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Journalism Standards and "The Dark Arts": The U.K.'s Leveson Inquiry and the U.S. Media in the Age of Surveillance

Lili Levi
University of Miami School of Law

JOURNALISM STANDARDS AND "THE DARK ARTS"[1]: THE U.K.'S LEVESON INQUIRY AND THE U.S. MEDIA IN THE AGE OF SURVEILLANCE

*Lili Levi**

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[1] THE LEVESON INQUIRY, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS, 2012, H.C. 780-I, Vol. I, at 270 (U.K.) [hereinafter LEVESON REPORT, Vol. I] (referring to journalists' illicit methods of obtaining confidential information).

I. INTRODUCTION

In July 2011, the British newspaper *The Guardian* reported that journalists and private investigators working for Rupert Murdoch's tabloid *News of the World* had hacked into the mobile phone messages of teenage murder victim Milly Dowler after her reported abduction in 2002, thereby giving her parents and friends the false hope that she had accessed her phone and was still alive.[2] While journalistic "dark arts"—such as phone hacking, covert surveillance, blagging[3]—had been used by the British tabloid press vis-à-vis celebrities and public persons for some time without triggering much press interest or public outrage, the Dowler story enraged the entire British public, regardless of class or newspaper preference.[4]

The results of the phone-hacking scandal included the closure of the *News of the World*;[5] the payment by News Corporation, the tabloid's parent, of almost $400 million in settlements and litigation fees resulting from private civil actions brought by phone-hacking victims;[6] continuing prosecutorial inquiries into the

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[2] Nick Davies & Amelia Hill, *Missing Milly Dowler's Voicemail Was Hacked by* News of the World, THE GUARDIAN (July 4, 2011), http://www.theguardian.com/uk/2011/jul/04/milly-dowler-voicemail-hacked-news-of-world.

[3] As used in the Leveson Report, "blagging" refers generally to the use of deception in order to access otherwise unavailable information. LEVESON REPORT, Vol I, *supra* note 1, at 11.

[4] *See, e.g.*, THE LEVESON INQUIRY, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS, 2012, H.C. 779, Executive Summary, at 9 (U.K.) [hereinafter LEVESON REPORT, Executive Summary] (stating that there was an immediate public outcry that followed the news that *News of the World* had hacked Milly Dowler's mobile phone); LEVESON REPORT, Vol. I, *supra* note 1, at 270 (stating that the inquiry resulted from the "wide scale public revulsion at the . . . intercepting of messages left on the mobile telephone of Milly Dowler"); THE LEVESON INQUIRY, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS, 2012, H.C. 780-II, Vol. II, at 547 (U.K.) [hereinafter LEVESON REPORT, Vol. II] ("The revelation of [the Milly Dowler] story rightly shocked the public conscious in a way that other stories of phone hacking may not have, but it also gave momentum to growing calls for light to be shed on an unethical and unlawful practice of which there were literally thousands of victims."); *cf.* Tim Luckhurst, *Read All About It: Britons Have Always Loved Scandal*, THE GUARDIAN (May 24, 2011), http://www.theguardian.com/commentisfree/2011/may/25/scandal-twitter-popular-press (describing the history of British Tabloid coverage of the famous and powerful).

[5] LEVESON REPORT, Executive Summary, *supra* note 4, ¶ 28, at 9.

[6] *See News Corp's Phone Hacking Costs: $382 Million*, HUFF. POST (Sept. 24, 2013, 9:52 AM), http://www.huffingtonpost.com/2013/09/24/news-corp-phone-hacking-costs_n_3981512.html (describing the company's extensive legal fees).

activities of other tabloid newspapers;[7] the commencement of criminal trials against high-profile tabloid editors;[8] and Prime Minister David Cameron's appointment of Lord Justice Brian Leveson to conduct a wide-ranging independent public inquiry into the culture, practices, and ethics of the newspaper industry in Britain.[9]

Although the issue did not receive extensive press attention in the United States, the year-long Leveson Inquiry culminated in an almost 2,000-page indictment of British press culture—with respect not only to newsgathering, but also to editorial and publication practices. The resulting Leveson Report, issued in November 2012, recommended the establishment of a new, powerful press self-regulatory entity backed by statute,[10] as well as a journalistic realignment of the balance between the public interest and privacy.[11] After a year of acrimonious negotiation, conducted in the shadow of the Leveson Report, between the British government and the newspaper industry, the Queen approved a government-backed Royal Charter on Self-Regulation of the Press.[12] The Royal Charter creates a framework for supervised self-regulation and effectuates the Leveson Report's recommendations.

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[7] *See, e.g.*, Gavriel Hollander, *Trinity Mirror Facing Investigation Over Whether it is 'Criminally Liable' for Phone-Hacking*, PRESS GAZETTE (Sept. 12, 2013), http://www.pressgazette.co.uk/trinity-mirror-tells-stock-market-sunday-mirror-under-investigation-phone-hacking (announcing the investigation of the *Sunday Mirror*).

[8] *See* Michael Holden & Kate Holton, *High-Profile British Phone-Hacking Trial Begins*, REUTERS (Oct. 28, 2013), http://www.reuters.com/article/2013/10/28/us-britain-hacking-idUSBRE99R0F620131028 (describing the charges brought against Murdoch's former newspaper chief); *Phone Hacking Trial and Social Media: Reports and Resources*, INFORRM'S BLOG (Dec. 4, 2013), http://inforrm.wordpress.com/2013/12/04/phone-hacking-trial-and-social-media-reports-and-resources/ (providing links to social media coverage of phone-hacking trial of eight defendants, including former *News of the World* editors Rebekah Brooks and Andy Coulson).

[9] *See* LEVESON REPORT, Vol. I, *supra* note 1, at 3–6 (providing the Prime Minister's statement to the House of Commons regarding the appointment of Lord Justice Brian Leveson and the scope of the inquiry).

[10] *See* LEVESON REPORT, Executive Summary, *supra* note 4, at 32–35 (summarizing the functions and powers of the regulatory body).

[11] *See id.* at 24 ("I have recommended changes in the law to remove unnecessary procedural red tape and provide for a fairer balance between the public interest in freedom of expression and the public interest in personal information privacy.").

[12] *See infra* Part I.C (describing the post-Leveson developments, including the Royal Charter).

While Britain is not alone in its recent exploration of ways to engender a "responsible" press,[13] it serves as a useful example of the unexpected ripple effects of such initiatives. Developments such as press reforms hewing to the Leveson Report threaten press freedom not just locally in the United Kingdom, but also in the United States. They bring into sharp relief the two sides of globalization vis-à-vis the press: on the one hand, the globalizing reach of journalism, and on the other, the possible globalization of journalism regulation.

British press reform may invite British courts to impose liability on American publishers in connection with their online journalism or the content and activities of their foreign media properties, foreseeably leading to a chilling effect on U.S.-based press. At a minimum, concerns about such developments might encourage American news organizations with online presences to join British self-regulatory organizations "voluntarily." Further, trans-border media ownership and partnership, the employment of British-trained journalists by U.S. media, and the increasing impetus for global institutional collaboration by news organizations are also likely to engender changes in the journalistic and editorial practices of the U.S. press.[14] Likewise, American courts seeking to recalibrate privacy and measure press behavior against media industry norms can import lessons from British press regulation to the United States, with insufficient attention to cultural translation and contextualization. There are

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[13] Other Commonwealth countries, such as Australia and New Zealand, have recently investigated press practices as well. *See generally* Terry Flew & Adam Glen Swift, *Regulating Journalists? The Finkelstein Review, the Convergence Review, and News Media Regulation in Australia*, 2 J. APPLIED J. & MEDIA STUD. 181 (2013) (reviewing recent Australian developments); Steven Price, *New Zealand Media Regulation: No One-Stop Media Regulator*, INFORRM'S BLOG (Oct. 7, 2013), http://inforrm.wordpress.com/2013/10/07/new-zealand-media-regulation-no-one-stop-media-regulator-steven-price/ (cataloguing media regulation developments in New Zealand). Press reform has been a live issue elsewhere in Europe as well. For example, last year, a report to the European Commission by the High Level Group on Media Freedom and Pluralism called for EU-level harmonization of media and journalism. High Level Group on Media Freedom and Pluralism, *A Free and Pluralistic Media to Sustain European Democracy* 33 (Jan. 21, 2013), *available at* http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism; *see also* Régis Bismuth, *Standards of Conduct for Journalists Under Europe's First Amendment*, 8 FIRST AMEND. L. REV. 283 (2010) (discussing European conception of newsworthiness).

[14] *See infra* Part II.B (describing how British press standards could be exported to the United States through "soft harmonization").

already judicial and scholarly voices in the United States calling for press improvement in the public interest.[15]

However well-intentioned, appeals to treat journalists like accountants—effectively subject to professional licensing and liability for violation of professional standards—should be opposed. Continuing commitment to American First Amendment exceptionalism is particularly important today because there needs to be a place where the global press, acting in the public interest, has a chance to circumvent authoritarian reporting limits elsewhere. The rise of the national security state and government censorship world-wide make this imperative.[16] Journalism under the shadow of surveillance deserves a safe place in which to flourish and evolve its own standards. The professional, commercial U.S. press, already weakened by significant economic trials and more timid in its challenges to government power than it might be,[17] should not be further deterred from engaging in accountability journalism in the public interest by direct or indirect incorporation of journalism norms adopted in response to regulation elsewhere.

Even in Britain, concerns about tabloid phone hacking should not stimulate such regulation as is likely to chill the journalism of the entire press sector.[18] Nevertheless, if press regulation tracking the Leveson approach does ultimately triumph in the United Kingdom, it should be operationalized with modesty and restraint. British courts should consider the benefits of press-friendly jurisdiction and choice-of-law analyses in online press cases involving American news organizations. The British press

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[15] For several articles advocating regulation of the press, see sources cited *infra* note 101.

[16] *See generally* FREEDOM HOUSE, FREEDOM ON THE NET 2012: A GLOBAL ASSESSMENT OF INTERNET AND DIGITAL MEDIA (Sanja Kelly, Sarah Cook & Mai Truong eds., 2012) (providing "a comprehensive study of internet freedom in 47 countries around the globe" and finding that "many authoritarian states have taken various measures to filter, monitor, or otherwise obstruct free speech online").

[17] *See* SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R40700, THE U.S. NEWSPAPER INDUSTRY IN TRANSITION (2009), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1639&context=key_workplace ("The U.S. newspaper industry is suffering through what could be its worst financial crisis since the Great Depression. Advertising revenues are plummeting due to the severe economic downturn, while readership habits are changing as consumers turn to the Internet for free news and information.").

[18] It is beyond the scope of this Article to elaborate the dangers of the Leveson approach to press self-regulation in Britain. Further forthcoming work will describe and analyze the threats to local British expressive values posed by the press reform movement in Britain.

regulator should draft and enforce its code of ethics with a view to the increasingly complex digital news eco-system and the worldwide atmosphere of intensified government secrecy. In the United States, courts and commentators should resist importing influences from regulatory reform abroad, lest they unintentionally further enfeeble the American press and deny a journalistic refuge for democracy-enhancing reporting.

Part II of this Article describes the Leveson Inquiry and its resulting Report, as well as the status of press reform in the United Kingdom currently. Part III discusses the direct and indirect effects on the American press of pending British press self-regulation. Part IV sketches why chilling effects on the U.S. press would be particularly threatening to the public interest today.

II. THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

The Leveson Inquiry was commissioned by the Prime Minister in July 2011 with a wide-ranging scope,[19] which Justice Leveson himself characterized as "almost breathtaking in its width."[20] After a year of taking testimony, Justice Leveson issued a four-volume Report of the inquiry into the culture, practices, and ethics of the press.[21]

A. LEVESON'S DIAGNOSES

The Report identified systemic cultural problems with the operation of the press (and particularly the tabloid newspapers) on three fronts: newsgathering, reporting/publishing, and the attitude of the press.[22] Newsgathering too often involved not just phone hacking, but also covert surveillance, blagging, deception, excessive persistence (through tactics such as door-stepping, chases by photographers, and insistent phone calls), illegal trade

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[19] LEVESON REPORT, Vol. I, *supra* note 1, at 4–5 (describing the broad Terms of Reference of the Inquiry).

[20] *Id.* at 12.

[21] *See generally id.* at 3–48 (describing the inquiry); *id.* at 49–51 (describing the Report).

