OPINION

The Half-Free Press: A Report on Retrogression

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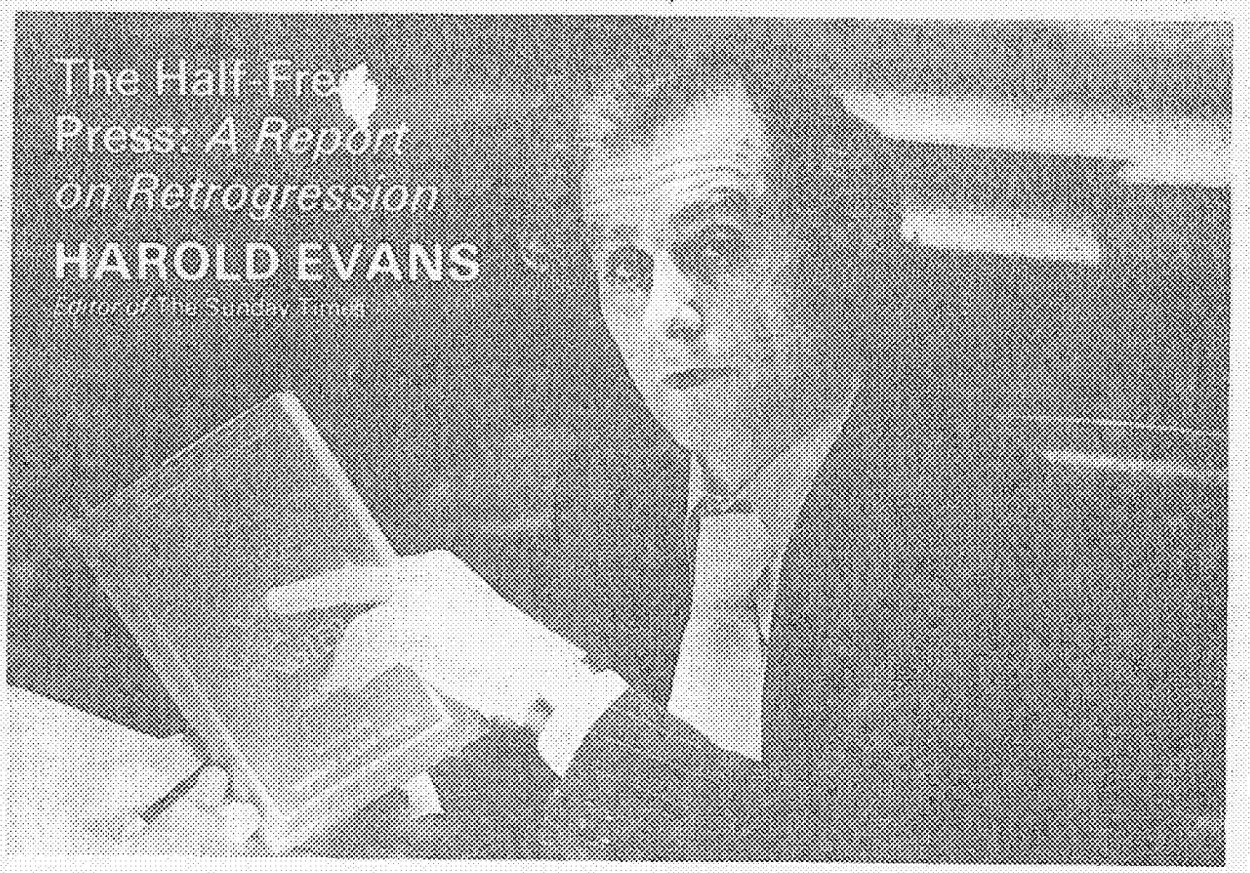

Early in 1974, in the Granada Guildhall lecture, I characterised the British press as half free, taking as fully free, for purposes of the argument, the United States press, which remains the freest in the world (though not necessarily always the best). I attempted to show how difficult it would have been for a British newspaper to stay within the law and do what the *Washington Post* did with Watergate: because of our laws of contempt. I made some suggestions for reform of the law of contempt, which had also frustrated the press over thalidomide; and which was at that moment also preventing the *Sunday Times* warning the public of a fraud in central heating selling. Today I would not be so bold as to say the press is half free: it is more like 40 percent. We have regressed because of judgments on the law of confidence; because of the introduction of the Rehabilitation of Offenders Act; because of yet another twitch from the corpse of parliamentary privilege; and because reform seems as distant as ever.

