Preamble

Purpose

There is a malaise afflicting press freedom theory. The discussion, such as there is, has taken on a distinctly dogmatic overtone. Rather than contest its essential meaning, by means of probing analysis, the literature treats the conceptual debate as if it is not only settled but beyond question. Consequently, whether commentators openly embrace or privately doubt this conclusion, the literature itself contains little more than the blithe repetition of the same archetypal phrases to describe the press that we find in the collective consciousness: that it is a 'public watchdog', a 'fourth estate', and a 'check on power'. These terms are used intuitively and uncritically. They have become so deeply-engrained within the literature as to be not only axiomatic but also sacrosanct. Accordingly, the press is taken to have an indisputable *telos* or purpose that it must serve. It is this that illuminates the concept of press freedom and distinguishes it from individual freedom of expression. Moreover, the press has become entirely depersonalised – it is not the product of autonomous, thinking minds, but a dead entity; an unliving 'thing'. We see this attitude clearly in Lord Justice Leveson's conclusion that John Stuart Mill's classic defence of free speech, grounded upon autonomy and self-fulfilment, 'has no direct relevance to press freedom because, put simply, press organisations are not human beings with a personal need to be able to self-express.'[1] This attitude is debilitating. It curtails the options for tackling press malfeasance effectively. Policy-makers, sensitive to unsubstantiated claims that mandatory regulation would severely impair the press's capacity to fulfil its public function, are left with little room to manoeuvre. Voluntary self-regulation is seen not as the *best* solution to the problem of press malfeasance but the *only* solution. Yet, as the UK's experience demonstrates emphatically, this model is hopelessly ineffective; the regulator is entirely dependent upon the good faith and willingness of the industry to humour it when rebuked. This is the paradigm that this book confronts.

Although the book makes general claims about the press that are applicable to its broadcast and online forms, it focuses exclusively on the printed press. There are several reasons for this. Unlike the broadcast press, newspapers are not subject to compulsory forms of regulation but are, instead, largely unregulated in

[1] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012) 62, [3.3].

a meaningful sense. In the UK and mainland Europe, voluntary self-regulatory schemes dominate. Yet newspapers continue to inflict unwarranted, serious harm on individuals. Since the cost of legal action is a luxury that few can afford, many suffer without receiving adequate compensation. Leveson saw this problem clearly enough when he said that comprehensive regulatory reform was needed to end the 'real harm … [inflicted upon] real people.'[2] This, though, remains unrealised.

The book's primary aim is to show that this goal can be realised without compromising press freedom. It does so by reconceptualising press freedom and by providing a philosophically-informed conceptualisation of press regulation, which the literature presently lacks. Specifically, it argues that this teleological conception is fatally flawed. It shows that the underlying propositions are specious: they are philosophically unsound, legally unjustifiable, and their historical pedigree is misjudged. No purpose can be externally imposed upon the press against its will. This is not to deny that the press can be a force for good. It *does* serve the public when it acts as a public watchdog. It *does* aid both public and private decision-making. Yet these descriptions have no prescriptive power. It cannot be said that the press *must* do these things. It is not obliged to be a public watchdog or to act as a check on power. It has no obligations to society at large to perform a social function. Press freedom can only be conceptualised as a negative freedom. The press can publish what it likes so long as it respects the rights of others. This non-teleological interpretation allows for the realisation of mandatory press regulation. Since public interest expression is not regulatable, there is no prospect of function creep that would otherwise jeopardise press freedom. For it is only the realm beyond the zone of press freedom that the regulator may patrol. What happens inside that zone is not its concern. The model of press regulation advanced in the book is independent from both government and the press industry. It provides the regulator with coercive powers to investigate complaints and award victims with compensation. Under this model, membership would be mandatory; as with the Danish press regulation scheme, all entities satisfying the definition of 'press' would fall under the regulator's jurisdiction automatically.[3]

To some, this inquiry will be insightful and to others, inciteful. Nevertheless, it is overdue. The academic commentary has accepted the status quo for too long. Accordingly, the primary object of critical inquiry is the press freedom literature rather than the press itself. Two major schools of thought dominate the intellectual agenda in this field: social responsibility theory ('SRT') and libertarianism.[4]

[2] Ie, not just so-called 'celebrities' – or the upper echelons of society – but *every* level of society; anyone who happens to fall under press scrutiny from time-to-time. Leveson, ibid, 50, [2.2].

[3] S 1(1), Danish Media Liability Act 1991.

[4] Both schools of thought are discussed in FS Siebert, T Peterson, and W Schramm, *Four Theories of the Press* (Chicago, University of Illinois Press, 1956). It was Theodore Peterson that coined the phrase SRT (see *Four Theories of the Press*, 73–103). Fred Siebert discusses the libertarian position at pp 39–71.

Briefly, SRT claims that since the press has this teleological function to serve, some external intervention is justified to ensure that it fulfils this obligation. This is a politically left-leaning position. Although libertarians agree with the central teleological premise, they argue that since the state is disqualified from adjudicating on performance of this function (because of its vested interest in an impotent press), only the market can determine this issue. This is a politically right-leaning position. The disagreement between SRT and libertarianism is at a stalemate. Those on the left cannot advance their regulatory reform agenda due to the various obstacles set for them by those on the right, including the concern that mandatory regulation imperils serious investigative journalism. By challenging this dominance, and by arguing for an alternative, third way of thinking about the issues, this book aims to break the deadlock by demonstrating how these obstacles can be overcome.

