PRIVACY AND A FREE PRESS: LOCATING THE PUBLIC INTEREST

Exploring the balance between Article 8 and Article 10 rights in a modern media context

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Abstract

The term "the public interest" is oft-cited but seldom defined. It is in essence both an umbrella term and a short-hand for a concept (or concepts) that we know we need to understand but have difficulty explaining. However, given both the prevalence and the importance of the concept to the law in specific disputes, confronting its essential nature becomes imperative to resolving those clashes. One such instance comes in the form of the conflict of privacy and a free press. One of the foremost legal problems of our time, the clash of Article 8 and Article 10 rights does not lend itself to simple resolutions given the frequency of what might be described as 'intractable' or 'zero-sum' cases – where both rights cannot be simultaneously realised to the satisfaction of the parties involved. This thesis therefore seeks to understand where the elusive 'public interest' lies in such cases. To do so it firstly examines where the public interest is located in each of the respective rights, and then how those rights are to be balanced. This thesis contends that it is not enough simply to understand the nature of the two rights which are being balanced, but that it is crucial to understand how the act of balancing itself impacts upon the outcome. All of this cannot be divorced from the wider social and political context in which the contest between conflicting rights takes place. This thesis therefore systematically examines each of these pieces of the puzzle to garner an in depth understanding of them individually and how they react with each other. This is done in order to produce a set tools – definitions, understandings, and conclusions – which can be applied to factual situations in order to illuminate the location of the public interest in conflicts between privacy and a free press.

Part One: Introduction & Methodology

Chapter 1. Introduction

1.1 Introduction

One of the most prominent legal problems of the last decade has involved balancing the right of a free press to report on the lives of celebrities and criticise public figures, with the rights of those same public figures to have their privacy and reputation rights respected and protected. The lengthy and often acrimonious debate during the first decade of this century around libel reform, culminating in the Defamation Act of 2013, drove the issue of press freedom and reputation rights into the public sphere. This was very quickly joined and then surpassed by a parallel debate regarding privacy. The advent of the Human Rights Act and the incorporation of a more 'European' sense of privacy rights from Strasbourg jurisprudence had already sparked a discussion of how the traditional prominence of the press's right to report celebrity gossip would be impacted by the changing legal landscape. This burgeoning debate was thrust centre-stage by the phone-hacking scandal, and the subsequent Leveson inquiry and report.

All of these developments either occurred or evolved a great deal during the researching and writing of this thesis. When I set out to produce this PhD research I did so originally with the intention of examining restrictions upon the free press in England and Wales. This would be with a particular focus upon defamation law. But from the beginning it became obvious that what I really wanted to discover was how the courts decided upon what was in the interest of individuals and the public when rights clashed – in this case the rights included under Articles 8 and 10 of the ECHR. The rapidly developing legal, political and social situation outlined above, plus a developing understanding of the law revealed that one could not examine this question simply in terms of defamation; the increasing overlap of reputation and privacy rights, especially in the jurisprudence around Article 8, meant that the two rights most often in conflict with freedom of the press would have to be taken into account together.

The increasing prominence of ECHR jurisprudence in English law, plus the continuing right to petition the Strasbourg court meant that any thorough examination must include ECHR case law. In addition to this, a comparative approach with the US has been undertaken. This

was due to the ease of comparison with a common law system, the US commitment to free speech, the extensive jurisprudence available, and the highly sophisticated level of academic research into the issues of privacy and freedom of expression.

Not only has privacy v. speech been one of the most prominent legal problems but also one of the most intractable. The simple fact is that in many cases the full expression of the press (or individual) right to speech is mutually exclusive with the subject of a news story's right to privacy or reputation. When disputes between the two are brought to court, the judge or (rarely now) the jury is faced with a zero sum game - for one right to win the other must lose. The solution – the most fair and equitable outcome for all parties – could only be decided by divining from the multitude of arguments what was in the 'public interest' in any given case, or set of circumstances, when the two rights clashed.

The central research question is therefore: Where does the public interest lie in the balance between free speech and privacy?

This thesis attempts to answer this by thoroughly examining the nature of the rights in conflict; the values and interests which give 'weight' to these rights; the impact of the social, political and legal context in which these conflicts take place; and the influence the balancing mechanism itself has upon the task of finding the public interest.

There are numerous examples of excellent books (often evolving from academic theses) which take a traditional black letter approach to examining the law i.e. a thorough assessment of free speech, privacy or defamation law across one or more jurisdictions with critiques and suggestions for reform[1]. There are also those contributions which take an in depth look at the nature of one particular right[2]. However, this thesis sets out to do something different which is to understand in achievable depth the sum total of the conflict between the rights across its numerous strands: the nature of the rights, the social and political context and the nature of the balance itself.

The thesis takes shape around themes relating to how value is attributed to rights from both an individual and societal perspective; how the rights are placed in a wider social and

[1] See for example Milo, D. Defamation and Freedom of Speech (2008 Oxford University Press); and Barendt, Eric *Freedom of Speech* (2005 OUP, 2nd edn)

[2] See for example McNamara, Lawrence *Reputation and Defamation* (Oxford : Oxford University Press, 2007); and Solove, D "A Taxonomy of Privacy," University of Pennsylvania Law Review, Vol. 154, No. 3, January 2006

political context; and how the process of balancing allows a definitive and authoritative (but not inarguable) conclusion as to where the 'public interest' lies between speech and privacy.

1.2 Methodology

My methodology is a mixture of conventional black letter legal research, socio-legal analysis, and a (necessarily delimited) foray into political philosophy.

I have undertaken an extensive literature review regarding academic and legal analysis of the nature of the rights in question; privacy, reputation and speech. This review stretches somewhat beyond just straight legal analysis to sociological, political studies, media criticism, and philosophical texts also. There is an extensive examination of case law and jurisprudential comment alongside this academic analysis. At each stage of the review the analyses are critically assessed in light of the wider context and ongoing discussion in which they appear.

As mentioned in the Introduction above, I have taken a specific but extensive comparative approach between three jurisdictions: England & Wales, the European Court of Human Rights, and the United States of America. Given the multi-layered legal system of the USA, I have tried to focus insofar as possible upon cases that involve constitutional questions relating to speech (and privacy) but where necessary have included information that falls outside this. All case law analysis is up to date as of 30th June 2016.

I am keenly aware of the potential challenges and obstacles inherent in comparative law studies, given the differences in approach across jurisdictions[3]. However, it is my contention that the similarities and differences between the three legal systems offers an opportunity to expose the nature of the various strands of the question examined in this thesis through the comparison of the jurisdictional approaches. For example the US commitment to freedom of speech by comparison to the European view, and the reflection of this in approaches to categorisation, balancing, and proportionality allow this thesis to both deepen and widen its analysis of all the topics involved in the discussion. As long as both author and reader remain aware that overly simplistic characterisations, or generalisations about legal principles across

[3] Bermann, George A., Patrick Glenn, Kim Lane Scheppele, Amr Shalakany, David V. Snyder, and Elisabeth Zoller. "Comparative Law: Problems and Prospects." American University International Law Review 26 no. 4 (2011): 935-968

jurisdictions are not helpful, then the comparative approach can be very useful in the context of the problem examined.

The socio-legal aspect of this thesis chiefly involves embedding the legal understanding of the respective rights in social and political realities. It is crucial to understand the wider context in which disputes between Article 8 and Article 10 rights take place in order to correctly evaluate the weight that courts should attribute to them. In this light there is some degree of sociological analysis that runs through the thesis but concentrated in Chapters 2 – 6.

Equally the analysis of political philosophy is heaviest in Chapters 5 & 7 but pervades the wider discussion also. There is a critical analysis of rights regimes and the concept of balancing in Chapter 7 which is necessary in understanding how the 'weight' of value can be correctly attributed and measured in a rights context.

Despite its prominence at the time of writing this thesis, I have chosen not to engage heavily with the Leveson process, either the inquiry or the report. This is because, although the evidence given shines a light upon motivations around privacy and the press, I wished to keep the analysis tethered to longer-term legal, political and sociological discussions rather than a contemporaneous debate.

The thesis is divided into five Parts according to the broad theme of the Chapters included therein. Each Chapter addresses a specific issue which will contribute to the final understanding of the 'public interest'. Each Part has an introductory explanation that will outline the purpose and content of that Part. Therefore I will not repeat these here.

The overall contribution to knowledge is based upon the idea that, despite an enormous canon of literature on the nature of both privacy and speech rights (and the conflict between the two), I have not come across an approach to locating the 'public interest' that is the same as that expounded in this thesis. The focus is on understanding the multi-faceted contributions to the 'value' and 'interests' that give rights weight in a balancing process; understanding the relationship between conflicting rights, and also between the values within a given right. The approach that this thesis takes to understanding the societal/community value of speech/privacy rights and the relationship with the individual value of those rights is a key aspect. The placing of this research into a political context and a critically assessed legal framework, leads to this thesis having a unique contribution to this ongoing academic discussion.

Part Two: Privacy and Article 8

The purpose of Part Two of this thesis is to explore and outline the social, political, philosophical and, most importantly, legal underpinnings of the rights protected by Article 8 of the ECHR.

The rights explored here are by no means the only rights protected by Article 8[4], but rather those which impact upon press freedom – the right to protection of reputation from defamation and privacy.

There may be a continuing debate around the position and protection of reputation rights under Article 8, but this thesis accepts the de facto situation that the European Court of Human Rights has consistently read the protection of reputation and defamation law into the right to a private and family life[5].

The central task of Part two is to probe underneath the text of the rights to privacy and reputation and ultimately posit and defend rational and coherent theories for the existence of these rights.

The approach in each of the chapters is slightly different. With defamation, the long history and evolution of the tort gives the starting point for discovering its true purpose. Whereas for privacy more recent case law establishes the outlines of the discourse around a definition of privacy. However, both Chapter 2 and Chapter 3 try to end up with the same conclusion: a workable and defensible theory of the right in question.

Chapter 4 by contrast offers a necessary, if truncated, exploration of how privacy is changing due to an evolving social and technological environment. It would be remiss to define privacy without reference to this phenomenon, especially given its impact on the overall conclusions of this thesis.

[4] Article 8 has been broadly interpreted to encompass a wide range of positive and negative rights, for example: prohibition of illegal searches, *Gillan and Quinton v. United Kingdom* - 4158/05 [2010] ECHR 28 (12 January 2010); sexuality, *Smith and Grady v UK* (1999) 29 EHRR 493 (27 September 1999); family life *Abdulaziz et al v UK* (1985) 7 EHRR 471

[5] See *Lingens v Austria* (1986) 8 EHRR 407; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1; *Pfeifer v Austria* ((2007) 48 EHRR 175

There are a number of things that Part Two does not attempt. Most notably it is not concerned with the full balancing of Article 8 rights with free speech. This will be drawn out in the subsequent Parts and Chapters. In Part Two these issues are only touched upon insofar as it is necessary to achieve the first major task of this thesis: defining the privacy and reputation rights protected by Article 8.

Chapter 2. What is Defamation For?

2.1 Introduction

At the turn of the century it was noted that defamation law was a relatively neglected area of the law[6]. Defamation was very often treated as the strange cousin of other torts such as negligence and was tacked on as an afterthought on law school syllabi. This was despite defamation providing some of the most high profile, media friendly and downright salacious court cases of the last 50 years. The legal practice involved in these cases was naturally lucrative and as such there were plenty of comprehensive and updated practical guides to the current law which served to advise practitioners and parties through the treacherous waters of libel and slander without ever stopping to question why this route was charted in the first place[7]. This scarcity of academic inquiry into the roots and foundations of defamation was accentuated when juxtaposed with the United States where a plethora of high profile academics and institutions committed volumes of inquiry and analysis into American defamation law. This interest was of course sparked and fuelled by the constitutional implications and debate around balancing protection of reputation with the First Amendment commitment to free speech first broached in 1964 in *New York Times v Sullivan*[8] and raging ever since.

In the 17 years since Eric Barendt lamented the lonely furrow ploughed by scholars of English defamation law the situation has changed enormously. A convergence of legal, historical, political and cultural factors has led to an explosion of academic and popular interest in this topic in England and other common law jurisdictions[9]. Several volumes and numerous articles have set us upon the road to a level of understanding and examination of defamation law akin to that developed in the United States. Not surprisingly this upsurge in interest, like in 1964 USA, coincides with constitutional change; in this case the Human Rights Act. This

[6] Barendt, E 'What is the Point of Libel Law?' (1999) 52 CLP 110, 110

[7] See for example Milmo, P Gatley on Libel and Slander 11th Ed. (London : Sweet & Maxwell, 2008) and Mullis, Alastair & Doley, Cameron (general editors) Carter-Ruck on Libel and Privacy 6th ed. (London : LexisNexis, c2010.)

[8] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

[9] In legal terms the introduction of the Human Rights Act is a stand out factor – the obligation for the UK courts to filter in ECHR jurisprudence particularly around Article 8 changed the terrain around defamation. Historically and culturally the advent of the Internet made policing libellous statements much more difficult; jurisdictions such as the US where speech is stringently protected suddenly had a direct impact and access to libel friendly arenas such as England. This all led to a renewed political will to reform defamation law in the UK to better suit the 21st century.

establishes a constitutional imperative to give particular regard to freedom of expression which has served as a counterbalance to a number of other interests and rights such as reputation [10].

After a period of relative stasis in the latter half of the 20th century, the law has undergone a great deal of change. As is often the case, change begets calls for further change and the last decade has seen many organisations, individuals and interests call for reform of this country's defamation laws, the greater volume manifesting in a clamour for weight to be given to free speech and freedom of the press, presumably at the expense of the traditionally sacred Englishman's right to reputation[11]. Given the historic presumption toward, and dominance of, reputational interests in English libel law there was really only one direction that reform or evolution of the law could travel and that was toward freedom of expression.

However, there are numerous gradations along this scale between complete deference to reputation and unbridled freedom of speech. The key is to find the correct balance. With the Defamation Act having come into force in January of 2014, and the first post-Act cases beginning to reach courtrooms, it is an ideal time to reflect and examine the nature of defamation and its fundamental purpose.

This chapter aims to review the various answers posited to the question, "What is defamation for?" It will do so by undertaking a historical and theoretical review of how the modern common law of defamation came about and subsequently the social, legal and cultural factors that underpin its existence today[12].

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[10] Human Rights Act 1998, Section 12 http://www.legislation.gov.uk/ukpga/1998/42/section/12

[11] See for example the Faulks Committee report of 1975; the Libel Reform Campaign begun in 2009 and led by English PEN and Index on Censorship; and Lord Lester's draft defamation bill in 2010.

[12] A note on terminology: The terms "defamation", "libel" and "slander" are often used informally in an interchangeable fashion, particular the first two. In legal terms there are of course important distinctions between the terms resulting, as we shall see, from the historical development of the law. Defamation as a tort is in fact two torts; libel and slander. Libel was traditionally written defamation and slander spoken. This has since evolved into libel taking a permanent or recoverable form including television and radio broadcasts and slander being those perishable or transient utterances typified by back fence gossip. Given the nature of the two libel is the focus of the vast majority of cases and will consequently be the primary focus of this paper abut slander will come into play as and when necessary. It has been noted that the terms "defamatory" and "libellous" have subtle but important differences in certain contexts with defamatory relating to the potential meaning of the statement and libellous referring to its subsequent actionability. Despite this I will use the noun forms "defamation" and "libel" in a interchangeable fashion but will stick to "defamatory" and "libellous" as distinct adjectives when it is necessary to distinguish. Equally "freedom of speech" and "freedom of expression" are the terms used by the US Constitution and the European Convention on Human Rights respectively. Along with "freedom of the press" they may have subtle but important distinctions in other contexts but here will be treated synonymously to encapsulate the broad and widely understood concept of free speech.

2.2 History of Defamation

If asked to answer the question in the title of this chapter in one sentence, most lawyers would probably reply, "To protect reputation". However, far from being a definitive answer the idea of a legal protection for reputation is merely a gateway to a plethora of subsidiary questions about the nature of reputation, its social and legal status and the requisite standard needed to fairly and adequately protect it. Before the current trend in English academia towards fundamental inquiry into the value and purpose of reputation, textbooks were content to take the role of reputation as a given, usually satisfied that the, by now customary, quotation of Shakespeare's Othello would suffice to dispel any lingering questions about nuanced or contradictory elements of the concept of reputation: "Good name in man and woman, dear my Lord, Is the immediate jewel of their souls..."[13].

The result of this suppression or dismissal of a deeper inquiry would subsequently manifest itself in a later confusion and perplexity at the idiosyncrasies present in modern defamation law. Indeed these stranger facets of the law would themselves be dismissed as eccentricities constituted in the bowels of history and incapable or undeserving of explanation, "...perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation"[14].

However, a number of scholars have shown this to be not the case through examination of the very essence of reputation and its interaction with the law. Initially in the United States, and subsequently in England and other common law jurisdictions, there has been a concerted academic inquiry into the origins of defamation law and reputation as its fundamental concern. Through examination of legal history, sociology, psychology and jurisprudence, the nature of reputation and its impact upon the common law of defamation has been distilled to an impressive extent and, although disagreements inevitably remain, a vigorous and robust discussion of the issues has led to a far greater appreciation of defamation law.

This chapter will attempt to critically assess progress toward this understanding. This will be done by looking at the historical development of modern law, leading to a discussion

[13] Othello, Act 3, Scene 3

[14] Veeder, Van Vechten. "The History and Theory of the Law of Defamation I" (1903), 3 Colum. L. Rev. 546, 546

of the current thinking about reputation as a sociological concept. Firstly though, we will set out a concise, albeit somewhat truncated, outline of the current law as broadly applicable in common law jurisdictions (including the United States pre-1964) as to what qualifies as a defamatory. This will help establish an idea and conceptual boundary that will help immeasurably in the discussion ahead.

Because of the way the common law of defamation is constituted, that is to protect reputation, the burden of proof in a number of key aspects rests upon the defendant in a libel action and there are a number of presumptions in favour of the plaintiff (claimant) whose reputation is the subject of the action. As such when a statement is described as defamatory this not to say that it is in contravention of the law of torts, as there may be any number of defences which justify its publication; from truth or justification, to absolute or qualified privilege. Rather the defamatory character of a publication or statement is merely the prima facie establishment that it causes the plaintiff damage to his reputation.

There are a number of elements that must be established before this can be said to have happened. There are three technical qualifications that must be met. Firstly, the claimant must show that the defendant published the statement, and then that it was received by a third party and finally that it referred to the plaintiff by name or other form of identification[15]. By and large this is a straightforward process because in the vast majority of cases these elements are relatively simple and objectively provable[16]. Under the Defamation Act 2013 the threshold has been raised by the new requirement that there is at least a likelihood of serious harm being caused to the claimant. The first cases interpreting this new aspect of the law have reached the courts including *Cooke v MGN Ltd*[17] which showed that a statement which would have been prima facie defamatory previous to the 2013 Act failed to clear the new hurdle of "serious harm".

The test then switches to the more contentious question of whether the statement is capable of holding a defamatory meaning. This decision is made by the trial judge and is done so through the following test: whether the statement has the tendency to make ordinary people

[15] Price, D. Duodu, K. Cain,N Defamation : law, procedure & practice. 4th Ed. (London : Sweet & Maxwell/Thomson Reuters, 2010) p.3

[16] Exceptions might include mistaken identity e.g. *O'Shea v MGN & Another* (2001) EMLR 943. 04 May 2001. High Court (QBD)

[17] [2014] EWHC 2831 (QB)

think less of the claimant by either "lowering the claimant in the estimation of right thinking people generally", "injuring the claimant's reputation by exposing him to hatred contempt or ridicule", or "tending to make the claimant be shunned and avoided"[18]. It is these elements of the test that are the focus for much of the discussion surrounding reputation and defamation in this section of this chapter.

Once this test has been discharged by the claimant there are a number of presumptions that automatically come in to play. Firstly, the presumption of falsity: that the said statement is not true. This presumption is rebuttable through the defence of justification, or slightly more tangentially, fair comment. Secondly, there is the presumption of damage; this is a presumption that a defamatory statement will have caused reputational damage and is irrebuttable. Thirdly, the presumption of fault; this establishes strict liability in the tort, that regardless of the intention to defame or not defame, the defendant will be at fault for the defamatory nature of any statement he publishes. These elements of the law are unsurprisingly controversial especially among free speech advocates and they will be discussed, insofar as they impact upon concepts of reputation, here in section 2.2.

Many of these elements, and the broader sum of defamation law, seem at first glance to be an unruly mismatch of disparate rules and caveats cobbled together with no consistent or unified principle. However, this undulating terrain of law can be explained through an examination of the origins and history of the legal systems that produced the law. While it is commonly accepted today that defamation's purpose is broadly speaking the protection of reputation this is by no means true of the earlier incarnations of the law[19]. In the time between the Norman Conquest of England and the development of the early common law following the demise of ecclesiastical courts and the Star Chamber, the chief purpose of the various strands of law that dealt with defamation appeared to be the maintenance of public order. A number of different judicial bodies existed simultaneously and dealt with complaints over defamatory actions being as they could a sin, a civil matter or a criminal offence. The ecclesiastical courts had been established to deal with sins and divide such offences from those temporal matters dealt with by the local courts[20].

[18] Robertson G, Nicol A, *Media Law 5th ed* (Sweet & Maxwell Ltd 2007) p. 103
[19] See generally: Veeder, Van Vechten. "The History and Theory of the Law of Defamation I" (1903), 3 Colum. L. Rev. 546.
[20] Ibid

In the ecclesiastical courts defamation was considered a sin contrary to God's command in the book of Leviticus that, "Thou shalt not go up and down as a tale bearer among the people"[21]. Being a sin, distinguished from a temporal matter, there was no compensation by way of damages, rather the party guilty of the slander would be required to apologise and declare the falsity of the accusation usually in the local church[22]. These ecclesiastical courts remained in function until the reign of Queen Victoria. Prior to the 2013 Act the influence could still be seen upon the modern law in slander's preoccupation with certain categories of defamation. Slander per se was a tort which needed no demonstration of actual harm, rather harm is presumed. Before 2013 slander per se was available after four types of imputation 1) a criminal offence punishable by jail 2) imputation of a contagious disease 3) suggestion of unchastity in a woman 4) allegations that damage a person's business or office[23]. Throughout the history of the ecclesiastical courts it was the first and third offences that dominated the case law[24]. Imputations of theft or dishonesty and sexual slanders, particularly against women were of greatest concern to the church making up 90% of cases in some jurisdictions[25]. The need to control rampant accusation and counter accusation in the field of morality is evident in the early church law; the value placed upon a good reputation would encourage similar behaviour.

The local courts had similar concerns with public order. Without a forum for redress of perceived wrongs breaches of the peace would inevitably arise. Imputations and accusations that offended one's honour were the subject of these local courts in a patchwork of actions including trespass, assault and slander[26]. The courts were concerned with protecting people's reputations/honour but only as a subsidiary of the need to protect the peace. An extension of this concept can be seen in the substitution of defamation actions for the ritual of duelling. Duels were fought, usually among the gentry, to protect the notion of honour, related to the idea of dignity. When Parliament made a concerted effort to clamp down on the practice it was decided after some debate that common law remedies would be invoked as an alternative mode

[21] Robertson (n.18)
[22] Donnelly, 'History of Defamation', 1949 Wis. L. Rev. 99, 122
[23] Imputation of criminal conduct, *Gray v Jones* [1939] 1 All ER 795; Imputation of certain contagious diseases, *Bloodworth v Gray* (1844) 7 Man & G 334; Imputation of unchastity, Slander of Women Act 1891; imputation of unfitness in business, *Jones v Jones* [1916] 2 AC 481. See generally: Price, Duodu, Cain, (n.15) p.40-41
[24] McNamara (n.2) p.73
[25] Ibid p.73
[26] Ibid p.69

of achieving "satisfaction"[27]. Again the pre-modern law concern with public order allowed an alternative vent for frustrations stemming from reputational slights.