The *Sunday Times* has been able to publish that central heating article, which was delayed for more than a year by consecutive legal cases, but only because there came an opening in the long period of *sub judice* censorship which enabled us to warn a wider public.

I did not then, in my most paranoid mood, detect any significant threat to free expression, good government, or the viability of a plural press, in the law of libel—the familiar whipping boy of defeatist and incompetent journalism.

The law of libel, I suggested, was not the main suppressor of good journalism; those who protested most strenuously were usually the casual purveyors of character assassination, a view neither I nor my colleagues at the *Sunday Times* have changed since, though I recognise that book publishers have legitimate and special grievances. Mr Cecil King, years ago, started this particular hare about libel and journalism, blaming the inequities of the law for the inadequacy of his own investigations, and it survives today.

Mr Auberon Waugh even managed in the *New Statesman* recently to suggest that nobody could criticise anyone any longer in the public prints without receiving dreadful libel penalties; a masterpiece of cumulative irony, presumably, coming from someone who seems to make a good enough living unscathed on the carcases of other people's reputations, and who only the week before affected indignation because *The Observer* had viciously attacked (his words) Mr Nigel Dempster, of the *Daily Mail* gossip column. It is a weirdly naive view of the law of libel, and could hardly be held by anyone with sufficient energy and intellectual curiosity to get to the end of an average-length newspaper article any day of the week.

A sense of seemliness inhibits me from mentioning the scores of people the *Sunday Times* has defamed—but not libelled—in the course of this year, but the same might be said of investigative journalism in the *Guardian*, the *Daily Mail*, *The Observer*, or the *Telegraph*. And

read Mr Bernard Levin in *The Times* for a ripe demonstration of how little the law of libel—rightly—prevents fair comment. It is a central principle of the libel law that you should not have to pay damages for commenting fairly on matters of public interest. Of course the facts have to be right, an awkward detail, but serious journalism accepts this responsibility. So does serious publishing, and it is here that I have my main quarrel with much anti-censorship crusading. It is no use being indiscriminate in one's call for relief. Abuses of censorship have to be selected and attacked with precision: the Montgomery armoured thrust rather than the Eisenhower attack along the line. It is unrealistic and it would be wrong anyway to reform the law of libel, as *Justice* suggested some years ago, by giving us all in press and publishing a qualified privilege. It is much more sensible for the press to concentrate on those laws which really do limit its responsible function and, in the case of libel, for press and publishers to concentrate on those parts which cry out for reform.

Publishers, for instance, on the question of libel should ask why the Government—this lamentably unreforming Government—is doing nothing about the Faulks Committee recommendation on special protection for book publishers: that aggravated damages should *not* lie against a publisher who continues publishing a book after a writ, and that the gold diggers who issue nuisance writs should pay compensation to publishers who do withhold or withdraw books.

For its part, the press should accept most, but not all, of Faulks. It is right that the onus of proof should be on us. It would be right, though again burdensome for us, if legal aid were extended to libel cases so that the ordinary man can have the same protection as the rich. But Faulks is wrong to make a jury trial of libel less likely. I agree that judges should set the damages rather than juries: juries should simply say whether damages should be substantial, moderate, nominal, or contemptuous. But juries must decide the cases. The modern freedom of the press from government harassment goes back to Charles James Fox, who in 1792 transferred libel from judge to jury. The jury became, and remains today, the best bulwark of individual liberty.

There are two other points in Faulks which press and publishers should resist. To give a right to relatives to sue on behalf of a man five years dead is to mix privacy and defamation. Libel and slander are personal wrongs and should remain so. Again, to merge libel and slander, as Faulks proposes, makes it easier in a way the committee seems not to appreciate for the unscrupulous to seek to prevent the asking of legitimate if hostile questions during investigative journalism. Threats of slander actions were used against the *Sunday Times* when, several years ago, we began asking questions about fraudulent car insurance companies. And they were used with even greater vigour when we began to look at the profits of Mr Robert Maxwell's Pergamon Press. Normally the defence is to prove the truth of the defamatory question, but at the stage of asking questions one may not have the admissible evidence. No doubt damages in these circumstances would be small, but such cases are often not meant to come to court. They are meant to waste time and to confuse. Slander actions, therefore, should remain for technical reasons harder to mount.