It does so by deconstructing the orthodox interpretation of these concepts before scrutinising them through the lens of normative legal theory as well as moral and political philosophy. This inquiry, therefore, informs the alternative set of normative moral principles that the book provides. Primarily, the book addresses the problem as it arises in the UK through an examination of global principles. It draws upon American and European scholarship in philosophy, law, and communication studies and the European experience of press regulation in practice, by reference to the regulatory codes of conduct that exist in 11 European countries: Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Slovakia, Sweden, and Switzerland.[5] Nevertheless, despite this, the conclusions it reaches are potentially applicable in all democratic states, regardless of local constitutional structures, but I leave it to others to pursue that claim. It should be noted that, when discussing the UK regulatory position, the standards code used by IMPRESS[6] – the only press regulator recognised in the UK under the Royal Charter on Self-Regulation of the Press – is not examined. I was part of the Code Committee that drafted the code and, given my involvement, it would have been disingenuous to critique it.

Since this is, primarily, a philosophical enquiry into the compatibility of press freedom with mandatory press regulation, there will be little discussion of the positive law. Although an appraisal of all the various laws that affect the press would, clearly, tell us something important about the meaning of press freedom, it cannot answer the questions animating my inquiry. It can only tell us what press freedom *is* and not what it *ought to be*. Similarly, the legitimacy of coercive independent press regulation cannot be determined solely by reference to the experiences of those in other jurisdictions or in other contexts. For example, the fact of

[5] This research relates to, and forms part of, another project I am involved in, entitled 'Defining Freedom of the Press', with colleagues from the Media and Communications, Philosophy, Ethics, and Linguistics schools of the University of Leeds, the University of Sheffield and Durham University. It is funded by the AHRC (AH-R00644X-1), http://defining-freedom-of-the-press.info/.

[6] www.impress.press/.

mandatory regulation of the printed press in Denmark, or of the broadcast press in many other jurisdictions, including the UK, is not proof of its compatibility with press freedom. Whilst these examples provide useful practical illustrations, they are not conclusive. That something happens or exists without objection does not mean that it is justified.

Context: The Leveson Inquiry

The book takes its title from the seminal work of the self-styled Commission on Freedom of the Press (otherwise known as the Hutchins Commission) which, in 1947, published its general report on mass communication (newspapers, radio, motion pictures, magazines, and books) under the title: *A Free and Responsible Press*.[7] This report, and those by the various Royal Commissions on the Press in the UK, as well as the academic literature it has inspired, are central to the theme of this book. It is this body of work that informs SRT.[8] This is the genesis of the teleological conception, at least as it is understood presently. The ideas underpinning this theory have enjoyed something of a recent revival having featured heavily in Leveson's report. Just as the Hutchins Commission spoke of the press as a 'public trust' that 'has responsibilities to the general spread of information [analogous] to those of a … trustee',[9] so too Leveson referred to press freedom as an 'instrumental good, to be valued, promoted and protected to the extent that it …. serve[s] its important democratic functions.'[10]

This attitude is not peculiar to commentators on the political left. Indeed, as Chapter 1 makes clear, this view can be found amongst those on the political right. It can also be seen in the attitudes of press owners and editors themselves, certainly those of a bygone era. For example, CP Scott said, of his beloved *Manchester Guardian*, that it stood for 'honesty, cleanness, courage, fairness, [and] a sense of duty to the reader and the community.'[11] Similarly, Lord Thompson, former owner of *the Times* and *Sunday Times*, said 'no person or group can buy or influence editorial support' from any of his newspapers,[12] whilst Cecil King, former owner of the Daily Mirror Newspapers group, believed it 'the duty of a newspaper first of all to explain fairly and adequately what a Government is trying to do.'[13]

[7] Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago, University of Chicago Press, 1947).
[8] Siebert, Peterson, and Schramm, *Four Theories of the Press*, (n 8), 73–103.
[9] WE Hocking, *Freedom of the Press: A Framework of Principle* (Chicago, University of Chicago Press, 1947), 150 & 225.
[10] Leveson, (n 1), 63, [3.7].
[11] CP Scott, 'A Hundred Years', *Manchester Guardian*, 5 May 1921.
[12] As reported in Harold Evans, *Good Times, Bad Times*, (London, Orion Books Ltd, 1994), 4.
[13] Cecil King, *The Future of the Press*, (London, MacGibbon & Kee, 1967), 93.

Nevertheless, despite this, even Leveson, who concluded that comprehensive reform of press regulation was necessary, did not recommend mandatory press regulation. Despite making all the right noises – that the regulator should have the power to issue sanctions for non-compliance, that 'everyone' should be involved, and that the government should institute what he called a 'backstop regulator' if the industry failed to do so – he stopped short of recommending it. We see this in his apologetic, defensive repetition of two sentiments: first, that the 'ideal' solution was for the industry to mobilise voluntarily to institute the sort of regulatory scheme he had in mind, and secondly, the pains with which he emphasised that the alternative – government intervention – was *not* one of his recommendations:

- 'It is worth repeating that the ideal outcome is a satisfactory independent regulatory body, established by the industry, that is able to secure the voluntary support and membership of the entire industry.'[14]
- 'I will say again, because it cannot be said too often, that the ideal outcome from my perspective is a satisfactory self-organised but independent regulatory body, established by the industry, that is able to secure the voluntary support and membership of the entire industry and thus able to command the support of the public.'[15]
- 'From the outset, I have encouraged the industry to come together to create an independent regulatory regime that satisfies the need to provide public confidence.'[16]
- 'I repeat the refrain that what I want is for the industry to come together to organise their own independent regulatory system.'[17]
- 'I have made it clear that I firmly believe it is in the best interest of the public and the industry that an independent self-organised regulatory body is set up.'[18]
- 'I repeat, as I have made very clear that, by a very long way, my preferred solution, and hence my recommendation, is that the industry should come together to construct a system of independent regulation.'[19]
- 'With some measure of regret, therefore, I am driven to conclude that the Government should be ready to consider the need for a statutory backstop regulator being established …'[20]

[14] Leveson, (n 1), 1769, [4.48].
[15] Ibid, 1771, [6.1].
[16] Ibid, 1781, [7.1].
[17] Ibid, 1782, [7.7].
[18] Ibid, 1782, [7.9].
[19] Ibid, 1794, [7.2].
[20] Ibid, 1758, [3.34].