A final strand to the historical development of the law is the conviction that the crown needed to protect "the great men of the realm" from libellous attacks upon their reputation and honour. Edward I duly introduced offences under the statutes of "Scandalum Magnatum". Initially it is believed that this was designed to disincentivise noblemen from taking up arms to settle disputes, but evolved in the light of the rising mercantile class and the advent of the printing press, into a mechanism for the aristocracy to assert their superior status and stifle dissent by protecting their perceived notion of honour[28]. The practical concept of libel was very different at this time. In these cases truth or falsity was irrelevant leading to the famous maxim of Lord Chief Justice Coke, "The greater the truth the greater the libel". Again the law was concerned with retaining order and the enforcement of the Scandalum Magnatum statutes fell into the remit of the infamous Star Chamber. When the Star Chamber finally disbanded in 1641 it left behind various criminal offences such as criminal libel, seditious libel and obscene libel, offences that were technically in existence up until 2009. Again the purpose of the law in this instance was primarily the protection of public order, to prevent the fomenting of dissent or insurrection, done so through the ostensible protection of honour of the great men of the realm.

The criminal law aside, the principles of the disparate strands of defamation law were being diffused into the common law tort demonstrated by the seminal case of *Lake v. King* in 1668[29]. This case established a difference between written and spoken defamation i.e. libel and slander. The law fluctuated for the next 150 years until the case of *Thorley v. Kerry* in 1812[30]. There is no definitive moment for the creation of the modern common law of defamation but this case confirmed the split into two defamation torts of libel and slander and it was this period in the early 19th century that the courts began to treat defamation actions as a protection primarily of reputation rather than as a means to the end of "public order"[31]. The legal commentaries at the time declared reputation to be a free standing right or interest[32]. Thus

[27] Mitchell, Paul *The Making of the Modern Law of Defamation* (Oxford : Hart, 2005.) p.39
[28] McNamara (n.2) p.107
[29] *Lake v. King* (1668) 1 Wms. Saund. 131b
[30] *Thorley v Kerry* (1812) 4 Taunt 355
[31] McNamara (n.2) p.77
[32] Blackstone, Starkie quoted Ibid p.92

the modern law had arrived at a conception of defamation law as the instrument through which reputation would be protected but retaining idiosyncrasies borne out of its erratic evolution.

The law turned then to the question of how to define reputation or, more accurately, how to define *harm* to reputation. The courts would have to inquire what precisely made a statement or publication that would harm a man's reputation and what were the factors that could allow identification of such imputations. It is broadly accepted that through sifting the modern case law one can establish three tests accepted to show that a statement is capable of a defamatory meaning[33] (It is important to remember that libel and slander are common law torts and, while some changes have been introduced by legislation, for the large part the law has been shaped by the courts). These tests are broadly consistent across the various common law systems[34].

The first test, that which might be called "the principal test", was established in *Sim v. Stretch*[35] which was articulated as any statement about a person which "tends to lower him in the estimation of right-thinking people generally". The second test is if the plaintiff's reputation is harmed by a statement that exposed him to "hatred, ridicule or contempt" and is usually attributed to the judgement in *Parmiter v. Coupland*[36] as crystallising the somewhat nebulous old common law test. Finally, the third test confirmed in *Youssoupoff v. MGM Pictures Ltd*[37] that a publication will be defamatory if it has a tendency to "make the plaintiff shunned and avoided".

There are a number of preliminary points to be made about these tests. Firstly, it is not clear that the list is exhaustive[38]. In fact some scholars, such as Prof. Trindade for example, enumerate two additional tests a) if an imputation will injure the plaintiff's trade, office or profession and b) if the publication displays the plaintiff in a ridiculous light[39].

However, it is posited that these supplementary tests are but extensions or subcategories of the three chief tests (specifically the "shun and avoid" test and the "hatred, contempt and

[33] Barendt (n.6)
[34] For a strong assessment of the comparative approaches see: Milo (n.1)
[35] *Sim v. Stretch* [1936] 2 All E.R. 1237
[36] *Parmiter v. Coupland* (1840) 6 M.&W. 105
[37] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 T.L.R. 581
[38] Barendt (n.6)
[39] Trindade, F 'When is Matter Considered "Defamatory" by the Courts?' [1999] Singapore. Journal of Legal Studies 1,

ridicule" test respectively) and can be included under those auspices. Secondly, there is not necessarily always a clear delineation between the tests. In specific instances court cases can be concerned with more than one category of defamatory meaning simultaneously, and there is often a degree of overlap, resulting again as we saw previously from the somewhat haphazard judicial development of the law.

An illustrative example of this is the establishment of the principal test of lowering the plaintiff in the eyes of right thinking people generally developed in *Sim v. Stretch*. The observant reader will have noticed that despite being listed as the first and general test *Sim v. Stretch* was decided nigh on 100 years subsequent to *Parmiter v. Coupland*, which confirmed the "hatred, contempt and ridicule test". The House of Lords in *Sim v. Stretch* expanded the law because it deemed the test in *Parmiter* too narrow; *Parmiter* itself being an attempt to draw together the various tests espoused by the courts and commentaries up until that point. Thus *Sim v. Stretch* became the central test and the slightly tangential "ridicule" aspect of the *Parmiter* test has become somewhat of a standalone alternative as demonstrated by cases such as *Berkoff v. Burchill*[40] which is discussed in greater depth below.

In the self-same case, Lord Neill stated that he was "not aware of any entirely satisfactory definition of the word 'defamatory'"[41], echoing Lord Atkin in *Sim v. Stretch* 60 years previously saying judges and textbook writers have found difficulty in defining with precision the word "defamatory"[42]. The problem then appears not to be a lack of definitions, for we have established there are at least three, but rather as to whether any of these are entirely satisfactory. Judges, like the academics with their nod to Othello, are apparently content to pay lip service to the idea that defamation protects reputation but never to delve further in to the exact nature of reputation nor the relationship with the law.

For example, in *Reynolds v Times Newspapers* Ltd[43] Lord Nicholls states, "Historically the common law has set much store by protection of reputation. Publication of a statement adversely affecting a person's reputation is actionable", but is content to leave the inquiry at this level. The common law has never attempted to define reputation, perhaps because of the

[40] *Berkoff v Burchill & Another* [1996] 4 All ER 1008 (CA)
[41] ibid
[42] *Sim v. Stretch* [1936] 2 All E.R. 1237
[43] *Reynolds v Times Newspaper Limited* [2001] 2 AC 127

difficulty associated with it and the new set of problems that such a process would spawn[44]. Fortunately there has been a significant exploration of the concept of reputation outside the courtroom by academics firstly in the US and more recently in other common law jurisdictions[45]. It is important for an understanding of the purpose of defamation law to probe the tests established by the case law, and identified above, against the ostensible purpose of the law. This we will do later, but before this can be attempted we must understand the concept of reputation against which the law is to be measured.

2.3 Theory of Defamation

Of all the studies or examinations of reputation, and in particular reputation in the legal realm, the most widely cited and influential analysis is that of Robert Post[46]. Post attempts to analyse conceptions of reputation through the prism of the common law of defamation. Post identifies three concepts of reputation; property, honour and dignity, which he goes on to examine in the American constitutional context. The concepts are applicable in all common law jurisdictions, however, and Post's theory remains as compelling today as when it was first postulated and provides a solid bedrock for contemporary examination of the purpose of defamation law. However, it must be noted, as was admitted by Post himself, the concepts overlap a great deal and each is unconvincing standing alone.

2.3.1 Reputation as Property.

Reputation can be viewed as a form of property akin to any other chattel that can be gained or lost. It has been described as "intangible property akin to good will"[47]. This idea fits with a conception of society as a market society where even something as nebulous as reputation can be quantified in proprietary terms[48]. The concept of reputation as property purports that reputation and the good will that it creates in a community and society is

[44] Barendt (n.6)
[45] See generally: Barendt (n.6), Gibbons, T. Defamation Reconsidered, Oxford Journal of Legal Studies. Vol. 16. 1996. Oxford. 587, Lidsky, LB 'Defamation, Reputation and the Myth of Community' 71 Washington Law Review 1 (1996)
[46] Post, R.C. "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74. California Law Rev 691
[47] Post (n.46) p.692
[48] Slaughter, MM, 'The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society' (1992) 14 Cardozo LR 351

something that can be earned, "The fruit of personal exertion", as the legal commentator Starkie put it[49]. The concept fits naturally if one imagines the efforts of a business or tradesman to establish a commercial reputation that will undoubtedly translate into commerce and pecuniary advantage. Even outside a strictly commercial sphere, the social capital accrued through the development of a good reputation will have a proprietary value through enhanced contacts or opportunities.

Post talks about the egalitarian nature of this concept that allows everyone equal opportunity to build a reputation, or rebuild one which has been previously diminished[50]. This concept chimes with alternative analyses of defamation and reputation. Thomas Gibbons' important dissection of the law promotes the idea that the law protects "false" reputations[51], or framed alternative reputations that have been "earned" regardless of whether there is any resonance with the actual character of the holder[52]. In fact the courts, according to Gibbons, are wholly unconcerned with the truth of the reputation as long as it is deserved in a purely market sense of the word[53]. It has been asserted that this view of reputation as property runs parallel to the rise of the liberal political philosophy borne of the Enlightenment which put great stock in the individual and the equity of the market place[54]. This logic was somewhat self-perpetuating; as the philosophy influenced the law, so the law gave credence to the philosophy[55].

The idea of reputation as property was certainly part of the received knowledge or philosophy that underpinned the law; Veeder writing in 1904 that reputation is valued and protected because it "... is strongly built up by integrity, honourable conduct and right living. One's good name is therefore as truly the product of one's efforts as any physical possession"[56]. Additionally, Paul Mitchell points out throughout the 19th century the courts of equity infused reputation with a proprietary value, that they might be able to grant injunctions on that basis[57].

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[49] STARKIE, T 'A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS' xx (New York 1826) quoted in Post (n46) p.694

[50] Ibid p.696

[51] This analysis is still robust in light of the 2013 Act. The changes in section 1 are related to the need for serious harm, therefore raising the "seriousness" threshold of the tort. But the idea that you can have an unearned reputation protected by the courts still stands.

[52] Gibbons (n.45) p. 596

[53] ibid

[54] McNamara (n.2) p.39

[55] ibid

[56] Veeder, Van Vechten. "The History and Theory of the Law of Defamation II" (1904), 4 Colum. L. Rev. 33, 33

[57] Mitchell (n.27) p.80

Post's analysis continues by highlighting the aspects of today's law that are reliant upon a proprietary aspect for explanation. Chief among these is that in most common law jurisdictions (including England) companies or corporations can sue for defamation. Another interesting point has been made that in jurisdictional disputes in defamation such as *Berezovsky v. Michaels*[58] different portions of one's reputation can be present in different jurisdictions demonstrating that reputation can be divided in a quasi-physical fashion, only explicable through a market conception[59].

Post is, however, at pains to point out that no one of his three concepts is satisfactory for explaining the full purpose or protection of defamation law, no doubt at least partly down to the disconnected evolution explored earlier. Rather there is often an overlap in which more than one of the three concepts is responsible for the aspect of reputation protected in a given rule of the law. Equally, each of the three concepts has weaknesses or drawbacks that show it is not a panacea for explaining the purpose of the law. In the instance of reputation as property there are a number of aspects of the law that clash with the property concept. Among these is the fact that non-defamatory statements, which are untrue and can cause real, measurable damage, are not actionable under defamation[60]. A good example would be: "Mr Smith is dead"; non-defamatory but capable of severe damage to property or commercial prospects[61]. Secondly, the old presumption of damage rule also indicates that the law was prepared to compensate for damages beyond what can be attributed a pecuniary value[62].

2.3.2 Reputation as Honour

Post's second conception of reputation is of honour, a concept that was significant during the early development of defamation law in pre-industrial England[63]. As was highlighted earlier, in the brief overview of the historical origins of the law of defamation, honour played a crucial role in the maintenance of the status and importance of the aristocracy

[58] *Berezovsky v Michaels* [2000] 1 WLR 1004
[59] Milo (n.1) p.30
[60] Post (n.46) p. 697
[61] Roberston G, Nicol A, *Media Law 5th ed* (Sweet & Maxwell Ltd 2007) p.113
[62] In this section is important to note that the tort of malicious falsehood is available for non-defamatory false statements. This is explored below. But if anything the existence of this tort reinforces the argument that "reputation as property" is a flawed concept.
[63] Post (n.46) p.697

and the gentry, both among themselves and against the criticisms of their social inferiors. This idea is compatible with Post's view of the concept.

The idea of honour, in this specific sense, is drawn from a conception of society in which all men are not equal but rather a society based upon deference, where status, usually through birth, bestows upon somebody an entitlement to respect and a sense of reputation quite unconnected to their own individual efforts[64]. Honour comes from the role or status occupied by the holder; it is indeed quite at odds with the individualism and egalitarianism of the market society and explains its prevalence prior to the Enlightenment and Industrial Revolution. The historical overview showed how one of the chief purposes of defamation was the maintenance of public order by ensuring that the masses paid due respect and deference to the great men of the realm epitomised by the statutes of Scandalum Magnatum and leftover in the crime of seditious libel.

This concept is reflected in defamation's preoccupation with the idea of vindication, in the basest sense of the word, almost akin to vengeance[65]. This is borne out by the traditional forms of resolution over a dispute in honour under the fledgling law of defamation. A choice was given between civil suit and indictment. Under indictment truth was irrelevant and compensation was not a remedy. The purpose was to punish the defendant, vindicate the plaintiff and restore honour to him and his position. These values are reflective of those imbued in duelling which, as we saw, was a precursor to defamation as an avenue of redress. This concept can be detected in today's law through the motivation of claimants in defamation suits. American empirical studies have shown that in a large majority of cases the motive for suing is not compensation but rather vindication and a restoration of honour, in a more modern sense of the word[66]. This is also one of the central reasons an "offer of amends" defence was introduced[67].

Post readily admits that in today's society this archaic incarnation of honour is not the legal force it was[68]. In fact, the law has actively attempted to extinguish notions that those in power should be sheltered from criticism and in many instances made such criticism easier.

[64] Ibid p.702
[65] Ibid p.704
[66] Bezanson, Randall P. "Libel Law and the Realities of Litigation: Setting the Record Straight" 71 Iowa L. Rev. 226
[67] Defamation Act 1996, s.3
[68] Post (n.46) p.706

This is largely a result of the rise in prominence of constitutional notions of free speech which dominate the discussion in section 2.4, but equally a tacit recognition by the law that, even within the narrowly defined realm of reputation protected by defamation, old ideas of honour have little place. *New York Times v. Sullivan* is the obvious example of how the US has rejected this form; but each of the common law jurisdiction have their own variations on the rejection of 'power' as having a protected position under defamation[69].

2.3.3 Reputation as Dignity

The idea of reputation as dignity is the most convincing and compelling of Post's three concepts. Post begins with a quotation from Justice Stewart in the US Supreme Court case at *Rosenblatt v Baer*[70] where he describes the protection of reputation in terms of "the essential dignity and worth of every human being". This sets up the paradox of how reputation, which is in essence a public and social construction, is essential to the private and personal dignity of an individual[71]. Post then sets about constructing "an implicit theory of the relationship between the private and public aspects of the self", which he deems essential to unravel the paradox[72]. This theory is firmly rooted in sociological, anthropological and psychological views of how society operates and interacts with the individual, utilising the work of George Mead, Charles Carley and Erving Guttman[73].

Wishing to avoid recounting the theory in exhaustive detail, the essential argument is as follows[74]. A person has a personality because they belong to a community; their place in this community is established by a process of "socialisation". Socialisation allows an individual to understand the rules of interaction and the rules of deference and demeanour, how one acts and how others react. The price of this process is that each individual is reliant upon the others in a community to complete the image of him. This concept links the idea of dignity to the realm of the law. The dignity of each person is reliant upon the following of rules, what Post calls the "rules of civility"[75]. Defamation law is the process by which these rules of civility are enforced among society. When dignity is breached by the publication of a defamatory

[69] Milo (n.1) p.126
[70] *Rosenblatt v. Baer ,* 383 U.S. 75 (1966)
[71] Post (n.46) p. 708
[72] ibid
[73] Human dignity is a growing concept in human rights law theory more generally.
[74] ibid
[75] Ibid p.710

statement the audience or society will have to decide upon who is correct by verifying whether it's true or not – a choice between interpretations. "The dignity that defamation law protects, is thus the respect (and self-respect) that arises from full membership in society"[76].

Thus defamation serves a dual purpose – to protect dignity and to enforce the rules of civility, it is both a public and private good. The public good of enforcement of civility rules is important in and of itself, not simply as a means to protect dignity. This was demonstrated by the old common law rule of presumption of damages – now since modified by Section 1 of the Defamation Act 2013. This was the irrefutable presumption that if a defamatory statement has been found to be actionable then it is assumed to be the cause of some damage[77]. This could lead to the absurd situation where even if a reputation is inadvertently enhanced, within a section of a given community, damages would still have been awarded[78].

Post contends than rather than a perversion of defamation law or the legal system this is rather a mechanism for enforcing the norms of society or what he terms the rules of civility[79]. Indeed this idea is one of the chief distinctions between the concepts of reputation as dignity and reputation as property. If reputation was solely concerned with property and pecuniary damage then the doctrine of presumed damage would have no place. Equally, the notion of vindication inherent in remedies based upon the honour concept is relevant also to dignity. Having been reduced in the esteem of this community, the plaintiff uses the tort of defamation to achieve a public and official vindication that will restore his reputation, i.e. his standing in the eyes of his contemporaries, and thus repair the damage to his dignity.

2.3.4 Other Conceptions

As mentioned, this theory of Robert Post's concerning the three conceptions of reputation has been widely influential and provides a very useful starting point to analyse the purpose of the law of defamation. However there are a number of critiques that can be made of Post's work and also additional theories that build upon it.

The first problem is with the idea of reputation as property. There is a real difficulty accepting that the proprietary aspect is an essential part of reputation rather than merely a

[76] Ibid p.711
[77] Mitchell (n.27.) p.53
[78] Milo (n.1) p.233
[79] Post (n.46) p.717

consequence of reputational harm. Lawrence McNamara gives a very strong argument in favour of considering property as separate from the honour/dignity half of the dichotomy[80]. As mentioned above, the 19th century political and philosophical tide may have influenced the way we saw the concepts of personal liberty, individualism and commerce[81]. Yet this view of reputation does not stand up to analysis. In the first instance it is quite clear that reputation is not, despite the uttering of Elizabethan playwrights' or legal commentators, of value in the same way as tangible property. McNamara points out that reputation has a pecuniary value because of its consequences rather than any inherent value. As a good reputation enhances commercial and social opportunities so damage to it will reduce these, but it's the potential provided by the reputation that contains value rather than the reputation itself – you cannot for instance very easily sell or make a gift of your reputation. "The Courts have developed and interpreted the law in a way that treats reputation *as if it were* property [but] the conception of reputation as property fundamentally to explain the native of reputation because it does not reveal anything about it"[82]. This argument is compelling, particularly in the light of McNamara's comprehensive examination of the honour/dignity rationale behind reputation in the law of defamation, which will inform this chapter's later discussion.

Additionally, it could be argued that the property conception is perpetuated by the reward of some monetary damages in all successful libel and slander suits regardless of the extent or nature of the damage. Intangible concepts such as mental anguish and emotional distress have been absorbed into this area at the law and given arbitrary monetary value. This may be due to defamation being a tort and thus the courts feeling compelled to follow the tortious line of awarding damages. Either way, the persistent measure of reputational harm in pecuniary terms perpetuates the conceptual link between reputation and property despite there being no consistent or compelling reason to do so. Post himself envisaged this conceptual inconsistency, arguing that the idea of defamation as a unitary concept was a fiction:

"By acknowledging the differences between reputation as property and reputation as dignity, defamation law could begin the task of devising district doctrinal structures appropriate to each form of reputation".[83]

[80] McNamara (n.2) p.41
[81] ibid
[82] Ibid p.42
[83] Post (n.46)

Another issue with Post's analysis concerns the framing of the honour concept. The idea that a particular position or status holds a higher standard or form of reputation is incompatible with modern democratic and equality principles. The modern law has, in response, all but eliminated this hierarchical aspect, which is a hangover from deference society and is increasing irrelevant today. *NYT v. Sullivan*[84] was cited previously of an example of how criticism of power is now encouraged rather than frowned upon. In other common law jurisdictions this trend can also be seen. In Australia and New Zealand the two cases involving former New Zealand Prime Minister David Lange have established that constitutional principles of free speech will overrule considerations of reputation when matters of politics come into play[85].

Even in England, a country and jurisdiction that still pays lip service to the ideas of deference, social status and aristocracy the legal realities have long since left behind these anachronistic considerations. Since *Derbyshire County Council v. Times*[86] in 1993 public authorities have been prohibited from suing for defamation. However, there is still a conception of honour that has a place in the modern law of defamation. This is a much more egalitarian incarnation of the notion of honour. McNamara gives an overview of a number of other anthropological studies which demonstrate that the concept of honour in society need not be pegged to notions of status but is common among the ordinary common people of society[87]. These studies range across societies from the Mediterranean to the American South and could presumably be applicable to all jurisdictions. This is a sense of honour that like dignity is born out of self-worth and self-esteem delivered through recognition of society. This is a sense of honour available equally to all people but earned rather than bestowed. It was virtuous behaviour that led to a person being considered honourable: "honesty, loyalty and the avoidance of moral turpitude in general"[88].

This concept of honour by virtue means that like the honour of the aristocracy one could hold a position of honour but would have to meet that honourable standard through behaviour,

[84] *Sullivan* (n.8)
[85] In Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, in New Zealand: *Lange v Atkinson* [2000] 3 NZLR 385
[86] *Derbyshire County Council v. Times Newspapers Ltd*. [1993] A.C. 534
[87] McNamara (n.2) p.44
[88] Pitt-Rivers quoted ibid p.49

judged by one's cohorts rather than simply demand it by dint of occupying the role[89]. This continuing role of honour in modern society is much more convincing than the version highlighted by Post. Post is undoubtedly correct that this conception was historically very prominent and had an enormous influence upon the evolution of the tort of defamation, but the modern emphasis upon truth and accountability particularly regarding offices of power mean it is difficult to see its place in the modern law.

The modern conception of honour is similar to the concept of dignity especially in its invocation of the idea of self-worth in the reputational arena at least, being contingent upon the projected or outward image being accepted and acknowledged by the wider community or society. In fact, it would be not unwise to group them together for the purposes of distinguishing them from the proprietary values that have become intertwined with the concept of reputation. Furthermore, it may be prudent to view honour in the modern conception as a subsidiary or outgrowth of a broader concept of dignity. McNamara groups the two together when he exemplifies the moral taxonomies that underpin reputation's interaction with social and personal judgement[90]. (These ideas with will be examined more closely below).

The concept of dignity that underpins Post's theory is built upon the position of human dignity encapsulated by an individual's self-worth being reliant upon the wider community accepting the positive projection of that self. It relies on both a personal and social agreement on the terms of the person's value. The acceptance of the individual as a full member of the society according to the moral values shared, protecting simultaneously the dignity of the person and the rules of civility important to the society. Both the concept of dignity and the updated concept of honour interact with this framework in the same fashion. Honour as understood as an exaltation of the individual based on virtuous qualities or actions that can be diminished by a defamatory degradation of that reputation, is but an extension of the broader acceptance of individual members of society for not transgressing similar values which equally can be disrupted through statements which diminish reputation. Honour subsequently can be

[89] As will be explored in subsequent sections there are limits for those who have tarnished their reputations in public, this extends to those who have "sold" their privacy only to claim it once more in a different context. A good example might be *Grobbelaar v News Group Newspapers Ltd. Reference* [2002] UKHL 40, where although the Liverpool goalkeeper technically won his libel action, his reputation was already so tarnished that the court awarded the minimum damages possible.

[90] Ibid p.89

viewed as an extension or manifestation of the broader dignity concept that is the bedrock for a social as well as legal understanding of how reputation functions and why it is important.

