even more acute. See *id.*

particular concern for the financially strapped regional press in Britain.<sup>209</sup> There are also questions whether the structure of the compulsory arbitration approach would sufficiently protect expressive press values.

### 7. *Uncertainty and Incoherence as to Scope of Coverage*

One of the major problems facing the proposed press regulation scheme is its scope of coverage. It clearly covers the traditional print newspaper, but what other entities are likely to be swept into the regulatory net?

The Leveson Report makes unpersuasive distinctions between the print press and online journalism.<sup>210</sup> Leveson recognizes that the organization might not be appropriate for small blogs.<sup>211</sup> In keeping with that intuition, both the Crimes and Courts Act 2013 legislation—permitting exemplary damages—and the Royal Charter for the Recognition Panel attempt to limit the systems' coverage to more established entities. The post-Leveson attempt to define the scope of the Royal Charter's coverage vis-à-vis Internet news organizations does not solve the problem of the scope of coverage, however.

Thus, for example, the current legislation in the Crimes and Courts Act 2013 contemplates application of the cost

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209. The regional and local newspapers—whose processes were generally approved by the Leveson Report—have strongly argued against Leveson's proposed arbitral arm for this reason. See, e.g., Lisa O'Carroll, *Nick Clegg Urged To Consult Local Papers Over Press Regulation Royal Charter*, THE GUARDIAN, (Apr. 18, 2013), available at <http://www.theguardian.com/media/2013/apr/18/press-regulation-royal-charter-nick-clgg>; LEVESON REPORT, *supra* note 7 (clearing the regional and local newspaper press of the culture of illegality for which he criticized elements of the national press). It is not clear that the concession in the new Royal Charter allowing regional papers showing serious harm to opt out of arbitration is sufficient to eliminate the papers' concerns. The statute nowhere explains either the burden of proof or what is to count as a showing of "serious" financial hardship.

210. Editorial, *Fleet Street's Grim Reaper*, THE ECONOMIST, Dec. 1, 2012 (noting that the Leveson Report showed little interest in the media industry's future, and concluding that it "already seems dated."). The Economist asks: "Should an offensive blog post be treated in the same way as an offensive article on a newspaper website? How about a comment—or a tweet? Does it still make sense to regulate the press, as opposed to all public writing? The lawyers and politicians grappling with these questions got little guidance from Lord Justice Leveson . . ." *Id.* Cf. Adam Cohen, *The Media That Need Citizens: The First Amendment and The Fifth Estate*, 85 S. CAL. L. REV. 1, 4 (2011) ("As journalism moves forward, media law and policy are looking backward.").

211. LEVESON REPORT, *supra* note 7, vol. IV, pt. K, ch. 7, ¶ 6.35, at 1779.

incentive scheme to “relevant publishers”—including, but not limited to, newspaper publishers.<sup>212</sup> Under the Act, a news purveyor would have to satisfy four cumulative criteria in order to be deemed a “relevant publisher”: that it publish “news-related material,” “in the course of a business” whether or not for profit, producing material “written by different authors,” and “subject to editorial control” over content, presentation, and publication decision.<sup>213</sup> In turn, “news-related material” is defined very broadly, including news or information about current affairs, opinion about matters relating to the news or current affairs, gossip about celebrities or public figures in the news. The statute specifically excludes broadcasters, “special interest titles,” scientific or academic journals, public bodies and charities, company news publications, book publishers, and micro-business blogs (with multiple authors, fewer than ten employees and an annual turnover of no more than £ 2 million).<sup>214</sup>

In addition to specifically excluded entities, discussion in the House of Commons indicated that the “relevant publisher” category was intended to catch “more sophisticated news publishers” and not “small-scale activity online.”<sup>215</sup> Then-Culture Secretary Miller specified news aggregation services such as Yahoo and Google, social networking sites, and sites which moderate others’ comments or aggregate blogs “without any active consideration of the content” as excluded services.<sup>216</sup> Yet a recent report by English PEN concludes that categories of publishers “that the government itself intended to be exempt” will be expected to join the regulator, and that charities, not-for-profit community newspapers, political parties, some specialist publications will also be swept into the definition of relevant publishers.<sup>217</sup> Moreover, otherwise similarly-situated web sites will be

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212. Crimes and Courts Act 2013, ch. 22, §§ 34, 35. The Royal Charter, in sched. 4, specifically incorporates the definition of “relevant publisher” under the Crimes and Courts Act 2013, § 41. For a recent critique of the indeterminacy of the “relevant publishers” category, see generally Anthony, *supra* note 113.

213. Crimes and Courts Act 2013, ch. 22, § 41. See also Potter, *supra* note 76.

214. Crime and Courts Act 2013, sched. 15.

215. Potter, *supra* note 76 (quoting then-Culture Secretary Maria Miller).

216. *Id.*

217. Anthony, *supra* note 113, at 3, 5, 7, 9–14.

classed differently. For example, because they are operated by broadcasters, the websites of BBC and Sky News will not be characterized as “relevant publishers,” while those of *The Guardian* and *The Times* will be.<sup>218</sup>

Despite attempts to carve up the universe of news purveyors in the legislation itself, there is a significant risk that many small publishers will either be swept into the new regulatory regime because they do not fit exactly into the scheduled exemptions, or believe that they are, therefore leading them to feel compelled to join the regulatory regime.<sup>219</sup> This is also because the list of covered publishers includes everyone, with a few exemptions, rather than the other way around. Moreover, such a piecemeal list of exempted publishers reads like a laundry list of publishers who succeeded in arguing their way out of the definition as part of political compromise rather than a list generated by a clear, thought-out, policy analysis. One can imagine any number of disseminators of news-related material who would reasonably entertain questions about their status under this system.<sup>220</sup>

In addition, the distinctions in coverage are difficult to square. For example, many local newspapers might satisfy the exclusion threshold for micro-businesses.<sup>221</sup> What principle, though, justifies their exclusion vis-à-vis larger newspapers? Is the distinction designed as a proxy for influence? If so, does size necessarily matter? Do individuals with extensive followings on Twitter and Facebook necessarily have less influence in the news ecosystem than mid-size regional newspapers? And if websites run by newspaper organizations would be subject to Royal Charter provisions while those run by Internet companies (such as Google) or broadcasters would not be covered,<sup>222</sup> then such a result both undermines the effectiveness of the system and raises questions about the underlying rationale for the

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218. *Id.* at 15.

219. *See, e.g., id.* at 9–12.

220. Commentators have mentioned the status of news agencies such as the Press Association, independent organizations such as the Bureau of Investigative Journalism, and student newspapers.

221. Micro-businesses are defined as having fewer than ten employees and a turnover of less than £2,000,000. *See Crime & Courts Act 2013*, sched. 15, § 8(4); Anthony *supra* note 113, at 14.

222. WAN-IFRA, PRESS FREEDOM, *supra* note 4 at 15.

definitional approach. If the reason for excluding small Internet publications is that their reporting will not likely have the same impact as the tabloids, then query whether that is still the case or, in any event, will continue to be the case in the future? And why interfere in the evolution of the news ecosystem if such interference will not ensure privacy for subjects of press attention? Similarly, why exclude small, multi-author blogs while refusing to protect community-based online papers, or some powerful blogs because they fit into the micro-business category, while including as relevant publishers blogs that are in fact less influential but operated with more employees and a bigger purse?<sup>223</sup>

In a thorough recent analysis of the “relevant publisher” category under the Crimes and Courts Act, English PEN concluded that “there is a worrying lack of clarity regarding the classification of relevant publisher[]”<sup>224</sup> and that the current regime “will create uncertainty and chill freedom of expression.”<sup>225</sup> As a result, English PEN “calls for an urgent review of the legislation.”<sup>226</sup>

#### 8. *The Third Leg of the Stool: Changed Legal Rules Affecting Newsgathering*

When one takes a bird’s eye view, the British press is at risk of constraint from a multi-pronged control strategy—from the combination of the self-regulatory process, government pressure justified by national security, and a rollback of access to information for reporting. The Report’s recommendations for legal changes beyond civil law recognition of exemplary damages thus also raise the possibility of press intimidation.<sup>227</sup>

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223. Anthony, *supra* note 113, at 15.