If these and a few others are the issues on the serious aspects of libel, and more so for book publishers than newspapers, I must emphasise once again that libel is not for newspapers the main threat today in censorship.

I would list these as: confidence and contempt first; official secrets and libel second; and a ragbag of other restrictions at the end, including parliamentary privilege, the Rehabilitation of Offenders Act, the looming law of privacy and our voluntary moratorium on routine kidnapping reports. On parliamentary privilege, all one needs to say is that the procedures of the Privileges Committee are far removed from natural justice since the defendant cannot be defended by counsel and may not be present during all the proceedings. Most recently, the Privileges Committee, consisting not of lightweight but of senior MPs, convicted the *Economist* for publishing a draft report of the Select Committee on the Wealth Tax, on the curious grounds that such committees must reach their conclusions 'free from outside pressure'. The committee has even proposed that this view of the role of information and open argument in a democracy should be reinforced by the ability to impose fines.

It is a view that deepens one's sense of despair at the possibility of opening up the process of government in this secretive country. And it is one of the reasons why the press, though co-operating for the moment, fears that its agreement not to report commercial kidnapping cases could be the thin end of yet another thick wedge. The police have a plausible case in saying that publicity makes their task of freeing the victim more difficult, and no journalist wants to be accused of murder by headline. Yet the moratorium does raise important and difficult questions about the invigilation of the police and the rights of the defendant, and though we at the *Sunday Times* still support it we will resist any extension of the idea. It cannot be said too often that Britain is an example of the mess you get into from too much law. We do not have a 40 percent free press because of a plan produced by evil men. It is because we apply the law like a poultice to every pain. We are enmeshed in the principles of old common law—irrelevantly but reverently—applied to quite different problems today.

The traditional view, of course, is that we do not have censorship. You do not need a licence from the Government to start a newspaper or scandal sheet, or book publishing firm. And when something is banned by law it is not in the form of 'don't do it', but 'If you do it you will be clobbered'. There is one growing aspect of the law which limits this traditional view: the appeal for an interlocutory injunction. We have had experience recently with Mr Edward Heath, who sought a court order, *ex parte*, at 7pm at night to stop the presses of the *Sunday Times*, and whose solicitor refused to say where the judge was who would be hearing the case. A Keystone Cops exercise thereby ensued, with the *Sunday Times* cars full of lawyers racing a car containing Sir Peter Rawlinson and others first to one judge's private house and then another's.

Just before that we had prior restraint, to use a term from the United States, for several months in the the Crossman Diaries case. The first hearing, before Mr Justice Ackner, and then before the Appeal Court, ended with only a partial victory for us and the publishers. We had to agree that until the trial—an interval of three months—we would not interview any Ministers of that period, or publish any new material from the Crossman Diaries.

The Attorney-General had sought something even wider. It was an attack on political reporting of breathtaking audacity. He wanted to ban not merely new Crossman, but also already published Crossman. He sought to prevent any Minister, present or past, or newspaper, revealing any policy discussions of the Crossman period without the approval of the Cabinet Secretary, who would have to be given a copy of the material fourteen days in advance. And he claimed a power for the Cabinet Secretary to scrutinise and censor the reporting of *current* politics where this reporting revealed how policy was being formed or executed today, a restriction that promised all the enlightenment afforded to a diligent reader of the *Albanian People's Daily*.

Parliament, the arena for the Opposition and for the defence of free speech, might have been expected to focus on this extraordinary claim. It hardly raised a whimper.

Crossman is now, of course, behind us: a 'victory' for publishers and press. But it is not mere paranoia—though I have a twinge or two—which makes me suggest that because of Crossman the law of confidence could become the most serious source of censorship in Britain today, more threatening even than the archaic law of contempt, of which more later.