Thus, it can be accepted as a broad contention that defamation law protects reputation as an aspect of human dignity. However, human dignity is a larger concept than merely one's reputation: there are numerous transgressions against a person that encompass harm to dignity, at least in part. Racist speech, torture, denial of choices about life and death, verbal or physical abuse are but a few of a wide spectrum of actions that can have a detrimental effect on dignity yet are not within the remit of defamation law nor are part of the reputational aspect of dignity. As has been pointed out by Eric Barendt,

"We should not lose sight of the point that libel law protects reputation, rather than the underlying value of human dignity. A right to human dignity, or to an aspect of self-esteem, is far too vague and amorphous to provide a basis for a legal cause of action."[91]

The question then arises as to what defines this particular sectional compartment of the broad value or norm of human dignity[92]. The essence of this question is the distillation of what makes a reputation. At surface level the idea of reputation is the view of projection related to (though not necessarily honestly reflecting) a person's character, but equally important to the projection , as pointed out by the legal scholars, psychologists and sociologists above, is the reception of that image by the audience i.e. the wider community. The reaction of society inherently and necessarily involves a judgement upon the person through their reputation or image and in the case of a defamatory statement a judgement upon how the alleged action affects the audience's perception of that character. We saw how the law has attempted to define these judgements in the realm of defamation through the three tests, "lower in estimation", "shun and avoid" and "ridicule". The final question that penetrates to the very essence of

[91] Barendt (n.6)

[92] There is a lively ongoing debate about the role of human dignity in human rights theory and discourse. For example Christopher McCrudden examines the role of dignity in judicial reasoning, surmising "that the use of 'dignity ' , beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions…" McCrudden, C. "Human Dignity and Judicial Interpretation of Human Rights", 19 Eur. J. Int'l L. 655, (2008) There have been numerous other contributions, including right-specific analyses (Feldman, David "Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty" (1994) 47 Current Legal Problems 41). For the purposes of this thesis I take the view espoused by McCrudden that a broad definition of dignity applied to privacy and reputation (and even speech) is not overly helpful, but rather an examination of what those rights mean can employ context specific explorations of dignity to enhance their understanding.

defamation law and reputation is on what basis or on what pretext those decision or judgements are based. By for the most convincing answer posited is along the lines of what McNamara has termed "moral taxonomies"[93].

2.3.4 Moral Taxonomy

A moral taxonomy is essentially a set of criteria used to make moral judgements. McNamara's purpose was to build upon the work of Post by going deeper into the roots of why and how moral decisions affected the law and its relationship with reputation as a social construct. Whereas Post's self-imposed mandate was to observe and identify the law's treatment of and reaction to reputational judgements, McNamara wishes to understand why those reputational judgements take place and through rigorous and comprehensive analysis finds this to be placed in the position of moral judgements. Central to this concept of moral judgement and the construction (or deconstruction) of moral taxonomies is the idea of community[94].

Community at the initial stage can be understood in the conventional sense and in the everyday usage i.e. a collection of people bound by shared or common values and beliefs. In the context of judgements a community will be influenced by what it considers to be its shared moral values but equally the moral values chosen will have an impact upon the makeup of that community. As such the makeup can be difficult to identify or define specifically in both a theoretical and practical context. However the important point to draw at this stage is that "...community is a moral construct. A community is a group of people that see themselves united by the values that they consider they share"[95]. This idea is consistent with Post's idea of dignity being drawn from community judgement.

In the case of defamation, an imputation that an individual has digressed from the acceptable community standard, or morality, will lead to a reduction of the perception of his character i.e. his reputation[96]. Ultimately, the consequences will be that either the allegation is

[93] McNamara (n.2) p.9
[94] Ibid p.24
[95] Ibid p.26
[96] One could argue that being labelled as a rape victim (e.g. *Youssoupoff*) shouldn't affect reputation, dignity or honour. However, this is McNamara's (and my) point that there is an inconsistency in defamation law rationales (caused by varied historical developments) but that a descriptive rather than normative analysis cannot ignore them.

proved true and the reputational reduction is justified, or it will not be shown to be true and the community mechanism of the court will vindicate the plaintiff restoring, in theory, his reputation. But at the initial stage of judging whether a statement is (capable of being) defamatory, thus detrimental to reputation, one must essentially ask if the alleged action that is the basis of the imputation is against the moral code or shared values of the community.

McNamara points out that there are a number of real problems with the idea of community[97]. The first and most obvious is that of the physical boundaries or construction of a "community". Is there only a single community within a society or are there numerous sub-communities? The question may seem absurd to the casual observer but different legal jurisdictions take different approaches[98]. This question runs parallel to the liberal and communitarian critiques of the notions of community.

The classic liberal position espoused by Mill emphasises the freedom of the individual[99]. In the context of this discussion about moral judgement, the liberal attitude is that the individual should not be subjected to a moral judgement by a community based upon their beliefs if he does not share the same values. Short of transgressing upon another's essential right the individual should be unencumbered by society and left free of moral evaluation. The communitarian position is of course the opposite; that a community has an overarching set of values that define it and keep it in order – not dissimilar to Post's rules of civility.

The communitarian view, although not necessarily a unified position, is broadly weighted toward a common standard of morality which in the context of defamation and understandings of reputation would result in a tendency toward a unitary or monolithic standard by which moral standards would be judged and the diminishing of reputations would be measured[100]. McNamara points out that the distinction of these positions and the gap between them is of practical legal significance when it comes to a number of instances such as homosexual acts or abortion where moral consensus is diffuse and divided. The view taken by the law in terms of liberal vs. communitarian will have real consequences for the outcome of

[97] Ibid p.32
[98] As explained below the USA takes a different approach to the England or Australia.
[99] Mill, John Stuart *"On Liberty"*
[100] McNamara (n.2) p.27

legal contests[101]. McNamara attempts to find common ground between the two positions[102]. But of most significance for our subsequent analysis as to what degree reputation is actually protected by the law of defamation is the fact that the law certainly has a conception of community as a moral gauge for the judgement of whether a given action has the consequence of leading to a reputational diminution of the plaintiff; or in other words is defamatory.

If we can accept that this conception of reputation is, in theory, the foundation for defamation, the philosophical and sociological underpinning of the law – and in the absence of any consistently articulated alternative, then we must – the next step is to test the practice of the law against the theoretical landscape which as we have seen is summarily, if superficially, alluded to in jurisprudence. There are a number of convincing and compelling criticisms of the way that the law of defamation in practice interacts with this established conception of reputation. Through distortion or misapplication there are areas of the law that seem to be concerned with interests that are not essentially relatable to the singular concern of protecting reputation. This is done despite a lack of any attempt from the courts to articulate an alternative foundation for defamation that would justify an alternative course or application of the law.

2.4 Critiques of the Law

Thomas Gibbons, in one of the first and most important English explanations of the nature and purpose of the common law of defamation, articulates a number of the criticisms of the application of the law[103]. Gibbons argues essentially that the law serves not to protect real reputations but rather to protect the projection of whatever reputation an individual can put into the public sphere be it right or wrong, deserved or not[104].

Like the related area of privacy, the purpose of defamation law is to control the level and type of information about oneself that appears in the public realm. The control of this information is a means to asserting autonomy[105]. Relating back to market concepts of

[101] Wallach, John R. "Liberals, Communitarians, and the Tasks of Political Theory". (1987). Political Theory 15 (4):581-611
[102] McNamara (n.2) p.29
[103] Gibbons (n.45) p. 587
[104] Ibid p.588
[105] Ibid p.589

reputation one can build up a good reputation not simply by earning it through virtuous acts and non-transgression of community acts but also by clever or, in some cases, manipulative management of the information that does come to light. Reputation is, as such, not a fixed attribute as perhaps arguably character would be, but is rather a flexible concept based upon the reaction of an audience or, in the terms used thus far, the community[106].

The power and resources available to an individual will naturally have a significant impact upon how much the information relevant to their projected reputation can be controlled whether by enhancing the positive or diminishing the negative. Gibbons demonstrates the validity of his argument through two examples. First is the issue surrounding actual character versus projected reputation[107]. The common law does not allow the actual character of a plaintiff to be introduced as evidence that a statement is not defamatory. This rule, established in the case of *Scott v. Sampson* 1882[108], has been criticised, not least by the Neill Committee on defamation law reform[109]. The rule essentially says that the law is not interested in protecting real reputation as an accurate reflection of character, nor is it concerned with the deserving nature or not of the plaintiff, rather it is interested with the protection of the projected or managed reputation unless the defendant can offer compelling evidence to prove the veracity of the specific allegation made in the defamatory statements.

Secondly, the law takes a negative approach to this issue[110]. The actionability relating to a defamatory statement is triggered by the diminishing of a reputation currently held whether deserved or not[111]. This argument taps into the broader issues about the evidentiary and practical operation of this area of the law, but in this instance the assertion that the reputation should be protected regardless of desert and the onus upon the defendant to produce compelling evidence to the contrary shows that the law is interested in protecting the "investment" in a reputation rather than its validity.

[106] Ibid p.592
[107] Ibid p.596
[108] *Scott v Sampson* (1882) 8 QBD 491
[109] Report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation (1991)(the Neill committee)
[110] Gibbons (n.45) p.596
[111] This can be contrasted with privacy where the correction of a false impression can be argued as justification for publishing information – see the arguments in the *Campbell* case.

Gibbons makes a number of other criticisms and then proposes an alternative system for remedy that dispenses with any allusion toward reputation or character and is concerned merely with liability for a defendant who makes unsubstantiated allegations that damage a plaintiff. However, it is the central criticism outlined above that is of most interest.

While it cannot be denied that Gibbons points out a number of flaws in the operation of the law, in this specific regard it can be argued that these are practical flaws which distance the law from its true purpose, but do not undermine the entire justification for the law i.e. the protection of reputation as a moral judgement by society upon the individual. Firstly, as a practical step the abolition of the rule in *Scott v. Sampson,* and also as an adjustment to the presumption of falsity would go a long way to closing the gap between the theory and practice of the law.

However, on an even more fundamental level Gibbons' criticism raises an important misinterpretation surrounding this area of the law. One of the most common axioms in defamation law and perpetually repeated in discourse on the topic of its purpose is that attributed to Veeder: "It is to be observed, that it is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be."[112]

In strictest semantic terms this is true, character is not protected. Character is the actual embodiment of one's moral and ethical behaviour and belief, whereas reputation is the public projection of an image of that. However, it is a mistake to blithely separate the two without recognition that defamation law links them more than separates them. In most cases, to paraphrase T.S. Eliot, between the character and the reputation falls a shadow. It is in that shadow that defamation law most often operates. A defamatory statement will reduce the standing of the individual in the eyes of the community, it will harm his reputation. However, it is well established that truth is an absolute defence to the tort. As such if one can produce evidence to show that the defamatory statement in question, which reduces the plaintiff's reputation, is in fact a fair reflection on actual character then the law lands in their favour. It is often said that the law does not protect an undeserved reputation[113], and while in practice it may fall short, in theory the law should only protect that reputation which accurately reflects the plaintiff's character.

[112] Veeder, Van Vechten. "The History and Theory of the Law of Defamation II" (1904), 4 Colum. L. Rev. 33, 33
[113] See for example t.he desultory damages awarded in the case of *Grobbelaar* (n.89)

2.4.1 The Three Tests

With the boundaries of defamation established with relation to reputation the final thing to do is to test these boundaries with the application of the law. The law has established three tests as to what makes a statement capable of holding a defamatory meaning. Each of these can be examined to see if they reflect accurately the meaning of reputation laid out above; the judgement of a man's character by a community based on the values it shares. Leaving the general or principal test until last, we can examine the two subsidiary tests. It has been argued that these two tests need not be considered accurate reflections upon the true purpose of defamation for different reasons[114].

The case that is most often cited as authority for the 'shun and avoid' test provides a very useful demonstration of the dichotomy that afflicts this test of defamatory publications. That case is *Youssoupoff v MGM Studios*[115]. The circumstances raise a host of fascinating issues regarding the historical development of the law and its interactions with notions of insanity, class and culture; however only a narrow portion of these are immediately relevant to this discussion[116]. The case involved the MGM film *Rasputin the Mad Monk* dealing in a fictionalised manner with actual events during the reign of Tsar Nicholas II. One particular scene showed Rasputin with the character Natasha and the implication was that the "mad monk" went on to rape the young lady. This character was widely known to refer to the real Princess Alexandrovna.

As such the Princess sued on the basis that the imputation she had been raped was defamatory. The Court of Appeal agreed on the basis that such a statement would have the tendency to make other individuals in the community shun and avoid the Princess. As we saw in the historical summary above an imputation of unchastity, particularly in the case of a lady, has long been held to be by definition defamatory. This has a great deal to do with the infusion of Christian ethics in Western society's traditional moral code. So prominent was the danger of having false aspersions cast upon the virtue of a lady in the Victorian mind that specific legislation was passed to protect against such libels in the Slander of Women Act 1891.

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[114] McNamara (n.2) p.107

[115] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 T.L.R. 581

[116] See generally Treiger-Bar-Am, Leslie Kim "Defamation law in a changing society: the case of *Youssoupoff v Metro-Goldwyn Mayer*" 20 Legal Studies 2 (2000) 291

Of course the imputation contained in the Rasputin film was not one of wilful unchastity but rather that the princess had had her virtue forcefully violated in an act of rape. Thus, the crucial question arises over whether a statement needs to carry the imputation of moral misconduct or culpability before it can be defamatory. In other words, as a direct thread from the earlier discussion, can reputation as understood in a social sense be reduced or diminished without the community in question passing a moral judgement upon the claimant as the subject of the imputation? The Court of Appeal in this case clearly answered in the affirmative. Indeed in 1934 the Court found it incredible that there would be any doubt surrounding the issue so obvious was it that an imputation of being raped would lead to a diminution of reputation[117].

However, the defence argued on a technicality that being raped was not the same as being unchaste (which was the legal standard in cases of slander per se) so there was no moral culpability. The court disagreed, stating that a reputation can be diminished in the eyes of the ordinary man even when the circumstances described in the imputation do not effect a moral culpability upon the claimant. This has applications beyond rape. The other classically cited examples would be a contagious disease or insanity[118]. These cases like accusations of having been raped can certainly be envisaged as capable of creating a prejudice in the minds of ordinary people that would lead them to be shunned and avoided[119]. In essence this is the crux of the law and the argument of those who would defend it[120].

However, if we accept that the purpose of defamation is to protect reputation and that reputation is based upon a moral judgement, by a community (with shared values) upon the subject of a potentially defamatory statement, then there is an inconsistency in the competing rationales here. In the case of rape, Prof. Treiger Bar Am divides the commentators into "realists" and "moralists"[121]. The realists being those who recognise that, right or wrong, an imputation of rape will cause a woman to be treated differently and shunned and avoided by sections of society. The moralists argue that to do so in this day and age is abhorrent and the

[117] Ibid p.300
[118] Milmo, P Gatley on Libel and Slander 11th Ed. (London : Sweet & Maxwell, 2008)
[119] The plain meaning of 'shunned' is "persistently avoid, ignore, or reject (someone or something) through antipathy or caution." This appears to be the meaning given in law also, despite suggestions that it might be held to mean 'treated differently' even 'sympathetically' in such cases as rape or disease. This would be supported by the fact that the test is 'shun *and* avoid' as opposed to 'shun *or* avoid'. For fuller discussion see Baker, Roy Defamation Law and Social Attitudes: Ordinary Unreasonable People (Cheltenham, UK : Edward Elgar 2011) p.28-31
[120] Treiger-Bar-Am (n.116) p.309
[121] ibid

standard should be based on whether members of society *should* shun and avoid a woman who has been raped. This argument touches on two points; firstly, the changing attitudes of society on certain issues, and secondly, on whether the standard in defamation is based on what people *do* think or what people *should* think, both of which will be discussed later. The important argument here is regardless of whether people do or don't shun a victim of rape; should a reputation for the purposes of the law of defamation be protected where there is no moral judgement? McNamara makes a compelling case in the negative[122].

In this argument it is observed that in recognising the imputation that a woman has been raped (or indeed has a disease or is insane) the law is pushing the idea of reputation from a community's judgement of moral fault into a judgement of moral worth[123]. The law is assigning an ascriptive moral discredit to imputations of rape, disease or insanity despite the lack of moral culpability of the subject of the statement. McNamara argues that this is an incorrect understanding of the protection of reputation and points out that latterly the courts appear to be recognising this through an importing of the "right thinking members of society" element of the general test (which will be examined in detail shortly) into "shun and avoid"[124]. There are a number of nuances and caveats involved in the arguments over these particular examples but the broad argument for the need for some form of ethical recognition within the definition of reputation is convincing. Otherwise the definition is widened to include every, and any, ascriptive characteristic that may be disliked by another member of the community in absence of any moral or communitarian criteria. This is not what the law intended. However, there is the counter-argument that in these cases there is a real and identifiable section of the community that rightly or wrongly will shun a person on this basis and the law must surely account for these phenomena to protect those on the end of such false imputations. In response it could be argued that the law already holds this consideration through the tort of malicious falsehood. This cause of action is precisely for those statements that are false and cause damage to a person, for example through shunning or avoiding but are not deemed defamatory. Ultimately though, if we accept that shun and avoid requires an ethical recognition to harm reputation, then it becomes indistinguishable from the general or principal test[125].

[122] McNamara (n.2) p.146
[123] ibid
[124] ibid p.148
[125] ibid p.46

The second subsidiary test is ridiculousness. As was noted in the historical overview there is a great deal of overlap within the three recognised tests. The original test was of course "exposing to hatred, contempt or ridicule" which was subsequently widened to "lowering in the eyes of right-thinking people". The new wider general test subsumed the hatred and contempt elements and left ridicule as an isolated and dormant anachronism until it was awoken in the case of *Berkoff v. Burchill*[126]. Even by the standards of defamation this is an odd case. The journalist Julie Burchill for reasons known only to herself made two separate references to the actor and director Stephen Berkoff in articles that had nothing to do with him as an artist and on both occasions made allusions to what she perceived to be his 'hideous ugliness'. Mr Berkoff took exception to this baiting and sued in libel on the basis that the articles exposed him to ridicule that could cause others to shun and avoid him. The Court of Appeal evidently agreed.

There had been an Australian case some years earlier, *Boyd v. Mirror Newspapers*[127], involving a rugby league player described as "fat, slow and predictable". This is in addition to the American case of *Burton v. Crowell*[128], involving a picture of a jockey with lewd imputations, which went a long way to establishing the perimeters of the law. All those cases are based upon the same idea that a publication which serves to expose the claimant to a heavy degree of ridicule can be held actionable under the law of defamation. This line of reasoning and the definition of reputation that contains the notion of ridicule does not stand up to scrutiny at all[129].

There are a number of distinct points that should serve to disqualify the "tendency to expose to ridicule" test as an action for libel or slander. Firstly, as the Court of Appeal made clear in Berkoff it is not simply mockery that is the basis for concluding a diminishing of reputation, but a higher degree of ridicule. The Court distinguished between "ridiculing a man" and "exposing him to ridicule"; the latter appearing to be such ridicule that the subject is lowered in the eyes of society. But as McNamara points out there still needs to be criteria by which this diminishment or lowering is measured[130]. It has been established that in cases of reputation

[126] *Berkoff* (n.40)
[127] *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449
[128] *Burton v Crowell Publishing Co*, 82 F2d 154 (CA 2, NY, 10 Feb 1936)
[129] For a more sensible judicial interpretation of the "ridicule" test see *Norman v Future Publishing* [1998] EWCA Civ 161; [1999] EMLR 325
[130] McNamara (n.2) p.179

that standard is the moral judgement of right thinking members of society. It is difficult to see how ugliness can be viewed as a moral discredit, or being fat and slow in the case of Boyd. The court in these cases appears to be attempting to protect the claimant's dignity and self-worth through a de facto protection of their feelings. But this is not the purpose of defamation law.

Defamation law can protect the dignity and self-image of a person and as a consequence save hurt feelings but only in connection to a reduction of that person's standing in the judgement of their community, a moral judgement. It is in fact the case that mere insult is not actionable under defamation law[131]. In the United States a tort of outrage, or deliberate infliction of emotional distress[132], has been developed and this is a much more natural place for insult and mockery to be placed, should society and the law deem it necessary to allow an action for such things at all[133]. What is clear is that ridicule should only be the basis for a defamatory statement when connected with a moral judgement which actually could cause the lowering of the claimant in the estimation of his community and in this instance the action would fall under the umbrella of the general or principle test.

There are a couple of other important points about ridicule. The actionability on these grounds is dangerous because it interferes with the right to honest comment (previously fair comment) and satire. The defence of fair/honest comment was established for just such occasions to protect the right of people to offer opinion and commentary even where that might cross over into insult and ridicule. The statements: "Stephen Berkoff is ugly", and "Boyd is fat and slow", demonstrate this point. Although they are phrased as assertion of fact, they are actually opinions. This can be swiftly demonstrated by the fact that a factual imputation held to be defamatory can be justified upon the basis that it is true. Truth is an absolute defence.

But how would one offer a justification or truth defence when the imputation is that someone is ugly or someone is slow? These are subjective and relative judgements otherwise known as opinions. As regards satire, it is an important tool of public dissent. From Jonathan Swift to Chris Morris satirists have long been instrumental in fostering a healthy disrespect for

[131] Robertson (n.18) p.127

[132] English courts recognise the tort of intentional infliction of mental shock through *Wilkinson v Downton* [1897] EWHC 1 (QB), [1897] 2 QB 57. I would argue that there are crucial differences of emphasis in these torts. In Wilkinson there was no insulting behaviour – rather it was a practical joke gone horribly wrong.

[133] Smolla, Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell, 20 Ariz. St. L.J. 423 (1988)

power and authority. Without being sucked into a digression on political expression, it is important to note that this form of speech is based upon mockery and ridicule, occasionally to a savage degree. It works because it uses non-factual imputations to assert a wider truth and often the best satire is that which sails closest to the wind. To pull ridicule into the orbit of defamation is dangerous but more importantly in the context of this chapter doesn't stand up to scrutiny[134].

So to the final test, the general or principal test. Defined as "lowering the claimant in the eyes of right-thinking people generally"[135]. There are a number of well-rehearsed issues arising from this test which the courts and scholars have attempted to resolve. A number of these have a direct impact on how the law interacts with notion of reputation.

The first preliminary issue relates to how the words are judged in terms of their meaning. One does not have to be an expert in semantics to recognise that a single word or set of words can have vastly different meanings depending on the speaker, the listener and the context. The courts recognise this and try to accommodate or devise the most appropriate application, however this is an inherently complex process and the courts have had varying degrees of success in what is perhaps an insurmountable task. As noted above, the court has essentially two processes regarding the meaning of a statement.

Firstly, the judge asks whether the statement is capable of holding a defamatory meaning and then the judge (or in what is now a tiny minority of cases, the jury) decides whether it did in this instance based upon the facts at hand. For our purposes, of course, what is important is whether the words are capable of bearing a defamatory meaning and judges are usually loath to rule out a meaning unless it is outside the possibility of attributable interpretations. As is consistent with the adversarial nature of court proceedings, the claimant will attempt to infer the most damaging defamatory meaning from the words and the defendant will argue the most innocuous form is correct. The moral judgement inherent in deciding upon the defamatory nature of the words will be looked at below but the capability of bearing such a meaning is the first concern of the court.

[134] It is worth noting here that Article 10 of the ECHR protects the right to shock, disturb and disgust in many cases *Handyside v United Kingdom* (5493/72) [1976] ECHR 5

[135] *Lewis v Daily Telegraph Ltd* [1964] AC 234

The general rule is that the words will be deemed to hold the meaning that would be inferred by the "ordinary reader"[136]. Yet this ordinary reader test is loaded with assumptions, also. It is crucial at this juncture to note that the meaning intended by the publisher is largely irrelevant. This is directly related to the law's concern with protecting reputation and is related to the presumption of fault. Defamation is a strict liability tort; that is to say that even if the defendant intended the words in an innocent fashion or one completely different from the defamatory interpretation constructed by the claimant, the court will judge the nature of the statement or imputation from the point of view of those receiving the communication. This course of action is directly related back to the theory of reputation explored above, that reputation is based upon an external judgement about a person's perceived character, and it is a value that governs relationships between members of a community. As such, the defendant can argue his interpretation of the words, but only insofar as he can show that interpretation to be the ordinary meaning perceived by right thinking people.

The concept of "ordinary meaning" also has a number of constituent issues. The ordinary meaning will be that naturally taken by the ordinary reader. The ordinary reader has been described variously as "the man in the street" or "Joe Public" or famously by Lord Greer in a different context as "the man on the Clapham omnibus"[137]. This ordinary reader will be a relatively worldly and intelligent person capable both of understanding a joke where intended and also of interpreting what is known as "false" innuendo, that meaning which can be drawn from the context by the average person without recourse to specialist or specific knowledge[138].