224. *Id.* at 5.

225. *Id.* at 3.

226. *Id.*

227. Although a detailed assessment of these changes is beyond the scope of this Article, it can be said that some of the recommendations regarding data protection and reforms of journalistic protections in the Police and Criminal Evidence Act (PACE) are likely to stymie newsgathering. See Alex Bailin, *Leveson: Police And The Media, The Proposals*, INFORRM’S BLOG, (Dec. 3, 2012), available at <http://inforrm.wordpress.com/2012/12/03/leveson-police-and-the-media-the-proposals-alex-bailin-qc/> (discussing the implications of Leveson’s proposals for legal changes); Gillian Phillips, *Media Law After Leveson: A View From The Coalface*, POLICY BRIEF, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY (Apr. 2013).

*E. Will Regulatory Benefits Likely Outweigh the Risks of Chill?*

Lord Justice Leveson's rather sanguine conclusions denying chill implicitly rest on a press trade-off: a belief that a certain amount of press deterrence is acceptable if other important values are served thereby—so long as it does not result from formal and direct state control. At least one question is whether such values are in fact likely to be served by press regulation.

The answer to this question is “no.” At a minimum, the risk of chill should caution against regulation: (1) when regulation is unlikely to achieve its principal asserted goals, and (2) when attempts to cabin the chilling impact are not likely to be reliable. This is particularly the case at times when government actions worldwide require a courageous press to be unafraid to hold the government accountable.

*1. Ineffectiveness in Protecting Privacy*

The starting point for the Leveson balancing approach is a sense that self-regulatory obligations placed on the press constitute a worthwhile exchange for the protection of other public values such as privacy. The legitimacy of imposing such commitments on the press would diminish if they could not realistically ensure protection of the counter-weighting values. But the Leveson Report does not assess the likely effectiveness of its model on the privacy side of the balance it advances. Simply put, it does not answer the question whether muzzling the U.K. press would in fact sufficiently protect press victims' privacy and dignitary interests in practice.

The United Kingdom does not protect privacy, as such, in its common law. So why should it protect privacy directly only against the class of press defendants? Moreover, newspaper publishers have argued that it makes little sense to constrain the publication choices of British media when the very material at issue is globally available via the Internet.<sup>228</sup>

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228. For example, one might wonder whether prohibitions on British tabloid publication of nude pictures of Prince Harry actually succeeded in protecting the royals' privacy and dignity when the photos were instantaneously available on the Internet elsewhere to curious audiences doubtless including British citizens. See LEVESON REPORT, *supra* note 7, pt. C, 3.7, at 165 (mentioning this argument). See also Louise Eccles, Rebecca English & Alan Hall, *Royal privacy row as German tabloid publishes picture of the Duchess of Cambridge's bare*

The reality of instantaneous worldwide dissemination of private information enabled by the Internet is that territorial prohibitions on the press are unlikely realistically to protect the privacy interests of the subjects of media attention.<sup>229</sup> In other words, effectiveness at press censorship will not necessarily lead to effectiveness in protecting press victims. Can we really conclude that press regulation will be effective and credible if it will impose asymmetric costs on one part of the Fourth Estate without assuring corresponding benefits with respect to other aspects of the public interest?<sup>230</sup>

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*behind when her skirt blew up during Australia tour*, MAIL ONLINE, (May 27, 2014), available at <http://www.dailymail.co.uk/news/article-2639702/Royal-privacy-row-German-tabloid-website-publishes-picture-Duchess-Cambridges-skirt-blew-Australia-tour.html> (describing German tabloid’s publication of *derriere*-revealing Duchess of Cambridge pictures).

229. A key goal articulated by the Leveson Report is that its proposed solutions “be perceived as effective and credible both by the press as an industry and by the public.” LEVESON REPORT, *supra* note 7, vol. IV, pt. K, ch. 1, at 1583. It has been argued that “the burgeoning of the internet is likely to render irrelevant much of the work of the Inquiry.” LEVESON REPORT, at 736 ¶ 3.1 (noting and rejecting such arguments). In other words, how can territorial regulation be effective in a world of instantaneous global communications? *See, e.g.*, Peter Preston, *Leveson: An Elephantine, Sloppy Exercise In Cut-And-Paste*, THE GUARDIAN, (Dec. 1, 2012), available at <http://www.theguardian.com/media/2012/dec/02/lord-justice-leveson-inquiry-newspapers> (“The idea that politicians (and newspaper proprietors) will suddenly discover a perfect way of regulating the press is bunk. To see that, turn to the single most depressing part of Brian Leveson’s magnum opus and the paragraphs of chop-logic where he pretends that Twitter, Facebook and the rest don’t exist. Who cares if Prince Harry’s Las Vegas revels and Princess Kate’s sunbathing are all over the net? Ethical, regulated newspapers are required to pretend that US privacy laws, French snappers and international celebrity websites that 90% of the British population can click to somehow don’t exist. It’s a ludicrous proposition. But Leveson, safe shuffling bundles in the warmth of his Strand courtroom, has nothing else useful to say.”).

But Leveson supporters would argue that British press regulation could be perfectly effective, despite the Internet, because it would cover both British print newspapers and their online offerings, not to mention those of any foreign news outlets operating in Britain and/or targeting the British audience online. The British audience, then, could be spared access to material that did not comply with the press regulatory regime. Unless Britain censors the Internet, however, information online will have worldwide availability and could be accessed via outlets that do not operate under Leveson restrictions.

230. In any event, even if statutory regulation could be effective in theory, the indirect character of the proxy press regulation as envisioned in the Royal Charter model is likely to mute its effectiveness at protecting plaintiffs in practice. It increases transactions costs, and the need to understand and coordinate more than one part of a complex regulatory structure. If signals are missed or misunderstood, then the very factors designed to protect the press could end up compromising the effectiveness of the regulation, sometimes in unpredictable ways.

2. *Inability to Limit Impacts to the “Pestilential”<sup>231</sup> Tabloids*

To the extent that the predictable chilling effect extends to all facets of the British press, it compromises the press’ watchdog function. To the degree that self-censorship principally affects the tabloid papers, then it potentially mutes or silences a particular moral vision,<sup>232</sup> and implicitly privileges an upper class type of journalism.<sup>233</sup>

There is a widespread view—at least among the British middle class—“that the tabloid culture is pestilential.”<sup>234</sup> It arouses contempt among elites, disdain from the “quality” press, and passionate accounts of intimidation from tabloid targets and press-reform advocacy groups such as Hacked Off.<sup>235</sup> The tabloid press in Britain has historically engaged in invasive and cutthroat practices many of which most observers would find beyond the pale.<sup>236</sup> The red-top papers’ publications policies are suspect as well.<sup>237</sup> It is claimed that reprehensible tabloid practices continue unchecked because tabloid power intimidates critics, press “omerta”<sup>238</sup> discourages intra-press whistleblowing, and competition leads

231. Lloyd, *supra* note 145, at 218 (“A large number of people do think the tabloids are dreadful. They think they have become largely outposts of the celebrity culture, that have a strong line in running sex scandals—mostly, too, among celebrities but not always – and that the news they carry, when it is not sex and celebrity, is often distorted and sometimes flat wrong.”).

232. Some have claimed that the British tabloid press sees itself as speaking truth to power and privilege, and even perhaps to be driven by a messianic fervor to call out violations of a particular (if contestable) moral vision. *See id.* at 219. Whatever one thinks of the tabs’ moral vision, regulation leading to its silencing is something to worry about—both from concerns about state-responsive orthodoxy, and from vantage points prizing a diversity of voices.