- 'I repeat, again, that I do not, at the moment, recommend any statutory backstop and to assert that I do will be to distort this Report and the clear recommendations that I do make.'[21]

Whilst this preference for voluntary self-regulation is consistent with the style of regulation that dominates the European scene, it is not obvious why Leveson should think this the preferable outcome. As we shall see, and as he was fully aware, the UK and European experience clearly demonstrates that compliance with regulatory decision-making in this model is contingent upon the indulgent submission of the will. The regulator is always beholden to the good faith of the regulated. Since this model provides no assurances for tackling press malfeasance, Leveson's attitude is mysterious.

Admittedly, Leveson was sensitive to the threat, or rather the perceived threat, to press freedom that mandatory regulation might represent. Yet, as will be argued, in Chapter 9 especially, these concerns are misplaced. To appreciate this point, we should be clear on what press freedom means. Of course, this is a central aim of the book, for I hope to revitalise the term by challenging the orthodox view that it is teleological. Nevertheless, it is helpful, as a preliminary point, to emphasise what strikes me as an inconspicuous ambiguity, especially in the popular debate, in which two senses of the term 'press freedom' appear. To better illuminate this confusion, I will distinguish these two senses by referring to one as 'freedom of the press' and the other as 'press freedom'. The former aligns with what might be called the prosaic sense of 'press freedom' and the latter with the formal definition that the purist would employ. Consequently, in its prosaic sense, the term means all that the press is entitled to do without incurring liability. We can imagine this as a zone of activity (which includes both newspaper content and newsgathering conduct) that the press is 'free' to engage in. This 'freedom of the press' concept, then, describes what Hohfeld would call the liberty-no right construct,[22] which is to say the absence of a right belonging to A to prevent B (the press) doing something that A objects to. The purist though would reject this interpretation of press freedom. She would say that the term embodies the reasons why the state guarantees the press the right to speak freely and, so, is short-hand for this justification. We can think of this as a smaller zone of activity, which sits inside that larger zone occupied by the liberty-no right construct. This smaller zone is also Hohfeldian and describes the right-duty construct belonging to the press, ie, the press's right to speak as against the state's duty to uphold that right.

From this brief description, we can see something of the problem that arises when the popular press laments the *diminution* in press freedom in the UK over, certainly, the past fifteen or so years, coinciding with the introduction of the Human Rights Act 1998, and the increased protection of privacy which

[21] Ibid, 1758, [3.35].
[22] WN Hohfeld, *Fundamental Legal Conceptions* (New Haven, Yale University Press, 1919).

followed. For what it is really decrying is the loss of freedom of the press. For example, whereas in 1990 the *Sunday Sport* incurred no legal liability when a reporter and photojournalist burst in upon an incapacitated TV actor, in his hospital bed, and proceeded to conduct an interview with him,[23] the same fact pattern today would incur liability under the misuse of private information tort. Consequently, it cannot be denied that the freedom of the press *has* diminished over time. Yet, for the purist, there has been no diminution of press freedom, as a matter of justification, because they would say (and I agree) the state does not afford the press its speech rights so that it can publish privacy-invading expression at will.

This book's inquiry is about regulation that impacts on freedom of the press, not press freedom. This is important to emphasise because mandatory press regulation is bound to reduce that larger zone of liberty-no right (from a press perspective) and increase that of right-duty (from a victim perspective), and so better protect victims when their reputational and privacy rights as well as rights to a fair trial are undermined by the press. Of course, these rights are protected, in theory, by the positive law but are not always maximally enforced due to the inefficiencies of the legal system. These inefficiencies, though, would be significantly reduced in the model of mandatory press regulation advocated by this book, for rights holders would have greater access to justice by means of cheap, efficient regulatory measures. Nevertheless, these encroachments upon the freedom of the press are unproblematic, as a matter of principle, so long as they do not interfere with press freedom.

This differential treatment of the term press freedom helps explain why the book argues in favour of coercive, independent press regulation. Press freedom, in the purist's sense, is unconnected to press malfeasance because unjustified breaches of the rights of others are outside the boundaries of permissible press freedom. Consequently, the regulation of press malfeasance leaves press freedom untouched. Moreover, it is only through mandatory regulation that it becomes possible to achieve the regulatory goal that Leveson sets, of ensuring 'real people' are protected from, or else compensated for, 'real harm'. Sadly, for victims of press malfeasance, Leveson's recommendations amounted to more of the same: the continuation of a (modified) self-regulatory scheme. As we shall see, in Chapter 2, this has been the UK Government's consistent policy since the 1940s. It continues to be so even though Leveson had said 'I cannot, and will not, recommend another last chance saloon for the press' (and yet he did) and that, to be effective, the 'new' scheme of press regulation must include everyone (it does not). Although Leveson agreed that all members of the press should feel compelled to join the tougher regulatory scheme, his strategy for compulsion was feeble, relying, as it did, on a misplaced sense that the press would be induced by an odd mixture

[23] *Kaye v Robertson* [1991] FSR 62.

