

Book Review

A Free and Regulated Press: Defending Coercive Independent Press Regulation by Paul Wragg
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The boldness of Professor Paul Wragg's contribution to the scholarship on press freedom and its limits is apparent from the very title of his book: *A Free and Regulated Press: Defending Coercive Independent Press Regulation*.¹ Any defence of coercive press regulation will be bold — and perhaps much more than bold — in the eyes of the press itself: that is to state the obvious. What is of greater concern for defenders of the principle of freedom of expression, and its subsidiary, press freedom, is the boldness of Wragg's project in comparison with the strength of the classical-liberal normative consensus: that the press should be insulated from coercion or control as to how and what it publishes, and that this insulation is integral to a liberal-democratic order.

Accepting this as the philosophical status quo, the questions, then, are: how Wragg envisages coercive regulation of the press to be independent; how targeting regulatory efforts on the press in particular can nevertheless leave us with a free press; and exactly which activities of the press would be controlled — and how — under a new regulatory scheme.

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¹ Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, 2020).

What essentially matters here is how a thesis defending coercive press regulation interacts with the principles of press freedom and freedom of expression, the extent to which such regulation interferes with these principles, and whether any such interference ought to be tolerated in a liberal democracy.

In this book, Wragg offers a serious and rigorous answer to all of these questions. Though the mere prospect of coercive press regulation in a liberal democracy may cause discomfort for those who accept a classical-liberal, or negative-liberty, conception of freedom of expression and press freedom, Wragg's contribution certainly cannot be ignored, and nor should it be dismissed. This is because it offers a novel, critical, and comprehensive reassessment of the normative underpinnings of press freedom, and the established theoretical claims justifying the insulation of the press from all forms of regulation targeted at the press *per se*.

Aptly, the book begins with a much needed disambiguation of liberalism and libertarianism. It then examines the rationale for press freedom, providing a welcome analysis of the historical, unified and straightforward vision of press freedom.² There is also discussion of a more complex, internally diverse normative quantity that we continue to label 'press freedom', including the distinct aims of plurality, impartiality, and the need to maintain the rule of law over press activities.³ What follows is a construction of press freedom in terms of its moral duties and expectations, its responsibilities and accountability, emphasising the relevance of ethics, power and misuse of power by the press.⁴

Wragg then explains what he means by coercive regulation, and exactly what it is targeted at: primarily, accuracy of subject-matter published, and the conduct of the press in its operations.⁵ The final part of the book sets out how regulation should be implemented in order to address the concerns raised and in a way that is consistent with the analysis of and theoretical justification for press freedom developed earlier.⁶ This is a valuable work of scholarship for its breadth and detail, its intellectual heft and integrity, and its coherent and persuasive reconstruction of what it means for the press to be free.

The book's critical analysis of the conventional understanding of press freedom itself, and its justification for normatively prioritising press duties over its liberties and immunities, ends with the simple question: "why not?"⁷ It is a fair question with which to end this significant contribution to the literature on press freedom and press regulation. Having answered the question "why 'yes' to coercive regulation?" in the book itself, Wragg appropriately leaves readers — scholars, jurists, and policymakers — with the responsibility to reconsider the status quo position of near-absolute immunity from direct regulation. And, however strong our allegiance might be to the classical, simplified vision of the press in a liberal democracy, it is crucial that we continuously examine and re-examine our understanding of the position, and privilege, of the press in a liberal society. Despite

² Ibid ch 1.

³ Ibid ch 2.

⁴ Ibid part 2 (chs 3–5).

⁵ Ibid part 3 (chs 6–8).

⁶ Ibid part 4 (chs 9–10).

⁷ Ibid 291.

the boldness of the book's title, the nuance, detail and coherence with which Wragg's thesis is furthered assuages concerns that what is being promoted here is a wholesale, substantive censorship apparatus for the press. Vitaly, Wragg draws a clear line between accountability for wrongdoing in how the press conducts itself and accountability for publishing sensationalist, politicised, ideological or unenlightened material: only the former is in issue here.