233. *See, e.g.*, John Steel, *Leveson: Solution Or Symptom? Class, Crisis, And The Degradation Of Civil Life*, ETHICAL SPACE: THE INTERNATIONAL JOURNAL OF COMMUNICATION ETHICS, vol. 10, no. 1, at 8; Paul Dacre, *Why Is The Left Obsessed By The Daily Mail?*, THE GUARDIAN, (Oct. 11, 2013), available at <http://www.theguardian.com/commentisfree/2013/oct/12/left-daily-mail-paul-dacre>.

234. Lloyd, *supra* note 145, at 218.

235. HACKED OFF, *supra* note 42, available at <http://hackinginquiry.org/>.

236. *See* LEVESON REPORT, *supra* note 7, at (on “outrageous” press behavior, both in newsgathering and publishing). *Cf.* Lidsky, *supra* note 151 (noting examples, *inter alia* the role of paparazzi in the auto accident leading to the death of Princess Diana).

237. They are often accused of printing (or at least implying) falsehood for partisan political gain; of degrading both public discourse and women’s rights by pandering sex and female nudity for profit; and of legitimating political ignorance by disregarding important political issues.

238. Bennet & Townend, *supra* note 181.

to imitation of the worst kinds of scoop-seeking practices and attention-grabbing headlines.<sup>239</sup>

It is thus assumed that the tabloid papers are not the raucous free press whose goal is to hold government power to account, but simply a vehicle for pacifying the population with stories of personal sin and moral failure—providing “bread and circuses” rather than state-challenging accountability reporting. Regulation proponents appear to believe that not much would be lost if Leveson-based press self-regulation were to result in chilling the noxious aspects of these culturally-specific tabloid entities.<sup>240</sup>

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239. Engaging in the “dark arts” by tabloids is not a matter of individual journalistic decision, but of organizational policy decided at the top. Carl Bernstein, *Murdoch’s Watergate?*, NEWSWEEK, (July 9, 2011), available at <http://www.thedailybeast.com/newsweek/2011/07/10/murdoch-s-watergate.html> (“As anyone in the business will tell you, the standards and culture of a journalistic institution are set from the top down, by its owner, publisher, and top editors. Reporters and editors do not routinely break the law, bribe policemen, wiretap, and generally conduct themselves like thugs unless it is a matter of recognized and understood policy. Private detectives and phone hackers do not become the primary sources of a newspaper’s information without the tacit knowledge and approval of the people at the top. . . .”). Lord Justice Leveson found that the culture at the top of the News of the World created excessive pressure and competition among its journalists. See LEVESON REPORT, *supra* note 7, vol. II, ch. 4, at 493 et seq. (discussing newsroom culture at the NOTW). Carl Bernstein of Watergate fame reports that a former executive at News Corp charged that “Murdoch invented and established this culture in the newsroom, where you do whatever it takes to get the story, take no prisoners, destroy the competition, and the end will justify the means.” Rosen, *supra* note 145. Given the competitiveness of the British tabloids, and the economic challenges felt by newspapers world-wide, it is no surprise to find that at least some of the other tabloid reporters would follow the lead of the News of the World and engage in the “dark arts” simply to remain competitive. See David Leigh, *Scandal On Tap*, THE GUARDIAN, (Dec. 3, 2006), available at <http://www.theguardian.com/media/2006/dec/04/mondaymediasection> (noting phone hacking by tabloids); see also PA, *Guardian Hacking Journalist David Leigh Won’t Be Charged*, THE INDEPENDENT, (June 14, 2012), available at <http://www.independent.co.uk/news/uk/crime/guardian-hacking-journalist-david-leigh-wont-be-charged-7851045.html>; James Robinson, *Leveson inquiry: Guardian journalist justifies hacking if in the public interest*, THE GUARDIAN, (Dec. 6, 2011), available at <http://www.theguardian.com/media/2011/dec/06/leveson-inquiry-guardian-phone-hacking>. Even without the News of the World in the lead, such a tabloid press facing a new raft of competitive pressures might be tempted to challenge ordinary journalistic ethics even further in the future.

240. Given the gossipy, celebrity-focused, sex-laden coverage of these tabloid papers, the argument might go, reining in their worst excesses would not damage the democratic role and value of the press. See LEVESON REPORT, *supra* note 7, vol. I, pt. B, ch. 2, ¶ 4.3, at 65 (adopting a political speech-focused view of the democratic benefits of free expression and a free press). Similar arguments have been made with regard to the U.S. press. See, e.g., Chris

But giving the government the power to classify the press, and declaring some journalism legitimate and other reporting junk, is likely to invite abuse and exploitation. Moreover, it generalizes too much to classify all tabloids all the time as archetypes of the “bad” press. Tabloid journalism is not simply one thing, and tabloid newspapers have broken important public interest stories in the past.<sup>241</sup> The Leveson Report could be criticized for assuming an impoverished vision of what the British press should be in its implicit dismissal of the tabloid press as a transgressive alternative.<sup>242</sup> Perhaps the Leveson report erred in failing to

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Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of “The Press” Can Help* (arguing that the Press Clause should not offer any protection to US journalists or news institutions found to be engaging in “he said-she said” versions of balanced journalism rather than truth-telling).

241. See, e.g., Jonathan Freedland, *In Defence Of Britain’s Tabloid Newspapers*, THE GUARDIAN, (Jan. 3, 2012), available at <http://www.theguardian.com/commentisfree/2012/jan/03/defence-of-tabloid-newspapers> (“there is more to Britain’s tabloids than sleaze and celebrity . . . For a true democracy cannot leave knowledge in the hands of the elite few; it has to be spread widely.”).

242. This criticism is not a defense of the legitimacy of the popular press simply on populist, anti-elitist grounds—that tabloid journalism is acceptable simply because red-tops are read by many in the working class. See Mills, *supra* note 21, at 23 (explaining that “[d]efending the nature and content of tabloid news is often seen merely as an overtly populist desire to justify the popular.”). The tabloids have been recognized by some for “promot[ing] a much wider agenda than for quality journalism”—an agenda “which is public-led, rather than quality journalism’s power-led agenda.” Mills, *supra* note 21, at 29. It has been argued that by choosing not to speak to the middle-class audience, by staking out a different—and more advocacy-inspired—narrative voice, by actively seeking out “offence” as part of “legitimacy, effectiveness, and appeal, rather than an unfortunate by-product of a different way of telling the news[.]” Mills, *supra* note 21, at 25, the tabloids may have intentionally set themselves up to provide a self-consciously contrary type of journalism. Moreover, some see the British tabloids as messianic avengers of a particular type of moral vision. At least in some of their coverage, tabloids seem to portray themselves as revealing hypocrisy, challenging accepted middle-class truths and public faces, and “speaking truth to power.” “Official journalism rests on, and perpetuates, the assumption that there are a limited number of acceptable things to talk about, and ways to talk about them: the vilification of tabloid journalism, then, not only requires such assumptions, but helps to maintain such a system.” Mills, *supra* note 21, at 27–28.

Of course, these accounts of tabloidism are quite abstract. When analyzed at the concrete level, it is easy to disapprove of much tabloid journalism—whether because their focus on sexual misconduct harks back to an outdated, 1950s sort of morality, because their emphasis on unmasking celebrity misbehavior distracts from the press’ central role as inculcator of democratic competence in the public, because these justifications have little to do with the pictures of naked women typically found on page three, and perhaps

address directly the class issue undergirding the relationship between the tabloid and quality press in Britain. Although progressives decry their viewpoints and methods, right-wing tabloids have sought political impact. It is not only tabloid revelations of celebrities’ love lives that are at stake.<sup>243</sup>

More generally, the Leveson approach creates a superstructure affecting many more press organs than just the most offensive red-tops. There is no reason to believe that press complaints adjudicated by the self-regulatory body will be limited to the activities of the tabloid journalists; they are likely to deter “responsible” accountability journalism as well. This is particularly true if government chooses to target non-tabloid venues traditionally associated with investigative reporting in the public interest.

