# The Freedom of the Press

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The Fleet Street Heritage sundial stands over the site of the early 19th century printing house of Richard Carlile. Richard Carlile is an unsung hero of the battle for press freedom.

For nearly 40 years until his death in 1843, he fought vigorously, persistently and at great personal cost, in support of freedom to express views far ahead of his time.

The causes for which Carlile suffered the repeated attention of the prosecuting authorities included: distribution of Tom Paine's Rights of Man (attacking hereditary government) and Age of Reason (attacking religion); distribution of the banned radical weekly The Black Dwarf; the revelation of the true facts regarding the Peterloo Massacre of a Manchester crowd which Carlile had been himself about to address; support for agricultural labourers who, it was alleged, had destroyed machinery on which they blamed their impoverishment; a steadfast antipathy to organised religion and the Monarchy; and advocacy of sexual equality, birth control and sexual emancipation.

Consistently with two of these last themes, Carlile was able to count on valuable assistance from his wife (who continued his work while he was in prison) and then (after separation from her) from his new partner, Eliza Sharples. The former born him five children, the latter lectured publicly as the mysterious "Lady of the Blackfriars Rotunda" or "Isis" (named after the Goddess of Reason) and bore him a further four. Carlile also inspired loyal co-workers.

The authorities repeatedly prosecuted Carlile, his wife Jane and their co-workers. The prosecution paid lip-service to the liberty of the press, but only "if temperately and moderately used". Carlile's response was that all would then depend on the view taken of the writer's character and that no one should set themselves up in judgment upon press writings on "systems (of governance) or matters or common occurrence without imputations on individuals". The law reports of his trials show him to be thoughtful, intelligent, and courteous in the face of prosecutors and courts showing little sympathy for his views or submissions. And he was prepared to suffer for his views. He spent over nine years in total in prison for offences of seditious and blasphemous libel. Surprisingly, while in prison, he was allowed to continue his editorial work.

## CONTROL OVER THE PRESS

Carlile lived in an age when the perceived threat of revolution, social and economic inequalities and unstable social conditions combined with an executive determination to control the press. Historically, there have been two principal means by which such control has been exercised: (a) censorship, which had effectively ceased over 100 years before Carlile's time, and (b) criminal prosecutions for blasphemy, sedition and defamatory libel.

Formal censorship had been Henry VIII's preferred means of control. His Act of 1533 prohibiting questioning of his matrimony with Anne Boleyn (1501-1536) proved, as events turned out, short-lived. His Licensing Act of 1538 was more general and longer lasting. Licensing survived, with re-enactments in modified forms, throughout the Cromwellian and Restoration periods. Eventually, after the Glorious Revolution of 1688, the licensing legislation was allowed to expire on 17 April 1695, leading to immediate expansion of the numbers of printers and booksellers. The first daily newspaper, The Daily Courant, appeared in 1702.

Printers and publishers were still at significant risk - especially in troubled times, as Richard Carlile's travails witness. The criminal offences of seditious and blasphemous libel (related offences, dating from an age when church and state were largely interchangeable) may be traced back to the Statute of Westminster 1275, prohibiting statements bringing the Monarch into hatred or contempt. The court responsible for trying them was the Star Chamber of the Privy Council. In a democracy we think of libel as a civil wrong, and take it for granted that accurate reporting will not give rise to any cause of action. But in 1606 the Star Chamber held (in the case de Libellis Famosis) that it was no defence to a criminal charge of defamatory or seditious libel that what had been said was true. What mattered in a criminal law context was that publication might cause a breach of the peace or upset the existing system of governance. So, the maxim was "The greater the truth, the greater the libel". That rule was abolished by Lord Campbell's Libel Act 1843, but only as regards defamatory, and not seditious, libel, and only if the statement was true and its publication to the "Public Benefit". Until 1765, the executive also continued to claim a power to issue warrants, general or special, for the purpose of searching for and seizing the authors of a libel or the libellous papers themselves. In that year the existence of any such executive power was however famously negated by court decision, enshrining the principle that an Englishman's home is his castle. Under the 1843 Act a defendant who successfully resisted a charge brought by a private prosecutor was also entitled to recover his legal costs. That is how Oscar Wilde was bankrupted after his failed libel suit against Lord Queensbury.