The chief authority for the configuration of this rule is *Lewis v. Daily Telegraph*[139]. In this case the newspaper reported that a company chaired by Lewis (a socialist MP) was under investigation by the London Fraud Squad. Ultimately Mr Lewis and the company were deemed innocent and sued the Daily Telegraph claiming that the story implied that they were indeed guilty. The House of Lords disagreed and stated that the ordinary person was "not avid for scandal" and would only infer that the company was under investigation, not guilty.

Additionally, the law recognises that in certain cases if the audience is in possession of specialist knowledge then they can draw a defamatory meaning from an otherwise innocent

[136] Ibid para.107
[137] *Hall v. Brooklands Auto-Racing Club* (1933) 1 KB 205.
[138] Price, Duodu, Cain, (n.15) p.7
[139] *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234

seeming statement. This is known as "legal or true" innuendo. An illustrative example of the rule is found in *Cassidy v. Daily Mirror*[140] where the audience would only have drawn the inference that the claimant was immoral, from a photo caption, if they had specific knowledge that she was Mrs Cassidy. There are a number of other technical rules surrounding the meaning of words, such as the "bane and antidote" rule which requires the publication or article to be taken as a whole, but the thrust of these rules is collectively to give protection to reputation by concentrating on the meanings drawn rather than the meaning intended. The courts must settle upon a single meaning, what might be termed the "correct" meaning in the circumstances at hand in the case. This is not to say that the statement cannot be interpreted in other ways, nor that one statement cannot hold several distinct and concurrent imputations, but rather that the court must decide on whether the single meaning can be and is defamatory.

Despite these efforts there is criticism with how this regime actually interfaces with reputation as a legal and social interest. Chief amongst these is the somewhat absurd idea that a single meaning can be drawn when it is generally recognised that ten different people can have ten different reactions to any given statement not to mention the potentially millions of distinct readers in the case of a national newspaper[141]. Lord Diplock criticised the approach of the law on this very basis in *Slim v. Telegraph*[142] saying, "Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey"[143].

Gibbons has pointed out that such an approach flies in the face of prevailing trends in cultural and semiotic studies which show the multi-layered approach individuals take in drawing meaning from a statement[144]. This is particularly prevalent in the case of "true" innuendo, defined above, where certain readers will have the knowledge necessary to infer a given meaning from the text of publication. In the seminal case *Tolley v. Fry*[145], one would

[140] *Cassidy v Daily Mirror* [1929] 2 KB 331
[141] Gibbons (n.45) p. 602
[142] *Slim v. Daily Telegraph Ltd*., [1968] 2 Q.B. 157, [1968] 1 All E.R. 497
[143] Ibid para 171
[144] Gibbons (n.45) p.601
[145] *Tolley v JS Fry & Sons Ltd* [1931] AC 333

have to have known the claimant was an amateur golfer (and the rules of amateur golf) to draw the influence that his presence in an advertisement cast a poor light upon his amateur status.

These variations in meaning are combined with a crucial aspect of the general test, which is the "tendency" to lower in the estimation. "Tendency" is the standard in place of alternatives such as "likely" or "definitively". As such, the law is less interested in the actual effect of the words upon audiences and more disposed toward a hypothetical or theoretical rendering of an audience reaction.

The reasoning for these rules on meaning is practical. Lawyers much prefer certainty, and the time and cost it would take courts to discover the multitude of possible meanings and whether these actually applied in fact would be prohibitive[146]. But this does lead to the situation where an artificial and idealised construct of the ordinary meaning of words interpreted by the judge and jury creates an artificial process to try and protect reputation, which on many occasions can miss this mark[147].

2.4.2 The Right Thinking Person

This idea of the substitution of an ideal over the reality of audience perception links into what is undoubtedly the most important and contentious element of the general or principal test of a defamatory statement; the issue of the "right thinking" person. In the same way that the individuals can take ten different meanings from a set of words, equally they can take ten different judgements on whether those words reduce the subject in their estimation. Yet the law states that when the court decides upon whether a statement will reduce the reputation of an individual it must do so according to the monolithic standard of the "right thinking person". It must be pointed out at this juncture that different jurisdictions have taken different approaches to this problem.

In England and Australia, the law persists with the traditional common law formulation of "right thinking people generally", that is a single standard spread across the millions of people in those countries. This situation is as absurd as it sounds and as such the United States, possibly also in reaction to its ingrained multicultural society, has adopted the more flexible and practical standard; that of the "sizable and respectable" minority. The sizable and

[146] Gibbons (n.45) p.603
[147] ibid

respectable minority standard allows the US Courts to recognise that different sub-communities exist and may hold different values from other sub-sets of people. A good example of this would be statement that an individual worked during a strike. In one community full of the striking workers this would obviously have the effect of reducing that person in the eyes of the individuals within that sub-community because of perceived disloyalty. Simultaneously, in a separate sub-community, and perhaps even in the overarching national community, the imputation would mean the subject was obedient and hard-working.

McNamara points out that although Australia ostensibly retains the 'general standards' approach the Court in *Hepburn v. TCN Channel Nine*[148] effectively adopted a sectional test (akin to a respectable minority test)[149]. The case was concerned with whether the accusation that a doctor performed abortions could be defamatory. Abortion was legal in Australia, which in a democracy is presumably an indication that the majority of people approve, yet the Court held it was capable of being defamatory because a substantial proportion of people considered it immoral. It is arguable that the same avenue is open to the English courts should they choose to interpret the word "generally" in "right-thinking persons generally" not as necessarily the majority but rather as a broad based sectoral support, again similar to the US approach.

However, regardless of whether the law takes a general or sectional approach the issue of what constitutes "right-thinking" in the former and "respectable" in the latter still remains. A major issue is how to deal with what is deemed acceptable or unacceptable in a society whose morals are in a state of flux[150]. The classic example of this is sexual conduct. Due to the prevailing influence of Christian morals there was for a long time, up until quite recently in fact, a presumed general consensus that promiscuous sexual behaviour was immoral and thus an imputation of such behaviour was defamatory without much consideration needed. However, in this day and age attitudes are more relaxed and sex outside of marriage is viewed much differently.

This dilemma is demonstrated in the Australian case of *Abbott and Costello v Random House Australia Pty Ltd*[151]. This case involved an imputation, contained in a political book, that a well-known politician's wife had engaged in promiscuous or pre-marital sex. There were

[148] *Hepburn v TCN Channel Nine* [1984] 1 NSWLR 386
[149] McNamara (n.2)
[150] Tindade p.19
[151] *Abbott and Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1

a number of other defamatory imputations but the court still had to make a decision upon whether at the turn of the 21st century the imputation of unchastity in a woman was capable of being defamatory. The court answered in the affirmative. The presiding judge Justice Higgins attempted to channel his perceived notion of what the "ordinary reasonable reader generally"[152] would think and judged that this mythical person would indeed make a moral judgement upon the claimant and reduce their opinion of her.

Sexual mores have been evolving rapidly over the last sixty years and it is extremely difficult to judge exactly what the general person would judge, partially because no such person exists, different people will take a different view. But besides the obvious advantages of a sectional test in this situation the problem remains relating to the moral judgement inherent in the presumed existence of right thinking people. If one were to hem off a sub-community, or substantial minority that professed to find unchastity abhorrent and detrimental to the reputation of those accused of it, the law and the courts would still have to essentially judge whether that minority could be considered "right-thinking" or "respectable" in light of their moral code. In cases of promiscuity the waters are murky enough and there is no pressing public need to adhere to a certain way of thinking so the courts can stick with the status quo. But there are other instances that pointedly demonstrate the importance of what the law considers "right thinking", and what it does not.

The most often cited examples of this phenomenon are the informant cases. Perhaps the most famous is *Byrne v. Deane*[153] where the defendants were golf club owners who had been reported to the police for illegal gambling. They subsequently posted a note in the club house identifying the claimant Byrne as the informer. Byrne sued but the court famously stated that informing, or cooperating with the police, was the action of a law abiding citizen and as such could not be defamatory. This scenario was repeated in the US in *Connelly v. McKay*[154] where a truck stop operator was accused of informing on truckers flouting the regulations. Again the New York Supreme Court ruled that involvement in the reporting of crime and helping enforce the rule of law could not be defamatory. In both these cases it was clear that among the relevant communities, the golf club members and the truckers, the imputation that the claimant had betrayed them by reporting their infractions would lower him in their estimation. Yet the courts

[152] Ibid para 104
[153] *Byrne v Deane* [1937] 1 KB 818
[154] *Connelly v. McKay*, 176 Misc. 685, 28 N.Y.S.2d 327, 329-30

have bypassed the actual community reaction to substitute what they believe it should have been.

Lidsky is strongly critical of this approach on a number of levels[155]. Firstly, she quotes Prof. Richard Hier's phrase calling the idea of a "substantial and respectable minority" a "crypto-normative" expression, being as it is an ostensibly descriptive notion, yet loaded with normative prejudice[156]. "Substantial and respectable" purports to describe an existing set of people in a given instance, yet in reality it is but the judge's assumption about what that community is and believes and presumes to inherently understand what "respectability encompasses". However, even if we accept that such are the vagaries of our legal system(s) that the judge must do his best to locate a position reasonably proximate to what might be deemed respectable, this leaves the problem highlighted by the informant examples above; the reality of reputational judgement and the ideal of "respectable" or "right-thinking" are not always congruent. As both Lidsky and Post point out, the courts are in essence making public policy decisions in lieu of actual judgments related to the loss of reputation within a community[157].

In the informant cases it was considered more important to reiterate the need for reporting of crime and the cooperation with law enforcement than it was to deal with the actual reputational loss that had occurred upon a plaintiff. This is done through the attaching of the "right-thinking" or "reasonable" caveat to judgments about the reaction of members of a community. The courts and the law are essentially saying that in most circumstances the reaction of the community will be the criterion upon which judgements of defamatoriness are made but in some instances a community's moral outlook or world view is so abhorrent that it cannot be sanctioned and will be jettisoned as "unreasonable" or "wrong thinking".

This is why Lidsky uses the phrase "the myth of community"; the myth that it is the views of the community upon which these difficult cases are judged rather than an idealised version of what we wish that to be. However, this is not necessarily to say that this approach is incorrect. As we have seen above the concept of reputation is about collective perception, and moral judgment of a character, but equally it is about enforcing the rules of civility. This myth

[155] Lidsky, LB 'Defamation, Reputation and the Myth of Community' 71 Washington Law Review 1 (1996)
[156] Ibid p.19
[157] Lidsky, ibid p.24 and Post (n.46) p.738

of community concept can be linked back to Post's idea that defamation, as well as to restore the dignity lost by a claimant is to ensure that society is able to maintain a standard of behaviour or moral code. The ability of the law and the courts to keep that within a boundary of reasonableness is important to that process.

However, as mentioned there are difficulties when the shape of that concept of reasonableness or right thinking is variable or in a state of flux, because inherently this will be a subjective moral judgement. The informant cases dealt with a comparatively straightforward concept of "right thinking", commonly accepted as it is across the general populace, and a matter of ingrained public policy, that breaking the law is wrong. Conversely, two sets of cases strongly highlight the difficulty of moral variability; the race cases, and homosexuality cases.

The changing nature of what is acceptable in society and consequently what can be judged acceptable criteria for defamatoriness is the treatment of imputations that somebody is black. In cases emanating from the US, where race is particularly an issue, a case from 1957 *Bowen v. Independent Publishing Co*.[158] found that a mistaken publication imputing a white person was black was found to be capable of being defamatory. The Supreme Court of South Carolina held that it was clear that a significant portion of the population believed a black person to be morally inferior to whites and thus the accusation of being black would lower the claimant in the eyes of that community and reduce their reputation.

The subsequent civil rights movement and a significant shift in attitudes toward race in America took place in the succeeding years and in 1989 a similar case came in front of the Georgia Court of Appeals in *Thomason v Times Journal Inc*.[159] An erroneous obituary for a still living person also listed a funeral home that predominantly served the black community, in this instance the court held that false imputations based on colour were not capable of being defamatory. The law had changed. Undoubtedly there were still a significant amount of people who held racist views and would consider colour grounds for lowering their estimation of a person (including the claimant in the case evidently), yet now the court held the position that this was no longer a view what could be held by a "reasonable" person. The intervening years had changed the broader society so that the law and public policy could no longer countenance the holding of such views.

[158] *Bowen v. Independent Publishing Co*., 230 S.C. 509, 96 S.E.2d 564 (1957)
[159] *Thomason v. Times-Journal, Inc*., 190 Ga. App. 601, 379 S.E.2d 551 (1989)

However, as Lidsky points out the law is willing to accept numerous fringe opinions as still within the realms of reasonableness for the purpose of finding defamatoriness, such as political opinion, and there is a difficulty in deciding when an opinion becomes unreasonable, such is the subjectivity and inconsistency of the definition. The homosexuality cases are a primary example[160]. They offer a helpful contrast to the race cases. Racism has become such a pariah among mainstream society that there really is not much debate, whereas homophobia is more prevalent and certainly more accepted.

The bedrock authority for the legal holding that an accusation of homosexuality is defamatory is *Kerr v. Kennedy*[161] involving an imputation of lesbianism. Things have moved on in terms of social acceptability since 1942 but in both the US[162] and Australia[163] relatively recent cases have still held that saying someone is a homosexual can be defamatory. This is despite equality legislation in these countries specifically designed to root out such prejudice. No recent case has come to the fore in England to evaluate the position here, possibly because no claimant believes that they could succeed on such grounds; but broadly speaking it appears the courts have not pushed this public policy position by deeming it (imputations of homosexuality as defamatory) outside the scope of reasonableness and right thinking.

It is obvious that this reasonable/right thinking part of the law still holds problems, chiefly the contradictory way the law operates under it. While we have seen above that reputation is fundamentally based upon a moral judgement by a community upon an individual, and thus by definition contains an ethical recognition strand, we can see that in certain instances the courts will not accept that ethical or moral judgement. The reasonableness qualification has practical social and public policy uses, but leads to the situation where in actual terms a reputation has been lost or damaged among a community and the claimant has no legal recourse. It echoes the idea, voiced by Trieger Bar Am around rape cases, as: “moralists” vs. “realists”.

By way of a solution to this dilemma, Lidsky offers a stark choice between accepting real communities and their moral judgements even if that falls outside what is socially

[160] Fogle, R “Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech” 3 Law & Sexuality 165
[161] *Kerr v. Kennedy [1942]* 1 K.B. 409
[162] *Naseri v. Missouri Valley College*, 860 SW2d 303 (Mo)
[163] *Horner v Goulburn City Council* (unreported, SC(NSW), No. 21287/97

acceptable, or persist with the 'myth of community', and accept that the societal aspect of defamation, used to enforce broader moral norms or rules of civility, will result in the occasional distortion of the 'true' reputational aspect of the law[164].

However, McNamara offers a valiant attempt to fuse the two. This can happen through the retention of the right thinking person standard but replacing the inherent values that underlie this notion[165]. The values that currently form this basis are traditional communitarian values that have in the past allowed adverse moral judgements on things like unchastity, homosexuality and race. These values should be replaced by a broadly inclusive liberal set of norms that would move away from ascriptive criteria and would embrace social change. The prerogative for the law to change from a liberal position if necessary in a given instance would be retained though. In this fashion the necessary ethical recognition element of the tort is retained while allowing for a more inclusive legal position.

2.5 Conclusion

The law of defamation has evolved a great deal since its beginnings. The original purpose of maintenance of public order by allowing a legal avenue for disputes over honour and dignity, and by preventing criticism of "honourable" men of the realm was ostensibly usurped in the modern common law by a desire first and foremost to protect reputation. But, as we have seen through the collective analysis of the fundamental social nature of the tort, there is still a broader corollary social purpose that underlies this protection of reputation. The emphasis has shifted over time from a need to protect reputations in order to maintain public order, to the need to enforce rules of civility in order to have reputations and the attached dignity protected. The relationship remains however; defamation is a social tort. Our reputation is important because it is a measure of our dignity, this is why intangible damages are rewarded for its loss, however the dignity in reputation is reliant upon others outside: the community. The answer to the original and central question is this: while defamation law exists to protect reputation, it is the *definition* of reputation and its role in the cohesion of a wider society that holds the real answers.

[164] Lidsky (n.155) p.47
[165] McNamara (n2) p.218

Chapter 3. The Purpose of Privacy

3.1 Introduction

Whether linked by chance or some form of causation, the rapid technological evolution of the information age and an increasing public obsession with the lives of the rich and famous have coincided to create a situation where society and the law have struggled somewhat to deal with the twin pressures of the right to free expression and the right to private and family life. Although arising from the traditional print press, the case of Naomi Campbell[166] brought these issues into sharp focus, forcing the courts in this country to consider the adequacy of traditional legal remedies in the face of increasing calls for protection of privacy and the obligation to enforce ECHR rights directly through the Human Rights Act. The case has become a milestone in the evolution of the law in England and Wales relating to the press, privacy and publicity.

At around the same time that Campbell was bringing her objection to being photographed leaving a Narcotics Anonymous meeting to the High Court in London, Princess Caroline of Monaco was making similar arguments in front of the European Court of Human Rights in Strasbourg regarding photos taken of her while in public but performing ostensibly private actions such as eating in a restaurant and walking with her children[167]. Both famous women were (at least partially) successful and the cases seemed to overturn a presumption on behalf of the press that as long as what they published was true, and as long as there was sufficient interest from the public that would lead them to pay for these stories, then the publishers were well within their rights as protected under the doctrine of a free press. The judicial rejection of this journalistic presupposition brought into focus the question of what exactly constituted the right to privacy and how far could it be used to limit what could be legitimately published.

At the conclusion of the *Campbell* case the then Editor of the Mirror Newspaper, Piers Morgan, described the decision thus: "This is a very good day for lying drug-abusing prima donnas who want to have their cake with the media, and the right to then shamelessly guzzle it with their Cristal champagne"[168]. It is quite clear from this quotation that Morgan and many

[166] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22
[167] *Von Hannover v Germany* [2004] ECHR 294
[168] Naomi Campbell wins privacy case' http://news.bbc.co.uk/1/hi/uk/3689049.stm

of his cohorts in the press considered that this was not a violation of the model's privacy, the chief argument being that fame reduces the sphere of privacy a person can expect and a level of unwanted publicity is the price one pays for celebrity. However, even the most ardent champion of free speech rights would not deny that both in the abstract and on a practical level there exists a right or interest in protecting privacy. Taking the baldest examples such as the wide dissemination or publication of a person's bank details, medical records, or intimate correspondence, the man in the street would instantly recognise these as violations of privacy. On the acceptance of this starting point at least three clear questions emerge. The first is: what is the nature of this right to privacy? Secondly: how far does this right extend? And finally: what is the law's role in protecting it?

These are the questions this chapter hopes to explore. The three are distinct but also inextricably intertwined. It is clear that by giving domestic effect to the ECHR through the Human Rights Act that the courts in this country are obliged to give effect to the Article 8 right to private and family life. However, as we can see in the jurisprudence of the European Court this is tempered by the need to balance it against competing rights, the most obvious and pertinent being the Article 10 right to freedom of expression, particularly regarding a free press. Crucially, in order to correctly balance these rights, and attempt to locate the elusive "public interest" fault line that runs between the two, it is imperative that we have a comprehensive and coherent understanding of the nature of the competing rights or interests.

Historically, volumes have been committed to the nature and constitution of the right to free speech and a free press[169], the literature pertaining to the understanding of privacy is comparatively more limited. While there is certainly no consensus on the scope, and application of free speech, it is clear that there is a great deal of understanding of its nature and the debates that surround its merits. The same cannot be said of privacy. The fundamental, underlying principles that give rise to the human interest in retaining privacy are still obscure and somewhat amorphous. The concept of privacy is one that has been approached from innumerable disciplinary standpoints; it is simultaneously a question of sociology, anthropology, psychology, philosophy and quite plainly as we have already seen a legal problem also.

[169] See for example: Barendt (n.1); or Meiklejohn, Alexander *Free Speech and its Relation to Self-Government*;

Despite the growing number of academic papers, books and articles that have been written espousing a theory or theories of privacy and its fundamental nature, there is no agreement and no widely held consensus. It is worth noting that in many of the attempts to either explore or apply the right of privacy the disclaimer that there is no agreed definition is posited prominently. Indeed some commentators conclude that there is no such thing as privacy but rather it is merely a name given out of convenience for a collection of other rights or aspects of those rights[170]. Or even further, that what we deem to be privacy is in fact another quality or interest such as intimacy[171] or dignity[172]. One of the chief difficulties is establishing the perimeters of the discussion and this is something explored in this chapter. Despite these difficulties, if we are to give legal protection to privacy and correctly weigh this interest against others, especially in the balancing of human rights, then it is incumbent upon us to establish a working definition, and this is one of the primary aims of this chapter.

Section 3.2 is a brief overview of the jurisprudence from three jurisdictions. This is designed to give context to the debate over privacy and also frame the chief issues that the courts have to tackle in such cases. The ECHR system is quite clearly very important in influencing the current and future approaches on the courts in this country, and offering contrast to the more traditional British approach to privacy and press freedom. By way of comparison and triangulation with the English and European approaches I have chosen the US system. The reasons are twofold: firstly, the US system holds only the right to free speech as a constitutional right so does not have to balance the right to privacy (which is simply a common law or statutory right in most states) in the same way[173]. The US commitment to free speech offers a contrast with the European approach that is useful in casting light upon the judicial choices in privacy cases. Secondly, the volume of academic work in both the theory and practice of privacy and free speech in the US is the most comprehensive and wide ranging there is.

Section 3.3 attempts to reach an acceptable definition of privacy both in a general sense and then one which can be applied in a legal context. This is done primarily by examining and

[170] Prosser, W 'Privacy', 48 Cal.L.Rev. 383 (1960); or Solove (n.2) 477–560

[171] Thomson, Judith 'The Right to Privacy'. Philosophy and Public Affairs, Vol. 4 , No. 4. (Summer, 1975), pp. 295-314

[172] Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser', 39 N.Y.U.L. REV. 962

[173] It is worth noting here that there is a school of thought that 'privacy' is protected indirectly through the Constitution, but as I argue below, the concept of 'autonomy' is a much better fit for those indirectly protected rights.

critiquing explorations and attempted definitions from all applicable disciplines. In the subsequent concluding chapters we will be able to use the established definition to explore the wider debate about the correct balance between speech and privacy in the public interest.

3.2 Privacy Case Law

The purpose of this section is to briefly record and give an overview of the law in different jurisdictions concerning the balance struck by free speech and privacy. The key jurisdiction will naturally be England and Wales and by extension the ECHR. We will then review the United States as our established chief source of comparison. The primary purpose of this section of the chapter is to establish a kind of legal boundary or framework in which to give the theoretical and academic discussion (in section 3.3) context. The law recorded here gives a practical basis or grounding to the rights of expression and privacy that constitute the bulk of the chapter. The cases discussed and the principles that emerge from them will set the scene or the stage so that the rest of what plays out will have context and reference points that imbue it with practical meaning. The danger is that without an overview of the law and its development the subsequent sections will lack a pragmatic grounding and will float off into a theoretical ether.

3.2.1 Definitional difficulties

As alluded to in the introduction privacy is a subject replete with definitional difficulties. For example, as we will see in section 3.3 there are numerous instances that can be conceivably described as "violations of privacy", but they may not be germane to the essential aim of this chapter. While they are relevant to the broader discussion of theories of privacy, for the immediate purposes of section 3.2 - establishing the nature and evolution of the law - they are not. In terms of the focus of this chapter (and the broader purposes of this thesis), the relevant focus is where there is a clash between what is described as the personal privacy right and the right of free speech in relation to the press. So despite the fact that broader considerations of "privacy" come into play particularly in section 3.3, section 3.2 will deal with only the law as applicable to the clash between privacy and expression.

Of course, an additional difficulty arises in the case of analogous rights such as confidentiality which share many characteristics with privacy and indeed often overlap. This is particularly the case in England where the modern privacy right as applied by the courts as "a misuse of private information" has evolved explicitly out of the older tort of breach of confidentiality. However, this English example also offers an opportunity for distinguishing between what is useful for our purposes and what is not. The traditional right of confidentiality was (or is) akin to a contractual right; that is a right where there is an established explicit relationship of confidence, for example between an employer and employee, or doctor and patient. This traditional notion is representative of a number of other interests related in varying degrees to privacy, which themselves can often be in conflict with freedom of speech or the press, but which are not the focus of our attention here.