*F. Is the Leveson Report’s Framework Misguided in the New Media Age?*

Evolving journalism raises the fundamental question of whether the Leveson model’s focus on controlling the traditional print press misses the boat in today’s digital news environment.<sup>244</sup> By promoting a backward-facing structure designed to control new media with old media norms and techniques, the Leveson approach flirts with futility and neglects the changes wrought by the digital fourth estate. It may effectively increase censorship, reduce innovation, undermine new institutional growth, and increase the divide between traditional and new press.

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even because the tabloids’ focus on the individual and on scandal may serve to reinforce class structure and the marginalization of a working class rather than challenging it.

Ultimately, what can be said for sure is that views differ significantly about British tabloids. Yet the Leveson Report did not transparently address these different kinds of claims to legitimacy by the British tabloid press.

243. Natalie Evans, *Phone Hacking Trial: Sienna Miller ‘Left Daniel Craig ‘I Love You’ Voicemail While Out With Boyfriend Jude Law*, MIRROR, (Jan. 28, 2014), available at <http://www.mirror.co.uk/news/uk-news/phone-hacking-trial-sienna-miller-3069470>.

244. The Leveson Report has been criticized for failing to spend much time on the Internet and online journalism. The Report addresses “the relevance of the Internet” and the role of new media in a bit over one page. LEVESON REPORT, *supra* note 7, at 736–37. See also Rob Tricchinelli, Reporters Committee for Freedom of the Press, *Could American press ever be subject to a stateside equivalent of the Leveson Inquiry?* THE NEWS MEDIA AND THE LAW, Winter 2013, available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/could-american-press-ever-b>. See also *supra*, note 229.

1. *Changes in the Production and Dissemination of News*

The Leveson Report has been chided for its minimal attention to the Internet. It distinguishes the Internet from the press by asserting that “the [I]nternet does not claim to operate by any particular ethical standards, still less high ones . . . so that bloggers and others may, if they choose, act with impunity.”<sup>245</sup> Then, it asserts “a qualitative difference” between online and newspaper content, and assumes that as a result, “people will not assume that what they read on the Internet is trustworthy or that it carries any particular assurance or accuracy; it need be no more than one person’s view.”<sup>246</sup> In the Leveson view, presumably, the non-institutional blogosphere is not particularly powerful or influential, and regulating the mainstream press could effectively achieve the right balance in public discourse between speech and privacy regardless of the contributions of bloggers.

The problem with this approach is that it is not particularly realistic today. The Internet has changed the news landscape on every front.<sup>247</sup> The networked Fourth Estate has already begun to generate new practitioners, practices, styles, and norms of journalism. It could be argued that the Internet has democratized news—generated a broader, more expansive view of what we should consider to be news and how it should be made, disseminated, and discussed.

Even now, it is arguably difficult to distinguish cleanly between the categories of blogs and the press<sup>248</sup>—as the Huffington Post has amply demonstrated. Such a binary characterization does not reflect lived experience. The blurring of that distinction will surely increase in the future. While the old media—newspapers, television, and radio—are “in retreat,”<sup>249</sup> an Internet-based new media is emerging—mixing, among others, solo blogs, old media web presences, group discussion web sites, Twitter, social media, and non-

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245. LEVESON REPORT, at 737 ¶ 3.3.

246. *Id.*

247. For a description of some changes brought to traditional journalism from digital networks, see Levi, *supra* note 159, at 1548–56. See also Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 521–32 (March 19, 2007) (on the changing nature of journalism).

248. See Benkler, *supra* note 11; Cohen, *supra* note 210, at 3.

249. Cohen, *supra* note 210, at 3.

profit online investigative organizations.<sup>250</sup> The new media sector contains “a mixture of different kinds of actors: some are clearly journalists, some are communicators who would never be confused with journalists, and some lie in between.”<sup>251</sup>

As established news institutions compete with new entrants into the news space, they increasingly involve their audience in the generation, processing, and vetting of news.<sup>252</sup> The types of sources seen as legitimate are expanded. The new journalism involves crowd-sourcing information, using non-professional journalists’ material and photographic images, permitting the public to comment on stories—in sum, engaging in various sorts of pro-am journalism that is celebrated by what has been called the Future of News consensus.<sup>253</sup> Some journalism is computer-generated, and does not even involve many journalists.<sup>254</sup> Moreover, the availability of unparalleled amounts of data and the unprecedented capacity to manipulate it also make newly possible the growth of large-scale data-based journalism.<sup>255</sup> Although these kinds of online journalism still supplement traditional journalism, they increasingly “fill the gaps” left by the mainstream press’s declining resources.<sup>256</sup> Moreover, journalism is now a much more tentative and iterative process requiring real time examination and evaluation of contested accounts of events.<sup>257</sup>

250. *Id.* at 3, 15–19.

251. *Id.* at 3, 14–15.

252. *See, e.g.*, Brian McNair, *Trust, Truth and Objectivity*, in *RETHINKING JOURNALISM: TRUST AND PARTICIPATION IN A TRANSFORMED NEWS LANDSCAPE* 83 (Chris Peters & M.J. Broersma, eds. 2012) (describing The Guardian crowd-sourcing project in 2011). *See also* *Crowdsourcing*, *THE GUARDIAN*, <http://www.theguardian.com/technology/crowdsourcing>.

253. Dean Starkman, *Confidence Game*, *COLUM. J. REV.*, (Nov. 8, 2011), available at [http://www.cjr.org/essay/confidence\\_game.php?page=all](http://www.cjr.org/essay/confidence_game.php?page=all) (coining the phrase). *See also* Levi, *supra* note 159, at 1548 (discussing the “new journalism” and the FON consensus); Cohen, *supra* note 210.

254. Steve Lohr, *In Case You Wondered, a Real Human Wrote This Article*, *N.Y. TIMES*, (Sept. 10, 2011), available at <http://www.nytimes.com/2011/09/11/business/computer-generated-articles-are-gaining-traction.html?pagewanted=all&r=0>; The Pew Research Center’s Project for Excellence in Journalism, *State of the News Media 2013*, *STATE OF THE NEWS MEDIA*, overview at 3 (2013), available at <http://stateofthemedias.org/>.

255. *See* McNair, *supra* note 252, at 82 (noting data-based journalism).

256. Cohen, *supra* note 210, at 4.

257. Alfred Hermida, *Tweets And Truth: Journalism As A Discipline Of Collaborative Verification*, *JOURNALISM PRACTICE*, (Mar. 27, 2012), available at

New entrants unaffiliated with the institutional press do, in fact, have (sometimes outsize) influence on global public discourse. Much news today is distributed not by mainstream newspapers—although newspapers are still the most critical aspect of the modern news ecosystem<sup>258</sup>—but in one way or another processed by bloggers, aggregators, citizen journalists, random tweeters, story commenters, and social media friendship networks. Internet sources get wide distribution by links.

The Leveson assumptions about journalism online ignore the reality that important stories in the public interest can be broken these days by bloggers at home, unsavory whistleblowers, small non-profit online investigative outfits, and even ideologically-motivated examples of a renascent party press.<sup>259</sup> Whether or not they do so in their pajamas,<sup>260</sup> bloggers and tweeters can affect the content, arc, duration, and intensity of news and public affairs coverage. They may at least sometimes set the agenda for mainstream press coverage, and add reporting and images. They may serve to publicize stories the mainstream media did not choose to publish.<sup>261</sup>

They step into a vacuum increasingly created by the retrenchment of traditional print media institutions. Economic pressures on the traditional press have led it to reduce reporting power.<sup>262</sup> Increasingly overstretched

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<http://tandfonline.com/10.1080/17512786.2012.667269>.

258. Levi, *Social Media*, *supra* note 159, at 1539 and sources cited therein. *See also* The Pew Research Center's Project for Excellence in Journalism, *supra* note 254.

259. *See, e.g.*, The Drudge Report, *available at* <http://www.drudgereport.com/>. Daily Kos is an example of a liberal blog. [www.dailykos.net](http://www.dailykos.net). *See also* Cohen, *supra* note 210, at 23–26, 76. This is even though, as Professor Ed Baker powerfully recognized, there is audience concentration in the blogosphere as well. C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 107 (2007).