[22] *See* LEVESON REPORT, Vol. II, *supra* note 4, at 592–693 (discussing in-depth the cultural problems of the operations of the press).

in personal information, and some instances of police bribery "in circumstances where it is extremely difficult to see any public interest justification."[23]

As for reporting, the press sometimes "reckless[ly] . . . prioriti[zed] sensational stories, almost irrespective of the harm [they could cause] . . ., all the while heedless of the public interest";[24] published "private information without consent";[25] showed "reckless disregard for accuracy"; and engaged in misrepresentation, embellishment, and distortion.[26]

With respect to the press's attitude in response to complaints, the Report identified a lack of respect for privacy and dignity;[27] "a cultural tendency within parts of the press vigorously to resist or dismiss complainants almost as a matter of course";[28] a refusal to investigate even charges of systemic criminality;[29] a propensity of newspapers under attack to attack their attackers, thereby intimidating and deterring complainants;[30] a hesitancy to break ranks and criticize other papers' practices;[31] and a failure of governance and compliance systems that might have averted misbehavior.[32] The Report highlighted the press's lack of remorse and defensive failure to self-examine as factors exacerbating the underlying newsgathering and reporting errors it described.[33]

The existing voluntary self-regulatory regime under the Press Complaints Commission (PCC)[34] was deemed ineffective to address these problems: Lord Justice Leveson excoriated the PCC for its press-protective attitude, lack of independence from the industry,

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[23] LEVESON REPORT, Executive Summary, *supra* note 4, at 10.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 11.

[27] *Id.* at 10 (speaking specifically about the *News of the World*).

[28] *Id.* at 11.

[29] *Id.* at 7.

[30] *Id.* at 10–11, 39 (noting that *News of the World* was "prepared to conduct surveillance on solicitors acting for claimants in phone hacking litigation").

[31] *See id.* at 8.

[32] *See id.* at 9–11.

[33] *See* LEVESON REPORT, Vol. II, *supra* note 4, at 704–17 (discussing the press's defensive attitude towards critics and unwillingness to apologize in response to complaints).

[34] The PCC is a self-regulatory body charged with maintaining and promoting a professional Code of Practice by journalists, and dealing with complaints about breaches of the Code by the press. *See* LEVESON REPORT, Vol. I, *supra* note 1, at 219–46.

"woefully inadequate"[35] remedies, and failure to act as an effective regulator.[36]

B. THE LEVESON REPORT'S RECOMMENDATIONS

In order to envision the future of press regulation, the Report began by identifying the following requisites for an effective system: "effectiveness, in terms of credibility and durability with both press and the public; fairness and objectivity of standards; independence, transparency of enforcement and compliance; effective and credible powers together with remedies; and the need for sufficient funding taking into account the market constraints."[37] The Report sketched out a proposed independent self-regulatory regime designed to accomplish those goals and invited the industry to effectuate it.[38]

The Leveson model centers on the establishment of an independent regulatory body tasked "with the dual roles of promoting high standards of journalism and protecting the rights of individuals."[39] The body would be governed by an independent board (the Board), whose chair and members would be appointed by an appointment panel, the members of which would be independent of both the industry and government and selected in a independent way.[40] While "the Board should include people with relevant expertise, there should be no serving editors on the Board"[41] and its majority should be independent of the press.[42] "The [Boards] chair should be clearly and demonstrably independent of the press," meaning that "he or she should have no current, or recent, affiliation with any particular press

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[35] LEVESON REPORT, Vol. II, *supra* note 4, at 12.

[36] *Id.* (discussing the ways in which the "PCC has failed"). The PCC's failure to engage in serious investigation of phone-hacking complaints reflected the Commission's utter lack of credibility, according to the Leveson Report.

[37] *Id.* at 13 (reiterating that these criteria had not been challenged).

[38] *See id.* at 32–46 (summarizing the recommendation for the regulatory model). The Leveson Report discusses and ultimately rejects the industry-backed offer for a new regulatory system proposed by Lords Hunt and Black. *Id.* at 13–14.

[39] *Id.* at 14.

[40] *Id.* at 32; *see also* THE LEVESON INQUIRY, AN INQUIRY INTO THE CULTURE, PRACTICE AND ETHICS OF THE PRESS, 2012, H.C. 780-IV, Vol. IV, at 1760 (U.K.) [hereinafter LEVESON REPORT, Vol. IV] (describing the appointment process details).

[41] *See* LEVESON REPORT, Executive Summary, *supra* note 4, at 32.

[42] *Id.* at 33.

organisation."[43] The Board's operations should be funded by the industry, via multi-year agreements to be negotiated well in advance, in order to limit funder influence on the Board's activities.[44]

The new self-regulatory body would have a multitude of roles, including: creating and enforcing a standards code (the Code); defining and issuing guidance on the public interest and the Code; requiring appropriate internal governance processes; enabling whistle-blowing; 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 civil law claims.[45] In drafting the Code, the board could be advised by a Code Committee that could include serving editors.[46]

In turn, the Code to be adopted by the Board "[m]ust 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."[47]

As for complaints, in contrast to 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 alleged breach, or a third party seeking to ensure accuracy of published information."[48]

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;[49] the authority to

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[43] LEVESON REPORT, Vol. IV, *supra* note 40, at 1759.

[44] LEVESON REPORT, Executive Summary, *supra* note 4, at 33.

[45] *Id.* at 33–34; LEVESON REPORT, Vol. IV, *supra* note 40, at 1763–66.

[46] LEVESON REPORT, Executive Summary, *supra* note 4, at 33.

[47] LEVESON REPORT, Vol. IV, *supra* note 40, at 1763. 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.*

[48] LEVESON REPORT, Executive Summary, *supra* note 4, at 33.

[49] *See* LEVESON REPORT, Vol. IV, *supra* note 40, at 1766. There would also be reporting requirements for the Board. *Id.*

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 Code or governance requirements of the body."[50]

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 Practice adopted under the auspices of the PCC.[51] It indicated that the body "should make it clear that newspapers will be held strictly accountable, under their standards code, for any material that they publish, including photographs (however sourced)."[52] It 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."[53] The press should not ordinarily release the names of arrestees or suspects.[54] It suggested that the code be amended to allow the body "to intervene in cases of allegedly discriminatory reporting, . . . reflect[ing] the spirit of equalities legislation."[55] 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,"[56] 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."[57] Wherever possible, the Report recommended encouraging the press to be transparent as to the identity of sources used for stories, and to provide easily accessible links to

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[50] LEVESON REPORT, Executive Summary, *supra* note 4, at 34.

[51] LEVESON REPORT, Vol. IV, *supra* note 40, at 1762–63 (discussing the problems with the old code and the need for a clearer code).

[52] LEVESON REPORT, Executive Summary, *supra* note 4, at 38.

[53] *Id.* at 37.

[54] *Id.* at 22 (providing an exception "where there may be a risk to the public").

[55] *Id.*

[56] *Id.* at 38.

[57] *Id.*

publicly available data.[58] Source identification would include providing information to help readers assess the reliability of the source.[59]

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.[60] The principal carrot was that membership in the regulatory body would entitle claimants to use a "fair, fast and inexpensive arbitration service" to be operated under the auspices of the body.[61] Given the expense of litigation and the possibility that the losing press defendant will be liable not just for damages but also for the winning party costs, Justice Leveson predicted that the arbitral option would be financially attractive to the press.[62] Claimants would have incentives to arbitrate as well.[63] Free for complainants, the availability of the arbitral arm would be considered by courts to weigh against wealthy claimants who choose to go to court instead, possibly subjecting them to claims for costs.[64]

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. First, they would not have access to a cheap, expert, and rapid arbitral process.[65] Second, in court for defamation, breach of confidence, or other media tort cases, they would be liable for exemplary damages if they lost.[66] Third, even if

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[58] *Id.*

[59] *Id.*

[60] *See id.* at 35–36 (summarizing the benefits of membership in the regulatory body).

[61] *Id.* at 35.

[62] *See* LEVESON REPORT, Vol. IV, *supra* note 40, at 1513–14 (describing the benefits of the arbitration process to a publisher and its strength as an incentive).

[63] *See* LEVESON REPORT, Executive Summary, *supra* note 4, at 35 ("[A member can] request the court . . . to have regarded to the availability of the arbitration system when considering claims for costs incurred by a claimant who could have used the arbitration service.").

[64] *Id.*

[65] *Cf. id.* (noting that membership provides members with access to the arbitration service).

[66] *See* LEVESON REPORT, Vol. IV, *supra* note 40, at 1500–01 (describing the current process for claimants suing the press, and the costs that would be incurred by either party when they win or lose).

they won, they would nevertheless be ineligible to receive cost recovery as is currently available.[67]

In its most controversial aspect, the Leveson Report recommended parliamentary enactment of a statutory underpinning that 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."[68] The requirements for recognition would be the Leveson Report's recommendations.[69] 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.[70]

Finally, the Leveson Report addressed the available options should the industry not "rise to the challenge"[71] of establishing a regulator along the lines it recommended, including the possibility of providing a "backstop regulator"[72] via legislation.

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[67] *See* LEVESON REPORT, Executive Summary, *supra* note 4, at 35–36 (noting that when a newspaper fails to become a member and thereby denies a losing claimant access to the arbitration system, "it would be inappropriate for the claimant to be expected to pay the costs incurred in defending the action"). Leveson recommended both revisions to existing law to effectuate the carrot-and-stick regime, and also changes to other substantive and procedural rules thought to be overly hospitable to the press. *See, e.g.*, LEVESON REPORT, Vol. IV, *supra* note 40, at 1810–11 (addressing some provisions of the U.K. data protection regime that serve as particular protections for journalistic activity as well as proposing increases to the Information Commissioner's powers). Leveson also recommended changes to the Police and Criminal Evidence Act of 1984 that would ease police access to journalistic material. *See id.* at 1813 (stating that journalistic material should only be considered confidential for the purposes of the Act if it was acquired through "an *enforceable or lawful* undertaking").

The costs and exemplary damages incentive provisions recommended in the Leveson Report were formally enacted by Parliament as part of the Crimes and Courts Act 2013. Crimes and Courts Act, 2013, c.22, §§ 34–42, *available at* http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted; *see also* Charlie Potter, *Press Regulation: All You Need to Know*, 24 BRIT. J. REV. 15, 15–22 (2013) (describing the Leveson Report, the political response, and the legal changes already undertaken as part of effectuating the Report's recommendations).

[68] LEVESON REPORT, Executive Summary, *supra* note 4, at 36.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 17.

[72] *See id.*; *see also* LEVESON REPORT, Vol. IV, *supra* note 40, at 1782 (articulating, but not explicitly recommending, such a statutory regulator prior to an assessment of the press's response to the Leveson Report's co-regulatory recommendations).

C. POST-LEVESON DEVELOPMENTS

After the release of the Leveson Report, the British government and newspapers engaged in negotiating press regulation in the shadow of the Report. The parties proposed contending Royal Charters that would guide the establishment of the new regulator.[73] On October 30, 2013, the press lost its battle when the Queen approved the Royal Charter on Self-Regulation of the Press, extensively based on the Leveson Report recommendations and the cross-party proposed Charter.[74]

As provided in the Royal Charter, a Recognition Panel charged with recognition of press industry self-regulators is currently being established.[75] The Recognition Panel is to be tasked with

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[73] In response to concerns about parliamentary involvement in press regulation, the Cameron government proposed using the Royal Charter mechanism to effectuate the recommendations of the Leveson Report. Lisa O'Caroll, *Royal Charters: What Are They and How Do They Work?*, THE GUARDIAN (Dec. 7, 2012), http://www.theguardian.com/media/2012/dec/07/leveson-inquiry-royal-charter-history. Unlike the parliamentary process involved in enacting legislation, Royal Charters are approved by the Queen upon recommendation of her Privy Council. *Id.*

The proposed Royal Charter negotiated by the Liberals, the Conservatives, and the Liberal Democrats—the cross-party charter—sought to execute the Leveson Report's recommendations with fidelity. *See* Final Draft Royal Charter on Self-Regulation of the Press (2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249783/Final_Draft_Royal_Charter_11_Oct_2013.pdf (providing the final cross-party draft of the proposed Charter).

By contrast, the newspaper publishers proposed their own version of the Royal Charter. *See* Draft Royal Charter for the Independent Self-Regulation of the Press, http://www.newspapersoc.org.uk/sites/default/files/pdf/Draft-Independent-Royal-Charter-25-4-13.pdf (last visited Apr. 9, 2014). The publishers characterized their proposed Charter as addressing the failures of prior self-regulation and responding to the Leveson Report's concerns, while posing fewer threats to press independence than the cross-party proposal. Lynne Anderson, *Newspaper and Magazine Publishers Apply for Royal Charter on Press Regulation to Implement Leveson Recommendation*, NEWSPAPER SOC'Y (Apr. 25, 2013), http://www.newspapersoc.org.uk/25/apr/13/newspaper-and-magazine-publishers-apply-for-royal-charter-on-press-regulation-to-implement.

[74] Royal Charter on Self-Regulation of the Press (Oct. 30, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf.

