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Beyond the great crash of 2008: questioning journalists' legal and ethical frameworks

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Beyond the Great Crash of 2008: Questioning journalists' legal and ethical frameworks

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Damian Tambini suggests that journalistic privileges should be given to bloggers and citizen reporters who fulfil a public interest role. But he questions whether 'journalists' who seek merely to serve investors – rather than the wider public interest – should not be deserving of such privileges

Journalists covering the 2008 financial crisis have been blamed for talking the market up and for bringing it crashing down. The BBC journalist Robert Peston was hauled in front of a Treasury Select Committee to discuss the virtues of imposing new restrictions on reporting on banks – to avoid repeat of panics such as the Northern Rock run. In the US, CNBC journalists Jim Cramer and Nick Santelli were publicly humiliated by news/comedy presenter Jon Stewart for lazy, credulous and unethical business reporting.[1]

It is easy to dismiss such criticism of journalists as messenger-shooting, but behind it is a genuine concern that financial and business journalists failed to perform the duties that the public trust them to perform. I argue here that in order to understand the coverage of the crisis we need to understand at a more fundamental level the legal and ethical framework that journalists operate within, and the ways in which they view their duties, as well as the contemporary pressures they face in performing them.

Journalists are granted certain privileges such as access to people and information, and access to information gateways (presses, transmitters). In recognition of the importance of this role for society as a whole these individuals are also granted certain legal privileges – such as the right not to reveal sources to law enforcement where to do so might discourage future sources, and more generally enhanced protection of free speech and legal immunities from prosecution when they act responsibly in the public interest (Castendyck et al 2008). Not everyone can enjoy journalist's privileges: they are reserved for journalists, and they are provided in recognition of the social role performed by journalism: which is to quickly provide the public with information about issues it is in the public's interest to know about, and to act as a counterbalance and check on power. Financial and business journalists enjoy the rights – and, therefore, bear the duties – in common with other journalists. In addition there are other rules – particularly in relation to investment markets and conflicts of interest – that particularly apply to business reporting.

What are the real motivations and practices of journalists?

So far: so obvious. Or is it? Such a view of journalism is contentious, for three reasons. First, it doesn't seem to correspond to reality. The description is functionalist and systemic and can be undermined in all the usual ways that such functionalist and systemic arguments can be undermined. Such an account says nothing about the real motivations and practices of individual journalists – such as paying the mortgage, selling papers, amusement, or pleasing their boss or owner – motives that do not necessarily fit in to this account of how journalism functions.

Secondly, we might object to the picture presented because it makes rights conditional on duties or on a specific idea of the function of journalism, and thereby implies an authority that could take away the privileges of journalists. The idea of rights and duties smacks of licensing of journalists, and seems undemocratic. Finally, we must not fall into the trap of treating normative or functional accounts as explanations. We might claim that a journalist *should* work as a watchdog or "public trust" but it simply does not follow from this that they *will* do so.

But when we take a closer look, it is difficult to deny that being a journalist – and enjoying the privileges that go with the profession – does depend on obeying certain rules, performing certain duties. Whilst it is right to be unenthusiastic about the idea of a single authority able to control access to the profession – with all the chilling of speech and political manipulation that could entail – what we have in Britain is a decentralised system of control that is separate from the state. Rights are conditional on duties at two levels. At the level of the individual journalist, the main employers of journalists can, of course, cease to employ journalists who do not conform to the rules of ethical journalism. If a journalist is found to have breached the code of the Press Complaints Commission and they work for one of the major journals, the chances are that this will put them in breach of their employment contract and they will be sacked. At the collective level, privileges are granted through law, and if journalists have too many drinks in the last chance saloon[2] then laws will be changed for all journalists. The development of the rights and privileges of journalists has been a long historical process full of conflicts and reversals (see Sparrow 2003). The system both controls and protects journalists. The National Union of Journalists in the UK will defend those who face disciplinary action for refusing to breach their code of ethics.