Another example would be the publishing of secret government information or documents as in the *Spycatcher* case[174]. These peripheral interests are not relevant for the following reason: our immediate concern in this section is with the weighing or balancing of two directly applicable, conflicting rights, not about contracting or limiting certain aspects of free speech because of a countervailing concern or public interest.

In the ECHR these rights are expressly set out in Article 8, the right to respect for private and family life (etc) and Article 10 the right to free expression. In the English system they are given horizontal effect through Section 3 of the Human Rights Act[175]. In the United States only the right to free speech is a constitutional right through the First Amendment, but privacy is still a common law right which the courts use to attempt to balance against the more heavily weighted constitutional imperative. So for the purposes of this section we will focus, in so far as it is possible, upon the instances where the courts have looked at cases involving a clash of these two rights: privacy and speech.

There is of course one final issue that is relevant and that concerns the issue of reputation as an aspect of privacy. Reputation and its protection through defamation are important aspects of this area of the law, but due to a desire to specifically focus upon privacy - in the sense of what one does but does not wish others to know about - the reputational aspect

[174] *Attorney General v Observer Ltd* [1990] 1 AC 109

[175] For a discussion around this principle see G. Phillipson, 'Clarity postponed: horizontal effect after Campbell' in H. Fenwick , G. Phillipson and R. Masterman (eds), Judicial Reasoning under the UK Human Rights Act (Cambridge: CUP, 2007)

has been deliberately divided into separate chapters in this thesis. The difficulty remains in that the European Court has specifically recognised reputation as an aspect of Article 8 privacy and so it is often the case that the claims before the Court will mix the two issues. This cross pollination has unsurprisingly entered the English jurisdiction, and even in the US where reputation and privacy are seen as separate common law rights there is no escape from the inevitable entanglement of the two sibling aspects of the broad privacy right. As such, for the purposes of clarity and ease this section of the chapter will endeavour as far as possible to focus upon the aspect that pertains to the discovery, revelation or publication of true facts about an individual against his wishes. It is the truth of the information, in very broad terms, that shall be the defining characteristic - this of course will largely draw a line away from reputational or defamatory cases where the key distinguishing characteristic or requirement is the untruth of the information or allegation against the individual.

There is of course a complication created by the existence of "false-light privacy". This when facts that are not true, and yet not defamatory, are published. This principle was raised in the seminal case *Ash v McKennitt* where the court recognised that privacy rights could be present even where the information was false or only partially true. This echoed an American case *Time, Inc v Hill* where the lines were once again blurred by what a mixture of false and true information.

A more straightforward example would be the recent case of Brad Pitt and Angelina Jolie's case against Newsgroup Newspapers[176]. Pitt and Jolie won the action by successfully arguing that false newspaper headlines about the breakup of their marriage were a breach of privacy. Again the information revealed was false, and yet the court recognised a privacy right. This blurring of the lines between defamation and privacy is further complicated by the tort of "malicious falsehood". Malicious falsehood occurs when an untrue statement is published, which harms the claimant, but does not meet the characteristics/threshold of 'defamatory' – i.e. causing the subject to be reduced in standing. This tort is necessary (like false privacy) because not all untrue statements that cause damage are related to one's reputation. The second key difference from defamation being, that malice must be proved by the claimant, where libel/slander have strict liability.

[176] *Brad Pitt and Angelina Jolie v News Group Newspapers*, 22 July 2010

The difficulty presented by these two additional torts is that they blur the lines between truth and falsehood that divide the great majority of privacy and defamation cases. It would be simpler, of course, if there was a clear delineation but that is rarely how the world or the law works. While it is important to bear this point in mind, it should neither distract from the core of this thesis which looks at the vast bulk of cases where privacy concerns the revelation of broadly true information, and defamation false. More importantly it should be noted that the existence of the two 'additional' torts for publication of false information do not impact on the basic argument made above and below, that the 'sociological torts' of privacy and defamation, and the rules of civility with which they interact are about the control of information about one's person, and the role that plays in the wider spheres of autonomy and dignity[177]. Whether the information is mistakenly believed to be true, or maliciously known to be false, the fundamentals inherent in the larger torts of privacy and defamation are consistent.

With this in mind we can turn to the evolution of the law in the European Convention system. This is best examined first given its longer history, greater willingness to embrace privacy as a distinct right and its subsequent role in allowing the current evolution in English law.

3.2.2 ECHR

One of the more curious aspects of this area of the law is the lack of historic cases dealing with publication of private facts especially in light of its enormous prominence and emergence over the past few years. Virtually all of the cases dealing with Article 8 violations vis a vis the press or publication were in relation to defamation[178]. These cases shed some light on the jurisprudential approach of the European Court in balancing Article 8 and Article 10, but do not shed much light on the treatment of private facts or images.

For example, one of the Court's most seminal cases is *Lingens v, Austria*[179]. This case concerned the Austrian libel law under which a publisher had been held criminally liable for a comment piece on a political figure. In finding for the publisher the European Court laid out

[177] It is important to note that autonomy is a crucial part of Art 8 rights, but privacy/defamation are only two parts of a much wider idea of autonomy.
[178] It has been noted in discussion that this was due to the prevalence of criminal sanction for defamation in many European countries – which is an onerous burden of free speech – creating the necessity to bring cases to the ECtHR and a likelihood of winning.
[179] *Lingens* (n.5)

the principle that free expression, particularly in relation to political matters would be protected even at the expense of individual reputation. This principle continued to be expanded and developed through the case law of the Court. It is salient here insofar as it shows the importance the Court has placed on the press role in a democratic society even in light of competing Article 8 considerations, but we must bear in mind that the most crucial factor is that in the libel cases the purported facts are shown to be erroneous to some degree, and yet the Court was demonstrating to a commitment to a Millian idea that free debate may lead to error but must be protected nonetheless.

In the 'private facts' cases which are our concern the Court must look differently at a situation where the publisher knows the information to be true, to contain some level of privacy, but has chosen to publish regardless. *Von Hannover* is obviously the seminal case in this regard and it will be discussed below, however, there are a few prior cases which will demonstrate how the Court's approach has evolved. Two UK cases serve to demonstrate that the Court recognized the potential for clashes between Article 8 and 10 in this regard. In *Winer v UK*[180] the case concerned a publication which contained both defamatory and private material and while the applicant had been able to recover for defamation he claimed he was unable to do so for the privacy violations. Ultimately the old Commission (a pre-reform body for sifting applications to the European Court) rejected the application by giving weight to Article 10 and applying a wide margin of appreciation but not before acknowledging the merits of an Article 8 application in such circumstances and highlighting the need to balance these two oft conflicting rights.

In a similar vein, *Spencer v UK*[181] was rejected by the Commission on the technical grounds that the applicant had failed to exhaust her domestic remedies i.e. breach of confidence but not before concluding that the intrusive articles and photos of Victoria Spencer (Princess Diana's sister in law), were potentially a breach of privacy and would the subject of a positive obligation to protect against their publication.

In French case of *Fressoz and Roire v France*[182] the European Court upheld an application on behalf the editor of *Le Canard Enchaine* who had reproduced the tax reports of

[180] *Winer v. the United Kingdom* 48 DR 154 (1986)
[181] *Spencer v United Kingdom* 25 EHRR CD 105
[182] *Fressoz and Roire v. France* ([GC], no. 29183/95, § 54, ECHR 1999-I),

an executive at Peugeot to show the disparity between his pay rise and that of his workers. A number of factors came into consideration; one being that there was obviously a strong public interest in the Article 10 claim. Equally, the information in the documents was public knowledge; it was rather the reproduction of the actual documents which was a breach of confidentiality but ultimately added credence to the paper's report.

At this juncture it is important to note an issue which has taken on a great deal of relevance in these privacy cases; this relates to the type or medium of information involved in the cases. As will be demonstrated, the Court and its domestic counterparts have a particular concern around the use of photographs in potential invasions of privacy. It appears that it is one thing to describe a scene in a great deal of detail but the visceral, raw and impactful nature of a photograph can be another issue entirely[183]. There can be arguments made about the validity of this idea, given the contradictory idea espoused that while a photograph by its intrusive nature should be considered additional information for the purposes of a privacy claim, it is simultaneously claimed that a picture adds nothing of substance to a news story when the subject of the Article 10 free speech claim. However, the fact remains that the courts have and do make a distinction.

This leads us to another UK case (perhaps it is not surprising the prevalence of UK cases relating to publication given the reputation of the English press). The case of *Peck v UK*[184] dealt not with a newspaper or magazine publishing private information but the local government body of Brentwood Council. Geoffrey Peck had attempted to kill himself by slashing his wrists, an act that was captured on CCTV camera. After he survived Mr Peck found out that images of his attempted suicide were being used as an educational tool to deal with other potential suicides and were broadcast on 'Crime Beat' to a large audience, under the mistaken belief that he might have been involved in a crime. Mr Peck deemed this a violation of his privacy and while the English courts rejected this idea, the European Court agreed with the claimant. Despite the fact that Mr Peck had been in a public place, the images of his action could still be considered private. There was of course no recourse under traditional breach of confidence so the UK had failed to positively protect his privacy, with a resultant violation of Article 13 for the lack of any appropriate claim in a domestic court. As this was decided pre-

[183] Barendt, Eric 'Balancing Freedom of Expression and Privacy: The. Jurisprudence of the Strasbourg Court', 1 J. Media L. 49 (2009)
[184] *Peck V. United. Kingdom* (2003) 36 E.H.R.R. 41

Campbell, the consequence of the case was a clamour for a more extensive privacy law to encompass such situations. This is a point considered below.

And thus we arrive at *von Hannover* (No.1), the case which has changed the way both the European Court and the relevant domestic courts approach the issue of publication of private information[185]. The facts of the case were in essence that Princess Caroline von Hannover the daughter of Prince Rainier and Grace Kelly of Monaco had a number of pictures taken of her while in public but performing, some would argue, private activities. A number of German tabloids ran the pictures including those of her with a male companion and also while walking in the street with her children. The German courts offered limited remedy and failed to distinguish between being in public and performing private activity. The German courts did grant injunctions on some of the photos and the Constitutional Court recognised the need to adequately protect children but the Princess still considered she should be protected from having her image published without her permission at all (as happens in France). The European Court of Human Rights ultimately agreed with the Princess on the fundamental issue of whether her privacy had been adequately protected but this fact neglects to do justice to the range and impact of what the judgment means[186].

As mentioned, within the US system the only right in these cases which is a constitutional right is free speech[187]. So the cases taken there in Federal courts are essentially where a publisher or person feels that the common law or statutory rights of reputation or privacy have infringed upon their right to free speech. The European Court has a double edged variation on this idea in that one appeals based upon the right one feels has been infringed by the state. As such the deliberation in the case will be skewed toward whichever right is under discussion. In practical terms there was already (in cases of reputation or privacy versus expression) a significant degree of de facto weighing of the merits of rights, but it is only with *von Hannover* that the Court explicitly said that the two rights - privacy under Article 8 and speech under Article 10 - would be weighed against each other in the light of the case facts to

[185] It is important to note that the second *von Hannover* case - *von Hannover v Germany (No. 2)* (2012) 55 E.H.R.R. 15 – had a different and somewhat contradictory outcome, giving the Germany courts leeway under the margin of appreciation doctrine to balance the competing rights differently. However, this case does not diminish the significance on the first *von Hannover* case and it is unlikely to prevent its influence on domestic courts applying Art. 8 rights. There is also the third *von Hannover* case

[186] Barendt (n.1) p.243

[187] The issue is more complex than this given the privacy elements read into the 14th Amendment, but for our current purposes the statement above is broadly accurate.

discover which should take precedence in this instance, or what would be termed a 'fair balance'[188]. This idea has particular significance in the English context as it is somewhat contrary to the Anglo-Saxon presumption toward free speech. Under *von Hannover* the two rights are given equal weight regardless of how arbitrary such a calculation seems.

Further principles which emerge from the facts and deliberations in *von Hannover* include the significance and unique nature of photographs in invasion of privacy. As mentioned above, particular weight is given to the idea that having one's image surreptitiously snapped is a particularly egregious invasion of privacy. Additionally, a key factor was the Princess's role, for although she was a royal and a person of some note she had no official function and perhaps more crucially had never actively courted publicity. This point is connected to another which gave weight to the fact that these photos and even any accompanying words conveyed no public discourse information, they were not essential communication for democratic purposes, rather they seemed designed to satisfy a prurient public curiosity.

Finally and perhaps most importantly the court expanded upon and gave credence to this idea of privacy in public places i.e. that even within a public area a person can still retain an expectation of privacy, depending on the activity or circumstances. It seems rather counter intuitive and will be explored in greater detail in section 3.3 but is a very important development in privacy law. The judgment in *von Hannover* has placed the role of the person, the nature of the information, and what it communicates at the centre of the weighing of rights.

The cases subsequent to *von Hannover* have to a large degree reflected these principles. For example in *Editions Plon v France*[189] where the Court held that a permanent injunction on a book about former President François Mitterrand was not proportionate given that the information contained was of legitimate public concern about a public figure.

By contrast in *Biriuk v Lithuania*[190] inadequate protection had been given to a woman whose HIV status and sexual history had been published in a newspaper. The Court was keen to distinguish the applicant, as a private citizen, the information as intensely private being her

[188] Barendt, Eric 'Balancing Freedom of Expression and Privacy: The. Jurisprudence of the Strasbourg Court', 1 J. MEDIA L. 49 (2009) p58
[189] *Editions Plon v France* (2004) ECHR 200
[190] *Biriuk v. Lithuania*, Application No. 23373/03, Judgment of 25 November 2008

medical history, and despite the protestations of the newspaper, of little legitimate public concern or contribution to democratic debate.

A case which created waves in this area of the law is *Reklos v. Greece*[191] which involved a couple suing a non-press photographer for snapping images of their new born baby. One of the controversial aspects is that the photos were not published, merely taken, yet the ECHR ruled in favour of the couple saying that the taking of a photo in these circumstances can be a breach of privacy. It is very difficult to gauge the full influence of the case because of the various circumstances and context including the fact that a child was involved, it was in a hospital, and it was a particularly vulnerable time for the family. But the potential ramifications upon privacy law and freedom of the press should not be understated.

There are a number of other cases in the wake of *von Hannover* that deal with privacy issues and indeed a number of older cornerstone cases that are tangentially relevant to the courts' balancing act such as *Handyside v UK*[192] but what is important is to establish the core principles that have emerged from this quickly developing area of ECHR jurisprudence.

Perhaps the most important recent case to distil these core principles is the *Axel Springer* case[193]. This case involved the publication of a story in the German tabloid *Bild* relating to the cocaine use of a well-known German actor. The German courts found this to be a violation of the actor's privacy, however the European Court disagreed and judged the German court decision to be a violation of the Article 10 rights of the newspaper in question. More important than this was the explicit recitation of a set of criteria to be weighed in balancing privacy and speech. The six elements are:

- Whether there was a contribution to a debate of general interest
- How well known the person was and the subject of the report
- Prior conduct of the person concerned
- Method of obtaining the information and its veracity:

[191] *Reklos and Davourlis v Greece* 1234/05 [2009] ECHR 200 (15 January 2009)
[192] *Handyside* (n.134)
[193] *Axel Springer v Germany*, App No 39954/08

- Content, form, and consequences of the publication
- Severity of the sanction imposed

These elements have been applied relatively consistently by the Court since, however, the weighing of the factors and the outcome reached by the Court are not necessarily as easy to predict.

In the *Lillo-Stenberg* case, the Court found that there had been no violation of Article 8 in a Norwegian court's decision to deny a musician and actor's privacy claim over the events of their wedding[194]. This is despite the wedding being a very personal event, on private property, and the use of telephoto lenses to capture images. Part of the explanation for this decision seems to stem from the Court's 'light touch' approach where it feels the national courts have robustly considered the rival rights claims. But as we will see in the sub-section of this chapter below, it is difficult to imagine a similar finding from an English court based on similar facts.

The impact of this ECHR jurisprudence is of course doubly relevant due to the fact that they will have an impact upon how domestic courts in England and Wales deal with these questions, obliged as they are take European jurisprudence into account. We will see this impact directly.

3.2.3 England & Wales

As *von Hannover* is to the European Convention so *Campbell v. MGN*[195] is to English privacy law. *Campbell* changed the landscape of media and privacy by coming as close as any other time to creating what is essentially a new tort of "misuse of private information". There remains some debate over the full extent of this significance[196], but there can be little doubt that *Campbell* signalled a new direction in English privacy law. Yet the ruling in *Campbell* which we will examine in greater detail below is drawn from a much older and more established

[194] *Lillo-Stenberg v Norway* [2014] ECHR 59
[195] *Campbell* (n.166)
[196] For example there was an academic conference at Newcastle University 'Conference: The Campbell Legacy: A Decade of "Misuse of Private Information", Newcastle, 17 April 2015

action in English law: breach of confidentiality. To understand how the modern English approach to privacy operates the evolution from confidence must be charted[197].

The cornerstone case in this journey dates back to Victorian times, and the monarch herself was closely adjacent to the case of *Prince Albert v. Strange*[198]. The case involved etchings of Prince Albert being copied without his permission, by an unscrupulous worker in the shop that produced prints, and then passed on to Strange who planned to produce a catalogue. Although Strange had no direct contractual relationship with Prince Albert, the court allowed an injunction on the basis that pictures were private and to impart such information would be a breach of confidence. Thus the action was born.

The rules or conditions for the production of a confidential relationship which could be thus breached were laid forth by Megarry J in *Coco v AN Clark (Engineers) Ltd*[199]. The information must have the quality of confidence about, be imparted in circumstances that implied confidence, and revelation of said information would be to the detriment of the claimant. He also made it clear that public knowledge or public property could not be confidential. However, Lord Goff upended this idea to some degree in *Spycatcher* by using the hypothetical example of a confidential document blowing out a window into the hands of a passer-by. If the document was obviously confidential in nature then a duty of confidence could certainly arise. Already the law was adapting to the realities of the complexities of modern relationships and to a limited extent to the advent of new technology and a mass media.

There can be little doubt however that the issue of privacy in this country has been brought into focus and the centre of attention by an ever increasing national obsession with the private lives of celebrities. Gossip, for want of a better word, fills the pages of newspapers, particularly but not exclusively the tabloids, and while many celebrities are happy to court publicity and the exposure that is essential to their careers there are inevitably occasions where they feel a line has been crossed and their privacy has been breached.

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[197] There are a number of other areas of law in England that relate tangentially and directly to some of the rights recognised as "privacy". For example older torts such as nuisance & trespass; harassment under the Harassment Act 1997; and modern laws related to burgeoning technology such as the Malicious Communications Act 1988 and the Data Protection Act 1998. Each of these can have a part to play in how we understand the law's relationship with privacy, however, in the specific focus of this thesis – the relationship between privacy and a free press – it is the evolution of privacy through the old tort of breach of confidence which is the most important development.

[198] *Prince Albert v Strange* (1848) 1 Mac. & G. 25

[199] *Coco v A.N.Clark* (Engineers) Ltd [1969] R.P.C. 41

A trio of cases shows how the courts came to deal with these new issues permeating the old law of confidentiality. They are but a cross section of many such cases involving celebrity. The first is *Barrymore v. Newsgroup Newspapers*[200] which is a pre-Human Rights Act case. In it Mr Barrymore sought and was granted an injunction against a former lover who had agreed to reveal intimate details of their relationship to The Sun newspaper. This is a classic example of the English tabloid staple the "kiss and tell", but what was interesting was that Barrymore had previously revealed himself as a homosexual, which might have been extremely sensitive information prior to his coming out, but in this instance the court made clear that the fact of the two men having a relationship was not per se confidential but rather the revelation of intimate details which quite clearly bore the quality of confidence in their relationship.

Contrast this with the approach taken in *Theakston v. MGN* [201]where the Court refused an injunction against the paper's descriptions of the BBC presenter's activities in a brothel. It was the court's opinion that the transitory nature of this relationship did not have the hallmarks of what could be described as confidentiality. Added to this was the fact that Theakston had entered the brothel through a public street (with a very recognisable face). However, the most interesting aspect of this case was the fact that the court did allow an injunction against pictures of the sexual encounter. This was a clear indication that the court considered photographs to be a higher level of intrusion than a fairly detailed description of the same scene. In fact, the court made this point quite explicitly describing photos as "particularly intrusive into the claimant's own individual personality"[202]. This logic can be seen as a precursor to similar stances taken by both the European Court in *von Hannover* and the House of Lords in *Campbell.*

A year later another celebrity attempted to have his clandestine sexual wanderings protected from the public gaze. In *A v B*[203] the footballer Gary Flitcroft had attempted to have an injunction placed upon a Sunday newspaper relating to relationships with two women, neither of whom were his wife. Initially he succeeded with Jack J granting an interim injunction but when the case reached the Court of Appeal the reasoning in the lower court was criticised. Lord Woolf made a number of statements which demonstrated the continuing evolution of this

[200] *Barrymore v News Group Newspapers Ltd* [1997] FSR 600
[201] *Theakston v MGN Ltd* - [2002] All ER (D) 182 (Feb)
[202] Ibid para 78
[203] *A v B* [2002] EWCA Civ 337

area of the law, most notably that the breach of confidence action would protect a justified expectation of privacy, moving the action away from the traditional relationship of confidentiality. His Lordship continued to lay out guidelines for gaining interim injunctions which have been much criticised, and his judgment included some spurious logic related to the public interest in selling newspapers that we shall return to in Chapter 8. But the case was significant in its development of the law of confidence as related to privacy. In the event, the Court of Appeal did not consider the relationship of Gary Flitcroft to his erstwhile lovers to have the necessary quality of confidence to trump their freedom of expression and his identity was revealed much to the disappointment of football fans and gossips everywhere who reacted with a collective exhortation of "Gary who?"

A much more serious set of circumstances involved the killers of James Bulger in *Venables and Thompson v. Newsgroup Newspapers*[204] who had been granted an injunction against the revelation of their new identities by newspapers on their release from prison. The case is significant because it shows the factors taken into consideration in balancing privacy and free speech. This case and those similar such as the circumstances surrounding Mary Bell[205] and Maxine Carr[206] show that other rights can come into play when privacy is at stake. One could argue that it was in the public interest that people know where these potentially dangerous people had taken up residency. However in the balancing of rights, the threat to their lives under Article 2 and their safety under Article 3 in combination with Article 8 privacy were enough to tip the balance in favour of injunctions. The issue of the use of injunctions as prior restraint and the impact of them upon free expression is examined in greater detail in Chapter 8 but regardless of one's opinion on celebrity uses, this case should be flagged up as one of those instances where the genie of publicity would be very difficult to put back in the bottle in the absence of an injunction.

The celebrity privacy furore approached a crescendo in 2001 when Hollywood star Michael Douglas wed Catherine Zeta-Jones and agreed to sell photographs of this uniquely personal moment to OK! magazine for the princely sum of £1 million[207]. Unfortunately for the newly betrothed Douglases and OK! magazine their crafty counterparts at Hello magazine had

[204] *Venables and Thompson v. News Group Newspapers* [2001] 1 All ER 908
[205] *X (formerly known as Mary Bell) & Y v News Group Newspapers Ltd & Ors*. [2003] EWHC 1101 (QB)
[206] *Maxine Carr v News Group Newspapers Ltd & Others* [2005] EWHC 971 (QBD)
[207] *Douglas v Hello! Ltd* [2005] EWCA Civ 595

scooped them with surreptitiously acquired snaps of their own. Needless to say the Douglases were not best pleased and, along with OK! sought an injunction against publication. The Court of Appeal ultimately decided against an injunction on the basis that damages were the best remedy for any loss accrued and that the Douglases had already traded the best part of their privacy for the cheque mentioned above. But this was not the end of the matter because the case went to trial and then onto the Court of Appeal (it ultimately reached the Lords but that element of the case was relevant only to OK! commercial rights). So it was that the Court of Appeal said the original decision in 2001 not to give an injunction was incorrect and would be decided differently in today's legal environment. The ultimate significance of *Douglas v Hello,* aside from the demonstration of how the law and its approach has changed, came through judicial comments in the original case which, although unsuccessful for the Douglases, established that the English law of confidence had shed the shackles of a confidential relationship and the quality of confidence, set out by Megarry in *Coco v A.N.Clark*. What was now significant was the private nature of the information.