[75] Royal Charter on Self-Regulation of the Press (Oct. 30, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf; *see also Press Self Regulation*, THE COMMISSIONER FOR PUBLIC APPOINTMENTS, http://publicappointmentscommissioner.independent.gov.uk/press-self-regulation/ (last updated Feb. 7, 2014); Roy Greenslade, *Words of Leveson Open to Interpretation Amid the Mud-Slinging*, STANDARD (Jan. 29, 2014), http://www.standard.co.uk/business/media/words-of-leveson-open-to-interpretation-amid-the-mudslinging-9092913.html.

determining whether applications for recognition from press regulators comply with the terms of the Charter by adequately satisfying the Leveson criteria, reviewing whether regulators granted recognition should continue to be certified, and reporting on the success or failure of the recognition system.[76]

In the meantime, the major newspaper publishers inaugurated their own press regulator—the Independent Press Standards Organisation (IPSO)[77]—purporting to comply with Leveson and to be the "toughest regulator anywhere in the developed world,"[78] albeit with structural departures from the Leveson model.[79] It is reported that the great majority of British newspaper publishers have signed contracts subscribing to IPSO.[80]

It may be, as recently predicted in the *Economist*, that the politicians' Royal Charter will find no takers and press reform will be deferred until after the 2015 general election.[81] IPSO is not likely to seek recognition under the Royal Charter regime.[82] Yet, a new self-regulatory option—IMPRESS (Independent Monitor for the Press)—has recently been proposed as an alternative to

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[76] Royal Charter on Self-Regulation of the Press, Section 4, Functions 4.1.

[77] IPSO: INDEPENDENT PRESS STANDARDS ORGANIZATION, http://ipso.co.uk/ (last visited Mar. 15, 2014).

[78] Ian Burrell, *Press Announces Timetable for 'Toughest Regulator in the World,'* INDEPENDENT (Oct. 24, 2013), http://www.independent.co.uk/news/media/press/press-announces-timetable-for-toughest-regulator-in-the-world-8902402.html.

[79] For a criticism of IPSO as insufficiently compliant with Leveson issued by a press reform organization, see MEDIA STANDARDS TRUST, THE INDEPENDENT PRESS STANDARDS ORGANISATION (IPSO), AN ASSESSMENT 4-4 (2013), *available at* http://mediastandardstrust.org/wp-content/uploads/downloads/2013/11/MST-IPSO-Analysis-15-11-13.pdf.

[80] *See* Mark Sweeney, *Press Regulation: Most National and Regional Newspapers Sign Up to IPSO*, THE GUARDIAN (Dec. 5, 2013), http://www.theguardian.com/media/2013/dec/05/press-regulations-newspapers-sign-up-ipso ("More than 90% of national newspapers and most regional publishers have signed up."). The *Financial Times* and the *Guardian* have not yet done so, citing concerns about independence. *Id.*

[81] *Hold the Presses*, ECONOMIST, Nov. 2, 2013, *available at* http://www.economist.com/news/britain/21588910-battle-over-newspaper-regulation-rolls-long-grass-hold-presses ("The battle has been postponed. It will be even more vicious when it rejoins.").

[82] *See, e.g.*, Dominic Ponsford, *MP tells PCC Chair Lord Hunt: 'You're being paid £180k for three days a week to shimmy and shift the sands,'* PRESSGAZZETTE (Jan. 28, 2014), http://www.pressgazette.co.uk/mp-tells-pcc-chair-lord-hunt-youre-being-paid-£180k-three-days-week-shimmy-and-shift-sands ("Publishers have said IPSO will not seek approval from the independent recognition panel set up by Parliament under the terms of the Royal Charter.").

IPSO.[83] If IMPRESS succeeds in attracting an adequate subscriber base and seeking recognition from the Recognition Panel, the press will face the chilling impact of exemplary damages.[84] Or, if another Milly Dowler-like press debacle is revealed, something even more challenging to press freedom than the Royal Charter regime is likely to emerge. While the ultimate shape of press regulation is still unclear, the Leveson Report's recommendations are likely to have a significant influence on press reform. Because it will operate in the shadow of the government's Royal Charter and other developing regulatory options, even the press's own regulatory IPSO is likely to be far less deferential to newspapers than was the PCC.

III. THE CROSS-ATLANTIC CHILL

Although some American journalists wrote a letter highlighting the threat to press freedom posed by the Leveson proposals[85] and the *New York Times* covered the phone-hacking scandal,[86] the U.S. media as a whole treated the issue as a British matter. This is not entirely surprising: despite the two countries' shared commitment to democratic government and free expression, the history, character, and law of the press in the United Kingdom and United States differ significantly.[87] As one columnist for *The Guardian*

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[83] *See* Lisa O'Carroll, *Sir Harold Evans Backs Plan for New Press Regulator to Rival IPSO*, THE GUARDIAN (Dec. 9, 2013), http://www.theguardian.com/media/2013/dec/09/sir-harold-evans-press-regulator-ipso-impress-project (describing IMPRESS).

[84] The exemplary damages provisions of the Crimes and Courts Act 2013 are designed to be triggered when a press regulator is established and submits to the Royal Charter certification process by seeking official recognition from the Recognition Panel established pursuant to the Royal Charter. *See* Crimes and Courts Act 2013, Sections 34–42, *available at* http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted; *see also* Charlie Potter, *Press Regulation: All You Need to Know*, 24 BRITISH J. REV., no. 2, 2013, at 15–23.

[85] *See* Rowena Mason, *American Journalists Urge David Cameron to Drop Leveson Press Regulation Plans*, TELEGRAPH (Apr. 3, 2103), http://www.telegraph.co.uk/news/politics/9969845/American-journalists-urge-David-Cameron-to-drop-Leveson-press-regulation-plans.html?fb (reporting on the letter by the Campaign to Protect Journalists to Prime Minister Cameron urging him to refrain from creating a new press regulator).

[86] The *New York Times*'s archives of articles regarding phone hacking and the Leveson Report can be found at *British Phone Hacking Scandal (Leveson Report)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/n/news_of_the_world/index.html?8qa (last visited Mar. 15, 2014).

[87] On the legal side, the British press does not operate under constitutional protections akin to the U.S. Constitution's First Amendment. British newspapers have been subject to

put it, "Leveson is peculiarly British, growing out of a long history of press regulation, myriad class issues and the special and outsized position of media proprietors in Britain . . . . I don't see it being applicable or even comprehensible in the American context."[88] Nevertheless, even if the British media landscape can be clearly distinguished from its American counterpart, and even if the Leveson approach—or some variant of press regulation—might be reasonable in the context of the particular structure of the British press, its effects are unlikely to remain local to Britain. Resulting chilling effects on the American press's activities can be expected.

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self-regulation under the PCC for two decades already. *See* LEVESON REPORT Vol. IV, *supra* note 40, at 1517 (mentioning the creation of the PCC in 1991). Furthermore, although Britain does not have a statutory privacy tort, the British envision the public interest in a free press as part of a balance with other public interests. *See id.* at 1862–64 (discussing privacy law in the United Kingdom). At least in Lord Justice Leveson's account, freedom of the press is adequately maintained in Britain if the government does not impose prior restraints on speech; subsequent punishment is far less of a problem. This, of course, is far from the freedom envisioned for speech in the United States.

British and American newspaper cultures also differ in some important ways. The American tabloids—such as the *New York Daily News*—differ from British "red-top" tabloid papers both in their coverage and style. Perhaps because of its comparative timorousness, the mainstream American newspaper press is not known for extensive use of journalistic "dark arts," although the investigative press has relied on surreptitious reporting. *See generally* BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012) (explaining that journalists have used undercover investigations to produce much of the most valuable journalism over the past 150 years). Further, while British broadcasters are statutorily required to be neutral in their news coverage, partisanship is expected in British newspapers. *See* KAREN SANDERS & MARK HANNA, *British Journalists*, *in* THE GLOBAL JOURNALIST IN THE 21ST CENTURY 220, 220 (David H. Weaver & Lars Willnat eds., 2012). And British reporters are said to be tougher and to press harder questions than their American counterparts. *See* Brian Reade, *Pulp Friction: Why Only British Journalists Ask Hard Questions of Celebrities*, MIRROR (Jan. 17, 2013), http://www.mirror.co.uk/news/uk-news/brian-reade-on-why-only-british-journalists-1538197 ("[T]he British media holds those in power to account more stringently than in any other country.").

[88] Rob Tricehinelli, Reporter's Committee for Freedom of the Press, *Could American Press Ever Be Subject to a Stateside Equivalent of the Leveson Inquiry?*, THE NEWS MEDIA & THE LAW, Winter 2013, at 15, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/could-american-press-ever-b.

A. POSSIBLE APPLICATION OF BRITISH PRESS LAW TO AMERICAN NEWS ORGANIZATIONS

From the *New York Times*, which purchased the former *International Herald Tribune*,[89] to the *Huffington Post*, which operates www.huffingtonpost.co.uk, American news purveyors are developing connections with British entities. In addition to its British interests, Rupert Murdoch's News Corp. also owns Fox Broadcasting and Dow Jones, the publisher of the *Wall Street Journal*.[90] Further integration of British and American media interests can be expected, either through ownership or contractual collaboration. All the major American newspapers, broadcasters, and cable operators, not to mention other U.S. news and opinion purveyors, have significant online presences and naturally seek to expand their reach to global audiences, including in the United Kingdom.[91]

Given the exceptional character of U.S. constitutional protection for speech and press, there is the looming possibility of American publishers being held liable by British courts for their online journalism or the content and activities of their foreign media properties. Such courts could assert jurisdiction on the basis of the online American press's British readership and attempts to target British readers, and could thereafter apply

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[89] *See* Roy Greenslade, *Why the New York Times is Moving on from the Herald Tribune*, Greenslade Blog, THE GUARDIAN (July 29, 2013), http://www.theguardian.com/media/greenslade/2013/jul/29/new-york-times-digital-media (discussing the acquisition of the *International Herald Tribunal* by the *New York Times*).

[90] *Resources—CJR's Guide to What the Major Media Companies Own*, COLUM. JOURNALISM REV., *available at* http://www.cjr.org/resources/?c=newscorp.

[91] *See* Ed Pilkington, *The New York Times's Jull Abramson: "The First Amendment is First for a Reason,"* THE GUARDIAN (Oct. 13, 2013, 1:24 PM), http://www.theguardian.com/media/2013/oct/13/new-york-times-jill-abramson-first-amendment ("A third of [the *New York Times*'s] 59 million unique monthly users live outside the US."). The obverse is true as well—British newspapers, for example, have made significant inroads into the American news market—with the *British Daily Mail* said to have become the world's most popular online newspaper. *See* Will Oremus, *The World's Most Popular Online Newspaper*, SLATE (Feb. 3, 2012, 5:44 PM), http://www.slate.com/articles/business/moneybox/2012/02/daily_mail_new_york_times_how_the_british_tabloid_became_the_world_s_most_popular_online_ne wspaper_.html ("The world's most popular newspaper is . . . the *Daily Mail*."); *see also* Tony Rogers, *British Newspaper Websites Seek a Bigger Audience in America*, ABOUT.COM JOURNALISM, http://journalism.about.com/od/trends/a/British-Newspaper-Websites-Seek-A-Bigger-Audience-In-America.htm (last visited Mar. 15, 2014) (explaining how U.K. newspaper websites seek to win over U.S. readers).

British law. This could lead to liability in circumstances where the journalists would be more protected under U.S. law.[92] Even

[92] Of course, important issues of jurisdiction and choice of law arising in connection with the transnational activities of online press entities have not yet been resolved. *See, e.g.*, LEVESON REPORT, Vol. I, *supra* note 1, at 177–79 (discussing the problems with "the enforcement of law and regulation online"); David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71, 77–85 (2012) (discussing issues posed by transnational cases in which two or more countries can claim their law controls the outcome); Jan-Jaap Kuipers, *Towards a European Approach in the Cross-Border Infringement of Personality Rights*, 12 GERMAN L.J. 1682–93 (2011) (analyzing the need to determine the law applicable to cross-border infringements of personality). While it is beyond the scope of this Article to describe British jurisdiction and choice-of-law developments with respect to the Internet in detail, the possibility that American news organizations could be held liable on the basis of their online reporting accessed in Britain appears non-trivial. The Internet "gives many defendants wider presence than they otherwise would have," and "most countries now embrace expansive ideas as to what contacts are sufficient to justify the exercise of jurisdiction." Anderson, *supra*, at 78. As for choice of law, some courts unilaterally apply forum law without engaging in choice-of-law analysis. *See, e.g.*, Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, 14 Y.B. PRIVATE INT'L L. 181 (2013). Even when they do engage in choice-of-law analysis, the outcome of the analysis is often unpredictable. Anderson, *supra*, at 79; *see also* Anna Kadyshevich, *Jurisdiction and Choice of Law for Online Publishers in Europe*, 28 COMM. LAW. 13 (2012) (discussing a recent decision by the Court of Justice of the European Union addressing jurisdiction and choice of law in privacy contexts).