And journalists' privileges are recognised in law. There are some formal privileges that journalists enjoy such as 'qualified privilege' in the case of defamation (the so-called Reynolds defence[3]), and the right to protect sources. It is in the granting of these legal privileges that judges (or 'society' in the functionalist shorthand of the introduction to this article) set out society's expectations about what constitutes ethical journalism. Journalists enjoy privilege, or immunity, but only if they behave ethically and responsibly in the public interest as described in some detail by judges in the key cases and thus the boundaries of the permissible are quite clearly set out.

Why does any of this matter? It matters because there is a fundamental, far-reaching debate going on about the future of journalism, which I would separate into two related issues. First, the professional identity of journalism – to whom and to what extent should the package of rights and obligations afforded to journalists be extended to others, such as bloggers, for example, or citizen journalists. Second, the sustainability of journalism: Because of changes in distribution technologies, the gate-keeping control held by journalists is in decline, and journalists' control of the specialist role of mass-distribution of contemporaneous information.

That we are currently witnessing a crisis in the financing of journalism, particularly foreign coverage, investigations and local coverage is now widely accepted (Beckett 2008; Downey and Shudson 2009). Current business models supporting financial journalism are also under threat. The definition of journalism as a package of rights and duties matters because it enables us to understand that journalism is, from the point of view of the law and self-regulation, a profession, and understand how it is, and should be, developing at a time when technology undermines business models and professional identity. It also enables us to understand how journalists' own understanding of their role and responsibilities impacts their practice of journalism.

Self-definitions of financial journalists

In the following section I will describe some findings of a research project which examined how the rights and duties of journalists are evolving, by focusing on specialist financial journalism as a case study. The research was interview-based, and examined the self-definitions of role among financial journalists and what financial journalists saw as the main challenges they faced in fulfilling those roles. The findings of the research have been outlined in longer papers elsewhere (Tambini 2008) but here I want to briefly précis some key findings and their implications for this broader debate about the role of financial journalists during the crisis.

As commentators picked over the rubble of the banking system in 2008-2009, questions were asked about why so few financial and business journalists had attempted to inform the public of the risks that were being run in the banking system. Such a view is based on the assumption that financial and business journalists should serve a watchdog function on behalf of the public. The idea of a “watchdog” role of journalists (Osiel 1986; Hallin and Mancini 2004) is based on a specific notion of the role of journalism in the wider society.

Political journalists, in particular, tend to have some sympathy with the notion that they have a responsibility to perform a watchdog function and conform to a set of ethical principles including a commitment to truth, accuracy and conflicts of interest. So what about the duties of specialist financial journalists? And is the practice of this form of ethical journalism under threat? Some of the ethical rules of business journalism, of course, are the same as for mainstream journalists. But the objective of the research was to seek some notion of the specialist ethics of this beat: my interviews with financial journalists during 2007-2008 revealed that whilst many do see themselves as performing a ’watchdog’ role, many do not. In the case of financial journalism, the ethical framework is weaker and responsibilities are fuzzier: journalists are more likely to adopt the view that they should simply deliver what their readers want, or that their main function is to provide information for investors (see Starkman 2009). In that sense, they reject the normative functionalist account of the watchdog role and see themselves as responding to audience demand.

Micro issues relating to conflict of interest

Interviews also revealed that the lack of self-identification of journalists as watchdogs does impact how they go about their work. Whilst the soul-searching since the crisis has examined the macro impact of journalists – whether they talk the markets up or down, whether they might cause panics[4] – the overwhelming focus of ethical discussion in relation to financial journalism is in relation to micro issues of conflict of interest. Codes of conduct and ethical debate are concerned with market abuse. This finding in itself is revealing and might hold some clue to the collective failure of business and financial journalism in the face of the crisis. The answer to the question: 'Why didn't the media see it coming?'[5] may simply be that business and financial journalists do not tend to see it as their primary role to act as a watchdog (Borden 2007) on behalf of the public. To the extent that they do have a specific professional self-reflection on their role it is mainly in the form of discussions relating to conflicts of interest.