This evolution that we have been tracking reached its (then) zenith in *Campbell v MGN*[208]. As established in the introduction, Naomi Campbell the supermodel was undergoing treatment for drug addiction at a Narcotics Anonymous facility. When exiting she was photographed by a press photographer and the pictures were published alongside an article in the Mirror newspaper detailing her battle against addiction. Ms Campbell subsequently sued the newspaper under breach of confidence. The ruling in the case is quite complex especially given that each of the five Lords gave a different opinion on the merits of the case, some agreeing and overlapping on some points while differing on others. The ultimate outcome was that Naomi Campbell was victorious and received the nominal sum of £1000 in damages[209]. However, the significance of the decision comes in its effect on the law of privacy and also how the individual circumstances of the case were approached. Firstly, the issue of public interest was addressed and it was made clear particularly by Baroness Hale that the court considered there to be a variance in quality of content in publications and this was an important factor in how much weight the courts would give Article 10 rights. In this instance the fact that

[208] Subsequently cases such *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch); and *Murray v Express Newspapers plc & Another.* [2007] EWHC 1908 (Ch) have developed the law further.
[209] Campbell's cohort Linda Evangelista once famously stating that supermodels "don't wake up for less than $10,000 a day".

Campbell had previously lied about her use of drugs was significant as it gave the press a legitimate hook upon which to hang its "public interest" coat.

Secondly, the court took the approach that even though Campbell was photographed in the street she might still be carrying out functions or activities deemed private. Lord Hoffmann made specific reference to the fact that the circumstances of the photo or activity are important, not merely the location. The fact that Ms Campbell was attending what amounted to a medical treatment appears to have been a highly significant factor in this approach. Once again the significance of photography came into play. While the court accepted, as mentioned, a legitimate interest in "putting the record straight" vis-à-vis Campbell's drug use, the obtaining and publishing of photographs was not deemed necessary to convey this point. The photographs, taken surreptitiously at a vulnerable moment, were particularly intrusive and tipped the scales toward a breach of privacy. Many editors and journalists profoundly disagree with this point, arguing that the Court appeared to hold contradictory positions, saying that the photos added nothing to the essence of the story, yet not allowing the same photos due to their impact.

It is important to note that according to Lord Hope the issue of the photograph tipped the scale. The most significant element of *Campbell's* impact is that according to most scholars it appears to have created what amounts to a privacy tort out of the old breach of confidentiality[210]. The correct term is perhaps that coined by the Lords as "misuse of private information", but the key point is that the House of Lords essentially recognised what was happening throughout the evolution described in this section, and that the law was attempting to shoehorn privacy into confidence despite the stark differences in their nature and construction. This process became increasingly awkward after the introduction of the Human Rights Act which, through horizontal application, required the courts to protect privacy rights under Article 8. England, as noted, traditionally has had no such standalone right in tort so its closest cousin confidentiality was being used as a surrogate.

The assessment of the impact of *Campbell* has been mixed; while clearly legally very significant, it has been pointed out that its impact upon celebrity gossip in the tabloids has been

[210] See generally the discussion 'Special Issue: Privacy Law Ten Years after Campbell' in Journal of Media Law Volume 7, Issue 2, 2015

fairly tame[211]. However, we have seen some impact, most notably the current confusion within English law regarding the use of injunctions in celebrity and other cases. The relatively recent cases of *Terry*[212] and *Trafigura*[213] are demonstrative of a judiciary struggling to come to terms with the new legal landscape that has not settled down. The constant tension between expression and privacy has led to a situation where criticism is prevalent regardless of what the judges do. In post publication trials we can clearly see the joint impact of *Campbell* with *von Hannover*. For example in *Murray v. Express Newspapers*[214] which concerned the photographing of JK Rowling's young son the hallmarks of the two cases, photographs, children, privacy in public places were all present and show a continuing route down the path toward greater privacy in English law.

Murray is a particularly significant development in the courts' approach to photography in privacy cases, particularly as it relates to the concept of "privacy in public places". In *Murray* the claimant was essentially asking the Court to expand the rationale in *Campbell* to a level akin to that in *von Hannover*. The lower court struck the claim out, but the appeal was allowed. The Court of Appeal ruled that there was at least an arguable expectation of privacy,

"The child has his own right to respect for his privacy distinct from that of his parents… The fact that he is a child is in our view of greater significance than the judge thought. The courts have recognised the importance of the rights of children in many different contexts and so too has the international community… If the photographs had been taken to show the scene in a street by a passer-by and later published as street scenes, that would be one thing, but they were not taken as street scenes but were taken deliberately, in secret and with a view to their subsequent publication."

This reasoning has distinct echoes of *von Hannover*. Victories for Paul Weller in protecting his children's privacy from long lenses extend this jurisprudence of the English courts again[215].

[211] Roberston G, Nicol A, Media Law 5th ed (Sweet & Maxwell Ltd 2007) p. 267
[212] *Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119
[213] *RJW v Guardian News and Media Limited* [2009] EWHC 2540 (QB)
[214] *Murray* (n.208)
[215] *Weller & Ors v Associated Newspapers Ltd* [2015] EWCA Civ 1176

Additional to this are the phone-hacking cases which gave rise to the Leveson inquiry and reform of the press regulation system in the UK. In cases such as *Gulati v MGN Ltd*[216] the quantum of damages awarded shows how seriously the courts take the right to privacy. Specifically, the Court of Appeal said that compensation awarded was not limited to damages for distress but could be exercised to compensate the claimants also for the misuse of their private information.

A final development to note in the increasing scope of privacy rights, is the encompassing of individual's rights over data collected on the Internet. In *Vidal-Hall v Google Inc.*[217] the court recognised the claimants' assertion that Google had breached their right to privacy by accumulating data for advertising services and using it to target ads on their computer screens, despite the fact that they had specifically set their browser to avoid this occurrence.

3.2.4 USA

The chief difficulty concerning the US as a jurisdiction is that it entails so many sub-districts throughout the states and regional circuit courts that is often difficult to garner what the overall position of the law is related to a given issue unless it has been the subject of a case that has reached the Supreme Court and binding precedent is set. For example, a number of states have created specific privacy laws relating to intrusions or publications which are specific and only applicable in that state, meaning the principles or philosophy that underpin the law may not be shared in another part of the country. However, there are a number of cases which have been decided by the Supreme Court which give guidance as to how the issue of privacy is viewed in American legal culture, how much weight the values and interests served by privacy rights are given, and how this weighs against prominent constitutional concerns such as freedom of speech and of the press.

The Supreme Court cases we are concerned with almost exclusively deal with constitutional questions. The right to privacy as a constitutional right is limited and only applies in certain situations. The right is enshrined in the Fourth Amendment and developed out of the classic American distrust of government the fear of search and seizure which was prevalent

[216] [2015] EWCA Civ 1291; [2015] WLR (D) 535
[217] [2014] EWHC 13 (QB)

during the War of Independence. Thus it relates to a very specific type of privacy, control over one's physical territory which can and has been adapted to include informational territory as seen below. This constitutional protection is almost exclusively applicable to intrusion, and intrusion by the government or its representatives. The Fourth Amendment protection does not have a horizontal applicability in the way we saw the Article 8 protection used in the ECHR and English jurisdictions. As such intrusions by private citizens such as a neighbour peering through windows or newspapers taking photos or conducting surveillance does not garner constitutional protection the way Article 8 offers it. Equally, the publication of private facts by the press or indeed anyone else is very much outside the constitutional protection of privacy offered by the Fourth Amendment.

Protection of privacy in this 'publication' sense is merely a common law right or collection of common law rights protected through tort, similar to the English jurisdiction pre-Human Rights Act. Like its cousin 'reputation' (protected by the defamation torts of libel and slander), the privacy right in the US - understood most commonly as protection against the collection and dissemination of personal information - is also to be considered against perhaps the most prominent and powerful constitutional right of all: the First Amendment protection of free speech. As such the majority of cases will be essentially testing the limits and strength of the common law right to privacy against the constitutional imperative of free speech. There is no obligation to balance the rights in the ECHR fashion; it is simply a matter of judging whether the privacy interest at stake is critical enough to limit the free speech in question. This offers an interesting contrast to the ECHR system and the latter development in England under the HRA.

It must be noted that there is an additional form of privacy right claimed under the US Constitution in relation to the substantive due process doctrine arising from the Fourteenth Amendment and the liberty over certain actions and aspects of a person's life, for example the right to abortion as demonstrated in *Roe v Wade*[218]. However, as is extrapolated below in section 3.3, this is very much a different sense of the idea of privacy and indeed is much more akin to a general right of liberty or autonomy.

The case which established that a citizen had a right to privacy as against unreasonable search and seizure, above and beyond the physical invasion of his home was *Katz v United*

[218] *Roe v. Wade*, 410 U.S. 113 (1973)

States[219]. This overruled the previous case of *Olmstead v United States*[220] which had established that wire-tapping did not constitute a search for the purposes of the Fourth Amendment. There had been considerable criticism of *Olmstead* at the time, not least in the dissent of Justice Brandeis that the court was viewing the concept of privacy and the sphere of what could be protected as personal or private information in a much too narrow and literal sense. The Supreme Court was failing to adapt the Constitution to developments in modern technology that were profoundly impacting upon ideas of personal space and privacy.

This was addressed once more in *Katz* where the FBI had bugged a public telephone used in the transaction of illegal gambling and used the recorded conversations in the conviction of Katz himself. The Court ruled that a physical interference was not necessary in order for a search to have taken place, this is a broader and much more realistic approach. Justice Black dissented saying that the wording of the Fourth Amendment would have included eavesdropping if that was meant to be included or understood to be an extension of search. This is a somewhat limited view but raises an important point about the relative nature of privacy and the difference between the idea of "eavesdropping" in a public place, and the secret surveillance and recording of what is thought to remain a private conversation. This issue is central to the discussion in section 3.3.

Additional to this is the Court's recognition of a "reasonable expectation of privacy"[221]. The wording is crucial because the Court recognised the relative nature of privacy and the importance of context. To take the position that the home is private and everything outside is public is simply not a realistic understanding of privacy. The Court produced a two part test incorporating the personal or subjective sense of privacy allied with an objective or community/reasonable standard for the expectation of privacy, this once again is central to the discussion in section 3.3.

The US Courts have considered a number of cases that measure the common law right to privacy against the constitutional right of free speech. Two things are noteworthy in the first instance. Firstly, just like the ECHR, the US jurisdiction has had a greater volume of key cases relating to defamation than the publication of true private facts, this reflects the fact that the

[219] *Katz v. United States*, 389 U.S. 347 (1967)
[220] *Olmstead v. United States*, 277 U.S. 438 (1928)
[221] The same term as used by the European Court of Human Rights.

debate around the publication and merits of untrue statements or stories has, at least until recently, been the primary focus of the free speech debate across the jurisdictions. Secondly, by contrast there is a notable dearth of celebrity publicity cases in the US compared at least with England. This may be due to a less celebrity-obsessed tabloid culture, or perhaps to the recognition that the First Amendment focus on free speech makes taking such cases comparatively difficult to justify.

Perhaps the most prominent case that involved a quasi-public figure who did not have an official or government position is *Sidis v. F.R. Publishing Co*.[222] The case involved a New Yorker magazine article based on the life of a former child prodigy including a 'where are they now' type of exposé. The fact is that Sidis had long since shunned the spotlight and given up all aspects of his former life as a child Harvard graduate and mathematician in order to lead a secluded life. Sidis objected to this violation of his privacy and sued, with the trial court granting him damages. The New York federal appeals court disagreed and held that because Sidis had once been a prominent public figure the curiosity about his life and fortunes was legitimately within the realm of the public interest and that his privacy had not been unreasonably infringed.

The case was significant because it seemed to reduce the protection given to public figures regardless of their lack of official function[223]. This attitude is a precursor to the libel decisions of the Supreme Court beginning with *Sullivan*[224] and evolving in subsequent suits. While *Sidis* remains neutral on the issue of definitional approach to expectations of privacy, it is clear that great stock is put in the public figure role by way of factors contributing to expectations of privacy.

The case of *Time Inc v Hill* [225] is a further development of this concept. The case involved a family who had been kidnapped by escaped convicts. Some years later a Time magazine article covered both a fictionalised dramatisation of the ordeal, greatly exaggerating the circumstances of the ordeal, and a rehashed account of the original facts. The Hill family was caused some deal of trauma by the coverage and sued. The case came before the Supreme

[222] *Sidis v. F-R Publishing Corp*,311 U.S. 711 61 S. Ct. 393 85 L. Ed. 462 1940
[223] Parallels can be drawn with the German courts' approach to what it deemed 'public figures par excellence', that is to say, prior to the first van Hannover case, German courts offered less privacy protection to those it considered to be de facto public figures regardless of their actual interaction with public life.
[224] *Sullivan* (n.8)
[225] *Time, Inc. v. Hill*, 385 U.S. 374 (1967)

Court. The decision and the legal consequences are somewhat blurred for our purposes because like many privacy cases there is an overlap into false light publication and defamation, due to the untrue or greatly exaggerated aspects of the publication. However, the central point that is relevant to privacy law is that the Court through Justice Brennan rejected that free speech was applicable only to political matters and asserted that a loss of privacy was simply a by-product of an open society,

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."[226]

This quotation from one of the great theorists and advocates of free speech on the bench is a good summary of the US approach to these issues and conflicts between speech and privacy, and offers a contrast to the ECHR approach.

An even starker contrast comes in a case that dealt with the constitutionality of protecting victims of crime from exposure through the release of their details. *Florida Star v. B.J.F.* [227]concerned a Florida statute that prohibited the publication of details of a rape victim. The Florida Star reporter had discovered a victim's name by chance and published it, and the newspaper was subsequently sued. The district court agreed on appeal that publication was a violation of the victim's right to privacy but the US Supreme Court disagreed, holding that the First Amendment right to speech was paramount in such circumstances and the Florida law was unconstitutional as it lacked a narrowly tailored, significant state interest in restricting the press. This is obviously a significantly different approach to privacy than the English and ECHR with their interest in balancing rights. Essentially the Court is saying that if the facts published are true then there are extremely limited circumstances that justify the stopping of publication or dissemination. If the protection of a rape victim from further trauma through

[226] Ibid at Page 385 U. S. 388
[227] *Florida Star v. B.J.F.* , 491 U.S. 524 (1989)

public exposure does not constitute a compelling interest it is difficult to imagine circumstances that do.

Florida Star v. B.J.F.[228] has been described as 'the beginning of the end for the tort of public disclosure (of private facts)' because of the nature of its commitment to free speech over other interests regardless of their seeming importance[229]. The case is not isolated but is one of a trio including *Cox Broadcasting Corp. v. Cohn*[230] and *Smith v. Daily Mail Publishing*[231] in which the Supreme Court ruled against the prohibition of publishing the names of victims of crime and juvenile perpetrators respectively.

These are but a small cross section of cases both in the US and the two previous jurisdictions. They are merely designed to show the prevailing attitudes of the courts to the various issues – albeit across jurisdictions and eras - most notably the value of privacy when juxtaposed with freedom of expression and the press. The respective judicial attitudes have evolved and changed to arrive at the positions held today, in the case of ECHR and England toward a greater appreciation and weight given to privacy concerns, in the US perhaps the other direction. What is crucial is that the balancing of the opposing values is demonstrated to give context to section 3.3's examination of the privacy value, which will in turn provide a reference point for the discussion in Chapter 8.

3.3 A Conception of Privacy

As was alluded to in the introduction, the process of defining privacy is extremely difficult, there is no consensus among scholars or practitioners as to what constitutes the right or interest in privacy or what value underlies it and ties it together. In fact, it would not be much of an exaggeration to say that there are as many views and opinions as to what privacy is as there are people who have attempted to tackle the definition. One only needs to attempt an essay assessing the nature of, and approaches to, privacy to fully appreciate this fact. The situation is perhaps best summed up by the oft quoted American judge who described privacy

[228][228] *ibid*

[229] Rolfs, Jacqueline R. 'The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure', 1990 Wis. L. Rev. 1107

[230] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)

[231] *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979)

as "a haystack in a hurricane"[232]. The analogy is apt because not only are there a multitude of parts seemingly disparate and amorphous but the reference points one would hope to use to identify, define and order them appear to be in a state of flux or movement; perhaps not even in their actual nature or substance, but in the numerous and varied way that they are approached both in theory and in practice.

Yet despite this difficulty an attempt to distil some form of meaning for the concept of privacy is what this section hopes to do. The reason for this attempt at understanding and extrapolating a meaningful and coherent character is comparatively simple; if one wishes, as we ultimately do, to find a balance between the burgeoning right to privacy and the traditional right to a free press then it is absolutely paramount that we understand the two rights and their nature and countervailing values. While the analysis of the privacy value is quite extensive, as we shall see, it pales in comparison to the volumes dedicated to free speech, expression and the press. Additionally, although there are inevitable differences, disagreements and disparities of approach to free speech there is a much greater understanding both popular and academic, as to the nature of that right. Suffice it to say that a greater parity of understanding of the competing rights must be reached before a fair appraisal of their merits can take place.

As the previous section showed, the law relating to privacy is growing rapidly, and various high profile cases are attempting to assess the legal scope and limitation of privacy rights. Yet this raises the question: if nobody can say with certainty what privacy is then how can there be a fair and accurate legal assessment? One need not be a legal academic or practitioner to understand the importance of society gaining a firm hold on our ideas and appreciation of privacy, indeed one need only open the newspaper to stories of phone hacking, celebrity injunctions, Snowden, and Wikileaks to see this.

As was seen in section 3.2 the chief concern (which will also be reflected by and large in subsequent concluding chapters) is with the aspects of privacy that intersect with the role and right of the press to publish and the right to free expression in general. However any attempt to understand privacy as a concept and define it as a right must look at the subject in the broadest sense that is relevant. This does not mean expanding the definition to include elements which are not naturally or legitimately related to privacy, but rather to examine reasonable claims to privacy right status in order to see if one can identify a unifying and binding value or

[232] Chief Judge Biggs in *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481 (3d Cir. 1956) para. 10

values. To limit any examination simply to those relevant to press regulation or litigation would be counterproductive. This also relates to an additional point: the need to search for a definition of privacy independently on its own merits; and to avoid automatically seeing the right through the prism of free speech and the balancing of the two rights. Whether searching for a broad sociological definition or one that is practically useful in a legal context, it is important that this right is established on its own terms rather than with one eye on a future competition with free speech. One could describe it in analogous terms of the advocates of a privacy interest having the obligation to establish prima facie the legitimacy of the privacy right or value before the balancing, weighing or competing against another right can take place.

3.3.1 Conceptions of Privacy

One of the chief difficulties in defining privacy and indeed one of the main reasons for the confusion mentioned above is that even short of agreeing on a definition, scholars often fail to agree upon the perimeters of the discussion. This can come from different disciplinary approaches or different motivations or requirements for the definition, if for example one is approaching the question from a legal, sociological or philosophical angle. This is understandable enough yet it is my contention that each disparate approach can be useful and can be reconciled as long as one is clear upon the end goal and perimeters for the definition and discussion.

In this sense I would take my cue from Ruth Gavison who laid out three criteria for a definition of privacy that could be simultaneously universally applicable but also pragmatically useful, in the sense of having legal applicability[233]. Gavison described this idea or definition as having three qualities: first it should be a neutral concept of privacy in that it is produced from a conceptually blank canvas as opposed to one previously laden with values or assumptions; in order that we can understand the nature of the right in an "intelligible" fashion. Secondly, the right or value of privacy must be coherent; that is to say bound together by an essential similarity. And thirdly, that the value can have a legal applicability; this is crucial if it is to be of use in legal balancing. This third factor also relates back to what was said above about the establishment and understanding of perimeters; the sociological and philosophical approaches are highly useful in understanding the basic and fundamental substance of what makes privacy

[233] Gavison, R 'Privacy and the Limits of Law' (1980) 89 Yale Law Journal 421

and why we desire and need it, but equally some non-legal explanations stray into territory that is difficult to transpose into a setting that will be practically useful.

Gavison's conception of a definition is reflected by Richard B. Parker who outlines a similar three-layered approach to finding a useful and thorough understanding of privacy[234]. Parker couches the criteria in terms of: firstly, the need to fit the data, or in other words be based upon tangible and empirical ideas of what underlies our value of privacy. Secondly, simplicity which is akin to a common characteristic that threads through our various privacy claims. And lastly, a need for practical legal applicability.

As we can see, though the language is slightly different the elements are essentially the same 1) a neutral or honest appraisal of what causes a desire for privacy 2) a coherent conception that links our privacy claims and 3) a conversion of this into some form of legally applicable right or value. The last is obviously of much greater concern to a legal scholar but the first two I would contend are applicable to any legitimate definition of privacy. As such, we will attempt to establish the first two before morphing them into the third.

One of the simplest and perhaps most straightforward tasks one can undertake in this pursuit of a privacy definition is to isolate it by establishing initially what privacy is *not*. The literature and case law surrounding the issue of privacy are littered with claims and examples of values and interests which while close to privacy in character - perhaps even linked to privacy by a broader underlying theme (e.g. human dignity), are essentially not the same as privacy and are not united by the same principle. This relates back to the first two parts of the Gavison-Parker formulation that the definition must be created by examining the real interests in having this right of privacy and that the aspects or branches of the right must be essentially unified and coherent.

It is often the case that other periphery or adjacent rights can overlap with the fundamental privacy right, particularly in the legal realm where the law is often a patchwork of rules, rights and interests built upon each other and evolving according to need or historical imperative. However, ultimately when the legal interests are examined and the nature of the interest that underlies them many of the adjacent rights will be left on the margins when the correct framework of the privacy definition is applied. Many of these false or connected claims

[234] Parker, R 'A Definition of Privacy', 27 Rutgers L. Rev. 275 (1975).

will be returned to as they are raised to support varying theories of privacy in this section but it is worth first identifying a number of the most glaring examples by way of establishing a reference point for further examination.

We saw in section 3.2 how the English system had, in its pursuit of a protection of Article 8 privacy obligations, evolved the law out of the established action for breach of confidentiality. *Campbell* was obviously the culmination of this process but it had evolved over a good deal of time. What was obvious though was the strain that this placed upon any natural or realistic interpretation of the idea of 'confidentiality'. We heard calls from judges for a standalone legal protection or tort of privacy because confidentiality was not adequate to meet Convention obligations, and commentators hailed *Campbell* as a judicial led creation of a new tort of 'misuse of private information' freed from the shackles of its progenitor: breach of confidentiality[235]. This is because confidentiality and privacy as commonly understood are different. The two overlap and share many traits but are essentially, at a fundamental level, separate concepts. It might even be said that confidentiality is a constituent element of privacy but it lacks the breadth to encompass all the concerns that privacy entails. The essential difference is of course the relationship of confidence that is necessary for information imparted to be confidential. This was implicit in the *Strange* case but was also explicitly set out by Megarry J as we saw above. The central premise of confidence is the fact that one partner in the relationship confides in another and a breach takes place when the second party then reveals information which was expected or designed to remain secret. Classic cases of breach of confidentiality such as *Ash v. McKennitt*[236], where a former employee of a country music star revealed personal details, amply demonstrate this principle.

But many modern press/privacy cases highlight the limitation of confidence as a concept to address privacy as a whole; *Campbell*[237] or *Murray*[238] being obvious examples[239]. If, for example, someone that I do not know takes an intimate photo of me using a telephoto lens then publishes it to a wide audience then there are obvious privacy interests brought into play even if we haven't fully or specifically defined it yet (though no relationship of

[235] See generally: Hartshone, J 'The Value of Privacy', Journal of Media Law Volume 2, Issue 1, 2010
[236] *Ash v McKennitt* [2006] EWCA Civ 1714
[237] *Campbell* (n.166)
[238] *Murray* (n.208)
[239] The legal requirement for 'confidence' had long since eroded by the time of these cases as pointed out by Lord Nicholls in the Campbell case.

confidence). Equally, most of the breach of confidentiality cases are based around the concept of disclosure of information which had previously been revealed in the context of a confidential relationship; however, this is but one aspect of the idea of privacy. As we will see in much greater detail below there are a number other aspects - notably intrusion or surveillance. If somebody watches me through the window of my bathroom a privacy interest is invoked yet breach of confidence will have little to say on the matter. A full understanding and definition of privacy may encompass confidentiality, but the two concepts are neither synonymous nor interchangeable.