The British Royal Charter's definition of those entities falling within its scope does not significantly protect American online news organizations from the imposition of liability by British courts applying British law. Its definition of a "relevant publisher"—based on the definition in the Crimes and Courts Act 2013 (Final Royal Charter, *supra* note 74, § 1(b)) sch. 4—would include all major U.S. newspapers with online editions. Crimes and Courts Act 2013, 2013 c. 22, § 41, Sch. 15, *available at* http://www.legislation.gov.uk/ukpga/2013/22/section/41/enacted.

Recently, a British court enjoined the *Wall Street Journal* from identifying the names of possible British subjects of a multi-country financial fraud investigation. *See News: SFO Obtains Injunction to Prevent Publication of LIBOR Names in Wall Street Journal*, INFORRM'S BLOG (Oct. 19, 2013), http://inforrm.wordpress.com/2013/10/19/news-sfo-obtains-injunction-to-prevent-publication-of-libor-names-in-wall-street-journal/ (discussing injunction in LIBOR investigation). Although the injunction expired shortly thereafter (see Cassell Bryan-Low & Jenny Strasburg, *Judge Allows Publication of Names in Libor Case*, WALL ST. J. (Oct. 21, 2013, 3:51 PM), http://online.wsj.com/news/articles/SB10001424052702304021045791495002 82467112 (reporting that the British court decided not to renew the order four days after the injunction)), its issuance in the first place reflects a different balance between press and other interests than would likely prevail in the United States in similar situations. *See Attorney General to Warn Facebook and Twitter Users About Contempt of Court*, GOV.UK (Dec. 4, 2013), https://www.gov.uk/government/news/attorney-general-to-warn-facebook-and-twitter-users-about-contempt-of-court (noting Attorney General's decision to publish advisory notes "to help inform the public about the legal pitfalls of commenting in a way which could be seen as prejudicial to a court case or those involved").

Analogously, prior to the passage of the Defamation Act of 2013, British courts had become a preferred venue for "libel tourism" because of their willingness to exercise jurisdiction over non-British defendants and to apply British defamation law even when the

parties had limited connections with the British forum. For recent discussions of transnational libel cases, see generally Anderson, *supra*, and sources cited therein. *See also* Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 513 n.24 (2012) (describing cases in which British courts exercised jurisdiction despite tenuous connections with the British forum); Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) (discussing European commissioner Reding's proposal to create the "right to be forgotten" as new privacy right). Parallel developments for media invasions of privacy are not inconceivable. *See* Stephen Bates, *More SPEECH: Preempting Privacy Tourism*, 33 HASTINGS COMM. & ENT. L.J. 379, 405 (2011) (arguing for extension of U.S. SPEECH Act's provisions for non-enforcement of foreign defamation judgments to privacy cases as well). Britain does not have a statutory privacy tort, having relied largely on the breach of confidence doctrine to protect Britons' privacy interests. *See* LEVESON REPORT, Vol. IV, *supra* note 40, at 1862–64 ("[T]he courts have demonstrated reluctance to develop a general cause of action for the protection of privacy rights."). Yet, as the Leveson Report itself indicates, British courts do balance the press's free expression interests with concerns about their subjects' privacy interests to a greater degree than might be tolerable in U.S. jurisprudence. *Id.*; *see also* Peck v. United Kingdom, 36 Eur. Ct. H.R. 1, 24–29 (2003) (finding that Britain's remedy structure for arguable breaches of Article 8 of the European Convention on Human Rights was ineffective as required under Article 13(3)). If Britain moves further toward statutory privacy tort protection, online American news organizations might be at even greater risk.

The balance between the relative importance of free speech and privacy has been developing in other parts of Europe in a manner different from that in the United States as well. *See generally* Scott J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125 (2012) (describing divergent definitions of public figures and public interest in the United States and Europe). From attempts in Europe to adopt a "right to be forgotten," to expansive European data protection law, there appears to be an increasing divide between the United States and Europe on privacy matters. *See, e.g.*, Frances Robinson, *European Parliament Acts Quickly to Pass Data-Protection Vote*, WSJ BLOGS (Oct. 21, 2013, 5:35 PM), http://blogs.wsj.com/brussels/20 13/10/21/european-parli ament-acts-quickly-to-pass-data-protection-vote/ (explaining that the amendments to a possible new European law include a more workable version of the "right to be forgotten"); Case of Delfi AS v. Estonia, ECHR, App. No. 64569/09 (2013) (finding no violation of Article 10 in the Estonian court's holding that the large Estonian Internet news portal was not exempt from defamation liability for readers' online comments). While the full implications of *Delfi* for the future of the press jurisprudence of the European Court of Human Rights are still unclear, many have characterized the decision as a significant threat to freedom of the press. *See, e.g.*, Tim Worstall, *Every Website That Accepts Comments Now Has a European Problem*, FORBES (Oct. 11, 2013, 11:22 AM), http://www.forbes.com/sites/timworstall/2013/10/11/every-website-that-accepts-comments-now-has-a-european-problem/ (explaining that under *Delfi* courts can hold those who run websites liable for the defamatory comments that readers post of their sites); Dirk Voorhoof, *Treating a News Portal as a Publisher of Users' Comment May Have Far-Reaching Consequences for Online Freedom of Expression*, INFORRM'S BLOG (Oct. 29, 2013), http://inforrm.wordpress.com/2013/10/29/treating-a-news-portal-as-publisher-of-users-comme nt-may-have-far-reaching-consequences-for-online-freedom-of-expression-dirk-voorhoof/ (stating that the *Delfi* case has been described as "a serious blow to freedom of expression online"). European courts in other contexts have also recently issued press-restrictive rulings. For example, a regional French court just required Google to find a way to effectively remove pictures of an orgy involving Max Mosley, the former head of the racing organization FIA and son of British fascist leader Sir Oswald Mosley. Alexandria Sage, *Google Ordered to Remove*

without trans-national ownership as such, the online activities of American news organizations—by generating foreseeable U.K. audiences—could bring them within the ambit of British press regulation and impose liability for media torts under British law.

The possibility of liability exposure—potentially in the millions of dollars—for activities of a foreign news organization is likely to have a significant impact on the editorial and newsgathering mindset of that entity.[93] U.S. organizations with British media interests or those that direct their online activities to generating British audiences might even feel compelled to participate "voluntarily" in the British press self-regulatory system.[94] Compliance by a company's British subsidiaries or interests could well lead to the absorption of those norms elsewhere in the organization—including in the company's American press holdings—either as a result of voluntary adherence to the regulator or the chilling effect of fear of liability, or both.[95]

Max Mosley Sex Party Images, REUTERS (Nov. 6, 2013, 12:17 PM), http://www.reuters.com/article/2013/11/06/france-google-idUSL5N0IR3SL20131106. Mosley initially won a suit in England for breach of confidence and unauthorized disclosure of personal information against the *News of the World* tabloid over its article revealing the orgy. Mosley v. News Group Newspapers Limited, [2008] EWHC (QB) 1777, [232].

[93] The cost of membership is likely to have an impact on which American media companies' British interests would choose to participate in a Leveson-type regulator. While small Internet voices might find the cost too dear, the large media conglomerates are all likely to participate in a Leveson-inspired press regulation scheme.

[94] As recognized in the Leveson Report itself, online entities have already voluntarily adopted a practice of complying with local, British law. *See* LEVESON REPORT, Vol. I, *supra* note 1, at 165–79 (discussing application of British law to online news providers of various sorts); *id.* at 171–72 (describing the *Huffington Post*'s voluntary subscription to the PCC, even under the pre-Leveson regime).

[95] Of course, it would be possible to erect Chinese walls between the American and European news operations in commonly owned entities. Such differences might even make economic sense as reactions to differences in the demographics of the different entities' audiences. But policing such walls increases transactions costs. A model of institutional separation—of journalistic silos within an umbrella organization—is likely to be sorely tested as journalistic efficiency in the modern age leads to collaboration, re-use, and re-packaging of stories, and trans-border deployment of professional staff. If the work investigated and reported in territory *X* is also going to be used in territory *Y*, which has more stringent limits on journalistic activity, then even the originating journalists in territory *X* may be influenced in their choices by the more restrictive norms and rules of territory *Y*. *See* Ashley Messenger, *What Would a "Right to be Forgotten" Mean for Media in the United States?*, 29 COMM. LAW. 1, 103 (2012) ("The EU rules may become a de facto standard for what is permitted online."). While another possibility is that companies will "geo-filter" leading to a Balkanized Internet (see *id.*), effective geo-filtering would likely be

B. POSSIBLE DIFFUSION OF BRITISH NEWS STANDARDS TO THE U.S. VIA PRESS PRACTICES

In addition to the chilling effects of feared British court decisions against the press, the new news ecosystem suggests the possibility of "soft harmonization" of reportorial and editorial practices over time. The increasing mobility of journalists and editors world-wide, the rise in cross-ownership or less formal cooperative relationships between American and foreign media, and the apparent flourishing of international media collaborations could set the stage for the exportation of journalistic constraints embedded in Leveson-inflected practice norms.[96]

1. Personnel. The international arc of professional journalistic careers today may lead to increasing trans-border norm influences. In the twenty-first century, the "British invasion" to which newspapers refer is the increasing employment of British journalists by U.S. media.[97] If this continues, the influx of foreign-trained reporters will likely influence the operations of the American press, although the precise nature of the impact is not yet clear. To be sure, some British reporters working for American press organizations are likely to see their U.S. employment as a way to avoid the subtle censorship of Leveson-inspired press self-regulation at home, and will happily shed the strictures of press

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very difficult to accomplish as a practical matter given the breadth of coverage provided by the online editions of newspapers and the variety and complexity of media tort laws.

[96] This Article assumes, on the basis of the Leveson Report, that at least some of the press standards ultimately likely to be adopted by the British press regulator will diverge from the norms generally applicable to the U.S. press. Although the specific code provisions have not yet been drafted, the drafters may be influenced by the Leveson Report's critiques of the adequacy of the PCC's existing Editor's Code of Practice, its suggestions of the desirability of press standards more sensitive to the privacy interests of subjects of press attention, its apparent toleration of not insignificant second-guessing of editorial decisions, and its assumption of the adequacy of a uniform set of standards for the press as a whole. The Royal Charter's provisions firmly track the Leveson Report. The private alternatives as well—IPSO and IMPRESS—appear largely to accept the Leveson Report's diagnosis of the British press's cultural failings. *See generally Prospectus*, THE IMPRESS PROJECT, http://impressproject.org/prospectus/ (last visited Mar. 15, 2014) (providing details of the IMPRESS project, which "will regulate the press in compliance with Leveson's criteria"); IPSO: INDEPENDENT PRESS STANDARDS ORGANIZATION, http://ipso.co/uk/ (last visited Mar. 15, 2014) (providing general information about IPSO).

[97] *See, e.g.*, David Carr, *British Invasion Reshuffles U.S. Media*, N.Y. TIMES (June 23, 2013), http://www.nytimes.com/2013/06/24/business/media/britain-as-a-breeding-ground-for-media-leaders.html?pagewanted=all (recognizing a number of prominent British journalists employed by U.S. news agencies).

codes.[98] Yet others—perhaps editors in particular—may well bring with them journalistic norms limited by Leveson-inflected assumptions, particularly over time as the new press self-regulation regime unfolds, generating and standardizing practice norms. Professional routines may exert subtle homogenizing effects, even if not always consciously or over the full range of journalistic contexts.

2. Collaboration. Even without massive trans-Atlantic employment shifts, increased trans-border institutional cooperation is likely to influence press practices. Economic and political pressures now invite formerly turf-protective and competitive news organizations to engage in experiments in collaborative news production. News organizations may reasonably see cooperation as a necessary political (and even existential) strategy when they seek to reveal information that powerful states wish to keep secret.[99]

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[98] This might be especially true for digital-era journalists without mainstream institutional affiliations, such as the advocacy journalists of the networked Fourth Estate. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 236 (Yale Univ. Press 2006) (describing the historical and modern characterizations of the press as the Fourth Estate). For example, it is hard to believe that Glenn Greenwald—former columnist for *The Guardian* and one of the journalists to whom NSA contractor Snowden revealed U.S. national security information—would hew in his reporting to press-restrictive journalistic standards associated with a Leveson-type press model. *See* Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?_r=0 (colloquy between former *New York Times* editor Bill Keller and advocacy journalist Glenn Greenwald on the question of neutral reporting versus advocacy journalism).