Above all, and as Wragg persuasively contends, there is a distinction between press freedom and press wrongdoing, so that the former does not subsume the latter, immunising the press from committing wrongs that interfere unjustifiably with individuals' lives. Indeed, the press — including individual journalists, press corporations and publishers — have always been subject to laws (whether civil or criminal liability) that apply generally and equally across all actors within a particular jurisdiction, including the torts of defamation and malicious falsehood, liability for privacy interferences, and laws prohibiting harassment, hacking and fraud. In addition to this straightforward rule-of-law aspect of how the press is treated in a liberal society (that it is subject to the ordinary laws of the land, unless specially exempted, as with some data privacy protection regulation), liberal democracies have also acknowledged the importance of (extra-legal) codes of ethics for the press, which commonly encompass standards of good conduct and accuracy.

As is clear from Wragg's book, such basic standards are intimately connected with the moral duties imposed upon the press in a free society, and the virtues associated with a free press in a liberal democracy. Without such standards, the press would not be able to claim the virtue that justifies its freedom and immunities in a liberal democracy. If it recklessly publishes inaccurate stories, if it intimidates, harasses and coerces individuals, how can it possibly be relied upon to educate, enlighten, facilitate democratic participation, and credibly hold the powerful (including those wielding public power) to account?

The problem identified by Wragg is that the harm occasioned by press breaches of the laws that bind it, and contraventions of clear, basic media ethics, has passed a threshold that requires us to consider whether direct, coercive regulation becomes normatively irresistible. Is it sufficient to rely on the general bindingness of ordinary laws, enforced *ex post facto*, and on the presence of self-policed ethical codes, to ensure that the press, whose power and privilege can well be justified by virtue of its instrumentality to the liberal democratic order, does not commit serious wrongs against individuals?

It is clear that Wragg's defence of coercive press regulation rests upon a consequentialist justification for such interference, specifically, the harm principle: such regulation is justified by the need to prevent serious harms to individuals. What is significant is that Wragg does not reconstruct press freedom into a weak principle that can be set aside whenever any form of harm is alleged to have flowed from press behaviour and publications. It is a particular type of harm to individuals that Wragg recognises as warranting our consideration of coercive regulation, and *that* harm involves stripping individuals of the autonomy to which they are entitled in equal measure in a liberal democracy. There is an inconsistency between a liberal democracy privileging the press for its liberty- and democracy-promoting value to society and the individuals in it, and the same liberal democracy permitting the press

through its misbehaviour to destroy individuals' basic autonomy, and liberty, in how they live their lives. Wragg is not concerned with any purported harms in one-sided, sensationalist, ideological media commentary; he is, rightly, concerned only with egregious interferences that have the potential to ruin individuals' and families' lives.

It has been a decade since the publication of the Leveson Report, which documented the extent of the wrongdoing by elements of the British press, including a contemptuous disregard for ordinary laws prohibiting hacking, harassment and interference with privacy; abuse of power; flagrant flouting of basic media ethics; and a profound effect on the individuals and families victimised by such wrongdoing.⁸ Such press misbehaviour not only results in harms well documented in the Leveson Report, but also entails a degree of wrongfulness, which can hardly be said to be defensible even under a strong, absolutist principle of freedom of expression.⁹

Such press wrongdoing does not, as Wragg argues, sit comfortably with the virtues associated with a free press, and with the moral duties borne by the press in a liberal democracy: ensuring that the public can be informed, educated and enlightened; facilitating democratic participation; and facilitating, through transparency and criticism, the accountability of the exercise of public (and private) power. And so, asks Wragg, how can we possibly defend a near-absolute freedom from regulatory attention for an institution that is at once expected to do good and been proven to have done bad?

It is not so much a 'riddle' that the press is obliged to do certain things, and simultaneously not obliged to do these things,¹⁰ but, rather, that the press is obliged to discharge certain (moral) duties, and not to commit certain (legal or ethical) wrongs, but its immunity from regulation has seen the press commit egregious wrongs and act inconsistently with its moral responsibilities. The real riddle is whether coercive regulation, purporting to be consistent with the virtue-based duties borne by the press, necessarily violates the very same principles and virtues that give rise to the duties and privileges of the press in the first place. Is coercive regulation of the press simply impermissible, whatever the purposes and limitations? Wragg says 'no', and, what is more, the values underpinning a liberal democracy, understood in the way he has reassessed them in his book, *demand* that the press be coercively regulated to protect against press wrongdoing.