Diversity across the press sector can help a variety of press goals flourish. If we are ambivalent about our social and press ends, it is “deeply unwise . . . to give exclusive dominion to one or another point of view.” Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV. 549, 560 (2012).

260. Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006) (discussing image of bloggers in pajamas).

261. LEVESON REPORT, *supra* note 7, at 170–71 (describing use of blogs by newspapers as proxies).

262. *See* State of the News Media 2013, *supra* note 254, overview at 3 (describing “shrinking reporting power” of the traditional press). *See also*

editorial resources have also made the traditional press more reliant on the information provided by sophisticated newsmakers.<sup>263</sup> And new practitioners of journalism online are increasingly being incorporated into “the larger media ecology.”<sup>264</sup>

The transmission of news and information via the Internet also increases the global dimension of news. It enables not only the delivery of hyper-local material and the “Daily Me” with its individually-tailored focus, but also the possibility of global audiences for what might previously have been thought of as issues of local or regional interest.

Some nascent online news organizations have also begun to function as watchdogs over both government and private power.<sup>265</sup> While they do not have the size and heft of the major players in the institutional press, they are also said to be undeterred by factors responsible for mainstream media’s restraint in criticizing government and powerful economic actors.<sup>266</sup>

Even the style of journalism increasingly varies. The press increasingly includes activist journalists seeking to advance advocacy goals alongside more traditional journalists espousing professional norms of objectivity and neutrality.<sup>267</sup> Institutional relationships have also changed—with increasing collaborations by reporters and news organizations world-wide.

Finally, some have provocatively questioned whether a “gray market in journalism” will inevitably be generated by the security state’s information lock-down and the intellectual property regime’s exclusionary framing of expression as

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Luckhurst, *supra* note 151 (referring to Index on Censorship chief executive John Kampfner’s argument that “journalism is too weak, not too strong” and reiterating the advice to Justice Leveson to “prevent wrongdoing without killing an already sick patient . . .”).

263. State of the News Media 2013, *supra* note 254, overview at 3.

264. Cohen, *supra* note 210, at 26. The uncertainty about scope of coverage is not resolved by the remedy provisions in the Crimes and Courts Act, 2013 passed by Parliament to effectuate the Leveson incentives. See Crimes and Courts Act, 2013, *supra* note 78.

265. *Id.* at 29–34.

266. *Id.* (describing examples of mainstream media timorousness over criticizing government and capture by corporate interests).

267. See, e.g., Cohen, *supra* note 210, at 34. Norms of objectivity have been claimed by newspapers in the US, as opposed to British newspapers, which have a history of partisan points of view.

property.<sup>268</sup> At a minimum, all these developments have led to more variety in the news environment.

These changes signal both change and increasing diversity in the current news landscape. Yet the Leveson/Royal Charter approach would likely hamper many significant and potentially beneficial aspects of the new production and dissemination infrastructure. For example, strict liability for everything appearing in newspapers<sup>269</sup>—including anything said in online comments, or any crowd-sourced material, or material published for its newsworthiness (even if not its accuracy)—could, as a practical matter, lead to reduced reliance on precisely what is generative in the new journalism space. The rational response to such a strict liability regime would be to shut off comments, avoid crowd-sourcing news stories, minimize reliance on unaffiliated photographers, and return to a pre-digital press era. In the era of the citizen journalist, when even the most mainstream of press organizations have involved their audience not only in commenting but also in the reporting of news, this approach is backward-looking and unrealistic.

Applying the Leveson approach to new media threatens to undermine important democratizing developments over time. Any self-regulatory body subject to continuing recognition body oversight under the Royal Charter is likely to adopt and apply a journalistic code of ethics in a disciplinary way. This is obviously problematic for the traditional print press, but presents even greater foundational difficulties for the networked Fourth Estate. Moreover, it can be used by traditional commercial media as a weapon to delay innovation in digital journalism.

## 2. *The Illusory Benefits of Disciplinary Codes*

The entire structure undergirding the self-regulatory body requires the development of a coherent vision of the public interest and a regulator-developed journalistic code of ethics. However, Justice Leveson's belief in the ability of a journalistic code of ethics to provide clear guidelines for balancing public access to information and norms such as privacy is questionable in the current environment.

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268. I am indebted to Patrick Gudridge for this provocation.

269. Royal Charter, *supra* note 60, sched. 3, at 8B.

Reliance on an ethics code subject to the imprimatur of the Royal Charter recognition body is arguably a problem for three reasons: first, because codes themselves by definition have complex relationships with lived practice; second, because a diverse media landscape and rapid evolutions in journalistic practices undermine the ability to articulate universal values in a code; and third, because disciplinary uses of codes enable incumbent-protective activity.<sup>270</sup> Application of an ethics code that does not adequately reflect this reality opens the door to more effective censorship.

The Leveson Report’s reliance on an ethics code effectively transforms the code from a tool whose goal is to guide journalists’ actual practices (however ineffectively) into a disciplining device wielded by a powerful enforcement body, potentially against unpopular targets. Because of the complicated relationship between journalism ethics codes and the actual practices of journalists, some would argue that it is misguided by definition to turn those codes into disciplinary metrics.<sup>271</sup> It may be that the new environment of the globalizing news market and the networked Fourth Estate will further undermine the authority of codes (or at least generate a multiplicity of codes for the many different kinds of journalism that will be practiced)—as journalistic practice increasingly “eludes standardization.”<sup>272</sup>

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270. For a critique of the chilling effect of the process by which the code is to be developed by the regulator, *see supra* text accompanying note 190.

271. At a minimum, it could be argued, it is a mistake for courts to test journalistic behavior by reference to either the broad or the concrete provisions of journalistic practice codes. Just as the aspirational guidelines may be insufficiently directive in the multiplicity of concrete situations facing journalists, the concrete prohibitions in such codes (such as the common prohibition of paying for stories) may at times undermine the public interest in important information. Zelizer, *supra* note 179, at 275 (describing examples in which “the unethical nature of news-gathering [and the use of checkbook journalism] . . . might have denied the US public fuller information critical to its functioning as a body politic. Furthermore, ethics codes offer a sliding scale of evaluation: If paying for information was acceptable in these cases, who is to say where its appropriateness ends?”).

In addition, the availability of different journalistic ethics codes in the United States itself grants too much discretion to courts to select their preferred norms and judicially craft professional boundaries.

272. Zelizer, *supra* note 179, at 274. It may also be that the codes don’t work except to the extent that the problems faced by the journalists are similar to problems they have previously encountered. Without exaggerating the changes wrought by the Internet, one can reasonably wonder whether past experience can continue to be all that directive when journalism is changing on all fronts—newsgathering, presentation, and dissemination. *See also* MEGAN KNIGHT &

Even if evolving codes—organically generated by engagement in the varieties of journalism developing today—are useful to reporters and editors as advisory guides for conduct, it is questionable whether they can and should be used as disciplinary tools.<sup>273</sup> As one proponent of the new journalism put it recently, “[g]ood journalism ethics don’t grow from strong rules. Good journalism ethics grow from strong conversations about our values and about making good decisions based in those values.”<sup>274</sup> The threat of censorship and the possible misuse of codes in that kind of context exist both for governmental bodies and for private press groups.<sup>275</sup>

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CLARE COOK, *SOCIAL MEDIA FOR JOURNALISTS: PRINCIPLES AND PRACTICE* 142 (2013) (noting that formal guidelines of many news organizations err “when they assume that the network is like the newsstand” and that the “more progressive” of those guidelines reflect the networked environment by placing “a greater emphasis on the autonomy of the journalist, and on their ability to make judgments on how they should behave in any given context.”).