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**PRESS FREEDOM TODAY**

Today freedom of the press is recognised in the free world as a central aspect of the fundamental human right to have and express different opinions and beliefs. Articles 18 and 19 of the United Nations Declaration of Rights 1948 protect everyone's "right to freedom of thought, conscience and religion" and "right to freedom of opinion and expression"; and the latter expressly includes "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Articles 9 and 10 of the European Convention on Human Rights 1950, to which the United Kingdom has been party from inception, contain like guarantees, which are since 2000 also directly part of UK law .

The old criminal law restrictions could not survive these developments. They had become effectively redundant, and were replaced by a nuanced regime. This involves a carefully proportionate balancing of all factors involved and a clear justification of any restriction on press freedom, even as a matter of the civil law, and all the more by the criminal law. Recognising this, blasphemous libel was formally abolished as a crime by the Criminal Justice and Immigration Act 2008, while the offences of sedition and seditious libel were abolished by the Coroners and Justice Act 2009 (though sedition by someone not a UK citizen remains an offence under the Restriction (Amendment) Act 1919.

Issues of freedom of the press now arise in a different arena. The British press is free of direct governmental control. Despite misbehaviour by some parts of the press, as in relation to telephone hacking, it remains essentially self-regulated. The inadequacy of its self-regulation by the industry's Press Complaints Commission led the Leveson Report in 2012 and Parliament in 2013 to contemplate the establishment of a new Press Recognition Panel of the Privy Council. But this failed to attract support. As a result, one part of the press remains effectively self-regulated by the Independent Press Standards Organisation (founded by three right-wing publishers) while other major newspapers belong to no regulator. The press retains a mass audience, and, although there is now a range of other sources online, it remains capable of influencing political events.

**MODERN CHALLENGES**

That is not to say that press freedom faces no challenges. Internally, the concentration of ownership of the traditional press in a limited number of influential proprietors remains. In relation to government, the right balance needs to be maintained between the press's justifiable interest in maximising freedom of information and administrative concerns that this may impinge on the frankness and effectiveness of internal decision-making. Ensuring appropriate transparency about dismissals of police or other public officers after "private" disciplinary hearings is another area of current press concern.

Not infrequently, the press's freedom to publish is now also challenged or inhibited by actions or threats against it by well-resourced individuals, whether celebrities, oligarchs or businesspeople. This can sometimes take the form of a "SLAPP" - a "strategic lawsuit against public participation". That is a lawsuit which the claimant does not expect to win, but uses to frighten, intimidate or exhaust the newspaper or its insurers.

English libel law, associated with high legal costs, continues to facilitate such litigation. Unlike the position under the First Amendment in the United States, English law recognises no principle whereby libel of a public figure is only actionable where accompanied by actual malice. In partial redress, English common law developed the defence of fair comment on a matter of public interest, protecting conscientiously researched journalism.

The Defamation Act 2013 builds on this with some further provisions aiming at underpinning press freedom. Under the 2013 Act, substantial truth and absence of serious harm to reputation are defences. Other defences are that the statement complained of was an "honest opinion" based on fact or on another, privileged statement; or that it was on a matter of public interest and believed to be in the public interest to publish. The Act also introduces stricter jurisdictional rules, and provides for trial to be without jury, unless otherwise ordered.

A particular area of tension and dispute remains the delicate balance between press freedom to publish and personal privacy. Material may be commercially saleable but personally detrimental and of no real public importance. Thus, disclosure, or further disclosure, of private sexual behaviour, however interesting to the public, may be restrained if its publication would serve no real public interest but would, in particular, cause real damage to children. Disclosure even of information of real public interest may sometimes be restrained. In a recent case, Bloomberg reporters obtained a confidential document showing that a US citizen working for an international company was under criminal investigation. The United Kingdom Supreme Court held that the US citizen had the right to have his anonymity protected from revelation by Bloomberg, into whose hands had come a confidential letter of request for information sent by the UK authority to the authorities of a foreign state. As of early 2022, the government was consulting on the law in this area.