[99] That the national security information leaked by Wikileaks and Edward Snowden was given to multiple news institutions itself tells the story. *See US, UK Officials Worry Snowden Still has 'Doomsday' Collection of Classified Material*, REUTERS (Nov. 26, 2013, 1:02 AM), http://rt.com/usa/snowden-doomsday-classified-documents-294/ (noting that Snowden initially gave classified documents to both *The Guardian* and the *Washington Post* and, reportedly, to others worldwide). Some kinds of news stories require multiple coordinated releases to give cover to the sources and the press itself against governmental pressure, censorship, and retaliation. Today, governments wishing to stifle discussion and censor the press have at their disposal not only extensive electronic sophistication and immense data-gathering capabilities of their own, but also the quiet cooperation of private information intermediaries such as broadband providers and telephone companies. Both leakers and news organizations recognize that effective dissemination now requires a hydra-headed strategy. As press critic and blogger Jay Rosen puts it: "the surveillance state is global, so the struggle to report on its overreach has to move about the globe, as well." Jay Rosen, *To Make Journalism Harder, Slower, Less Secure*, PRESSTHINK (Aug. 29, 2013), http://pressthink.org/. *The Guardian*'s Editor, Alan Rusbridger, has promised that although his paper's destruction of hard drives

It is not unreasonable to expect, even without engaging in a detailed empirical inquiry, that all of these ongoing trans-border interactions might generate a tendency toward synchronization of at least some journalistic norms. Once important stories are associated with cooperative press alliances rather than competitive news organizations, consensus-based working norms are likely to emerge. International cooperation among news organizations is increasingly seen as a way to avoid territorial press censorship.[100] Yet collaboration can also, often subtly, extend the reach of censorship.

C. POSSIBLE IMPACT ON U.S. DOMESTIC COURTS

Finally, regardless of their suitability for the British journalism context, lessons from British press regulation could be imported by U.S. courts seeking to recalibrate the current press/privacy balance by measuring press behavior against media ethics norms. While there are serious constitutional impediments to wholesale incorporation of standards that would conflict with core First Amendment principles, the groundwork has been laid for reduced deference to the press as an institution in the United States.

Some American media scholars, focusing on the failures of the commercial press, have joined the regulatory bandwagon, calling for improved press practices, mandated press responsibility, and even the possibility of press regulation.[101] These voices are raised

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containing Snowden-related documents at the government's request may have satisfied the British government,

> [i]t felt like a peculiarly pointless piece of symbolism that understood nothing about the digital age. We will continue to do patient, painstaking reporting on the Snowden documents, we just won't do it in London. The seizure of Miranda's laptop, phones, hard drives and camera will similarly have no effect on Greenwald's work.

Alan Rusbridger, *David Miranda, Schedule 7 and the Danger That All Reporters Now Face*, THE GUARDIAN (Aug. 19, 2013), http://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters.

[100] *See, e.g.*, Joe McDonald, *Google helps Chinese: Avoid Censorship*, USA TODAY (June 1, 2012), http://usatoday30.usatoday.com/tech/news/story/2012-06-01/google-china-censorship/55326416/1 (discussing the ways in which Google tries to help Chinese Internet users circumvent censored word searches).

[101] *See, e.g.*, Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 781 (2009) (discussing whether the press and free market principles are capable of regulating ethics in today's journalism marketplace); Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 OHIO N.

in an environment in which the media no longer enjoy the significant public esteem in which the investigative press was held after Watergate.[102] And while large numbers of people applaud the press for its coverage of government surveillance developments, many also fault both whistleblowers like WikiLeaks and Snowden, and the professional press through which it disseminated its information.[103]

Regardless of old assumptions about press freedom, government concerns about national security have recently been used to justify press subpoenas and wide-ranging attempts to access newsgathering records.[104]

U. L. REV. 717, 720 (2008) (warning that media must "self-regulate" by placing more weight on the rights of the subjects of their stories or else be regulated by law); Andrew Selbst, Note, *The Journalism Ratings Board: An Incentive-Based Approach to Cable News Accountability*, 44 U. MICH. J.L. REFORM 467, 469–72 (2011) (making a limited proposal that cable news should be regulated by a sub-agency within the Federal Communications Commission). For an earlier argument of this kind, see, e.g., Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 452 (1985) (proposing that libel be treated as a malpractice action rather than a general tort). *See also* Tricchinelli, *supra* note 88, at 15 (quoting the Dean of Berkeley Graduate School of Journalism on the possible appropriateness of something akin to the Leveson Report in the United States if new media diverges significantly from traditional media: "The question now is whether in the digital age, marked by real-time news scrambling, the media are moving toward a new hypercompetitive epoch, and a corresponding impatience with patience and accuracy. If so, self-regulation [may become] a prospect to be addressed on our side of the Atlantic as well."); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 182 (1999) (describing public distaste for intrusive newsgathering in the late 1990s); *cf.* Cristina Carmody Tilley, *Rescuing the Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 65–66 (2013) (arguing that the Ninth Amendment would provide a "foothold in the Constitution" for dignitary torts so as to limit First Amendment interpretations that would otherwise "force the abolition of these torts," in practice and possibly in theory).

[102] *See, e.g.*, DANIEL H. WEAVER ET AL., THE AMERICAN JOURNALIST IN THE 21ST CENTURY, U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM 137 (2007) (reporting fading glamour of Watergate).

[103] *See, e.g.*, Derek E. Bambauer, *Consider the Censor*, 1 WAKE FOREST J.L. & POL'Y 31, 32–33 (2011) (discussing the controversy over WikiLeaks).

[104] Scholars have noted increases in the numbers of press subpoenas. *See, e.g.*, Sandra Davidson, *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of WikiLeaks*, 34 HASTINGS COMM. & ENT. L.J. 27, 71 (2011) (asserting that federal subpoenas are more frequent than they were five years ago); RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 667 (2009) (noting that even an "incrementally larger number of subpoenas" allows for more opportunities to "unravel" a judicially-created privilege). The *Associated Press* revealed in May 2013, for example, that the Justice Department had secretly collected two months of telephone records for its reporters and editors. *See* Matt Smith & Joe Johns,

Judicial regulation of press practices has also reflected ambivalence towards journalistic enterprises. On the one hand, the U.S. Supreme Court has, in the past, recognized the important role played by the press in democracy and has been quite deferential, at least in dicta, to editorial freedom.[105] On the other hand, both reporter's privilege cases from the 1970s and contemporary rhetoric in the U.S. Supreme Court's cases reveal a counter-trend skeptical of media exceptionalism.[106] At a

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AP Blasts Feds for Phone Records Search, CNN (May 14, 2013), http://www.cnn.com/2013/05/13/us/justice-ap-phones/index.html.

[105] *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding a newspaper right-of-reply statute unconstitutional under the First Amendment due to its interference with the press' editorial freedom); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496–97 (1975) (holding that a state could not constitutionally impose sanctions on the accurate publication of a rape victim's name obtained from public judicial records due to a reluctance to invite "timidity and self-censorship" in the press); Florida Star v. B.J.F., 491 U.S. 524 (1989) (holding that a newspaper that published lawfully obtained truthful information about a matter of public significance revealed by government officials may only be punished to further a "state interest of the highest order"). *See generally* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 522 (2007) (describing the Supreme Court's recognition of "the important role the mainstream media plays in our democracy").

[106] For the Supreme Court's rejection of a constitutionally required reporter's privilege, see Branzburg v. Hayes, 408 U.S. 665, 708–09 (1972) (holding that a reporter did not have a special First Amendment privilege to refuse to answer a relevant and material question asked during a grand jury investigation of a story she wrote). *See also* David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 894 (2009) (describing the *Branzburg* holding). Scholarly work on the limitations of a federal constitutional privilege for reporter-source confidentiality is extensive. For a recent contribution, see RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1226 (2013) (arguing that the Court should analyze "confidential source cases based on the anonymous-speech rights of issues, rather than on the information-flow or newsgathering rights of the reporters").

For more recent rhetoric cutting against exceptional status for media corporations, see, e.g., Citizens United v. Federal Election Comm'n, 558 U.S. 310, 352 (2010) (quoting Justice Scalia for the proposition that there is not a constitutional privilege for the institutional press beyond that of other speakers). Admittedly, the Court's assertion was "almost offhanded" and has been subject to scathing critique. *See* Randall P. Bezanson, *No Middle Ground? Reflections on the* Citizens United *Decision*, 96 IOWA L. REV. 649, 654–55 (2011) (criticizing the *Citizens United* opinion for its lack of "substantive discussion of the reasons for the conclusion"); *see also* C. Edwin Baker, *The Independent Significance of The Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956, 959 (2007) (proposing a complex and nuanced reading of the press's juridical status in American law, premised on the belief that case law treats the press differently from individual speakers).

The Court has also been much more deferential to state regulation in the context of broadcasting. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding the FCC's fairness doctrine against First Amendment attack).

minimum, these "tensions embedded in existing law can be a source of legal instability."[107]

Some lower courts have displayed increased skepticism regarding the press and its practices.[108] Protection of confidential news sources is a useful context in which to see the tensions in judicial and legislative approaches to press protection.[109] The

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[107] Baker, *supra* note 106, at 1024.

[108] *See* Amy Gajda, *The Justices and News Judgment: The Supreme Court as News Editor*, 2012 BYU L. REV. 1759, 1784–90 (discussing several cases in which the courts have been willing to punish journalists for covering events that are arguably in the public interest); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1041–43 (2009) (explaining that the position favoring journalist in legal contests over newsworthiness is now under pressure); Amy Gajda, *The Value of Detective Stories*, 9 J. TELECOMM. & HIGH TECH. L. 385, 381–97 (2011) (discussing cases in which courts have held publications potentially liable for reporting routine detective stories); Clay Calvert, *Every Picture Tells A Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 356 (2010) (arguing that courts are growing less deferential to the press in privacy cases); Eric B. Easton, *Ten Years After:* Bartnicki v. Vopper *as a Laboratory for First Amendment Advocacy and Analysis*, 50 U. LOUISVILLE L. REV. 287, 294–309 (2011) (providing both broad and narrow readings of the Court's newsgathering decision in *Bartnicki*); Eric B. Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247, 252–53 (2007) (noting that the press has been more successful at lobbying courts in its self-interest outside the newsgathering context); Lidsky, *supra* note 101, at 184–85, 239 (noting that the media receive far less constitutional protection with respect to newsgathering than publishing, and arguing that although the balance between privacy and press freedoms with respect to intrusive newsgathering methods should be tipped in favor of privacy, a newsgatherer's privilege should be adopted to protect media intrusions that serve a significant public interest); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 116–36 (2008) (reporting on mixed results in press cases); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1042–46 (2011) (discussing reduced legal protection for newsgathering). For a positive view of these developments, see Karcher, *supra* note 101, at 823–34 ("In order for the press to regain credibility, it must be acknowledged by the courts that the press has lost credibility."). *Cf.* Randall Bezanson, *Means and Ends and* Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896–97 (1998) (rejecting special press immunity for newsgathering); Brian C. Murchison et al., Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7 (1994) (describing how the actual malice standard under *New York Times* v. *Sullivan* in libel cases "invites judges to create norms of acceptable journalistic conduct for all three stages of news gathering, namely, research, writing, and editing").

[109] While some courts have applied state reporter shield laws liberally, others in recent high-profile cases have rejected journalists' attempts to protect source confidentiality. The move to establish a federal reporter shield law designed to protect journalists from compelled disclosure of their sources failed in 2011, partly because of the controversy prompted by the spectacular release of U.S. government documents by WikiLeaks. *See, e.g.*, Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the*

digital press and media consolidation have also generated new challenges to traditional journalistic practices, generating occasions for judicial interference with news judgments.[110] Reference to Leveson-inspired press standards might move U.S. courts further towards rejecting press exceptionalism.

Investigative journalism in the United States has often required the use of surreptitious methods: undercover newsgathering techniques, dissimulation, deceit, entrapment, and sometimes, doubtless, bribes of public officials and other sources.[111] Whether here or in Britain, investigative journalism is "not a dinner party."[112] Questionable investigative techniques are sometimes necessary in the public interest, even if they would normally violate journalistic ethics norms.[113] Were U.S. courts to

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Networked Fourth Estate, 46 HARV. C.R.-C.L. L. REV. 311, 315–30 (2011) (summarizing the release of U.S. government documents by WikiLeaks). Although the current version—the Free Flow of Information Act, H.R. 1962, 113th Cong. (2013), *available at* http://beta.congress.gov/bill/113th/house-bill/1962—may ultimately be enacted, it has notable limitations. *See* Steven Nelson, *Holes in Media Shield Law Worry Opponents, and Even Some Supporters*, U.S. NEWS & WORLD REP., Sept. 18, 2013 (describing issues with the Free Flow of Information Act). *See generally* Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277 (2012) (describing state shield laws and proposing model law).

[110] For an overview of the impact of social media on the press, see generally Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1547–55 (2012).