273. See Peter Preston, *Peter Preston: ‘Leveson Sees Journalism As An Exercise In Providing Cases For The Courts To Examine’*, *PRESS GAZETTE*, (Feb. 25, 2013), available at <http://www.pressgazette.co.uk/content/peter-prestonleveson-sees-journalism-exercise-providing-cases-courts-examine>. We should hesitate to transform journalism codes into legalized, disciplinary mechanisms also because professional values may be at odds with one another at different levels of analysis and with other professional values. Weaver et al., *infra* note 276, at 473–94, 534–44.

274. Steve Buttry, *Upholding And Updating Journalism Ethics: My Colorado Keynote*, *THE BUTTRY DIARY BLOG*, (Mar. 15, 2014), available at <http://stevebuttry.wordpress.com/2014/03/15/upholding-and-updating-journalism-ethics-my-colorado-keynote/>.

275. See Benkler, *supra* note 11 (noting that mainstream mass media largely disavowed the journalistic activities of Wikileaks). See also, *supra* note 165, (describing Daily Mail’s criticism of The Guardian for publishing articles based on information leaked by Snowden).

Some have argued that “journalistic practice—as it takes shape in news gathering, news presentation, and news distribution—defies the establishment of meaningful ethical standards.” Zelizer, *supra* note 179, at 271. There are lessons to be learned from the fact that journalists (by contrast to academics—and, perhaps, judges)—“eschew and deride” ethics codes. *Id.* at 272. They are said to do so because “[t]hey see dominant approaches to ethics as simplifying, restricting, or ignoring the various materialities by which the news is crafted.” *Id.* at 272. As press sociologist Barbie Zelizer has explained: “The problem with ethics derives in large part from . . . the difficulty that ensues in establishing standards for shifting practice . . . [N]ews-gathering takes shape in situations largely beyond the control of journalists, where rapidly unfolding news stories, high stakes, a marked degree of risk and inherent unpredictability are all part of the ground that journalists must navigate on their way to making news. News presentation, complicated perhaps more than ever before by corporatism, privatization, sensationalism and convergence, is often decided without the input of the journalist who gathered the news. And news distribution in today’s online environment has multiple shapes, platforms and audiences, making one form of a news story a thing of the past. Instead, multimodal journalists are

The Leveson Report gives the impression that many of the transformations enabled by the Internet would violate the norms likely to be developed by the self-regulatory body.<sup>276</sup>

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regularly expected to rework news angles for multiple objectives alongside non-journalists who are doing the same. . . . Journalism is thus more porous, more unstable, more variegated and less authoritative than might be assumed. Though it may be relatively easy to delineate one’s ethical aspirations as a journalist, it is far more difficult to translate those aspirations into practice across the range of situations with which journalists regularly engage.” *Id.* at 273–74.

Even for old media, the codes serve principally as aspirational guides (with a few concrete prohibitions). See Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 *LOY. U. CHI. L.J.* 781, 783–85, 793 (2009) (describing the CCJ and SPJ codes and citing to numerous others). For additional discussions of journalism codes in the US, see, for example, Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 *NOTRE DAME J.L. ETHICS & PUB. POL’Y*, 595 (2005); Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 *CARDOZO ARTS & ENT. L.J.* 467 (2012). Cf. Holger Sievert, *Reporting (in) Europe: Heuristic Remarks on Old and New Research on ‘European Journalism’* in *COMMUNICATION AND LEADERSHIP IN THE 21ST CENTURY: THE DIFFICULT PATH FROM CLASSICAL PUBLIC RELATIONS TO GENUINE MODERN COMMUNICATION MANAGEMENT* (H. Sievert / D. Bell, eds. 2008) at 19–20, available at <http://ssrn.com/abstract=965732> (observing European journalistic diversity and noting that even in old media, and even within Europe, studies show significant variation in journalists’ professional self-concept and goals). They are also artifacts of their historical contexts. For example, the history of Western journalism ethics codes has been described as reflecting the needs of a particular historical moment—as part of a shift from journalistic models of partisanship to those of professionalism and objectivity. See Zelizer, *supra* note 179, at 272–73 (“The first ethics codes in journalism came into being in the late nineteenth and early-twentieth centuries, aligned with the ascent of a model of professionalism and a particular notion of modernity. Richly implicated in the quest for truth, that mindset saw rationality, objectivity, impartiality and reason as the modes of engagement, which journalists could offer those needing information about the world and the ethics codes that reflected its values. Ethics codes thus mirrored a transformation in journalists’ affiliations from reigning work models of partisanship to those of objectivity, and justified those hoping to promote journalism as more of a profession than an occupation. In so doing they set in place a prism for evaluating journalistic practice that was aligned with particular expectations of professionalism in a particular kind of modern context.”).

276. For example, while big data (including government information and information collected from individuals’ online activities) creates the possibility for extraordinarily broad-scale investigative journalism, it also implicates issues of information privacy. Pro-am investigative techniques, despite their many benefits, may also lead to increased error, failure to check sources adequately, and a contextual reporting. See Levi, *supra* note 159, at 1556–73 (discussing the dangers of the “new journalism.”); Cohen, *supra* note 210, at 39 et seq. One empirical study in 2007 found that online journalists were significantly more likely than their print (although not their broadcast) counterparts to say that numerous types of controversial reporting practices “may be justified on occasion.” *THE AMERICAN JOURNALIST IN THE 21<sup>ST</sup> CENTURY: U.S.*

Arguably, Leveson-compliant code-drafting entities would have incentives to craft codes of journalistic ethics skewing toward the norms of the traditional printed broadsheets. If mainstream media feared the onslaught of competition from Internet-enabled non-professional journalism, for example, then wouldn't code-drafting committees dominated by the mainstream institutional press have an incentive to draft journalism ethics codes that valorized only their kind of mainstream journalism? If the resulting codes had real teeth, they could provide a cheap way to disadvantage competitors. If so, couldn't the Leveson approach potentially invite mainstream media industry protectionism?<sup>277</sup> Even if that were not the case, to the extent that the Royal Charter system would exempt some important digital participants while applying to others, it would effectively interfere in the evolution and structuring of the digital news space.

Press reformers would argue that traditional ethical boundaries must be reinforced and policed precisely because of concerns about a likely increase in ethics violations by new journalists. Regulation supporters would worry that a combination of the Internet-influenced "new journalism" and the economic pressures on the "old-school" press would lead to

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NEWS PEOPLE AT THE DAWN OF A NEW MILLENIUM 222 (David H. Weaver et al., 2007). The rise of social, fact-based news is likely to lead to an increased amount of falsity, at a minimum because not all the participants have the professional training to avoid it. Insufficiently sourced, ideologically biased, self-serving and inflammatory news accounts can all-too-easily make their way to millions of readers online. Cohen, *supra* note 210, at 39–42 (describing right-wing blogger Andrew Breitbart's misleading story concerning Department of Agriculture employee Shirley Sherrod's purported racism). See also Derek Bambauer, *Consider the Censor*, 1 WAKE FOREST J. OF L. & POL'Y 34–42 (2011) (describing WikiLeaks and the dangers of control of information by small groups of cyber-activists). The global scope of networked journalism may also augment the need to engage in newsgathering in places with very different ethical norms for reporting. See Zelizer, *supra* note 179.

277. Admittedly, the reality today is that the mainstream press is deeply enmeshed in figuring out the future of media, has already begun to participate in new approaches to the journalistic enterprise, and already incorporates the Internet and its audience in extensive ways. Traditional newspapers are aware that they must share the field with new entrants, and are busy defining the "value added" they can provide in the future and the new curatorial and analytic role they are likely to play. With its online initiatives, its acceptance of crowd-sourcing, and its openness to reader comments, the modern newspaper appears more open to the possibility of different ways of doing journalism. Its publishers are unlikely to believe that they can effectively maintain a backward-looking place and status for old-fashioned newspapers by manipulating a journalistic code drafting process.

increases in irresponsibility and inaccuracy.<sup>278</sup> Because many of the “new” journalists and news outlets do not have the kind of brand associated in the public mind, rightly or wrongly, with mainstream news organizations, the public does not have a “veracity proxy” on which it can rely.<sup>279</sup> In addition to conferring special legitimacy on the included group, then, policing traditional boundaries could reduce the possibility of error and audience confusion.