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The more general threat faced by the traditional press is to maintain circulation and viability in an age where the provision of news, comment and the means of communication is increasingly undertaken on an enormously expanded basis by other, more instantaneous media, whose power over peoples at large is now also very evident. The spread, platform structure and lack of accountability of these instantaneous media have led to concerns about the distortion and undermining of ordinary social and democratic life. In an era where 'fake news' tends to spread faster than truth on Twitter and the new media generate silo effects, John Milton's optimism about the power of truth to prevail may be open to some question. Jonathan Swift may also have had a point when he wrote, in 1710, that "Falsehood flies, and the Truth comes limping after it".

**THE ENDURING VALUE OF PRESS FREEDOM**

The press has moved physically from Fleet Street. But Fleet Street still stands for the press, and the sundial above it symbolises the information and enlightenment which a free press brings. Press freedom is the oxygen of liberty and the driver of participatory democracy. Without it, abuse of power, misconduct and lesser failings and inadequacies, public or personal, pass unrevealed, unremarked and uncorrected. Press freedom is an engine of improvement and a fundamental human right. It is a right which we in a democracy are extraordinarily fortunate to enjoy, for which we owe a debt of thanks to Richard Carlile among others, and which we must always defend and cherish.

This was the qualification made by prosecuting counsel, Mr Adolphus (and on which he said that "all sensible and all wise men agree"), in The King v Richard Carlile (1831) reported in State Trials (New Series), II< 459, at p.467. Ibid, p. 476.

See e.g. State Trials (New Series), II< 459: The King v Richard Carlile (1831) and Old Bailey Proceedings Online, The Trial of Richard Carlile (24 November 1834).

The actual implementation of licensing in Elizabethan and Stuart England was principally by the Star Chamber of the Privy Council and was inconsistent. By the Habeas Corpus Act 1640 the Long Parliament abolished the by now hated Star Chamber, only to substitute its own Licensing Order 1643, to like effect with the role of censor now assigned to the Stationers' Company. In objection, John Milton wrote in Areopagitica, saying: "Let [Truth] and falsehood grapple; who ever know Truth put to the worse in a free and open encounter? Her confuting is the best and surest suppressing". The restoration of the monarchy in 1660 led to the Licensing of the Press Act 1663, which continued censorship by the Stationers' Company, and gave the King or a secretary of state express power to enter property to search for unlicensed presses or material.

Entick v. Carrington (St. Tr. xix. 1030), presided over by Camden, Lord Chief Justice of the Common Pleas His response to the argument that "such warrants have been granted by Secretaries of State ever since the Revolution" was that "if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end". Camden LCJ enjoyed great popularity as a result of this, as well as an earlier judgment holding that John Wilkes enjoyed Parliamentary privilege making him immune from arrest for seditious libel: . This earlier judgment may have led to the proceedings in Entick v Carrington being brought in the Common Pleas, rather than the Queen's Bench, though there may also have been a concern that the Lord Chief Justice of the Queen's Bench, Lord Mansfield, might take an executive minded view. Three years after Entick v Carrington, Lord Mansfield himself earned popular approval for a reversal of Wilkes' outlawry: R v Wilkes 4 Burr 2527 (1770), but this was on grounds so technical and accompanied by such protestations of the judicial duty to render justice independently of "the opinion of the times and posterity" (accompanied by the familiar invocation "Fiat justitia, ruat coelum) as to raise questions about his actual motivation: see Norman S. Poser's admirable biography, Lord Mansfield, Justice in the Age of Reason (MQUP), Chapter 14 Freedom of the Press, p.254..

Under the Human Right Act 1998.

Reynolds v Times Newspapers [1999] UKHL 45, affirmed in Jameel v Wall Street Journal Europe [2006] UKHL 44.

PJS v News Groups Newspapers Ltd [2016] UKSC 26, a 4 to 1 decision, in which the writer wrote the lead judgment.

Bloomberg v ZXC [2022] UKSC 5. The decision might well not merit comment in some continental jurisdictions, where the practice is commonly to anonymise the reports of criminal convictions.

See Human Rights Reform: A Modern Bill of Rights A consultation to reform the Human Rights Act 1998 (December 2021) (CP 588), paragraphs 204-217.

Vosoughi, Roy and Aral's The Spread of True and False News Online, Science (2018) vol. 359 p.1146.

The Examiner (2 to 9 November 1710) No. 15, p.2.

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# Additional notes

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