Would the paisley pyjamas sting stand up in court?

Nicholas Robin *argues that recent cases involving media trying to lure MPs into their pyjamas and get pop singers to deal drugs raise doubts about whether the definition of the public interest should be left to the press industry or prosecutors to decide.*

The *Sunday Mirror's* use of a fake Twitter account to trick an MP into sending 'selfies' of himself in bed has raised renewed questions about whether journalists are justified in using entrapment in the public interest. The paper's editor, Alison Phillips, has strongly defended the sting as being in the public interest. She argues that it is 'wholly inappropriate' for a middle-aged Minister to send explicit pictures to a seemingly star struck twenty-one year old trying to get into politics; especially if he is the very Minister responsible for encouraging more women to get into politics.

However, it has emerged that the freelance reporter who sold the story to the paper used pictures of women without their permission when posing as the fictional 'twenty-something Tory PR girl' Sophie Whittam. It has also come to light that a number of male MPs were targeted in this way, prompting allegations from Hacked Off and others that this was a fishing expedition with dubious public interest motivations.

The question of whether this constitutes a legitimate piece of investigative journalism in the public interest, or an unethical example of entrapment, now looks set to be the first test of the new industry funded self-regulator set up by some parts of the press in the aftermath of the Leveson inquiry. The decision for the new head of the Independent Press Standards Organisation (IPSO), Sir Alan Moses, will hinge on whether the reporter's approach complied with Clause 10 of the new IPSO code of practice, which states:

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

The law and prosecution of crimes committed by or 'unveiled' by the press

Prosecutors have to face a similar question when deciding to bring criminal cases against investigative journalists or the people they purport to have 'caught' committing a crime, such as in the recent case involving X Factor judge Tulisa.

However, the law is ambiguous when it comes to investigative reporting and inconsistent in the protection it offers for journalism in the public interest. Although a public interest defence is available in the Data Protection Act 1998, it is not available in much legislation that could be used to prosecute journalists – such as the Official Secrets Act 1989; Computer Misuse Act 1990; Regulation of Investigatory Powers Act 2000 (RIPA); and Bribery Act 2010.

If the Daily Telegraph had exposed the abuse of parliamentary expenses today, rather than in 2009, it could be prosecuted for purchasing a disc of expense receipts from a public official under either the Data Protection Act or the Bribery Act. Yet only under the Data Protection Act – which carries much lighter sentences – would the paper have technically been able to mount a public interest defence. In some cases involving journalists, this means that the 'defence of necessity' has to be used to invoke the public interest indirectly. QC's Alex Bailin and Edward Craven have argued that it is unacceptable that these defences have to be brought by the 'back door'.

Leveson on public interest defences

During the Leveson inquiry there were calls for a public interest defence to be formally established in law to provide clarity and protection for investigative journalism. But Lord Leveson dismissed this argument in less than two pages of his mammoth final report, arguing that it would give journalists carte blanche to break the law while newsgathering even if the eventual stories are not in the public interest – as long as they could come up with an ex post facto justification.


Leveson dismissed the argument for a formal public interest definition.

Leveson instead put his faith in the structures he outlined for a new approved self-regulatory body and invited the Crown Prosecution Service to produce guidelines for prosecutors on whether to proceed with cases involving the media. The Director of Public Prosecutions (DPP) published these guidelines in Sep 2012, setting out a non-exhaustive list of grounds that could justify otherwise illegal activity in the public interest. However, this leaves the ultimate responsibility with prosecutors to decide 'whether the conduct in question outweighs the overall criminality'.

In evidence to Leveson, the Guardian newspaper questioned whether prosecutorial discretion provides sufficient safeguards for investigate journalism. The law, it argued, 'should be sufficiently certain to allow a citizen to regulate his or her conduct'. One also has to ask whether it is appropriate for decisions on balancing and interpreting the public interest to be left with the press regulator and prosecutors in this way?

The role of the Jury

I would argue that the public interest can only legitimately be defined by democratic institutions. That does not mean we have to hand politicians the power to curtail the press. We already have an ancient direct democratic institution that could legitimately define the public interest over time – the Jury system. All Parliament would have to do is pass a non-exhaustive statutory public interest defence; then it could leave it to juries and judges to delineate the limits of public interest justifications over time through the accumulation of case law.

By definition juries are better placed than prosecutors or the press to ultimately decide the public interest. Whereas prosecutors (or indeed editors) will be wont to bring their own particular professional view of the public interest to bear on such cases, a lay jury is able to bring a genuinely collective public perspective. In operating as the 'conscience of the community' the jury is the appropriate vehicle to determine where the public interest lies. Indeed if juries are a democratic *'bulwark of liberty against the state',* there can be no better mechanism for protecting press freedom.

Of course, there are obvious reasons why some editors and journalists may prefer any definition of the public interest to remain undefined in law. It suits some parts of the industry to be able to justify privacy intrusions ex post facto – as we are arguably seeing in the Brooks Newark case. But establishing a public interest defence in law would be one way of improving the internal governance of print and online news providers regardless of whether an industry regulator was recognised by a Royal Charter or not. Such a law would favour journalists and editors who had recorded their internal decisions on the public interest before they used subterfuge to seek evidence. This would protect genuine public interest journalism, while going some way to prevent reporters using entrapment indiscriminately in the hope of tempting public figures into embarrassing or criminal behavior.

The article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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