That important stories might be uncovered through means that a regulatory body might deem to violate a conventional journalism code does not necessarily deprive them of their significance in the public interest, however. The very changes in journalism that have been enabled by the digital environment arguably lead to much beneficial innovation as well.<sup>280</sup>

The social benefits of the “new” journalism should not be ignored in the race to avoid its harms. While the immediacy of Twitter may put pressure on journalistic standards of accuracy, the millions of Twitter users and 800 million Facebook subscribers can create a fact-checking matrix likely

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278. One could reassuringly speculate that traditional press institutions could serve as a professionalizing influence on the potential excesses of the networked Fourth Estate. Yet, it is not certain that the traditional institutional press will inevitably exert such a professionalizing influence—or do so in a desirable way.

The Leveson Report’s critique of the PCC reinforced the Justice’s view that purely voluntary self-regulation would not be successful. See LEVESON REPORT, *supra* note 7, at Ch. 6, ¶ 2.5 et seq. That is neither necessarily correct nor an insuperable difficulty. There are many ways to measure the “success” of any self-regulatory scheme. *Id.* at 755. Some stack the deck. The Leveson Report’s discussion of theories of regulation (*see id.* pt. K, ch. 6, at 1734 et seq.) does not adequately address this issue. See Simon Jenkins, *Cameron Is Right About Leveson*, THE GUARDIAN, (Nov. 30, 2012) (“We do not say the burglary laws have “failed” just because burglary continues.”). For an argument that the PCC’s apparent regulatory failure was attributable to inappropriate expectations of such an entity, see William Dutton, *Save the Fourth Estate*, LSE MEDIA POLICY PROJECT, (Oct. 11, 2013), available at <http://blogs.lse.ac.uk/mediapolicyproject/2013/10/11/william-dutton-save-the-fourth-estate/>. Moreover, there may be ways of promoting better voluntary self-regulation without going all the way to the kind of dangerous, continuing-oversight regulatory regime as that enshrined by the Royal Charter approach.

279. Cohen, *supra* note 210, at 41–42. That is increasingly less the case as well-established blogs earn their own reputational credibility. *Id.* at 76 (mentioning Talking Points Memo and SCOTUSblog as examples).

280. See, e.g., Tom Engelhardt, *Are We in a New Golden Age of Journalism?*, MOTHER JONES, (Jan. 21, 2014), available at <http://www.motherjones.com/media/2014/01/new-golden-age-journalism-daily-newspaper-rise-internet>.

to combat the enhanced accountability challenges likely to arise in the modern journalistic ecosystem.<sup>281</sup> Although online reporting may increase the likelihood of legal liability, it may also help promote a self-correcting marketplace of ideas.<sup>282</sup> Citizen journalists, non-profit news purveyors, and other online actors provide desirable diversity in the perspectives from which they report the news.<sup>283</sup> They can serve to enlarge the “sphere of legitimate debate” defined by the traditional press, and even open the door to some views from the “sphere of deviance” shunned by mainstream news organizations.<sup>284</sup> An assessment of the press that does not speak to the complexities of the modern landscape is the poorer for it. And press regulation that would target innovative new developments would disserve the public interest more than it would serve the goals articulated in the Leveson Report.

Finally, to the extent that the goal of press reform is to reduce specific sorts of press behavior deemed inconsistent with privacy norms, recent history suggests that legal changes other than wholesale press reform can help achieve it. For example, since changes to the Bribery Act in 2010 have made it more difficult for journalists to pay for stories from the police and public officials, editors report that journalists have gone back to old-fashioned methods of journalism.<sup>285</sup>

Because most citizen journalists are more vulnerable than the large institutional press to pressure and intimidation by the threat of lawsuits or fines, they are potentially more likely to self-censor—undermining the public interest.<sup>286</sup> Even when that is not the case—and when it is

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281. Levi, *supra* note 159.

282. *Id.* See also Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

283. Cohen, *supra* note 210, at 5.

284. Jay Rosen, *Audience Atomization Overcome: Why the Internet Weakens the Authority of the Press*, PRESSTHINK, (Jan. 12, 2009), available at <http://archive.pressthink.org/2009/01/12/atomization.html> (describing Daniel Hallen’s model of American journalism as consisting of the sphere of consensus, the sphere of legitimate debate, and the sphere of deviance). See also Cohen, *supra* note 210, at 5, 27.

285. John Plunkett, *Sun Editor: Journalists Have Gone Back To Traditional Methods*, THE GUARDIAN, (Nov. 11, 2013), available at <http://www.theguardian.com/media/2013/nov/11/sun-editor-journalists-david-dinsmore>.

286. Cohen, *supra* note 210, at 65–66. Indeed, to the extent that the new

the traditional media that most wither under Leveson-type scrutiny—negative consequences might follow. Specifically, to the extent that emergent journalism could benefit from the professional practices and ethics norms of traditional newspapers, a cowed and self-censored mainstream print press could not properly serve that norm-propagation function. Moreover, effective censorship can undermine the ability of new entrants to develop institutional heft over time. In light of the diminishing power of the beleaguered traditional press, this would reinforce diminution in press power overall at the moment when a powerful press is most needed as a counterweight to government abuses of power. Roadblocks to the development of new press institutions should be resisted.<sup>287</sup>

### III. THE “MESSAGE” PROBLEM: WHAT SIGNAL IS THE U.K. SENDING ABROAD BY ITS PRESS REFORM EFFORTS?

Numerous international news organizations have voiced concerns about the “message” sent to the world by Britain’s foray into press regulation.<sup>288</sup> The principal argument of these

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media actors are the speech intermediaries, they may have little self-perception as First Amendment actors and slim commitment to press values.

287. See, e.g., Emily Bell, Clay Shirky & C.W. Anderson, *Post-Industrial Journalism: Adapting to the Present*, TOW CENTER FOR DIGITAL JOURNALISM REPORT (Nov. 2012).

288. See, e.g., Jason Deans, *Press Regulation: Seven Global Groups Urge Queen Not To Sign ‘Toxic’ Charter*, THE GUARDIAN, (Oct. 24, 2013), available at <http://www.theguardian.com/media/2013/oct/24/press-regulation-queen-toxic-charter> (arguing that the “toxic” press reform Royal Charter would be nothing more than “camouflage for a “set of repressive statutory controls” being imposed on the industry against its will.”). After the Charter was adopted despite that protest, WAN-IFRA sent an unprecedented delegation to the UK in response to “international concerns surrounding the situation for press freedom in the United Kingdom.” Larry Kilman, *World’s Press Examines UK Press Freedom*, WAN-IFRA, (Jan. 17, 2014), available at <http://www.wan-ifra.org/press-releases/2014/01/17/world-s-press-examines-uk-press-freedom>. See also, *supra* note 3, *infra* note 289.

According to its website, WAN-IFRA “is the global organisation of the world’s newspapers and news publishers. It represents more than 18,000 publications, 15,000 online sites and over 3,000 companies in more than 120 countries.” Its core mission is to defend and promote “press freedom, quality journalism and editorial integrity and the development of prosperous businesses.” See Larry Kilman, *About Wan-Ifra*, WAN-IFRA, <http://www.wan-ifra.org/about-wan-infra>. The delegation’s mission “highlighted serious concerns regarding the independence from political involvement in that process, and how implementation of the legislation that underpins the Royal Charter

non-UK journalists and editors is that the diminution in British press freedom sends a highly repressive signal to other countries.<sup>289</sup> In its recent report criticizing the Royal Charter, WAN-IFRA adverted to “growing evidence, reported by the WAN-IFRA membership, that the British approach—either in terms of regulation, or in the misuse of terrorism and national security legislation—is being used by repressive regimes to excuse their own practices toward the Press.”<sup>290</sup>

Many countries in the world are far less protective of free speech and press than Britain. Under those circumstances, a repressive signal from the U.K. is problematic in two ways. The first is that some governments seeking to rein in their press might cite or gain inspiration from the British example in order to adopt their own “reforms.”<sup>291</sup> WAN-IFRA points to “the UK’s continued influence over developing nations where media are essential for the spread of democratic values[.]”<sup>292</sup> The Campaign to Protect Journalists (CPJ)—a group of American reporters and editors—highlighted a variety of attempts to control the “irresponsible” press by countries as far flung as South Africa, Hungary and Russia.<sup>293</sup> It is

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could potentially be abused to restrict a free press both here in the UK and abroad.” News Release, *World’s Press Examines UK Press Freedom*, WAN-IFRA, Jan. 17, 2014, available at <http://www.wan-ifra.org/press-releases/2014/01/17/world-s-press-examines-uk-press-freedom>.