[111] *See generally* KROEGER, *supra* note 87 (contending that much of valuable journalism has been a product of undercover investigations of those employing various forms of deception); Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 1 (2012) (tracing the necessary development of privacy doctrines); Lidsky, *supra* note 101, at 178 ("Prying, spying, and lying by the media are not new techniques."); DECEPTION FOR JOURNALISM'S SAKE: A DATABASE, NYU, http://dlib.nyu.edu/undercover/ (last visited Mar. 15, 2014) (New York University-sponsored database of undercover and surreptitious reporting and associated stories).

[112] David Leigh, *Scandal on Tap*, THE GUARDIAN (Dec. 3, 2006), http://www.theguardian.com/media/2006/dec/04/mondaymediasection ("Investigative journalism is not a dinner party, particularly in a secretive country like ours where the privacy cards are stacked in favour of the rich and powerful.").

[113] Arguably, when the press cannot engage in its watchdog function without bending process rules, society may have to accept the cost of non-compliance, error, and excess in exchange for the clear social benefits of the journalistic output. For a history of American investigative reporters' use of deception and other surreptitious techniques, see generally KROEGER, *supra* note 87. *See also* Ugland, *supra* note 108, at 176–77 & n.368 (providing examples of deceptive techniques used in investigative journalism); *cf.* Leigh, *supra* note 112 (explaining the need to use surreptitious newsgathering practices in the public interest in England as well); BONNIE J. BROWNLEE & RANDAL A. BEAM, *U.S. Journalists in the Tumultuous Early Years of the 21st Century*, *in* THE GLOBAL JOURNALIST IN THE 21ST

apply the Leveson lens to surreptitious behavior, however, it is at best unclear whether the mainstream U.S. press's behavior would pass muster.[114] And perhaps less admirably than traditional investigative journalism, U.S. electronic media have aired sensational news-as-entertainment programming.[115] Such

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CENTURY, *supra* note 87, at 348, 358 (suggesting shifts in American journalists' willingness to use various types of surreptitious newsgathering techniques).

To the extent that such press behavior is not currently the focus of public discussion, it may be because the economic hardships faced by the U.S. press have led to a reduction in commitment to expensive accountability journalism. *See, e.g.*, STEVEN WALDMAN, FED. COMMC'NS COMM'N, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 52–53 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf (discussing the decline of investigative journalism in the local news industry); BROWNLEE & BEAM, *supra*, at 361.

[114] Some might think that even if British press regulation could threaten the British tabloid press (whose sensational and gossipy coverage has little public value), it would be unlikely to reach the journalism of the mainstream, respectable cohort of the American press. After all, unlike Britain, the United States does not have a robust tabloid press these days. Other than the *National Enquirer*, U.S. print journalism purports boringly to hew to standards of objectivity and public interest. And apart from the paparazzi stalking Hollywood celebrities for gossip magazines, mainstream American journalists ordinarily do not engage in "checkbook journalism" or routinely practice the "dark arts" in their newsgathering as described by the Leveson Report. The ethics codes of the mainstream press generally look askance at highly intrusive newsgathering, and a recent empirical study of journalists' views indicates that many American reporters at least articulate that same attitude. BROWNLEE & BEAM, *supra* note 113, at 358. The U.S. press has at least a recent history of openness about its own misbehavior. For example, the recent "mini-scandal" involving the revelation that journalists working for the financial news company Bloomberg had accessed client data in the pursuit of news stories was addressed with such transparency, expert outside review, and responsive management changes to data access policies that the *Columbia Journalism Review* ran a story titled: *Bloomberg as the Anti-News Corp.: Its Transparent Handling of Snooping Allegations Starkly Contrasts With News Corp. Cover-Ups.* Dean Starkman, *Bloomberg as the Anti-News Corp.*, COLUM. J. REV. (Aug. 21, 2013, 4:20 PM), http://www.cjr.org/the_audit/bloomberg_as_the_anti-newscorp.php?page=all&print=true; *see also* Dan Barry et al., *CORRECTING THE RECORD; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, http://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html?pagewanted=all&src=pm (revealing journalistic fraud by *New York Times* reporter Jayson Blair); WEAVER ET AL., *supra* note 102, at 130 (describing the *New York Times*'s "extraordinary 14,000-word explanation of Blair's misdeeds").

Nevertheless, the reality is far more complicated. *See, e.g.*, Lidsky, *supra* note 101, at 175–83, 217–19. In the United States, for example, cable television news programs—which increasingly resemble the entertainment talk show format, *see* STATE OF THE NEWS MEDIA 2013, PEW RESEARCH CENTER PROJECT FOR EXCELLENCE IN JOURNALISM, *available at* http://stateofthemedia.org/ (last visited Mar. 15, 2014) [hereinafter PEW RESEARCH CENTER]—offers a type of sensationalist, opinionated, passionately delivered programming reminiscent of the British tabloids. *E.g.*, *id.* at 217 (detailing *20/20*'s exposé of nursing home abuses in Texas).

[115] Popular examples include broadcasts involving police ride-alongs, predator-outing shows such as *To Catch a Predator*, and the "perp walk" ubiquitous on local television news.

programming would be even more problematic in a Leveson-type regime.[116] Particularly if "a new American privacy is already on the rise"—one in which American courts already engage in a kind of balancing between free expression and privacy that is more common in Europe[117]—these courts might naturally look to press reform developments in Britain as part of their analyses.[118]

At least sometimes, the larger public interest will be disserved. Examples of self-censorship are evident even in "old" media.[119]

See Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1094 (2009) (describing *To Catch a Predator*); *see generally* Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130 (2012) (providing a psychoanalytic reading of the program).

[116] For example, while police ride-alongs and perp walks are not considered inappropriate invasions of privacy or inconsistent with norms of judicial process in criminal cases in the United States, Leveson was clear in stating that suspects' or arrestees' identities should be deemed confidential until conviction. *See* Alex Balin, *Leveson: Police and the Media, the Proposals*, INFORRM'S BLOG (Mar. 12, 2012), http://inforrm.wordpress.com/2012/12/03/leves on-police-and-the-media-the-proposals-alex-bailin-qc/ (stating that while Leveson's guidelines regarding the confidentiality of suspects is welcome, the Report should have gone further and prohibited police ride-alongs for the press).

[117] *See* Richard J. Peltz-Steele, *The New American Privacy*, 44 GEO. J. INT'L L. 365, 365, 372 (2013) (suggesting that "American privacy norms already are moving in the direction of Europe's" despite free speech law).

[118] Developments such as California's adoption of anti-paparazzi legislation could be seen to support this suggestion. *See* Patrick McGreevy, *Gov. Jerry Brown Signs Law Protecting Children of Public Figure*, L.A. TIMES (Sept. 24, 2013), http://articles.latimes.com/2013/sep/24/ local/la-me-pc-gov-brown-signs-law-protecting-children-of-public-figures-20130924. For a historical account of privacy in U.S. press jurisprudence, see generally Barbas, *supra* note 111. *See also* Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 905 (2013) (noting fundamental and irreconcilable differences between the concepts of privacy in the United States and Europe). Yet because of the reality of trans-national interactions, Krotoszynski suggests "disaggregating the concept of privacy into more discrete and easily definable packets or sticks of rights" in order to "point the way to a shared solution." *Id.* at 906. While this is an eminently sensible suggestion, the devil is, as always, in the details. American courts seeking to follow Krotoszynski's lead in the press context might well look to the British approach under Leveson as a guide.

[119] Recent examples of self-censorship by major newspapers in response to White House requests on national security grounds are described in Glenn Greenwald, *US Media Yet Again Conceals Newsworthy Government Secrets*, THE GUARDIAN (Feb. 7, 2013), http:// www.theguardian.com/commentisfree/2013/feb/07/saudi-arabia-drones-media-concealment. Further examples of self-censorship by newspapers have been collected in filings in challenges to NSA surveillance. *See, e.g.*, Claire Gordon, *Survey: 1 in 6 Writers Have Self-Censored Because of NSA Surveillance*, AL JAZEERA AMERICA (Nov. 21, 2013), http://americ aaljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/11/21/survey-1-in-6 -writershaveselfcensoredbecauseofnsasurveillance.html. Earlier, the United States had its own version of Hackgate: the *Cincinnati Enquirer*'s exposé of human rights violations and widespread abuses by Chiquita, based in part on material obtained by illegally tapping the

The complex realities of "new" journalism today pose even greater challenges to the notion of newsworthiness as established by reference to the best judgments of professional editors. It may be that newsgathering in the future will become, at least sometimes, more lawless and lacking in editorial filter, undertaken by those unaffiliated with or untrained by professional news organizations.[120]

Ultimately, if the American courts tip the balance against the press—particularly in connection with the surreptitious newsgathering often necessary for public interest investigative reporting—then a fundamentally important part of the democratic checks-and-balances on which we rely could be profoundly diminished.[121]

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company's voice-mail system. Alicia C. Shepard, *Bitter Fruit*, AM. JOURNALISM REV. (Sept. 1998), http://www.ajr.org/article.asp?id=543. Despite a year of painstaking investigative journalism and the editors' continuing belief in the substantive truth of the stories, the paper renounced them, apologized in print, and paid Chiquita over ten million dollars. *Id.*

[120] Recent events have revealed a dark side to relying on new journalistic techniques. In April 2013, a bloody terrorist bombing of the Boston Marathon was reported not simply via the usual journalistic techniques, but also by mainstream media organizations relying extensively on Twitter and crowdsourcing. Simon Rogers, *The Boston Bombing: How Journalists Used Twitter to Tell the Story*, TWITTER (July 10, 2013), https://blog.twitter.com/2013/the-boston-bombing-how-journalists-used-twitter-to-tell-the-story; Seth Mnookin & Hong Qu, *Organize the Noise: Tweeting Live from the Boston Manhunt: A Reporter and a Programmer on What Social Media Coverage of the Boston Bombings Means for Journalism*, NEIMAN REPORTS (Spring 2013), *available at* http://www.nieman.harvard.edu/reports/article/102885/Organize-the-Noise-Tweeting-Live-from-the-Boston-Manhunt.aspx. In the course of that reporting, mainstream news organizations latched on to the breathless (and often incorrect) identification of suspects by the Reddit hive community. *See* Jordan Zakarin, *Boston Bombing: How Reddit, Twitter and the Internet Helped and Hurt the Manhunt*, HOLLYWOOD REPORTER (Apr. 19, 2013, 8:06 AM), http://www.hollywoodreporter.com/news/boston-bombing-how-reddit-twitter-442946 ("While news outlets debate internally before reporting, Reddit's process is transparent, leading to a difficult relationship with the outside world grasping for any information."). As a result of uncritical reliance on the undisciplined activities of well-intentioned citizens, or because false information can be disguised by tweeter-police-media "credibility-building feedback loop[s]," the advantages of citizen journalism were undercut by the harm to innocents. *Id.* These sorts of developments are likely to lead to less press-protective attitudes of courts in media tort cases.

[121] If U.S. courts did not refer to the British press regime in the past (although pre-Leveson British law was already more stringent than U.S. law and the British newspaper industry was already subject to PCC regulation), what does the Leveson-influenced press reform add that could induce a U.S. court to refer to British norms?

The post-Leveson era is likely to offer a different level of analogy to an interested American court. According to the Leveson Report, the PCC had been both ineffective and universally perceived as such, profoundly reducing the Commission's credibility and

IV. WHY U.S. FIRST AMENDMENT EXCEPTIONALISM IS PARTICULARLY IMPORTANT NOW

It is particularly important today to resist press-restrictive "reform" attempts, reaffirm American First Amendment exceptionalism, and push for a press-protective attitude in U.S. law. In the age of pervasive surveillance, the national security state, and government censorship world-wide,[122] there needs to be a place where the global press, acting in the public interest, has a chance to circumvent authoritarian reporting limits and perform its democratic functions. Moreover, a British regulatory system that defines and controls press excesses that Britain deems responsive to perceived British cultural norms would make it much easier for authoritarian or corrupt regimes to resist challenges to their press restrictions on grounds of their own cultural norms.

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legitimacy. LEVESON REPORT, Executive Summary, *supra* note 4, at 12. A new body, armed with the kinds of powers recommended in the Leveson Report and structured to promote independence, would offer a very different alternative. *See id.* at 32–46 (outlining recommendations for an independent self-regulatory regime). As for increased occasions for relevance of British standards, upsurges in collaborative newsgathering and reporting by British and American journalists could make it difficult for courts to separate out the different kinds of journalistic norms to apply to different participants. Moreover, the Leveson Report's suggested reforms go beyond existing British norms. Because of the regulator's broad area of authority, its independence, and the suggested transparency and public participation of its processes, *id.*, it is possible that its definition of the public interest and its journalism code could be deemed to have broad, if not universal, legitimacy and application. Even if an American court were to refer to these British developments as a matter of contrast, the comparative baselines would have shifted. Because British press reform would now permit more regulatory second-guessing of newsgathering and reporting practices than previously, American courts could ratchet up press expectations as well, even if not to the same extent as under the British regime. Finally, British law regarding privacy is non-statutory and complex. *See* LEVESON REPORT, Vol. IV, *supra* note 40, at 1861 (criticizing misfit of claims of intrusion into breach of confidence tort). Although the British precedent does seem to distinguish between public interest journalism and titillating coverage of celebrities in which the public might be interested, cases vary in the leeway they give journalists. The Leveson Report's apparent approval of the least press-protective privacy precedent could unduly influence American courts looking for comparative analyses.