One of the most important and closely related interests to privacy is 'reputation' protected of course through the law of defamation. We saw in section 3.2 how the two overlapped in case law. However, this is all the more reason to ensure that they are adequately distinguished and separated, representing as they do quite different interests and fundamental values. Robert Post, in an American context, described defamation as 'the sociological tort' and one of the chief reasons for the closeness of privacy is that it too is a sociological consideration[240]. Post himself speaks of privacy in similar language to reputation, that the two concepts are based upon social constructions that he terms "the rules of civility"; that is the norms that we have established in society for the ordered interaction of people and groups. In privacy breaches, like in defamation, these rules are broken by one party and thus the other seeks some remedy[241]. However, it is crucially important to note, as Post does, that the values underpinning the need for these rules of civility and the respect for them are distinctly different between reputation and privacy.

One need only undertake a rudimentary examination of the interests at stake, violations of reputation and privacy, to understand and identify the stark line separates the two. The right to reputation, as understood by common law legal systems and societies, is designed to protect against false information being published or disseminated that will harm a man's reputation or moral standing in society or a community. The fundamental requirement is falsity. In privacy quite the opposite is true; it is the truth of the information that is passed on or published which is at the crux of the issue. In practice the situation is slightly more nuanced than this, for example there are circumstances (outlined above) where false information can also invoke a privacy claim, and in practice there are many situations where a mix of false and true

[240] Post, Robert 'Social Foundations of Privacy', 77 Calif. L. Rev. 957 (1989)
[241] ibid

information is published. However, the essential difference is that false information that reduces a man's standing is the concern for reputation and by extension defamation. Conversely, the concern related to privacy is to identify why *true* information similarly revealed is also the subject of a right violation.

An additional note on defamation and reputation is that, short of a few mutations in the law, defamation only protects against false information that reduces a social standing, which is the essence of reputation; false statements which enhance a reputation or standing to not engage this particular right. We saw in Chapter 2 how Lawrence McNamara described this in terms of a moral taxonomy, which is to say that the false information, in order to harm reputation, must be to the moral discredit of the individuals at hand[242]. This is a convincing thesis and draws another distinction that will assist us to frame privacy. In invasions or breaches of privacy the information gained or revealed need have no qualification put upon it. True information may diminish or enhance the standing of the subject in the eyes of those who receive it; the impact on the subject's standing is entirely inconsequential, showing the essential divide between interests in reputation and privacy.

A slightly tangential point but an important one nonetheless, is that there is no equivalent offence to intrusion when one examines the reputational right[243]. The emphasis is entirely upon the passing on of information - a triadic relationship is essential - and while the dissemination of private information is a large and important part of privacy it is not adequate to give the full picture. There can clearly be invasions of privacy even in the context of a dyadic relationship between the intruder and the intruded upon.

In terms of positive attempts to identify what constitutes privacy and what fuels the human desire for privacy, one of the simplest and most often propagated formulations is the idea that privacy is simply the right "to be let alone". The articulation of this conception is most often attributed to Justice Brandeis writing his dissenting judgment in *Olmstead*, an American case.

[242] McNamara (n.2)

[243] There are, of course, numerous dyadic relations in related areas of law - other torts and crimes such as nuisance, harassment, stalking, data protection offences; my point here is that no equivalent dyadic relationship exists for reputation. You cannot defame someone to themselves.

Unsurprisingly, Brandeis was arguing for a greater right to privacy in the case of phone-tapping, against the majority of his colleagues. The difficulty in this formulation, and the reason it attracts such criticism, is that it is much too broad to be simply a definition of privacy and encompasses many non-privacy interests to which it is equally applicable. Examples such as the right not to hear loud music or not have to endure noxious smells have been cited as examples where one is not 'let alone' but are not instances where privacy has invaded, in the generally accepted understanding[244]. Equally something like the requirement to pay taxes is certainly not leaving the recipient alone yet he is unlikely to bring an action in privacy against the government in the way he might should he discover they had been reading his emails without justification.

These violations of rights, insofar as they are violations, are aimed at interests that are in the same family as privacy but differ in fundamental ways. Without wanting to digress into defining other rights or interests, one could conceivably say that the examples above broadly interfere with a person's *autonomy*[245]. That is to say, that if a man is born into a state of complete theoretical freedom or autonomy then the introduction of noise and smells that are unwelcome and the requirement that he pay tax are impositions upon his sense of freedom or liberty. Part of the difficulty in efforts to define privacy arise from the fact that there can be significant overlap with the broad rights of liberty and autonomy. Indeed, as we will see below, certain aspects of autonomy are fundamental in the understanding and enjoyment of privacy. This leads to the situation where some rights or interests which are not in their essence about privacy become mixed up in the discussion and create much of the confusion relating to a workable definition of privacy; a fine example of this illustrated by the US Supreme Court's decision in *Roe v. Wade*[246].

This famous decision of course relates broadly to whether a woman had the right to an abortion. The Court formulated its decision through the prism of privacy rights residing in the Fourteenth Amendment. However, this is a fundamentally different understanding of privacy to that which is generally understood and will ultimately bear out. Without wanting to be mired

[244] These rights/interests are dealt with through other torts such as nuisance

[245] See generally: Raz, Joseph (1986). *The Morality of Freedom*, Oxford: Clarendon; Sandel, Michael J. (1982). *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 2nd edition 1999.
Or more specifically: Baker, CE "Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment" Social Philosophy and Policy 21 (2):215-268 (2004); Cohen, J "Examined Lives: Informational Privacy and the Subject As Object," Stanford Law Review 52 (2000): 1373–1438

[246] *Roe v. Wade*, 410 U.S. 113 (1973)

in a debate about semantics, what the Supreme Court meant by privacy is in fact the liberty and autonomy mentioned above; in this instance the personal liberty to control one's body and the autonomy to make decisions based upon that. To formulate this as privacy is erroneous, and leads to much confusion as we will see in our further critique of some of the proffered definitions of privacy. Equally, it leads to the situation where seemingly workable and logically sound definitions of privacy are rejected on the basis that they fail to take into account privacy issues such as abortion when these issues are in fact concerned with some other value or interest altogether. We must be keenly aware and vigilant to ensure that those things called privacy are not in fact much better dealt with under a different rationale.

Brandeis's formulation of 'the right to be let alone' fails because it is too wide for merely privacy and indeed encompasses issues of much broader liberty, but the confusion is both easy and understandable given that privacy undoubtedly makes up an important but limited aspect of the wider interest which fell under the larger right to autonomy, or "to be let alone".

Brandeis was of course involved in perhaps the earliest attempt to define privacy in a legal sense in the common law system in through the famous 'The Right to Privacy' article in the Harvard Law Review of 1890[247]. Brandeis and Warren were concerned with a particular aspect of privacy which had personally affected them and thus couched their definition of privacy in much narrower terms than would be the case some 38 years later in *Olmstead*[248].

Warren had become severely irritated at the reporting of the private lives and actions of the Boston upper social class of which he and his wife were members. He considered that this 'yellow journalism', as he termed it, was a cynical commercial attempt to dumb down the expectations of the newspaper readers and engage in the peddling of cheap gossip in lieu of real news. Warren pressed his legal partner Louis Brandeis to assist him in formulating a new consideration of some old rights to produce a broad protection for the invasions that had caused him such distress and this was deemed the right to privacy[249].

The rights that Brandeis and Warren used in this formulation included contract, defamation, breach of confidence and property rights. It was their contention that the elements of these individual rights were all related parts of a broader sense of privacy and that this was

[247] Warren, S & Brandeis, L "The Right to Privacy" Harvard Law Review. Vol. IV December 15, 1890 No. 5
[248] *Olmstead v. United States*, 277 U.S. 438 (1928)
[249] For full account see: Prosser (n.170)

necessary given the increasing transgressions of the press. They tried to draw analogies with these rights while simultaneously trying to extrapolate the new privacy right from them[250]. The influence of this article upon American law cannot be overstated and its impact upon understanding of a right to privacy equally so. The strengths of Brandeis and Warren's contention were that they set some of the early benchmarks for what we consider to be the purpose of privacy and set us on the road to a greater understanding; but obviously given that this was the first real attempt to define this concept, and that it arose from a personal grievance, results in severe weaknesses too.

One of the key aspects to the Warren-Brandeis theory of privacy is the emphasis upon the mental anguish that invasions of privacy cause. This may seem obvious in light of the general concern that torts have with mental anguish now but it is important to outline the personal aspect of privacy and its importance as an internal mechanism. At a basic level people understand the need for privacy in terms of peace of mind and even if this is very broad, it is a starting point to understanding privacy's value. One of the major flaws of the Brandeis-Warren formulation is that they concentrated exclusively on the idea of publication of private information in the press. Their approach took no consideration of other widely recognised violations of privacy such as government surveillance or surreptitious observation. However, this does not preclude their theory having utility because if it managed to locate the fundamental nature of privacy then it could be applied to such situations.

Unfortunately, the biggest weakness of Brandeis-Warren is that they formulated the idea of privacy as analogous to forms of intellectual property. That is to say that one's control over privately held information was akin to literature or art not yet published, and those who revealed it or disseminated it without permission were, in essence, thieves. The folly of this analogy is evident in that as mentioned above it is inapplicable to instances of intrusion; even more so the idea of a quasi-proprietary right sits uncomfortably with some basic notions of privacy relating to protecting secrecy, autonomy, intimacy etc. The proprietary analogy seems reflective more of a market view of the world than on a fundamental concept of privacy.

[250] Post, R. C. (1991). Rereading Warren and Brandeis: Privacy, Property, and Appropriation. Case Western Law Review, 41(3), 647-680

Perhaps the second most influential attempt to formulate a privacy definition in the US came from Dean William Prosser in 1960[251]. Prosser took what could be described as a reductionist view of privacy[252]. It was Prosser's aim to review the vast amount of case law involving various privacy claims in the US since the publishing of the Brandeis-Warren article, in an attempt to distil from these the essence of what we try to protect when we protect privacy. It is Prosser's contention that the law in the US, in fact does not protect a single value or right to privacy but rather protects four individual interests that are generally termed as privacy but are indeed separate torts. They are: 1) Intrusion into seclusion or private affairs 2) Publication of private facts 3) False light publicity 4) Appropriation of another's name or likeness.

Prosser's account has been criticized for its reductionist approach[253] and this will be examined, but first on a far more fundamental level there is a major difficulty in this formulation in that the last two of Prosser's torts are not in fact privacy at all, certainly not in the sense that we will come to formulate it. Like the autonomy/liberty cases above, one can debate semantics but the fact remains that after examination these two interests are much closer to other rights or values than privacy.

In terms of the false light publicity, this is essentially defamation or in some cases malicious falsehood if reputational damage is not engaged. A stark illustration of this is the English *Tolley*[254] case in which a jockey's image was falsely used to advertise and he found his remedy in defamation. This English approach seems much more aligned with the interest at stake[255].

Equally, there are severe problems with Prosser's categorisation of the 'appropriation of a name or likeness'. This can essentially be objected to on one of two grounds: either the subject did not want any publicity, in which case it is a simple instance of publication of private facts under Prosser's second tort. Or the objection is on commercial grounds in which it is a trade mark issue or some other proprietary right.

[251] Prosser (n.170)
[252] Gavison (n.233) p.422
[253] Bloustein EJ. (1964) 'Privacy as an aspect of human dignity: An answer to Dean Prosser' New York University Law Review 39: 962, p.971
[254] *Tolley -v- J S Fry & Sons Ltd* [1931] AC 333
[255] While one can recognise that in both the US and English jurisdictions cases like this have in fact been brought under privacy, it is my assertion that normatively they should not as I explain.

Fundamentally, Prosser's overall categorisation deals only with two rights that can be understood realistically as privacy. Perhaps if this approach had been shared by Prosser he would not have taken the reductionist view that the torts were separate and not linked by a common privacy value, but instead he might have continued the search for that common thread or value that could define privacy. Prosser's contention instead is that these individual torts and the interests that underlie them are in fact quite separate and the attempts to group them as privacy or components of a singular value are mistaken and unnecessary.

This view is reflected for the most part by the philosopher Judith Thomson in her article 'The Right to Privacy'[256]. This article was one of four published in the summer of 1975 and autumn 1976 by philosophers attempting to grapple with the fundamental nature of our desire for privacy. Each succeeding article takes the form of a critique of the previous one in the series and attempts to refine or evolve the ideas presented, and the series has become very influential in the understanding of privacy.

Thomson's was the first article and she used a number of hypotheticals and thought experiments to pare away toward the centre of what we understand to be privacy. Thomson's central contention is that privacy is not about the actual information or facts relating to the subject of a perceived violation, but rather the steps taken to acquire those facts or the use of those facts (we can see the equivalence in Prosser's intrusion and dissemination). The emphasis is upon the *ownership* of the private information from a personal or even proprietary point of view; the ownership is the barrier that must not be illegitimately transgressed.

The crux of Thomson's idea, the source of much criticism, and the connection to Prosser's reductionism is that the ownership boundary is essentially made up of a number of alternative corresponding rights. That is to say that privacy, rather than being a cluster of rights bound by a common interest, is in fact merely a line drawn which intersects a series of other autonomous rights. Each time we claim that our right to privacy has been violated we can identify a corresponding right such as the right "not to be harmed" or "the right not to have your belongings looked at", which are personal and ownership rights respectively. Thus, according to Thomson, it is not necessary to try and find a unifying value among that which might be called privacy as they are already protected by other recognised rights.

[256] Thomson (n.171) p.295-314

In the next contribution in the series Thomas Scanlon expressly criticises the approach of Thomson[257]. Most importantly he rejects the notion that there need not be a search for a unifying factor in privacy cases. Scanlon says that ownership over facts or information is not the key value of privacy because this ignores the reasons *why* such ownership is necessary. Ownership as described by Thomson is simply the barrier one puts up to protect certain interests, and it is rather the nature of those interests that provides the key to a unifying conception of privacy.

Scanlon makes the additional separate point, which will be useful in our later attempt at a legal applicability, that mere "bad behaviour" or gossip is along the same linear scale as other invasions of privacy, it is simply a matter of when the level of offence invoked by this bad behaviour becomes an unacceptable violation of a privacy right.

James Rachels builds upon both Thomson and Scanlon but places emphasis upon the reason we wish to control that barrier of access, or ownership as it was described, to information we deem personal or private[258]. There are a number of different types of information that we try to protect, and equally there are a number of outcomes from the revelation of private information (or its discovery) which we wish to avoid.

The first of Rachels' central points is that the information is classified together on the basis that it is "nobody else's business"[259]. This is a simplistic way of establishing that the ownership, access or control barrier is legitimately controlled by the subject of the information. The second major strand of the article is that the reason we want to protect access to this information is because it allows us "to create and maintain different sorts of social relationships with different people"[260]. Rachels gives numerous examples of how the revelation of differing levels of information depends on and helps form different relationships such as between a husband and wife, or between a businessman and his employees. Rachels defends this social process against critics who would argue that allowing one to retain this information is to sanction the creation of false personas or impressions for public consumption. Rachels argues that there is in fact no singular "real" person but simply a management of relationships within

[257] Scanlon, Thomas 'Thomson on Privacy'. Philosophy and Public Affairs, Vol. 4, No. 4. (Summer, 1975), pp. 315-322
[258] Rachels, J. 'Why Privacy Is Important'. Philosophy and Public Affairs 4:323-333, 1975
[259] Ibid p325
[260] Ibid p326

a set of social norms. He criticises Thomson's view of control as equivalent to a proprietary right, because this disassociates the right from what makes privacy important[261].

Finally, Jeffrey Reiman penned an article which accounted for all of the three approaches above[262]. Reiman criticises Thomson's approach heavily describing it as 'a large non-sequitur balanced on a small one'[263]. Fundamentally, he rejects the idea that privacy is derivative from the large cluster of other rights corresponding to privacy claims. Secondly, he argues that even if they were so derivative, that would not preclude the search for a common value that united each of the rights in the "right to privacy cluster"[264].

Reiman continues by focusing on Scanlon's search for the common nature or interest in the privacy claims. Scanlon is correct to do this according to Reiman, but erroneous in his approach, basing it as he does upon the tautology that the element which unites the various privacy invasions is a desire to be free from certain forms of intrusion. This formulation adds little to the fundamental value of privacy because Scanlon fails to ask *why* we want to be protected from the intrusions. James Rachels' answer was, as we saw in immediately above, that different human relationships are formed and maintained by varying degrees of information revelation. Reiman appears to reject Rachels' formulation (and indeed Charles Fried's[265], whom Reiman quotes and whose ideas he thinks equate closely to Rachels' theory). He rejects Rachels' theory on the basis that social relationships are about more than simply information exchange, they are about caring. The revelation of information is but an additional aspect which fills out or enriches a relationship[266].

Reiman instead proposes that the interest in privacy is derived out of respect; respect the right of people to be able to choose. Reiman establishes it thus: "Privacy is a social ritual by means of which an individual's moral title to his existence is conferred"[267]. What this essentially means is that regardless of the circumstances of the person they should have their choice of how they wish to form their personhood respected. This is the social imperative at

[261] Ibid p332
[262] Reiman, Jeffrey H. (1976). 'Privacy, Intimacy, and Personhood'. Philosophy and Public Affairs 6 (1):26-44
[263] Ibid p.27
[264] Ibid p.28
[265] Fried, Charles "Privacy", The Yale Law Journal. Vol. 77: 475, 1968
[266] Ibid p.35
[267] Ibid p.39

the heart of privacy and which the right should aim to protect: a person's ownership of their own existence.

3.3.2 A Formulation of Privacy

I have outlined the four way discussion above with minimal comment for two reasons. Firstly, the writers do quite a good job of critiquing each other when they have the opportunity. But more importantly, I think this set of arguments has given the essential building blocks with which to construct a plausible theory of the right to privacy and they have set out the fundamental outlines of that discussion. As such at this point I think it is incumbent upon me to attempt to set out a broad theory of privacy that I will then attempt to defend and refine with reference to these articles and others which contain potential criticisms of the position.

Privacy is fundamentally about control of information and knowledge about oneself[268]. This is information in the broadest sense of the word, it need not be 'useful' or processable information such as one's income or birth date, it can extend to something as simple as being watched or having one's photo taken. Ruth Gavison gives the example of the two polar extremes of exposure: at one end complete solitude, at the other complete exposure[269]. Where most people draw the line is somewhere in the middle, but at that point they wish to have control over access to information that is personal to them. That line alters and moves according to the social situation one finds oneself in. If a man is in the street and another looks at him then he is unlikely to object, yet if he is looked at naked in his bathroom then the opposite will be true. Equally, if an amusing story is relayed in an email among friends about a woman then she may find this acceptable, but if the same story is on the front page of the local newspaper then her reaction will be entirely different.

But it is important to be clear that it is the information that is the key. The information can be deeply personal or entirely innocuous but the starting point is that this information which relates to the subject is revealed to another, be it through direct observation or sensation, or through dissemination by a third party. The first obviously relates to intrusion in whatever form that may take and the second to publication or dissemination. The chief argument against this

[268] It is important of course to distinguish between the 'privacy' examined here – related to control of information and extrapolated upon in some detail in that regard - and the broader ideas of, for example 'private and family life' encompassed by ECHR Art. 8.
[269] Gavison (n.233)

contention is that a man standing in a crowded street cannot have an objection to someone looking at his face or listening to his conversation should he be speaking loudly, but this is precisely the point. The man will have surrendered some elements of his privacy when he stands on the street because he has lost control over personal information about him. The fact that in this particular context he is unlikely to object does not affect the essential surrender of privacy or co-opting of privacy that has occurred.

Robert Post speaks of the necessity, when forming a legal recognition of privacy, to go beyond the subjective feeling of the victim/subject and have an objective reasonableness test to determine whether the law should protect the privacy interest invoked[270]. This is true, but to have a judgment on the objective offensiveness of any violation one must test it against the subjective claim of the victim or subject, and this is where we find the essence of privacy and the value which ties the recognisable privacy claims together.

Each time another person gains information about us, by whatever means, without our permission we have lost an element of our privacy because we have lost control over that information. The point on the scale between solitude and full exposure where we draw the line of what we are prepared to surrender is the barrier of privacy and if it is transgressed then we will have a violation of privacy. The context will be determinative of the location of that barrier; the man on the street will draw it differently from the man in his bathroom. But behind that drawn line it is the control of 'information' that gives us privacy.

This theory is not original, most meditations on privacy recognise that control over personal information is at least in part a factor underlying privacy, however, I think that expressed in these terms it provides a wholly defensible rationale for privacy. Or more precisely what we *protect* in privacy, because the reasons *why* are another matter to be examined below.

Firstly, however, it can be demonstrated that this informational control is shown to be applicable through the practical realities of the case law. Prosser's four torts, if reduced to the two that honestly and realistically are representative of privacy, fit perfectly into this idea. Intrusion in its many forms is objectionable because control over our personal information is lost. Prosser gives examples of a woman being watched during childbirth, wire-tapping of

[270] Post (n.240)

phones, prying into bank accounts[271]. These all fit into the idea of lost control of information. They are transgressions of that line or barrier that separates what we wish to share and what we do not.

Public disclosure is the same. It of course entails at least three parties (victim, perpetrator, and audience) but the principle is the same. Prosser uses as examples a former public figure having his new life exposed, and woman having her criminal past revealed; again the objection is based on a loss of control of this personal information. Examples from England and Wales bear this out too. The Max Mosley[272] case is a stark example of how sexual relations fall behind this barrier of information control and a newspaper's publication of this was considered a violation by both Mr Mosley and the courts. Equally, the victims of phone-hacking in England began to take cases because the intrusion into their private messages was clearly beyond the barrier of access and the lost control of their information was the nature of the violation. Interestingly, they sued under the newly expanded breach of confidence tort which, as we have seen, has become akin to a breach of privacy tort.

This conception squares with other rationales for what privacy protects. As we saw the Rachels (or Rachels-Fried) conception understands this control of information to be for the purposes of social interaction, but the protection of information is the essential element. Richard Posner undertakes a fascinating economic analysis of the right to privacy[273]. He looks at both the theory and legal practice of privacy through the economic prism of supply and demand. He goes into much depth that is irrelevant here (such as the transaction-cost of gaining information and the relative values of personal and commercial privacy) but what is illuminating is that he identifies two goods: 'privacy' and 'prying', both of which are vying for control of information. Posner's answer as to why we protect privacy is couched in economic terms of advantage, but what essentially privacy protects is control over personal information.

Richard Parker has separately and alternatively contended that what is protected by privacy is not information as such but rather control over who senses us, be it through touch, sight, smell etc[274]. This conception is quite regressive as it appears to be but a step backwards from the correct conclusion - after all the sole purpose of 'sensing' something is to gain

[271] Prosser (n.170)
[272] *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB)
[273] Posner, Richard A., "The Right of Privacy" (1978). Sibley Lectures. Paper 22
[274] Parker, R A Definition of Privacy, 27 Rutgers L. Rev. 275 (1975)

information about it. But by that very fact – sensing as gaining information – Parker unwittingly supplies further ballast to the formulation of privacy as control of information.

3.3.3 Why Protect Privacy?

The basic layer of a privacy definition above fulfils the requirements of the Gavison-Parker criteria that the definition be gained from a neutral examination of the data; and secondly that it be a coherent and binding value across privacy claims. From a legal view point, one could argue that what is important is that it has simply been established what it is that privacy protects i.e. control of information. This is because as long as society and its constituents wish to protect that value the law should respond accordingly. However, an understanding of *why* we wish to have privacy through control of personal information is essential in order to fully understand the right that we will ultimately have to weigh against other rights when disputes arise. An understanding of the motivation for privacy is indispensable to its defence. We must avoid simply falling into what Reiman criticised as tautology or circular reasoning: justifying the protection of information control because of its importance to privacy[275].

One of the most common and influential explanations for the need for privacy was that posited above by Rachels, specifically the need to manage, create or maintain certain relationships and social interactions[276]. We saw that Reiman rejected this in favour of a concept around the need to retain ownership of one's personhood. Reiman's language in this instance is obscure and too amorphous to be applicable in a practical sense. The conception he offers is so broad as to be capable of encompassing any number of things. However, if we can extrapolate that what Reiman is actually driving at is the idea that privacy is essential to autonomy and human development then what is clear is that this idea is certainly not mutually exclusive with Rachel's idea of social relationships.