of shame[24] and (dubious) incentivisation[25] – neither of which has worked in practice. This concern for victims, though, has been lost in the aftermath of the Leveson inquiry. Although the incumbent press regulator in the UK, the Press Complaints Commission ('PCC'), has been replaced by the Independent Press Standards Organisation ('IPSO'), the scheme is still voluntary and the proximity between regulator and industry still uncomfortably close. The reforms that have occurred seem superficial; certainly, it cannot be said that meaningful safeguards against press malfeasance are now in place. Consequently, victims of press malfeasance continue to suffer serious harm. This is tragic given it was, after all, a concern about the treatment of these victims, and the adequacy of the pre-existing regulatory regime to provide them with sufficient redress, which caused the government to initiate the Leveson inquiry into press malfeasance in 2011. Yet, since the government's decision to cancel the planned second part of Leveson's inquiry into the press, which would have scrutinised the question of phone-hacking in more detail, the prospects for meaningful reform seem bleak.[26]

Perhaps a book such as this would have been rendered nugatory had the government kept its promise to implement Lord Justice Leveson's recommendations.[27] Perhaps the need for it would have been even greater had it done so. For the Leveson report is riddled with such problematic reasoning and notable omissions that faithful rendition of its recommendations would be philosophically unsound. This book, then, both champions and criticises the Leveson report. It advocates fulfilment of certain recommendations and cautions against the use of others. In this way, the book springs from a deep-rooted sense of frustration with the premises, and execution of, the inquiry. Chief amongst these is the report's conception of press freedom. As will become apparent in Part 2, Leveson endorsed a left-leaning construction of the term that imbues the press with a duty or responsibility to aid democratic participation and to monitor power. This interpretation has attracted little critical attention amongst academic commentators. Indeed, I think Eric Barendt speaks for most, if not all, when he says 'Leveson's treatment of press freedom is hardly novel, though that is not meant as a criticism.'[28] Here, I must disagree – it strikes me, that the conception

[24] 'Failure to [mobilise voluntarily] would be a sad indictment of the inability of the press to put commercial interest to one side' (Leveson, (n 1), 1779, [4.37]); 'Given the public appetite for some accountability of the press, I do not think that either the victims or the public would understand if the industry did not grasp this opportunity'; (ibid, 1782, [7.9]) and 'Neither would they understand if I were not to consider the consequences of the industry failing to deliver the independent regulation that is required' (ibid, 1782, [7.9]).

[25] 'I believe that the model that I set out has real and significant benefits … for the press', ibid, 1757, [3.28].

[26] P Walker, 'Leveson inquiry: government confirms second stage axed' *The Guardian*, 1 March 2018.

[27] Hélène Mulholland, 'David Cameron tells hacking victims he still has an open mind over Leveson', *The Guardian*, 7 October 2012.

[28] E Barendt, 'Statutory Underpinning: a Threat to Press Freedom?' (2013) 5(2) *Journal of Media Law* 189, 191.

undermines the report's recommendations. For it actively works against the imposition of a tougher regulatory regime by affording no protection against the claims, emanating from the right, that such regulation threatens this special function of the press. Moreover, since all the intellectual energies of this conception are devoted to the production of societally-valuable materials, it has so little to say about victims that it left Leveson with nowhere to go to defend them against the necessary connotations of safeguarding the public watchdog beast. Indeed, one wonders if Leveson himself sensed this because, by the end of the report, his notion of press freedom played no substantive part, as if it had been quietly abandoned.

Relatedly, Leveson treated our interest in press regulation as, somehow, unitary or monolithic, and so failed to recognise that there are competing interests at stake. Accordingly, he did not see that the interests of society at large, victims, and readers are not the same and that each involves separate considerations. In Part 3, I examine these interests closely and individually to show that victims' interests provide the most compelling justification for regulation. Indeed, I argue that beyond this concern for victims of press malfeasance, society has no regulatable interest at stake. Even readers' interests are limited; there are few that could conceivably lend themselves to regulatory provisions. Leveson's teleological conception of press freedom becomes even more significant when seen in this light. For, by framing press freedom in societal terms, he failed to see that his conception had nothing to say about victims; it provided him with no grounds on which to justify the coercive scheme of press regulation he recommended. Furthermore, his reliance upon the colloquial but inaccurate notion of 'ethics' as a set of rules which govern the professions (doctors, solicitors, etc) and not the proper notion of ethics, in the Kantian sense, of individuals deciding, for themselves, what actions and responses constitute the good life,[29] rendered the discussion confused, and confusing, through the constant oscillation between questions of what a person *should* do (according to morality) and questions of what a person *must* do (according to law). This confusion further taints the recommendations as to the nature of regulation and the legitimacy of using coercive measures to enforce it.

In short, Leveson's scheme of press regulation neither utilised a philosophically-sound notion of press freedom nor offered, let alone relied upon, a philosophically-informed notion of press regulation. Consequently, he was backed into a corner in which, although he sought to dismiss them, he could not nullify complaints that a statutory scheme of press regulation would be unconstitutional.[30] He did not do enough to reject this view. His equivocation lent a credibility to it that it did not, and does not, deserve. An important aim of this book, then, is to counter this view by demonstrating the legitimacy of both statutory and

[29] I Kant, *The Metaphysics of Morals*, L Denis (ed), M Gregor, trans, 2nd edn (Cambridge, Cambridge University Press, 2017). See discussion below.

[30] Leveson, (n 1), 1782, [7.8].

mandatory press regulation. This includes tackling the view, expressed by several participants at the Leveson inquiry, that this use of statute would be a 'slippery slope' that would justify anti-press legislation in the future, even that which undermined press freedom. Chapter 9 demonstrates the implausibility of this claim: there can be no 'function creep' through mandatory press regulation, not least because we have the language to differentiate press freedom from press malfeasance and so ensure that only the latter is regulated.