It is crucial to emphasise that Wragg's thesis is not a paternalistic one: he unambiguously rejects the justificatory basis for press regulation that sees readers as victims of a press that has fallen short of the virtues and duties imposed upon it. The harm that justifies the type of intervention Wragg advocates, and the (re)vision of press freedom that he furthers in this book, is not associated with how the material the press publishes is received by its readership, eliminating any sense of autonomy and responsibility of readers. As Wragg rightly puts it, '[t]he collective good cannot

⁸ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012) ('Leveson Report').

⁹ Indeed, a recent major philosophical defence of the absolute principle of freedom of expression does not include such wrongdoing within the protective ambit of that freedom: Matthew H Kramer, *Freedom of Expression as Self-Restraint* (Oxford University Press, 2021).

¹⁰ Wragg (n 1) 287.

be pursued at the expense of individual autonomy. This is the immutable, irreducible minima of the open society and the secret to the good life ... all we can do is manage harm when it arises.¹¹ Instead, the harm necessitating intervention, in Wragg's view, is the harm suffered by those individuals who are impermissibly commodified by the press in producing its reportage or commentary. This reoriented view of press freedom means that the protection of the press from coercive regulation must stop at the point at which the press causes serious harm to individuals through its wrongful behaviour and operations, and not through how readers might receive or react to reportage and publications.

This point is important, precisely because it allays any instinctual concerns that the press's freedom will be interfered with for its substantive publications, which may or may not carry or reflect a particular political or ideological stance. Those classical liberals who take issue with coercive press regulation for the risks it poses to empower the State to control or punish those elements of the press that publish disagreeable material will take comfort in Wragg's clear allegiance to individual autonomy and responsibility. It bears setting out how he clarifies his position:

The reader that believes what she reads must be taken to have made a *choice* to believe. Consequently, her conclusions about the information she receives is itself a manifestation of her autonomy. She has chosen to read the information. She has chosen to suspend her critical judgment and accept that information, which may be because it accords with her own worldview. Or she has conducted her own independent research, but poorly so as not to discover the truth. Yet, in any event, these decisions, as defective as they may be, are her own responsibility. This is true even of the reader who we suspect has not reached her decision *rationaly*, which is to say that she has preferred feelings, emotions, and beliefs over reason, scepticism, and analysis. It is true of the reader who chooses sensationalism over the dispassionate. In this way, we should see that the idea of the reader — or larger society — here as victim is simply unvarnished paternalism.¹²

Coercive regulation of the press, then, is targeted at preventing the types of harms to individuals which are, more or less, *already* prohibited in law or codified in ethical standards, including unreasonable and unjustified interference with privacy, harassment, phone-hacking, having a reckless disregard to accuracy, and mistreating the individuals who are the subject of, or are involved in, the particular story reported or commented on.

Insofar as press freedom has been (mis)understood as plenary immunity from accountability for serious wrongdoing, Wragg has in this book sought to dislocate the tectonic plates on top of which such a vision of press freedom has comfortably rested. He has proposed that '[m]eaningful press regulatory reform is *not* an attack on press freedom. It is an attack on press malfeasance.'¹³ Whether or not Wragg succeeds in convincing every reader that he is right about the nature of press freedom and the need for coercive regulation as the solution to the problem highlighted, *A Free and Regulated Press* will undoubtedly have a major influence on scholarship

¹¹ Ibid 291.

¹² Ibid 290–1 (emphasis original).

¹³ Ibid 291 (emphasis original).

(and perhaps even policy) on the rationale for and boundaries of press freedom. At the very least, it raises the bar that needs to be met by those who seek to defend the classical normative conception of press freedom and the justifications for its protection from any form of regulation whatsoever.

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