[122] *See generally* FREEDOM HOUSE, *supra* note 21 (providing "a comprehensive study of internet freedom in 47 countries around the globe" and finding "many authoritarian states have taken various measures to filter, monitor, or otherwise obstruct free speech online").

A. THE NEED TO REFOCUS ON STATE POWER

Much progressive First Amendment scholarship has criticized traditional, negative-rights interpretations of the First Amendment as overly focused on the government as a threat to speech and insufficiently sensitive to the censorious power of private entities.[123] Yet having a powerful press to stand up to government[124] is particularly important today when governments use the threat of terror and the need for national security to justify both secret surveillance and a zero-tolerance approach to journalistic revelation of their activities. In Britain, for example, as lawmakers contemplate press reform in response to the Leveson Report's recommendations, the government is engaging in various press-intimidating practices.[125] British journalists talk of an

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[123] There is vast literature on this motif, particularly in the context of broadcast regulation. For important examples, see generally J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

[124] This is not to say that government is the only threat or repository of power, or that the press need not be a watchdog over private power as well. Many have argued that state involvement can beneficially shore up the press against the rising power of private, corporate entities. For such an argument in the context of the Leveson Inquiry, see Jacob Rowbottom, *Leveson, Press Freedom and the Watchdogs*, 21 RENEWAL, no. 1, at 57, *available at* http://renewal.org/uk/files/Rowbottom_final.pdf. While it would be unrealistic to deny the influence of private power, however, its existence should not blind us to the rise and effectiveness of government power, or to the degree to which government can partner with and use private resources in accomplishing its objectives.

[125] The British government has been actively trying to discourage reporting on governmental surveillance. Recently, *The Guardian*'s editor, Alan Rusbridger, was required to testify before a parliamentary committee in connection with his newspaper's decision to print stories based on Edward Snowden's leaked national security documents. *See, e.g.*, Anthony Faiola, *Guardian Editor Defends Publication of Snowden Files*, WASH. POST (Dec. 3, 2013), http://www.washingtonpost.com/world/europe/guardian-editor-defends-publication-of-snowden-files/2013/12/03/8204608e-5c49-11e3-8d24-31c016b976b2_story.html. The partner of Glenn Greenwald, former columnist for *The Guardian*, was detained and had his electronics confiscated at the airport last year. Guardian Staff, *Glenn Greenwald's Partner Detained at Heathrow Airport for Nine Hours*, THE GUARDIAN (Aug. 18, 2013), http://www.theguardian.com/world/2013/aug/18/glenn-greenwald-guardian-partner-detained-heathrow. *The Guardian*'s chief lawyer recently cited that detention as "show[ing] why the state must not be allowed to regulate the press." Gavriel Hollander, *Leveson Has Been 'Disastrous' Says Guardian Legal Chief*, PRESSGAZETTE (Sept. 18, 2013), http://www.pressgazette.co.uk/leveson-has-been-disastrous-says-guardian-legal-chief. The British government has also issued "D notices" or Defence Advisory Notices, to the press prohibiting publication of information that could jeopardize national security. *See, e.g.*, Josh Halliday, *MoD Serves News Outlets with D Notice Over Surveillance Leaks*, THE GUARDIAN (June 17, 2013, 3:54 PM), http://www.theguar

existential crisis for the kind of accountability journalism that gives the press its democratic pedigree.[126] Editors like *The Guardian*'s Rusbridger have been explicit in casting the United States as a journalistic haven for some of the watchdog journalism they cannot freely practice at home.[127] The risk of official oppression, limits on informational access, and prohibitions on dissent and government critique are greater yet in truly authoritarian regimes.[128] American's First Amendment exceptionalism leads to positive externalities for the public interest not only for American audiences, but worldwide.

B. ALREADY-BELEAGUERED: THREATS TO U.S. PRESS FREEDOM

The global benefit that U.S. press freedom can provide is threatened both by domestic factors and by the possible influence of less press-protective, non-U.S. norms. The U.S. commercial press is itself under domestic burdens on every front. American press organizations face government pressure, including scrutiny

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dian.com/world/2013/jun/17/defence-d-bbc-media-censor-surveillance-security (reporting on the issuance of a confidential D notice to the BBC and other media groups by Defense officials). Further, the new head of MI5 implicitly accused *The Guardian* of having aided terrorism in publishing secret material leaked by Snowden. Ian Burrell, *The Real Reason It's Open Season on 'The Guardian,'* INDEPENDENT (Oct. 11, 2013), http://www.independent.co.uk/voices/comment/the-real-reason-its-open-season-on-the-guardian-8875021.html.

[126] *See generally* Tim Luckhurst, *Missing the Target and Spurning the Prize*, *in* THE PHONE-HACKING SCANDAL–JOURNALISM ON TRIAL 176, 176–88 (Richard Lance Keeble & John Mair eds., 2012) (arguing that the main question facing British policymakers is how to finance an ethical future); Rusbridger, *supra* note 99 (noting that the state's "formidable apparatus of surveillance" creates an "absolute threat to journalism" and predicting that "it may not be long before it will be impossible for journalists to have confidential sources").

[127] *See* Rusbridger, *supra* note 99 (noting that America "at least has press freedom enshrined in a written constitution").

[128] China, for example, has been notably restrictive in connection with foreign press organizations and journalists recently. *See, e.g.*, David Carr, *Where Freedom of the Press Is Muffled*, N.Y. TIMES (Dec. 8, 2013), http://nytimes.com/2013/12/09/business/media/where-freedom-of-the-press-is-muffled.html; Evan Osnos, *The Meaning of China's Crackdown on the Foreign Press*, NEW YORKER (Dec. 6, 2013), http://newyorker.com/online/blogs/newsdesk/2013/12/the-meaning-of-chinas-foreign-press-crackdown.html (reporting on Chinese government threats to expel multiple correspondents). Under these sorts of circumstances, the problem is not just that Chinese audiences are deprived of access to the information their government does not want them to have, but also that U.S. journalists cannot enter the country to report. At least sometimes, U.S. news organizations comply with Chinese censorship and refuse to run stories for any audience at all. *See, e.g.*, Edward Wong, *Bloomberg News Is Said to Curb Articles That Might Anger China*, N.Y. TIMES (Nov. 8, 2013), http://www.nytimes.com/2013/11/09/world/asia/bloomberg-news-is-said-to-curb-articl es-that-might-anger-china.html.

for reporting on national security matters.[129] Economic and cultural pressures as well turn watchdogs into lapdogs in the commercial media sector.[130] Financial losses have led to newspaper closures, decimation of the regional press, and significant thinning of an already overworked journalistic staff.[131]

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[129] *See* Adam Liptak, *Court Rulings Blur the Line Between a Spy and a Leaker*, N.Y. TIMES (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/us/politics/first-amendments-role-comes-in to-question-as-leakers-are-prosecuted.html?emc=eta1 ("The federal government is prosecuting leakers at a brisk clip and on novel theories. It is collecting information from and about journalists, calling one a criminal and threatening another with jail."). Journalists' pre-publication materials are being secretly gathered. Federal agents raided the Associated Press's offices for documents, including home and cell phone records of reporters and editors, and did so without notice or an opportunity for judicial review. *See* David Carr, *For Journalists, More Firepower to Protect Sources and Secrets*, N.Y. TIMES (Sept. 29, 2013), http://www.nytimes.com/2013/09/30/business/media/for-journalists-more-firepower-to-protect-sources-and-secrets.html?ref=media&_r=2&. On the threat of the government legally pursuing the press—and particularly smaller outlets—for reporting on the basis of leaks, see, e.g., Christina E. Wells, *Contextualizing Disclosure's Effects: Wikileaks, Balancing, and the First Amendment*, 97 IOWA L. REV. BULL. 51, 61–62 (2012). *See also* Davidson, *supra* note 104, at 66 n.142 (citing prior literature on the subject). Whistleblowers to the press are confronting prosecution and jail time. *See, e.g.*, Charlie Savage, *Former F.B.I. Agent to Plead Guilty in Press Leak*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html (reporting on a former F.B.I. agent pleading guilty to leaking classified documents and spending forty-three months in prison); Glenn Greenwald, *The DOJ's Creeping War on Whistleblowers*, SALON (Feb. 25, 2012, 8:26 AM), http://www.salon.com/2011/02/25/whistleblowers_4/ (noting that the Obama administration has indicated and prosecuted multiple people who leaked information during the Bush Administration, revealing "various degrees of corruption, ineptitude, and illegality"); Davidson, *supra* note 104, at 79 (stating that judges can "order a subpoenaed journalist to disclose the source of [a] leak or go to jail"). Further, private speech intermediaries have partnered with the government to increase the costs and difficulties of newsgathering and dissemination. *See generally* Benkler, *supra* note 109 (regarding WikiLeaks).

[130] *See, e.g.*, Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 347 (2012) and sources cited therein (summarizing scholarship on the changing roles of the press); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 248–49 (2008) (describing the press throughout history as occasionally serving the role of "lapdog of the executive branch").

The economic interests of large, publicly held, multi-national conglomerates do not necessarily support the role of standing as bulwarks of press freedom. Because they are effectively required by fiduciary duty to their shareholders to engage in cost-benefit analyses of their activities, these entities have significant incentives to avoid or skimp on expensive accountability journalism. *See* BROWNLEE & BEAM, *supra* note 113, at 361 ("The challenging economic environment for U.S. news organizations raises questions about whether they will be able to afford the costly investigative work that they have produced in the past."). Corporate owners are aware that self-censorship in their journalistic divisions can, in many circumstances, benefit their non-press interests.

[131] *See generally* PEW RESEARCH CENTER, *supra* note 114. *See also* Luckhurst, *supra* note 126, at 176–88 (arguing that the "financial crisis facing journalism is paramount"). Consolidation of news operations means that there are fewer trained investigative journalists

The American public is reputed to have little trust in the press,[132] and is noticing the effects on content due to a decade of newsroom cutbacks.[133] At least in part because of the failures of the American commercial press, American voices, like their counterparts in Britain, have begun to call for enhanced journalism standards to improve press accountability.[134]

Because the economic incentives of both the government and the commercial press tilt against an aggressive watchdog press, and because it is desirable to maintain the United States as a safe haven for important journalism impracticable elsewhere in the world, shoring up First Amendment press exceptionalism should be a front-burner value. The institutional press is still the top option as a counterweight to government secrecy today. In collaboration with its new digital partners, even the commercial institutional press sector—whatever its limitations in funding, training, corporate co-optation, and susceptibility to governmental authority—can help serve democratic goals.

The potential influence of Leveson-inspired norms and laws would enhance the already extensive threats to U.S. press freedom independent of foreign norms. The possibility of liability abroad and soft harmonization in press-restrictive directions domestically is likely to exacerbate the chill already affecting the U.S. press, or at least serve as an excuse for commercial press entities to avoid the inevitable controversy with global investigative journalism. Rather than serving as the global journalistic safety net, the U.S. press sector could begin to operate as if it too were subject to global press regulation.

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in the field. There is a marked reduction in journalists' self-perception of professional autonomy in U.S. news organizations. BROWNLEE & BEAM, *supra* note 113, at 355.

[132] Elizabeth Mendes, *In U.S., Trust in Media Recovers Slightly from an All-Time Low*, GALLUP POLITICS (Sept. 19, 2013), http://www.gallup.com/poll/164459/trust-media-recovers-slightly-time-low.aspx.

[133] PEW RESEARCH CENTER, *supra* note 114, Overview, at 1 ("Nearly one-third of the respondents (31%) have deserted a news outlet because it no longer provides the news and information they had grown accustomed to."). On television, news and entertainment are converging extensively. The high quality news coverage that the three-network television oligopoly had provided as a matter of reputation and noblesse oblige in pre-cable days has been swept away in the current environment of tireless competition. Furthermore, in a notable development, newsmakers increasingly end-run the press and address the audience directly via digital media. *Id.*

[134] For sources advocating more press regulation, see sources cited *supra* note 101.

C. A FREE AND IRRESPONSIBLE PRESS?[135]

Attempts to perfect press practices and ethics from the outside, via government-approved bureaucracies, should be resisted even when supra-normal numbers of ethical failures might be expected. The variety of participants in the news reporting enterprise, not to mention technological changes, will likely increase the likelihood, extent, degree, and permanence of error and harm, at least for some time.[136] Both untrained "citizen journalists" and the overworked reporters of the traditional press are likely to cut journalistic corners.[137] Irresponsible and false journalism is likely to increase not only in sensationalist tabloid revelations of sexual misbehavior by public figures, but also in what would classically be called watchdog or accountability journalism in the public interest.