This argument is important to establish since it is only through statute that Leveson's goals for meaningful regulatory reform can be realised. I use the term 'meaningful', throughout this book, in a specific way. Formally, we can say that the UK has had a scheme of press regulation in place since the creation of the General Council of the Press in 1953.[31] Yet, as numerous public inquiries and successive iterations of the self-regulatory model demonstrate, it cannot be said that these modifications have resulted in *meaningful* regulation since the press, even today, remains free to disregard regulatory rebukes and, even, leave the scheme whenever it wants, consequence-free. Accordingly, for the purposes of this book, *meaningful* press regulation is that which provides victims with redress for the wrongs done to them by press malfeasance.

Structure

Rationale

Chapter 1 examines the historical pedigree of the teleological conception and finds it wanting. This notion belongs to a specific period in time – which I set at 1855–1947 and call the 'ideological phase' – and coincides with the zenith of the Liberal Party movement, in which maximal enfranchisement and the compulsory education agenda was in its prime. Yet, the circumstances justifying the teleological conception were radically different to today, for the Liberal Party had its own press, which it could command to serve its Enlightenment ambitions. Once its liberal agenda had been realised, however, the Liberty Party's raison d'etre expired and its newspaper empire, such as it was, collapsed. The teleological conception, however, did not perish, as it should have, but, instead, assumed its modern form as an analytical framework by which to judge the performance of newspapers. This critical phase began in 1947 and is marked by the novelty of the state (eg, the Royal Commission on the Press) and non-state bodies (the Commission on the Freedom of the Press) using this conception as a tool for criticising perceived deficiencies in the modern press.

[31] The history of press regulation is discussed in T O'Malley and C Soley, *Regulating the Press* (London, Pluto Books, 2000), 51–96 and J Curran and J Seaton, *Power Without Responsibility* 8th edn (Oxford, Routledge, 2018), 1–192.

Nevertheless, despite the apparent uniformity in critical thought about the nature and meaning of press freedom, we find profound disagreement in the literature about the mechanics of realising these teleological ends. This gives rise to the riddle that commentators do not acknowledge, let alone solve: if the press has obligations to society at large to perform certain public functions, then why are commentators not united in promoting mandatory regulation to ensure these obligations are performed correctly? After all, in other social contexts, such regulation exists, and with little dissent, eg, in the professions, the construction industry, works affecting the environment, motoring, public liability insurance, health and safety, the installation and maintenance of utilities, etc. What makes the press special? Those subscribing to the orthodox view would say it is the press's public-serving role that makes it exceptional; that its function as a 'fourth estate' compromises the state's capacity to establish (let alone administer) such a scheme. According to libertarians, only the market can be trusted to ensure the press delivers on its promises. Understandably, libertarians fear that quality control of press speech, by means of formal regulation, will enfeeble the press; that even well-intentioned oversight will become intolerably bureaucratic. Since SRT provides no means of overcoming these concerns – for the emphasis on quality is inextricably woven into its core principles – the deadlock cannot be broken and meaningful press regulation remains unrealisable. This book breaks that deadlock by demonstrating the implausibility of the press exceptionalism argument: it shows that the barrier to mandatory regulation is contingent upon the teleological conception. If this is abandoned, as I argue it should be (because it is philosophically incoherent), then mandatory regulation can be established without compromising press freedom.

Right

Part 2 advances this overarching argument by demonstrating the philosophical failings in the teleological conception. Chapters 3 and 4 show why the orthodox view ought to be abandoned whilst Chapter 5 establishes the limits of the press freedom concept: the entitlement to benefit from the state's free speech guarantee cannot be made contingent upon some positive obligation to do good. Press freedom means, and can only mean, a negative obligation not to unduly harm others combined with a positive obligation to make good any such harm it causes. In this way, I say press freedom is an obligation to make good, not do good. This marks a radical departure from the established literature.

The orthodox view, then, as shown in Part 1, is that press freedom has burdensome qualities that individual freedom of expression does not. These burdens manifest in the public watchdog role, that the press is supposed to monitor the use of power and serve the public good. Chapters 3 and 4 consider alternative manifestations of this obligation and scrutinise them from both a normative perspective, through the lens of theory, and a descriptive one, through the lens

of the positive law. Chapter 3 imagines this obligation as a duty which correlates to a right. It follows that if the press has a duty to act, then there must be a rights-holder entitled to demand performance of that duty. Accordingly, acts by the press that are incompatible with its duty would provide grounds for interference by the rights-holder.

When we scrutinise the basis of this claim, we find it derives its moral force from flawed philosophical claims. Since this conception has great resonance with Kant's moral philosophy (and since Kant is sometimes prayed in aid of this high-minded position), the claim, which is found in both case law and commentary, is deconstructed by means of Kant's political philosophy, as it appears chiefly in the *Rechtslehre*. It is argued, in short, that neither Kant's political nor ethical theory supports the imposition of this sort of onerous obligation. Essentially, Kant says that the categorical imperative driving inner legislation is unenforceable by external influences and has no claim on the outer world, which is governed by the Universal Principle of Right (*Allgemeines Princip des Rechts*), which is defined in the *Rechtslehre* as this: 'any action is right if it can coexist with everyone's freedom in accordance with a universal law or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'[32] Interferences with rights are properly subject to coercion: 'if a certain use of freedom is itself a hindrance to freedom in accordance with the universal laws (ie, wrong), coercion that is opposed to this (as a *hindering* of a *hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.'[33] Indeed, this description of juridical duties is reflected in the positive law's treatment of press freedom. As will be shown, although judges sometimes speak of press freedom 'duties' in terms that are reminiscent of SRT's position, these references are misleading: the positive law does not support this sort of duty-right construct.