The law of confidence is unknown in the United States. Perhaps this is understandable since they did not have a Queen Victoria or Prince Albert who began it all with a successful action in 1849 to prevent copies of some privately printed etchings being published in a catalogue by a man called Strange. Strange had not broken any contract, so to protect the Royal Family the judge had to invent a new law of confidence. It developed erratically but rapidly thereafter, protecting from third-party depredation the originators of patent medicines, of glue and leather punches and, in Peter Pan Manufacturing Corporation *v.* Corsets Silhouettes Ltd, the designers of a brassiere. In all these cases it was affirmed that the obligation to respect confidence is not limited to cases where the parties are in a contractual relationship and that confidence lies in the information and not merely in its form.

These strictly commercial cases are now the seedbed of a law which can restrict the press and public—entirely by ricochet—on matters of public policy.

When the *Sunday Times* attempted to reveal that the Greek colonels had hired a public relations company, who had in turn paid an MP to help them in Britain, the company got an injunction against us and later almost succeeded in having the entire article banned on grounds that it was a breach of confidence. To breach confidence one has to be disclosing an iniquity, disclosing it justifiably in the public interest, and disclosing it to someone who has a proper interest in receiving it. It sounds fine, but 'public interest' and 'proper interest' have been interpreted in very narrow ways. Even Lord Denning, our best hope for commonsense, said that our public interest claim in the Greek case was not enough to override the rights of confidence. We won only because Lord Denning and his colleagues decided that the wrong plaintiff sued us—that it should have been the Greek Government, who owned the confidence, and not the PR firm.

The most significant case indicating how fragile is the public interest defence was when the *Sunday Times* wanted to use Distillers Company documents about the manufacture of the drug thalidomide—a little-reported confidence case not to be confused with the celebrated suppression of our article by the House of Lords on contempt grounds.

We argued that the documents revealed an iniquity. Judge Talbot decided that the documents should be shut away for ever from public scrutiny in part because, he said, even if they disclosed negligence which deformed children, that was not sufficient 'iniquity' to override the right to confidence. A more elevated concept of the primacy of property values would be hard to invent.

In the Crossman case the Lord Chief Justice allowed publication—just—but ruled that the law of confidence may be used not merely to protect commercial secrets or so-called commercial secrets, but the affairs of the realm. The public's theoretical right to know has now a counterweight: the right of the Government to invoke a civil law of confidence. The Lord Chief Justice said he thought he was bound to build on the clearest extension of the law into public policy—in Argyll *v.* Argyll in 1967 when the Duchess obtained an injunction restraining her husband and a newspaper from disclosing marital confidences. Not so much Star Chamber as Bedchamber justice.

With political memoirs, it is better that the main power has thereby been removed from the bureaucracy—pending any future legislation—and given to the courts for public adjudication. But so narrow has been the judicial interpretation so far, so dangerous is the prospect of prior restraint, that we may yet be better off with a statutory law of confidence, provided a sound public interest defence can be written into it. I say *might* because the Law Commission working paper on this (No. 58) would be no advance on the present uncertainties. I say *might* also because one can have little faith in the legislators, and the fate of the various specialised reports on libel, official secrets and contempt is discouraging.

Hardly anybody has for years had a good word to say for our law of contempt—like confidence it has built up in common law cases with little relevance to modern publishing or politics. Three years ago the *Sunday Times* was banned from reporting how that wretched drug came to be manufactured by Distillers in the first place. We were banned because litigation was pending between parents and the company, though it had been pending for eleven years or more. The late Lord Reid in the leading judgment in the House of Lords said that if

things drag on indefinitely there will have to be an awakenment of the public interest in a unique situation'. What has happened since reminds me of Lord Reid's remark when in another case Counsel protested that Reid's question indicated a line of thought contrary to that he had shown at the beginning of the proceedings. Ah, yes', said Reid, 'but I was a very much younger man then.'

I feel the same, for since that judgment we have had the Phillimore, or Cameron, Report on Contempt—full of sensible proposals which would enable us to publish the banned thalidomide articles, incidentally, without damaging anyone's right to a fair trial. What has happened to that reform? Nothing. The law remains as it was in 1742. Let me give just one expert view:

Is not the law of contempt even more of a shambles than it was before, which is saying something? Does the Attorney-General not agree that if the law remains as it appears to be at the moment it will prevent the press from carrying out one of their most important duties, that of exposing injustice? While I acquit the Attorney-General of any desire to limit the freedom of the press, will he not now agree that legislation is vital?