This is not a comfortable prediction. It might be reassuring to think that the institutional press can help serve to constrain or counteract the most irresponsible and harmful aspects of the non-institutional participants in the news space.[138] That will certainly often be the case, but not always.[139] Not only will the combination

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[135] Referencing Yochai Benkler's allusion to the Hutchins Commission's important report. COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947). *See* Benkler, *supra* note 109, at 311.

[136] *See* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 75–83 (2011) (discussing accountability in social media reporting); Levi, *supra* note 110, at 1556 (addressing impact of social media on reporting practices of mainstream news organizations).

[137] The twenty-four-hour news cycle, competitive pressure from a multiplicity of news platforms and outlets, and increasing financial hardship all put pressure on the traditional press model. For example, with newsroom cutbacks of 30% since 2000, few news outlets will likely be able to enforce ideal fact- and source-checking for all or most of their stories. PEW RESEARCH CENTER, *supra* note 114, Overview, at 1. Gaffes like those attending the coverage of the Boston Marathon bombing, see Mnookin & Qu, *supra* note 120, may evidence corner-cutting by traditional media. *See, e.g.*, Cohen, *supra* note 137, at 76–77, 77 n.467; Bill Chappell, *After Internal Review on Benghazi Report, CBS Puts Logan on Leave*, NPR (Nov. 26, 2013), http://www.npr.org/blogs/thetwo-way/2013/11/26/247372332/after-internal-review-on-benghazi-report-cbs-puts-logan-on-leave (discussing the flawed CBS story, based on a lying source, on the 2012 attack on the U.S. Consulate in Benghazi, Libya).

[138] This is not to deny the contested character of objectivity-based claims in support of the traditional press. *See generally* Keller, *supra* note 98.

[139] For example, professional journalists and editors were able to review and redact the huge cache of documents leaked to them by WikiLeaks, thereby seeking to reduce the likelihood of harm from their disclosure. *Fresh Air: NYT Reporter Defends Publishing WikiLeaks Cables*, NPR (Dec. 8, 2010), http://www.npr.org/programs/fresh-air/2010/12/08/1

of the twenty-four-hour news day and reliance on untrained tweeters likely lead to more factual error, but also as traditional journalists increasingly focus on explanation, contextualization, selection, and curation, their traditional ethical verities will likely face new and unexpected sorts of challenges.

Yet First Amendment exceptionalism should not be scuttled because the multiplicity and economic uncertainty of what constitutes the press's function today can increase some risks of error. Even if an unregulated networked Fourth Estate poses perils, it is reasonable to worry that press self-regulatory regimes such as the Leveson Report might open the door to global regulation instantiating repressive press norms. This is a far worse result, especially at times when the government's hidden and expansive exercises of power most require the revelations of the investigative press. Regulation, even the "soft," indirect variety, is a particularly dangerous response to predictions of irresponsibility and harm.

Surely, imposing costs and assessing damages will not help; the U.S. print press already faces profound economic challenges. Instead, participants in the new news space must attempt to analyze their own practices and generate evolving norms—not as tools to be used by courts or regulators to deter hard-hitting journalism (for which an already-beleaguered commercial press already has too little appetite), but as outgrowths of self-criticism and improvement.[140] Criticism of the Leveson model does not

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31905288/ ("[The *New York Times*] went through [the WikiLeak cables] so carefully to try to redact material that we thought could be damaging to individuals or undercut ongoing operations. And we even took the very unusual step of showing the 100 cables or so that we were writing from to the U.S. government and asking them if they had additional redactions to suggest."). Of course, some argue that even professionally trained journalists do not have the ability to make fully-informed risk assessments in these sorts of circumstances. And, in any event, the electronic availability of the leaked documents poses dangers of unfiltered public disclosure of the raw data either intentionally by sources unhappy with the press's processes, or unintentionally by error (as occurred with WikiLeaks itself). *See* Peter M. Shane, *Introduction–"The Future of Online Journalism: News, Community, and Democracy in the Digital Age,"* 8 I/S 469, 469–70 (2013) (describing the dangers of online news); Bambauer, *supra* note 103, at 34–42 (distinguishing the WikiLeaks and Pentagon Papers contexts).

[140] There are already signs of increasing self-reflection. From the *New York Times*'s Public Editor to the media columns in various newspapers, even the commercial news media are paying attention to how well journalists and news organizations of all kinds do their jobs. *See* Tanni Haas, *Mainstream News Media Self-Criticism: A Proposal for Future Research*,

mean rejection of evolutionary press self-regulation. The press of the future should evolve its behavioral norms by reference to a combination of better enforcement of existing law and industry self-criticism.[141] The benefits of improved diversity in who

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CRITICAL STUDIES IN MEDIA COMMUNICATION, Vol. 23, No. 4, Oct. 2006, at 350, 354 (noting the changes and calling for further research). The role of public and non-profit media is very important in this connection. From high quality public television exposés to the investigative work of entities like ProPublica and the fact-checking processed by groups like factcheck.org, the public sector leaves room for the kind of journalism which the commercial sector's economic concerns undermine. For excellent accounts of the possibilities of public media, see Ellen P. Goodman & Anne H. Chen, *Modeling Policy for New Public Service Media Networks*, 24 HARV. J.L. & TECH. 111 (2010) and Ellen P. Goodman & Anne H. Chen, *Digital Public Service Media Networks to Advance Broadband and Enrich Connected Communities*, 9 J. ON TELECOMM. & HIGH TECH. L. 82 (2011). *See also* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN 4–8 (2010) (arguing strongly in favor of public media support). Another example may be *The Guardian*'s recent appeal to newspaper editors worldwide to address the appropriateness of the paper's publication of articles based on the Snowden leaks. *See generally Editors on the NSA files: 'What the Guardian is Doing is Important for Democracy,'* THE GUARDIAN (Oct. 10, 2013), http://www.theguardian.com/world/2013/oct/10/guardian-democracy-editors. Journalism practice textbooks as well are focusing on the new challenges of the networked news landscape. *See, e.g.*, MEGAN KNIGHT & CLARE COOK, SOCIAL MEDIA FOR JOURNALISTS PRINCIPLES & PRACTICE (Mila Steele ed., 2013). In the new media environment, journalistic self-criticism is also likely to be supplemented by real-time crowd response to stories. *See id.* at 140 (describing the "regulatory capacity" of social media).

It should also be remembered that *The Guardian* and the *New York Times* did reveal the British phone-hacking scandal. *See, e.g.*, Don Van Natta, Jr., Jo Becker & Graham Bowley, *Tabloid Hack Attack on Royals and Beyond*, N.Y. TIMES (Sept. 1, 2010), http://www.nytimes.com/2010/09/05/magazine/05hacking-t.html?ref=newsoftheworld&_r=0 (chronicling the *News of the World*'s phone-hacking scandal). Reputable newspapers have been using Edward Snowden's leaked NSA materials to reveal the contours of state surveillance today. *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 5, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order (reporting that a secret court order requires Verizon to give the NSA information on all telephone calls made in the United States or between the United States and another country). Although late, the American newspapers and television stations that blindly followed the suspect identifications on Twitter during the Boston Marathon bombing coverage ultimately did recognize and disclose their errors. *See, e.g.*, Jack Mirkinson, *CNN, Fox News, AP Forced to Walk Back Reports of Boston Bombing Arrests*, HUFF. POST (Apr. 17, 2013, 2:24 PM), http://www.huffingtonpost.com/2013/04/17/cnn-boston-arrests-media-nbc_n_3102680.html (reporting that CNN, Fox News, and the Associated Press initially incorrectly reported that the police arrested a suspect in connection with the Boston Marathon bombing and later retracted the statements). The hundreds of millions of pounds spent by *News Corp.* on settling phone-hacking claims will doubtless serve as an object lesson with respect to the most aggressive forms of tabloid newsgathering. *See News Corp's Phone Hacking Costs: $382 Million*, *supra* note 6 (reporting that News Corp has made multi-million dollar payments to the phone-hacking victims).

[141] Moreover, one lesson to be learned from the Leveson Inquiry concerns the impact of large, global influence-seeking "news" organizations like News International—what has been dubbed the "Murdoch effect." In the news context, the "Murdoch effect" refers to

performs journalistic functions in the digital news ecosystem are likely to outweigh the risks overall.[142]

What if it turns out that, as a political matter, press reform is too far along in Britain to fail, whatever the particular details of its ultimate form? Now that the power of the tabloids appears to be on the wane, the politicians can take advantage of market reality to tame the institution with which they have had a complex and ambivalent relationship since the late nineteenth century.

If so, then two sets of recommendations follow—the first directed to the British press reformers and the second to the American audience. On the British side, the Royal Charter Recognition Panel should play its continuing certification role with great modesty. It should hesitate to engage in ad hoc inquisitions seeking to root out purportedly systemic ills in the press. The new regulator's Code Committee should also be especially modest as it seeks to draft universal journalistic norms in today's complicated media environment. It should avoid arming the new regulator to be a super-editor inclined to second-guess every aspect of the

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outsized influence of one element of the press sector not only over government, but also via competition and intimidation over the rest of the press industry as well. Daya Kishana Thussu, *From MacBride to Murdock: The Marketisation of Global Communication*, PUBLIC, Vol. 12, No. 3, 2005, at 55–57. Ownership regulation designed to decrease the outsize influence of particular news and influence wielding organizations might open the field to forward-looking and collaborative norm generation and truly voluntary self-regulation by the multiplicity of participants in journalism today. *See id.* (discussing the "Murdoch Effect" or "Murdochisation" of the global media). (In an analogous argument, Professor Ed Baker has argued that media "dispersal helps avoid the danger of demagogic power—the 'Berlusconi effect.'" This is a rationale for media diversity based on its value as a democratic safeguard. *See* C. Edwin Baker, *Viewpoint Diversity and Media Ownership*, 61 FED. COMM. L.J. 651, 655 (2009) ("[D]ispersal helps us avoid the danger of the demagogic power—the 'Berlusconi effect.'"); C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY 18 (2007) (noting that the "Berlusconi effect" refers to the power wielded by Italy's richest individual, Silvio Berlusconi, over both government and media during his lifetime).) Of course, antitrust type solutions are only part of the answer, and we should properly worry about the extent to which limits on consolidation and cooperation would in fact hurt an already struggling traditional media sector.

[142] *See generally* Jonathan Zittrain, *The Internet and Press Freedom*, 45 HARV. C.R.-C.L. L. REV. 563, 566, 576 (2010) (describing the beneficial effect of complementary skills of professional journalists and "interested citizen[s] . . . united by the desire to get at truth" to counteract mainstream journalists' "loathsome convention," leading, among other things, to lockstep refusals to publish controversial matter); Charlie Beckett, *Report: The Value of Networked Journalism*, LSE POLIS (June 11, 2010), http://www.lse.ac.uk/media@lse/POLIS/Files/networkedjournalism.pdf (demonstrating "the increasing effectiveness and diversity of the new forms of news production").

journalistic task and output. It should explicitly recognize the complexities of today's news ecosystem. Those complexities are generated, inter alia, by: the multiplicity of participants undertaking press functions without a single common view of the journalistic role, the challenges to the power of the traditional institutional press before new institutions have had sufficient time to evolve, and the technological capacity for both massive amplification of error and immediate self-correction. Press reliance on the "dark arts" in newsgathering should be disciplined more by effective enforcement of existing laws than by regulatory intervention.

For their part, British courts engaging in jurisdiction and choice-of-law analysis in connection with media tort claims against non-British online news organizations should be mindful of the beneficial role played by U.S. First Amendment exceptionalism in the age of surveillance. Despite the significant gulf between approaches to the proper balance between protecting free speech and privacy interests in the United States, United Kingdom, and Europe in any given case, press freedom and a recognition of the democratic role of the media are shared values, the importance of which should not be diminished.

On the American side, courts that have been veering away from press-protective doctrines should be reminded of the dangers of over-professionalizing journalists and hinging liability on compliance with professional codes. To the extent that reformist developments in Britain could provide attractive analogies otherwise, their acontextual importation should be discouraged.

V. CONCLUSION

Press reform is currently pending in Britain. Instead of bolstering and improving the media, however, well-intentioned press regulation is likely to have an unintended chilling effect—not only on British newspapers, but also on the already-struggling American press. Worldwide government excesses in surveillance and secrecy make it imperative today to support fearless journalism committed to holding governments accountable. By attempting to ensure press civility and protect victims of tabloid newspapers in the U.K., however, British reformers may ironically

succeed in depriving both U.S. and global audiences of a robust, constitutionally protected reportorial safe zone for important political coverage. Those seeking to effect British press regulation should be sensitive to, and strongly resist, such extraterritorial consequences.