Chapter 4 takes a different approach and so imagines the obligation in the teleological conception as a limitation upon the press freedom right. To avoid linguistic confusion, it uses the term 'responsibility' to describe this obligation. It explores the possibility that, even if there is no duty on the press, there is a responsibility to act consistently with democratic ideals. This alternative treatment of obligation finds expression in notions like 'responsible journalism', which is an ethically-loaded term, usually deployed, in the commentary, as proof positive of some differential standard between individual and press speech. Users of the term 'responsibility', then, say that press freedom must be used in a specific way (a responsible way) to attract legal protection. Yet, as will be shown, this is inaccurate, for the law does not say that journalists must be responsible, in a way that individuals are not (or need not be). Instead, it says that if a journalist is to ride roughshod over another's reputational interests to make

[32] Kant, (n 29), [6:231]
[33] Ibid.

a point of significance to the public at large, then the law will only protect it if the damage to reputation was, in some way, unavoidable.

Finally, Chapter 5, outlines what I call the 'accountability' model of press freedom, which I argue is the only defensible conception of it. Here, I reject the burdensome interpretation of press freedom. I also challenge the orthodox view that press freedom *must* have different normative grounds to individual freedom of expression because the press *cannot* self-express (with the result that liberal accounts of free speech cannot apply). I demonstrate that this claim is based upon an erroneous interpretation of John Stuart Mill's account in *On Liberty*.[34] The central premise of the accountability model is that interferences with press speech or conduct are justified only when it has engaged in wrongdoing which causes harm. If these three elements – wrongdoing, causation, and harm – are not satisfied, then no liability can be imposed. This emphasis on wrongdoing thus preserves the special treatment that public interest expression receives. In other words, since press malfeasance corresponds to the wrongdoing-causation-harm construct and press freedom does not (for it involves no wrongdoing), then it can be said that press malfeasance and press freedom operate in two separate realms, of which only the former is regulatable.

Regulation

Part 3 explores the practical consequences of the accountability model. It examines existing press regulatory codes as applied in the UK and across Europe[35] to determine the legitimacy of enforcing such provisions by coercive means. Since it is argued that the legitimacy of press regulation depends upon its conformity with press freedom, the range of conceivable codes of conduct (which regulatory members must comply with to avoid coercive outcomes) is limited to those which do not unduly interfere disproportionately with the press's right to speak. Accordingly, Part 3 determines the parameters of coercive independent press regulation. In this Part, I categorise existing code provisions according to the three competing interests in press regulation: those of society, victims, and readers.

Chapter 6 examines clauses aimed at protecting societal interests in press freedom. As it demonstrates, SRT's teleological claims find their greatest expression in the common regulatory provision that newspapers must publish accurate information. This obligation can take two forms. It can stand for the (uncontentious) proposition that newspapers should avoid injuring the reputation of others through the dissemination of falsehood. Alternatively, it can take

[34] JS Mill, 'On Liberty', in JM Robson (ed), *Collected Works of John Stuart Mill*, vol XVIII (Toronto, University of Toronto Press, 1977).

[35] Specifically, Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Slovakia, Sweden, and Switzerland.

a broader, more onerous form, which penalises inaccuracy for the (perceived) damage it does to public and private decision-making. This second form is usually premised on society's 'right to know' and so extends the obligation beyond that owed to the reader to include society as a whole, on the basis that inaccuracy taints public debate (which then misinforms non-readers) and corrupts democratic participation (by voters acting upon misinformation/disinformation), which has grave consequences for non-readers as well. Coercive enforcement of this provision, though, would be incompatible with the accountability model. For, even if it could be shown that the dissemination of inaccurate information constitutes 'wrongdoing' (which is not conceded), the causal link between act and deleterious effect cannot be established. No one is forced to read a newspaper, let alone act upon its findings without engaging their critical functions. Consequently, the decision to trust newspapers and to believe its contents, is always a choice; it is the product of autonomous decision-making. Accordingly, the responsibility for those consequences is that of the autonomous agent alone. This is a significant finding since much of the libertarian resistance to mandatory regulation stems from the (understandable) fear that regulatory exuberance in superintending the quality of press speech emanates from this provision.

Chapter 7 relates to victim interests in an accountable press. It is crucial to the overarching argument in favour of coercive independent press regulation. These provisions are not limited to those that mimic positive law rights, such as privacy, libel, and the right to a fair trial, but extends to those that are comparable and compatible with existing rights. The chapter is divided into a discussion of provisions relating to newspaper content and to conduct (as part of the newsgathering process). It argues for the enforceability of discrimination provisions, to the extent that these satisfy the wrongdoing-causation-harm construct. Accordingly, only discrimination that targets specific individuals or groups and causes demonstrable harm will be captured. The discussion about conduct is sub-divided. The first subsection tackles unwanted contact. It argues that provisions prohibiting intrusion are legitimate even if the positive law does not protect against this sort of wrong (eg, UK law does not recognise the US intrusion into seclusion tort). The second subsection tackles covert conduct. It argues that provisions prohibiting clandestine recordings and subterfuge are legitimate only to the extent that they satisfy the wrongdoing-causation-harm construct. Problematically, many pre-existing provisions penalise the fact of covert conduct even in the absence of harm.