Some financial journalists do see their role as holding corporations and public bodies to account. So we turn now to the interview data on what they saw as the main challenges they faced in fulfilling that role. Four issues were identified as particular challenges: speed (tight deadlines in a 24-hour news cycle), complexity (new financial instruments and a lack of specialist training; see Doyle 2006), strategy (the role of PR and strategic communication in controlling access to sources; see Miller and Dinan 2000) and sustainability (the business model) were the main issues identified (Tambini op cit).

Current technological changes also present a deeper question of professional identity: who is a journalist? In the past it has been clear that the profession of journalism was one clearly associated with control of the main content gateways in mass distribution platforms, mainly presses and transmitters. With the rise of new communications technologies and loss of control of market entry, the notion of who is a journalist has been radically problematised, with obvious implications for the implementation of ethical frameworks. Financial journalists, conventionally defined, now compete with a variety of information providers. We might expect this to be a good thing in terms of performing the watchdog role, but it seems that the public in 2008 were no more informed of the impending crisis than the public of 1928.

Do the new media players in business news (like Motley Fool or Seeking Alpha) belong within the ethical framework of financial journalism or should they stay outside it? Do they see themselves as watchdogs? And should the bloggers, like other "members of the press" enjoy the benefit of protection of sources against financial regulators, or should they have the same obligations as other members of the public? It is reasonable to note that there is nothing new about this, there have always been newsletters and tip sheets, but the increase in new media, including some that look and feel very much like the websites and mobile news services of established media outlets, do present new problems. What seems to be clear is that the new media financial information services, like the older newsletters and tip sheets, seek a position well outside of the restrictive ethical framework that applies to financial journalism. This raises a fundamental question that is yet to be answered: Will it be possible to maintain the 'social compact' of rights and duties associated with financial journalism or will direct competition with non-regulated platforms undermine it?

Summary: The rights and duties of financial journalists

Financial and business journalism in the UK is under intense pressure due to the pressures of speed, PR, and the technical complexity of financial stories. But this is only part of the explanation of why journalists largely failed to inform us of the approaching financial crisis. At least as important is the fact that many financial journalists reject the notion that they should act as a watchdog of the public interest.

As a society, through the legal and regulatory system, we do offer a set of privileges to journalists. They are conditional in terms of the fact that laws can be changed, and in terms of the fact that journalists can be removed from the profession if they breach its rules. There are important implications of this. We need an urgent debate about what constitutes a journalist or journalism. We may decide that we should be affording some journalistic privileges also to bloggers, citizen journalists and others, because they are fulfilling the public interest role of journalism. And we might also specify that "journalists" who seek merely to serve investors – rather than the wider public interest – are not deserving of journalistic privileges.

Financial journalists need to decide whether the package of rights are sufficient for them to fulfil their role in the new environment, or whether they might need to cover also some macro issues such as panics and bubbles, and deal with the new power of PR. And “society” needs to make clear what is expected of financial journalists in the overall framework for corporate governance. If journalists are to take on new duties in an improved new regulatory settlement, then they should expect some more support, legal and otherwise, in the form of new privileges.

Notes

[1] See also Brady 2003 for earlier criticism of CNBC.

[2] In 1989, the then-Heritage Secretary, David Mellor, gave a speech in which he accused the press of “drinking in the last chance saloon” with the implication that statutory controls may have to be introduced.

[3] In a case of defamation brought by the Irish Prime Minister against *The Sunday Times*, the idea of journalists being permitted protection of speech if they worked within a certain ethical framework was developed: the reporter was protected from liability if he or she was working without malice, was not reckless on a matter of public interest. Lord Nicholls set out a ten point test of privilege, adding that: ‘The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.’ For discussion of journalists’ privilege in general, see Papandrea (2007), Butterworth (2008).

[4] The Treasury Select Committee ran an inquiry into the banking crisis in early 2009, inviting comments on ‘the role of the media in financial stability and whether financial journalists should operate under any form of reporting restrictions during banking crises’.

[5] This was the topic of a conference organised by Polis in February 2009.

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