That was Mr Arthur Davidson, a Labour lawyer MP, questioning the Conservative Attorney-General (who said reform must await Phillimore) in July, 1973. Mr Davidson, an admirable MP and reformer, is now Parliamentary Secretary, the Law Officer's Department, but he has not succeeded in reform even with Phillimore in his hands—and even with the support of Mr Harold Wilson, who wrote to *The Times* (July 24th, 1973) after the House of Lords had finally banned our article:

Therefore, if the law is as the Lords have authoritatively stated, Parliament, the legislature, has not only the right but the duty to change it. That task must begin now.

The reports on legal reform flow thick and fast but the Lord Chancellor's office sits inertly on its woolsack. We, for our part, have taken the thalidomide contempt case to the European Commission on Human Rights, and despite Cameron and despite what Mr Davidson and Mr Wilson said in opposition, this Government is opposing us all along the line. Such is the suffocating power of the bureaucracy.

Nothing has happened either on Faulks—and not yet either on Franks and Official Secrets, on which I, like a number of other editors, have mixed views. The Franks Report is, of course, more liberal than the Official Secrets Act—only Caligula could outdo that—but it is too restrictive. Robert Carr's gloss on them when he was Home Secretary was more restrictive still, so that we were, under the Heath Government, in danger of seeing an old blunderbuss which nobody liked using replaced with a brand new pistol which Ministers might be all too ready to put to an editor's head. Mr Roy Jenkins, who is preparing a reform, is certainly on the side of the angels here, but we have yet to see what his colleagues and the Civil Service do to his ideas. But it remains unsatisfactory, in any event, that these things should be tackled piecemeal.

Mr Harold Wilson some years ago suggested that there should be a package of legal reform affecting the press. He was then, and may still be today, concerned to offer liberalisation in return for a law of privacy. Mr Wilson's case was unimpressive in the slag heap affair, but the gossip columnists have come to his aid. For one of the curious and sad things about Britain today is that while it is exceedingly difficult to discover and publish important public matters, it is relatively easy to prey on private lives where prurience, not public interest, is the motive. You may or may not agree with the news values of the editors, with half the front page of a national recently given up to the breakdown of an actor's marriage. I don't. What is undeniable is that this degenerate competitive conception of the public's right to know is fuelling animosity among legislators, which will inflict on us all, and not only the doorsteppers, a general law of privacy of the kind the Younger report thought inadvisable.

I have until now been against a privacy law as an extra screw on the press and I have always been opposed to one which gave interlocutory relief by way of injunction because at the early stages the 'public interest' defence may be hard to mount. But I do believe it would be better to have a narrowly, soundly drawn privacy law with other liberalising reforms than no reforms at all. Or perhaps the Press Council, after consultation, could make an affirmation of principle on privacy similar to its potent affirmation on criminal memoirs.

I therefore find myself, uncharacteristically, in support of Mr Harold Wilson. Let there be a package which attempts to balance these competing claims of privacy, confidentiality, the rights of free speech and public scrutiny of public affairs.

The balance needs emphatically to be tipped towards more openness in government by a Freedom of Information Act of the kind the United States had passed, and amended, in which every document is open to the public unless the administrators can satisfy the courts that it should not be. There are justified claims of security. But security alone is not the test, as Lord Radcliffe here and US Judge Gerfein have both eloquently recognised, and the package would not be acceptable unless the Act was a radical reforming measure. If it were, and if Phillimore-plus on contempt, and Faulks-minus on libel, could also be enacted, and possibly a new approach on confidence, then a narrow privacy law and legal aid for libel would be a price worth paying. We might move a little nearer the ideal of openness and civilised tolerance as attributed by Pericles to Athenian democracy.

We have no black looks or angry words for our neighbour if he enjoys himself in his own way, and we abstain from the little acts of churlishness which, though they leave no mark, yet cause annoyance to those who note them . . .

Our laws secure equal justice for all in their private dispute and public opinion welcomes an honest talent in every branch of achievement, not for any sectional reason but on grounds of excellence alone . . .

Our citizens attend both to public and private duties, and do not allow absorption in their own various affairs to interfere with their knowledge of the city's. We differ from other states in regarding the man who holds aloof from public life not as 'quiet' but as useless; we decide or debate, carefully and in person, all matters of policy, holding, not that words and deed go ill together, but that acts are foredoomed to failure when undertaken undiscussed . . .