Certain pre-existing code provisions recognise what is known as a public interest exception. This means there will be no breach of the code if there is a public interest at stake which necessitates interfering (proportionately) with the victim's rights. The final part of Chapter 7 discusses the nature of this exception and demonstrates its compatibility with the accountability model. Since the publication of public interest expression cannot count as 'wrongdoing', it is not regulatable. Accordingly, this represents an important contribution to the book's overarching claim that press freedom and press malfeasance operate in two separate realms.

Chapter 8 concludes this Part by examining the legitimacy of enforcing pre-existing provisions which protect readers' interests. Ostensibly, these provisions police the contract between reader and press, to ensure that readers receive what they are entitled to. Alternatively, they protect the reader from unwarranted harm. Both types, though, are deeply problematic. Contractual performance cannot be regulated, at least not in the manner that the pre-existing provisions envisage. Even if we could show that the supply of accurate information was a contractual term (which is doubtful), the remedy would be compensation (the contract price) rather than specific performance. Similarly, provisions that purport to protect readers from harm fail on causation grounds (to demonstrate this point, the chapter focuses on the common provisions relating to the depiction of suicide). The chapter concludes by examining the treatment of reader autonomy that such provisions project. Problematically, such provisions impose, or else seek to impose, liberal thinking upon readers. For example, the typical accuracy clause treats readers not as autonomous agents capable of exercising healthy scepticism when receiving information, but as automatons who are infected by inaccurate information at the point of contact. Indeed, the thinly-veiled problem for many SRT advocates is that the threat to epistemic advance represented by inaccurate information is that it promotes reactionary agendas antithetical to liberalism, especially in its intolerance of migrants, feminism, and Islam. This, though, fails to recognise the liberal paradox: whereas all broad-minded people embrace liberalism (at least, as it relates to tolerance and plurality), forcing it upon the recalcitrant is a contradiction of its essential premise. Accordingly, SRT's agenda – to ensure the enlightenment of society and guarantee a state of perpetual progress – is utterly incompatible with the sovereignty of individuality. It cannot be realised without sacrificing autonomy.

Realisation

Part 4 discusses the conceptual issues arising from the realisation of coercive independent press regulation. It has very little to say, though, about the practical issues inherent in this project – at least, not to the extent of examining the fine details of the arrangements. I do not provide a draft statute to establish the scheme, as O'Malley and Soley do,[36] I do not talk about the process of policy-making, and the opportunities for offering professional development and education, as Rowbottom does,[37] and neither do I specify the composition of the board or the code committee, nor describe the ideal corporate structure that the regulator should take, as Leveson does.[38] Likewise, I say nothing about the funding arrangements.[39]

[36] O'Malley and Soley, (n 31), 191–199.
[37] J Rowbottom, *Media Law* (Oxford, Hart Publishing, 2018), 264–265.
[38] Leveson, (n 1), 1758–1760, [4.1]–[4.10].
[39] Ibid, 1761–1762, [4.14]–[4,17].

These are important issues, of course, but there is nothing philosophically interesting about them – or, at least, not to my mind. Instead, in asking how Leveson's chief regulatory goal of protecting 'real people' from 'real harm' is to be achieved, Chapter 9 scrutinises the claim that mandatory press regulation would be unconstitutional. Chapter 10, meanwhile, concludes the book by reflecting upon the previous chapters to answer the question of why we should regulate.

Chapter 9, then, is concerned mainly with the issue of compulsion. How do we compel the recalcitrant press to join a scheme of regulation that the press has consistently refused even to entertain the possibility of? It seems to me that there is only one method available to us, and that is by means of statute. As we have seen, above, Leveson was unconvinced by claims that *any* use of statute to underpin regulatory arrangements would undermine press freedom, but stopped short of denying that statutory regulation (by which he meant, chiefly, *mandatory* regulation) would be unconstitutional. Chapter 9 grapples with this issue. Amongst other things, it argues that the status quo – of using contract to govern the regulatory relationship – is fatally flawed. Since contracts are the ultimate expression of consensual dealings, they are hopeless tools by which to regulate. For one thing, contracts are always escapable – and as IPSO's predecessor (the PCC) and other European regulators have seen, publishers will leave the scheme if they feel badly treated. This ineffectiveness makes mandatory regulation all the more important. The opposition to it, though, is hard to pin down. There are too many unspoken assumptions and misperceptions. Chief amongst these misperceptions is the assumption that statutory press regulation amounts to censorship, which is simply wrong. Leveson was guilty of this. His report panders too much to the unsubstantiated claim that mandatory regulation represents the 'thin end of the wedge' and the 'slippery slope' – but this sort of function creep can only occur if we lack the language to articulate the boundaries of both press regulation and press freedom. This is *not* true of press freedom. There is no language shortfall that would enable duplicitous regimes to make inroads into press freedom unnoticed by means of press regulation. As the previous chapters demonstrate, press malfeasance and press freedom belong to different realms. Legitimate press regulation cannot creep from one to the other unobserved.

Chapter 9 also argues against the use of sanctions as a disciplinary tool, and instead argues for their use as a compensatory tool. Disciplinary measures send the wrong signal. Since victims are the priority, it should be victims who benefit from the imposition of sanctions. Consequently, I argue that the regulator should be empowered to award compensation in amounts that recognise the unwarranted harm that undue press attention causes. Of course, Leveson had in mind that disciplinary sanctions would be used to fund the regulator, but this provides an unfortunate incentive to fine because the failing financial health of the regulator demands it.