289. *Id.* (“The mission highlighted WAN-IFRA’s concern that general confusion surrounding changes to the self-regulation system for the press in the United Kingdom, coupled with the government’s chilling intimidation of The Guardian, is sending a negative message to the international community. That foreign governments may cite the current British example when reforming their own regulatory processes, as well as the inspiration they may take in how to treat investigative journalism, remain of particular concern and risks causing serious repercussions worldwide.”). WAN-IFRA also pointed to the U.K. government’s “chilling intimidation of the Guardian.” *Id.*

290. WAN-IFRA, PRESS FREEDOM, *supra* note 4 at 28.

291. See, e.g., Anri Van Der Spuy & Emma Goodman, *The Leveson Report Anniversary: A Celebration or a Commemoration?*, LSE MEDIA PROJECT BLOG, (Dec. 2, 2013), available at <http://blogs.lse.ac.uk/mediapolicyproject/2013/12/02/the-leveson-report-anniversary-a-celebration-or-a-commemoration/> (citing Article 19 legal counsel position that “[m]any other countries that may be evaluating the ways in which they govern their press systems are watching what is going on in the UK . . .”).

292. WAN-IFRA, PRESS FREEDOM, *supra* note 4.

293. Van Der Spuy & Goodman, *supra* note 291. In fact, the group revealed that a Russian lawmaker had “seized on the British example to propose the creation of a Russian media regulator . . . with powers to censure, fine, and even close down news outlets, bypassing the judicial system.” *UK Urged To Reconsider Post-Leveson Media Proposals*, COMMITTEE TO PROTECT JOURNALISTS, (Apr. 2, 2013), available at <http://cpj.org/2013/04/uk-urged-to>

notable in this connection that the Leveson approach is said to be more extensive and coercive than most other Press Councils in Europe.<sup>294</sup> At a minimum, without such a signal, countries seeking to control their press might have incentives to be less blatant in their efforts.

Second, and most notably, press-repressive states can also use British press reform as a weapon to blunt criticism of their press control regimes. Former Guardian editor Peter Preston warns that “[i]t matters . . . what messages the process [of press regulation] sends to foreign states where democracy has frailer roots.”<sup>295</sup> Operating under a potentially repressive press regime deprives the U.K. of its moral high ground on the subject. As the CPJ recently warned the British Prime Minister, press regulation could erode British “moral authority” to object to press censorship in other countries, particularly former members of the British empire.<sup>296</sup> Having succumbed to press regulation subverts Britain’s ability to promote the value of an untrammelled press world-wide.

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reconsider-post-leveson-media-proposal.php.

294. Lara Fielden, *Regulating the Press: A Comparative Study of International Press Councils*, REUTERS INSTITUTE, (Apr. 2012), available at [https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working\\_Papers/Regulating\\_the\\_Press.pdf](https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working_Papers/Regulating_the_Press.pdf).

295. Preston, *supra* note 229.

296. See Rowena Mason, *American journalists urge David Cameron to drop press regulation plans*, THE DAILY TELEGRAPH (Apr. 3, 2013) (“Campaign to Protect Journalists (CPJ) urges Mr. Cameron to “step back” from creating a new regulator as it would set a bad example to repressive dictatorships.”). The CPJ’s directors include senior figures from ABC News, NBC, Bloomberg, the Chicago Tribune, The N.Y. Times, CBS News, The New Yorker, The Washington Post, the Nation, Getty Images and the Miami Herald. Dan Rather, Arianna Huffington, and Paul Steiger, president of ProPublica, sit on the CPJ’s board. *Id.*

Some Leveson proponents argue that the only reason other countries could use UK press reform to justify their own repression of the press is because the press has misled the world by its distorted reporting on the Royal Charter. See, e.g., Steven Barnett, *Leveson Past, Present and Future: The Politics of Press Regulation*, THE POLITICAL QUARTERLY No. 3, at 353, July-Sep. 2013; Angela Phillips, *Distorting The Debate On Media Reform*, INFORRM’S BLOG (Jan. 18, 2014), available at <http://inforrm.wordpress.com/2014/01/18/distorting-the-debate-on-media-reform-angela-phillips/>. That the British proposal does not entail direct state regulation of the press does not mean that it cannot serve as an excuse for more authoritarian regimes to justify and deflect criticism of their far more draconian press control regimes. Moreover, whatever the substantive merits of the point, however, the reality is that a message has been sent to the world that the British are willing to engage in regulation of the press (at least to a much greater degree than heretofore).

## CONCLUSION

The phone-hacking scandal of 2011 served as an occasion for British consideration of an experiment in “voluntary self-regulation” of the press backed up by Royal Charter underpinning. Had Lord Justice Leveson, author of the regime, limited his review to how to pass and enforce laws that would minimize press reliance on illegal “dark arts” (such as phone-hacking, blagging, purchase of information from public officials, door-stepping etc.),<sup>297</sup> the proposed press reforms would have been unexceptionable. But, instead, the reform approach sought to discipline the press and promote “responsibility.” It became “a classic example of overkill[.]”<sup>298</sup> Instead of increased press responsibility, its most significant impact is likely to be enhanced press timorousness at the very moment when courageous reporting is most necessary to keep states and their agents in check.

British press reform revises the balance of power between the press, the government and the political elite in ways that are likely to “protect secrets—personal, political, and corporate—that only an irreverent press is likely to ferret out.”<sup>299</sup> This is not simply about controlling tabloid excesses; the impact of the Royal Charter regime will not be limited to the tabloids. Nor can it realistically be about protecting privacy of the press’ victims, as the worldwide dissemination of information over the Internet undermines British ability to constrain publication. The particular provisions of the system—although structured with Rube Goldberg complexity to appear to avoid state control—in fact promise a significant chilling effect on British newspapers.

The chill is likely to be felt far beyond British borders. Journalists world-wide are already subject to physical danger, death threats, imprisonment, and lawsuits—reporting under increasingly dangerous conditions today.<sup>300</sup> Government threats against journalism today are more extensive and powerful than ever. We live in the time of both the

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297. See Levi, *supra* note 159.

298. Lester, *supra* note 203, at 189–90.

299. Burns, *supra* note 5.

300. See, e.g., Maya Taal, *CPJ Risk List: Where Press Freedom Suffered*, COMMITTEE TO PROTECT JOURNALISTS, available at <https://cpj.org/2014/02/attacks-on-the-press-cpj-risk-list-1.php> (cataloguing dangers to journalists and roadblocks to reporting *inter alia* from Russia, Turkey, China, Ecuador, Syria).

surveillance state—engaging in massive surveillance of populations—and also the security state—resisting disclosure of state programs of mass surveillance on security grounds. The state in turn deploys both public and private power to achieve its ends. Under such circumstances, it is unduly optimistic to contend that structures with the potential for press control will not be used to the full extent of their influence. The new regulatory strategies available to states must also be assessed in light of the increasing economic threats facing news organizations, and the uncertainties created by a rapidly-changing digital news landscape. Initiatives like British press regulation, no matter how measured they appear on their face, pose a profound threat to journalistic freedom everywhere.