Chapter 10 concludes by asking the same question twice (why regulate the press?). The first part asks – why *regulate* the press? – and so responds to an anticipated criticism relating to the necessity of regulation. For it might be argued

that since the book seeks to limit regulation to circumstances where normative legal theory allows for intervention, it is an argument for law reform rather than regulation. In which case, why *regulate* at all? This, to my mind, would be the libertarian's response to what I say, for it is really an argument in favour of private concerns dealing with what is a (major) public issue. This reliance upon the market, though, is deeply flawed. First, the last 70 years (at least) have demonstrated that such reliance upon the private market[40] to address press malfeasance is seriously ineffective. The press continues to inflict untold harm on victims – often on, as Leveson saw clearly, those who are not famous and who do not have the financial resources to secure their rights. Also, this reliance permits a sort of 'divide and conquer' mentality to flourish within the industry. By settling claims before court proceedings are concluded – or worse, using superior financial muscle and bullying tactics to harangue victims to surrender their legal rights without compensation – the press can conceal the true extent of wrongdoing from public scrutiny. Coercive independent press regulation addresses this significant inefficiency in the realisation of justice. By providing cheap means of redress, it cures the disproportionate costs of pursuing, and defending, legal action (for both parties) and so produces both a time and cost-effective mechanism for settling disputes. Moreover, since the regulator has the power to commence investigations on its own initiative, it can shield, or at least provide some protection for, the complainant against the bullying tactics of the press. This may go some way to address the antagonism that regular targets of press retaliation face when they complain (rightly) about press bullying. The press will be prevented from doing deals in the dark to silence them.

The second criticism I anticipate is: why regulate the *press*? In other words, why am I focusing exclusively on the traditional press and have nothing to say about broadcast or the internet? There are several reasons for this. First, there remains something important in Nick Davies's warning that the traditional press, especially the powerful incarnations, such as the *Daily Mail*, still dictates both the news agenda of these other sources of communication and, perhaps even more significantly, the political agenda through the great influence it wields in Parliament and upon the executive.[41] Second, we should recognise that, in our complicated relationship with the press, and our expectations of it, we have, as commentators, never really got it right. How else are to explain the fact that European press regulators – in Belgium, Denmark, Germany and Sweden, to name a few – attribute the basis of regulation to this mythical public's right to know and not the very real problem of protecting victim's rights? In *After Virtue*,[42] Alasdair MacIntyre complained that modern philosophers misused the language of ethics that the Greats had given them, because they had lost

[40] It is not a total reliance, of course, for the Attorney General has the power to initiate contempt proceedings when the right to a fair trial is unduly compromised.

[41] N Davies, *Flat Earth News* (London, Chatto & Windus, 2008), 365–369.

[42] A MacIntyre, *After Virtue* (first published, 1981) (London, Bloomsbury, 2011).

touch with the origins of that language, especially the civic and social culture from which it emerged. We see the same happening in our modern treatment of press freedom, when commentators say the press is 'obliged' to educate the populace or protect us from the evils of corrupt power.

If we can achieve a better, philosophically-sound notion of both press freedom and press regulation now, we can use this in the future if and when newspapers disappear and are replaced by something else (be that the internet or something not yet invented). The danger – in not tackling this issue – is that our flawed conceptions of press freedom and press regulation remain and those mistakes continue into the next realm of mass communication. We have already seen this in the broadcast context. There was no philosophically-sound design underpinning the introduction of broadcast regulation in the mid-twentieth century but, instead, a confluence of historical accidents, in which, in the UK and US, the intellectual snobbery of the established press met with state designs on controlling the dissemination of information and produced something which is not an exemplar of free speech. Now, though, commentators regularly champion broadcast regulation as the paradigm of left-thinking, quietly forgetting that the restrictions placed upon broadcasters are tolerable only because the traditional press (and the internet) remains as a powerful source of correction to the regime of political interference and inhibited free speech that broadcasting represents.

Significance

This book represents a major departure from the orthodox views on press freedom and press regulation. By denying that the grounds for press freedom are axiomatic, and by rejecting much of what the established literature takes for granted, it challenges the reader to take a fresh look at the notion of press freedom, and to think again about the perceived unconstitutionality of *forcing* the press to engage with regulation. This sort of profound re-evaluation of press freedom and press regulation, at a conceptual level, is vital. It is only by doing so that the present deadlock may be broken in realising meaningful press regulatory reform.

Moreover, the book addresses a shortfall in the literature, for the compatibility of press freedom and mandatory press regulation has not previously received the level of forensic, schematic, and philosophical analysis that it does here. By doing so, it provides the sort of robust justification, as a matter of normative legal theory, that the academic literature lacks to prove that the establishment of an independent regulator, with powers to compensate victims of press malfeasance, is compatible with the state's press freedom guarantee. It shows that press freedom and press malfeasance occupy two distinct realms that do not overlap. Accordingly, press regulation exists outside the realm of press freedom and, simultaneously, press freedom exists outside the realm of press regulation. In this way, the one is no threat to the other; we do not need to compromise one project to realise the other. Consequently, the book provides the intellectual foundations

for what Leveson called the 'backstop regulator' which, according to him, the public is now 'entitled to demand … to ensure that the press is accountable.'[43]

Although the book is critical of the press, it is not an 'anti-press' book. Neither is it evangelical about the press. In arguing for press freedom, it rejects the sort of 'sacrificial lamb' defence that views victims as collateral damage in what is otherwise a 'just war' orchestrated by the press against the corrupt and the powerful. Arguments of this kind confuse two separate issues: the noble cause of press freedom and the indefensible consequences of press malfeasance. In other words, the shape of the debate is not linear but binary. Consequently, the book throws into sharp relief the needlessness of victim suffering and the emptiness of claims that such suffering is the price of democracy.

[43] Leveson, (n 1), 1757, [3.51].