Both Ruth Gavison and Robert Post emphasise the need for both an individual and social conception of why we value privacy[277]. Indeed Post speaks of the remarkable truce in the ongoing philosophical battle between communitarians and liberals (explored in subsequent

[275] Reiman (n.262) p.29
[276] Rachels (n.258)
[277] Post (n.240)

chapters of this thesis) when it comes to the intrusion aspect of privacy, given the importance of privacy to both social norms and the development of the autonomous person[278].

Gavison outlines numerous functional interests that are reliant upon a sense of autonomy or relative solitude in order that they be fully expressed by people[279]. These include the freedom from physical access necessary for a number of human functions such as concentration or rest and relaxation. Equally, privacy promotes liberty of action through the avoidance of censure or ridicule for certain actions, promoting moral autonomy by allowing reflection and critical acceptance of societal norms. Gavison includes the notion of promoting mental health but it seems that mental health, or the detriment thereof, is a consequence of denial of other functions facilitated by privacy, rather than a standalone function. For example, it is the denial of relaxation or freedom from scrutiny which leads to mental distress. This is equally applicable to the social functions mentioned below; it is the denial of these social functions that can cause the mental harms of anguish and distress.

A final privacy function is in the dignity of non-exposure. This is dignity in a smaller or narrower sense of the broader "human dignity" that runs through many rights (including but not limited to privacy). This is rather the simpler dignity that comes from being able to undertake certain tasks without being observed.

Both Reiman and Post put great stock in the work of Erving Goffman and his theory and study of the role of self and solitude in interaction with society. Goffman speaks about the 'territories of the self' and the importance that the respect for these territories - what we would see as the boundary and control over personal information - has for the ability of a person to create and maintain a sense of self[280]. This idea sits comfortably with the rationale that privacy protects the functions of autonomy.

Gavison places the promotion of human relations within the understanding of the personal functions of privacy, but it in fact straddles the personal and the societal functions. The maintenance, creation and evolution of one's personal relationships are quite obviously important on a personal level but have profound social benefits too. Rachels, as discussed above, gives a convincing account of privacy and how the control of information about

[278] ibid
[279] Gavison (n.233)
[280] Goffman, Erving *Relations in Public: Microstudies of the Public Order* (New York: Basic Books, 1971) p.28

ourselves allows for social relationships to take place. Our ability to control the access and exposure of personal information acts as a valve which can be used to regulate levels of intimacy according to the appropriateness of the context.

There has been some criticism of this position along the lines that to hide or limit information is somehow dishonest and results in the creation of a 'false' public persona[281]. This is deeply unconvincing. Firstly, due to the fairly obvious problem that the alternative is full exposure which is both practically unworkable and in principle, abhorrent. Moreover, the function of privacy is not limited to concealing a particular kind of information in order to present a false public persona but it is aimed at the need to conceal any information being revealed at all, should the subject not wish it to be revealed[282]. Furthermore, it is the context of the situation that gives the social cues about what should or shouldn't be revealed. For example, when a person is in a public restaurant he does not swear, or take his shoes off, or sing out loud or take his clothes off; yet there are numerous private situations where these actions would naturally occur, so to deny the role of context in expectations and functions of privacy is nonsensical.

Bloustein attempts to bracket the common value among the functions of privacy as dignity in a broader sense[283]. This has been criticised as overly broad given that there are numerous other violations which offend human dignity, but are not privacy related, such as insult, torture or assault[284]. But just because privacy is but one aspect of dignity this does not preclude it as a value that is infused in each of the functions that privacy promotes.

Each of the criticisms of the various proposed functions that privacy protects arise when other proposed functions are considered in competition or erroneously viewed as mutually exclusive. However, as seen above, there can be many different functions served by the same essential desire to retain control over our personal information when appropriate. Myriad interconnected desires and actions can be protected. Rather than being mutually exclusive the ideas of personal and autonomous functions of privacy and their societal counterparts are in fact symbiotic, enhancing and feeding each other. A society that promotes a strong sense of self and autonomy allows for the creation of sound social relationships and vice versa.

[281] Austin, L "Private Law: The Dilemma of Justification," (2010) 55 McGill L J 165
[282] Bloustein (n.172)
[283] ibid
[284] Gavison (n.233)

3.4 Legal Application

With the first two criteria for a successful privacy definition fulfilled (the drafting of a coherent and linked concept and value of privacy drawn from a neutral grounding reflecting the demonstrable impacts of privacy and which applies to both what privacy protects and why) the conversion to a legally applicable standard should be relatively straightforward. But there are a number of issues that need to be addressed.

In a linear consideration of what constitutes a legal claim for a violation of privacy there is initially, as we have established above, a relocation or transfer of personal information; this is done without the permission of the subject. The major requirement is then that the subject considers that the barrier of access which he deems appropriate for this context has been transgressed. This is a subjective judgment of a breach of privacy but all this can occur without engaging the protection of the law.

A legal system cannot give its protection based purely on the whims of each individual as to whether their sense of privacy was breached to the point of offence. Many people will have vastly different considerations of the threshold at which privacy is breached. Society would not be able to function if it was merely the subject that decided this. Rather, there needs to be an additional objective judgment about where the barrier between private information and public observability lies before the law can be engaged. Thus it is perfectly possible for a person to subjectively feel their privacy has been grossly violated, yet because this claim falls short of an objective test they will lack legal recourse. Such a test would be something akin to a reasonableness test.

Post describes this in terms of the need for an offensiveness threshold[285]. The tort of invasion of privacy must not be based simply upon the plaintiff's discomfort in fact, but rather what would be considered offensive to persons of ordinary sensibilities: a reasonable person. The offensiveness of the invasion, be it intrusion or dissemination must go beyond the bounds of decency. It is this respect for decency that the tort essentially polices. Post is basing his analysis upon the United States legal system yet this principle is applicable in all common law

[285] Post (n.240)

systems or environments. There is a need to limit the legal recourse or applicability of privacy claims for the simple reason that to protect every offence taken by an individual at a perceived slight related to privacy would be pragmatically unworkable. Our society, and the infinite amount of social interactions which compose it, is predicated upon a certain robustness and elasticity in terms of the give and take of human relations. Society and community survive because of our ability to absorb minor transgressions in numerous forms, not least privacy.

Lisa Austin refers to the courts' approach to this idea as "containment anxiety"[286]. This is essentially an anxiety or worry felt by the courts and legal system regarding the danger of a too expansive legal definition of privacy that would allow a plethora of unwarranted privacy claims that would undermine the healthy interaction of society and be contrary to the development of the broad public interest. There are essentially two ways to limit privacy claims and ease the containment anxiety. The first is to balance privacy against other rights such as free speech, and the other is to limit the applicability of perceived privacy transgressions or inversions within the legal context. The latter fits the role of the objective test or reasonableness threshold.

Post sees this idea of reasonableness as not merely a statistical average of opinion but rather an instantiation of community norms and a reflection of those norms[287]. Post makes a number of crucial observations about this concept. Referring once again to the idea of 'civility rules' and drawing upon the work of Goffman related to the rules of 'deference and demeanour', Post explains that the objective element or standard in the tort of privacy is based not upon the actual emotional impact or offence caused by the invasion but rather whether the community or societal reflection or conception of civility rules had been breached. In other words: whether the norms relating to demeanour and deference had been transgressed to such a degree that it went beyond a reasonable or collective sense of dignity. At this point a legal recourse will be permitted because the offence has breached that point on the scale which Gavison defined between mere bad behaviour (or moral wrong) and a legal wrong. There are a great many factors to be considered in this weighing of the scale of reasonableness and offence. We can examine but a few.

[286] Austin (n.281) p.165
[287] Post (n.240) p.962

It is important to note at this point a crucial distinction that between the US and the ECHR and English approaches that bears some impact upon the outcome of the consideration of standards of reasonableness, decency and acceptability relating to privacy. The US, in their fervour for democratic accountability have a definitional system which they feel gives a greater sense of certainty in the outcome of the case. This essentially means that there is a definitional divide between public and private figures when it comes to issues of privacy and reputation.

This obviously has a great impact upon the weighing of free speech against these rights but will also, given the intertwined nature of these considerations, have an impact upon whether there is a privacy claim in the first instance. This feeds into the question of intrusion as a newsgathering technique. There is debate over whether the simple taking of a photo is an intrusion without publication, but regardless of the answer, the consideration will be different in the US for a public rather than a private figure. The English and ECHR systems had in the past used what might be described as an ad hoc rather than definitional approach; for example, while a public figure would have to expect greater scrutiny and reduced spheres of privacy the reasonableness will be judged upon a more holistic consideration of circumstances and factors. In light of the maturing jurisprudence of the European Court and the English Courts in recent years (see the analysis of the *Axel Springer* case above), the courts in both jurisdictions, while avoiding an American definitional approach, are crystallising the criteria used in their balancing, which should, in theory, give greater certainty in the case law.

N.A. Moreham has given consideration to the nature of these factors and circumstances which will allow a judgment upon the reasonableness or not of a privacy claim[288]. Moreham considers these in the context of privacy in public places but broadly they are applicable to what would be considered private places also. Location is a fairly obvious factor especially in relation to what was just said about applicability in private or public places. What a person is comfortable revealing in their home will differ vastly from what they will reveal in public. This is equally applicable to the assessment of reasonableness of invasions of privacy. The principle extends to different categories of public place, for example: stripping at a nudist beach versus in the high street. This comes down to the crucial distinction between access and accessibility[289]. That is to say that simply because one is accessible in a relatively public place

[288] Moreham, N "Privacy in Public Places" [2006] Cambridge Law Journal 606-635 p.623
[289] Ibid p.618

it does not necessarily follow that one wishes to grant unlimited access to everyone, particularly in these cases through media dissemination.

There are obviously different expectations of privacy depending upon where one is located. This is equally true in the nature of the activity undertaken. An embarrassing, intimate or traumatic event or activity will again garner greater protection as we saw from the respective courts' approaches in *Peck*[290] and *Campbell*[291], where although performed to some degree in public the activity in each case remained intensely personal and thus invasions of that private sphere were protected against. These examples are as opposed to when a person is deliberately drawing attention to themselves and an inference with their potential sphere of privacy is to be expected. Moreham gives examples of how the method of the privacy invasion can have an impact. For example, if the information is accessed in a surreptitious manner or if there is an element of harassment in the invasion or if technology is used to breach the sphere of privacy, then this can be a more severe violation.

The number of variations and nuances is almost infinite but what is central to all of them is Post's idea of privacy being normative in nature. Just as a person's subjective consideration of their boundaries of privacy will be based upon the context and circumstances, so the wider community's norms will be dependent upon a number of factors and considerations related to context[292]. When cases such as *von Hannover* and *Murray* were decided in favour of the claimant there was some criticism of the concept of protection of privacy in public places[293], but this was to ignore the importance of context in the formation of community norms[294]. Just as a hug from a stranger is vastly different from a hug from a loved one, on a relative basis, so the photographing of a public figure at a restaurant or with their children is different from photographing them at an official function or a book signing. Thus the variation of circumstance, and understandings of relativism and context, inform the legal systems' application and considerations of normative values.

[290] *Peck V. United. Kingdom* (2003) 36 E.H.R.R. 41
[291] *Campbell* (n.166)
[292] Solove (n.2) p. 477
[293] See generally: Hughes, Kirsty 'Photographs in Public Places and Privacy' Journal of Media Law Volume 1, Issue 2, 2009
[294] And subsequent developments such as the Princess Kate photos show that this 'context' issue is increasingly recognised in privacy disputes.

One key point relates the question around the necessary extent of the publicity (or degree of exposure) in publication/dissemination cases in order that the privacy transgression crosses the threshold into what might be deemed offensive. This aspect of privacy perhaps above all demonstrates the need for the objective community standard of reasonableness due to the stark differences that it will have with a subjective approach. On a subjective level the revelation of an embarrassing fact to a single (third) person, perhaps a girlfriend or prospective employer, can be devastating and subjectively offensive to a high degree, but there is a live debate over whether this constitutes a legal violation of privacy. The fact is that in most instances where there is a claim of privacy violation by dissemination it is in the circumstances of publication to a mass audience, or at least potentially a mass audience. That is the nature of the beast, but it does not necessarily preclude a smaller scale exposure being considered a violation of the privacy right. We can easily see how on a subjective level this is possible but the community standard is what acts as a check and the criteria for its consideration must be examined.

As Post points out it is not simply the content which matters but the entire context of the communicative act[295]. Very often the mass publication qualification is used as a kind of limiting device because the law cannot police every single interference with privacy. Thus presuming the general threshold for community notions reasonableness is that the transgression is 'highly offensive' then the scope and size of the audience will have to be taken into consideration.

A further point that extends this idea of context is presented by Daniel Solove in his consideration of aggregation[296]. This is the idea that an invasion of privacy be it through intrusion or dissemination, must be considered in light of any other information about the subject that is, or potentially is, in the public sphere. Very often a small piece of information can seem harmless but when aggregated with existing knowledge can lead to the situation where a privacy violation occurs. This is particularly prevalent with data circulation but also can be the case with intrusions that complete a wider picture. Legal protections and the legal conception of privacy should be understood in this wider context.

[295] Post (n. 240) p 981
[296] Solove (n.2)

Finally, the subject of harm is a complex one when related to privacy. The presumed nature of harm resulting from invasion of privacy would be a broad idea of mental distress or emotional anguish. However, it is equally the case that in the jurisdictions examined here no additional damage need be shown in order to claim privacy has been invaded – it is the loss of privacy or the loss of control over private information that is the harm in and of itself. It is true that in most cases the claimant will in fact attest to the damage or harm that has been inflicted through the violation of their private sphere, but it is the case that such harm is overly broad and strictly unnecessary because it goes beyond those intrusions of privacy that do not alter one's mental state but are nonetheless actionable[297].

This of course differs from other torts where damage must be shown. Even in defamation, where damage is also assumed (although needs to be shown to be sufficiently serious for damages under the 2013 Act), the claimant must show that the publication was defamatory, and not simply untrue. Part of the reason for privacy's exception is that it deals with an aspect of dignitary harm that is presumed. However, more fundamentally, it is due to the fact that the invasion of privacy itself is the harm; it is the puncturing of the barriers of personal information control. It relates back to the ideas of autonomy and social interaction which privacy facilitates, when they are interfered with through a breach of privacy, the harm is inferred[298]. This idea is further demonstrated by the issue of vindication. People bring libel suits in an attempt to restore their reputations through vindication by the court declaring the libel untrue (or unproven). In privacy a court case is often self-defeating as it leads to further publicity. The essence of the information is true so the only vindication the court can give is to say that the invasion was unwarranted, thus demonstrating the intrinsic harm in privacy invasions and explaining the keenness of victims for the use of pre-publication injunctions[299].

3.5 Conclusion

In conclusion, there are a great number of issues that relate to the formulation of a definition of privacy as we can see, particularly with legal applicability. The three key components are a neutral conception gained through analysis of real cases and examples of

[297] Parker, R A Definition of Privacy, 27 Rutgers L. Rev. 275 (1975). P279
[298] Post (n240) p.965
[299] See *Mosley* (n.272)

privacy claims; a coherent and underlying value, present in the need to control personal information in different contexts in order to facilitate personal autonomy and the formation of social relationships; then in order to have legal use the personal subjective concepts of privacy must be tested against an objective community norm that nonetheless must be adaptive to context and the relativity of private circumstances. Broadly I think this has been achieved.

The chief dangers or obstacles to a coherent understanding of privacy include the over stretching of the term to include aspects of other rights such as liberty or autonomy over our bodies or actions[300]. This unwarranted extension obfuscates the true nature of privacy and gives rise to reductionist claims that there is no single interest in privacy but a cluster of disparate values. A clear sight of privacy's purpose demonstrates what Gavison calls "the poverty of reductionism", that reductionists are essentially engaged in circular logic in their idea that merely because there are different facets to privacy one need not or cannot identify a unifying value.

Ultimately the key is to allow protection of an important aspect of our broader human dignity be it personal or societal, by protecting the right to control over personal information and knowledge thereof.

The themes and conclusions of this chapter will be returned to in the concluding chapters when trying to achieve a balance between privacy and freedom of the press, and will be used to inform conclusions about the nature of the public interest between the competing rights.

[300] There is no doubt that Article 8 covers a wider range of rights interests than just the narrow sense of privacy this thesis is concerned with. However, in disputes between privacy and speech in the media should be seen in this narrower privacy context. While Art. 8 covers a lot of areas, in press cases I am arguing that the "control of information" definition gives a platform to decide on the balance to be struck. I don't think a wider 'autonomy' definition fits normatively – and in most cases descriptively. Where individual cases run against this assertion, I would argue the courts need to adjust their rationale in order to find a consistent logic/balance.

Chapter 4. Technology, Society and the Evolving Sphere of Privacy

4.1 Introduction

Even before the advent of the Internet and the rapid evolution of technology that has occurred over the last twenty years or so, the law, and society in general struggled to deal with the myriad issues tied up with privacy and its protection. One simply has to look at the reams of literature dedicated to attempting to define privacy as a concept or value to see this. As outlined in the previous chapter, scholars of many disciplines including but not exclusive to law, philosophy, psychology, sociology, anthropology have all attempted to pin down the essence of the ethereal concept of privacy and in doing so have managed to agree on but one thing: their disagreement. There is an ever-expanding litany of differing approaches to privacy; some seeing it as a unified concept and others viewing it as but an umbrella term for a disparate but linked set of values.

It is no surprise then that, being built upon such wavering foundations, the evolving societal response to the impact of technology upon notions and understanding of what is private, is even more difficult to grasp. The one thing that can be said with confidence is that our collective idea of privacy has altered inexorably in the past two decades. Developments such as the long term retention of data, the speed and ubiquity of the Internet, the creation of social networking, the proliferation of digital camera technology, and the adoption of mass surveillance, have all created an environment where the traditional notion of privacy has shrunk and become warped. From a societal perspective, reactions and the development of responses have gamely, if not always successfully, attempted to keep up. However, the traditionally sluggish sphere of the law, has struggled much more in trying to adapt to the fast altering landscape. This is crucially important given the growing importance of the law upon the realm of privacy and the increasing legal role in protecting it.

The purpose of this chapter is to explore a few key impacts of the technological evolution on the sphere of privacy. The chapter will conclude by trying to assess how the law, impacting upon privacy, should react in light of these developments, chiefly asking the question as to whether the law's obligation is to bend to the reality of the new paradigm or to attempt to protect a more traditional value and understanding of private life.

4.2 Social and Technological Evolution

With the practical and coherent definition of privacy, both social and legal, formed in the preceding chapter we have a terrain upon which to assess the impact of the technological advances (and the parallel, inextricably linked social developments) of the past two decades or so upon both individual and collective understandings and expectations of privacy. Specifically, the focus will be upon how these phenomena have altered the conceptions of privacy that individuals hold - the subjective element; and perhaps even more importantly how society and the legal sphere has altered what might be determined an unreasonable interference with privacy – the objective element.

Questions regarding impacts and the correct response of the law and society to these changes are the subject of section 4.3 but they grow directly out of the issues examined here. The sheer number and scale of recent technological advances is enormous and as such cannot be done justice to in this chapter. However, it is possible to select a number of specific instances of direct impact upon the realm of human privacy that provide a cross-section of the vast terrain and allow us to draw some conclusions relevant to the aim of this chapter. The selected issues include handling and retention of data; the broad impact of the Internet in instantaneous communication, permanency and publicity; the specific impact of Online Social Networks (OSNs); and the proliferation of potentially privacy-invading technology including cameras and other recording devices.

Even before the mass proliferation of the Internet, the digitisation and storage of data was causing consternation among privacy advocates. Societies and governments in particular have always had the need and indeed obligation to keep records on its citizens through, for example, censuses and health/criminal records[301]. Private companies also collected (sometimes detailed, sometimes rudimentary) information about customers and clients. These were relatively trouble free as they were isolated, traceable and had to be kept minimal due to constraints on storage. The computer age changed this dramatically, ushering in an age where massive amounts of data could be stored in very little space, information could be transferred instantaneously, became difficult to track, was permanently stored, and perhaps most worryingly was now subject to 'aggregation': the process whereby several separate instances

[301] See for example Public Records Act 1958 http://www.legislation.gov.uk/ukpga/Eliz2/6-7/51/contents or Census Act 1920 http://www.legislation.gov.uk/ukpga/Geo5/10-11/41/contents (accessed 30th June 2016)

of data collection could be quickly and easily collated to create a picture of the subject that was not necessarily the original intent or understanding[302]. The Internet has served merely to exacerbate these already snowballing trends.

Data protection and information rights are a vast area but there are a few key points worth noting. The first is the important distinction, noted by Jacqueline Lipton, that the focus of privacy has shifted from traditional concerns which were about invasive violations of privacy such as surveillance to a greater concern over the collation and processing of personal information and data[303]. Although issues like hacking email are still prominent in the computer age, the greater threat is the aggregation of personal information, voluntarily surrendered, to form a picture that was not the explicit will or desire of the subject.

Equally disconcerting is the processing or selling of data for purposes for which it was not intended. These concerns are both reflected and highlighted by the various data protection laws that have been enacted in different jurisdictions[304]. It has been noted that the European Union has a particularly comprehensive regime of data protection, at least in comparison to the United States[305]. The Data Protection Directive (implemented domestically by each member state) protects against a host of information privacy concerns, notably consent to having information processed, access by a subject to data collected about him, its purpose and the identity of the collector. This regime squares with the definition of privacy posited in the preceding chapter - namely the control of information about a person in order to protect their dignity and autonomy. Indeed the definition of data in the Directive is simply, "any information relating to an identified or identifiable natural person"[306]. This is a fairly broad approach but again is reflective of the theory of privacy based upon control of, and access to, information. America, reflecting a different priority given to privacy (it is not recognised as a full/explicit constitutional right compared to, for example, First Amendment free speech), has a more piecemeal approach.

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[302] Steinbock, D. (2005) 'Data Matching, Data Mining, and Due Process', Georgia Law Review, p1-84

[303] Jacqueline D. Lipton, Mapping Online Privacy, 140 N.W.U. L. Rev. 477, p.499-500

[304] Data Protection Act 1998 http://www.legislation.gov.uk/ukpga/1998/29/contents (accessed 30th June 2016)

[305] Daniel E. Newman, "European Union and United States Personal Information Privacy and Human Rights Philosophy—Is There a Match?" (2008) Temp. Int'l & Comp. L.J. 307, p.327

[306] Article 2, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data , Official Journal L 281 , 23/11/1995 P. 0031 - 0050

The fact remains that despite efforts to update European data protection, through the newly adopted General Data Protection Regulation[307], it will only come into force in mid-2018 and the current Directive dates back to the pre-mass Internet age and, as mentioned above, the exponential growth of the Internet has caused an equally rapid expansion of data collection and given rise to a host of new issues some of which are examined below. The incongruity of old understandings of data and the new Internet behaviours is amply demonstrated by perhaps the most famous case to arise from the Directive's implementation: the *Lindqvist* case[308].

Ms Lindqvist's prosecution for violating the Swedish law implementing the Directive was upheld by the ECJ. The prosecution was based on the publishing of fairly innocuous personal details of her fellow parishioners on a church website, and the subsequent ruling essentially held that such information disseminated online was seen as a public rather than personal sphere, an idea which has drawn criticism due to its implications for many online activities. The consequences of the *Lindqvist* case are further explored below, given how illustrative it is of the evolving conception of public and private space.

As mentioned, the Internet has a number of broad implications for privacy and control of information. Not simply the rate of growth of the Internet, but its positioning at the very heart of our society means it cannot avoid having profound implications upon our social structures. This is amplified in the case of privacy if, as we understand, privacy is essentially about information. It is worth remembering that one of the early sobriquets attached to the Internet was "the information super highway". In the early days, and to a lesser extent today, much of this information was non-personal, that is to say it was business, commercial, government data for the benefit of work in these spheres.

However, as is palpable to anyone who has ever been on the World Wide Web, the Internet is now very much a tool of recreation and personal interaction. As such, the very essence of our theory of privacy is entangled in a mechanism designed for the speedy and wide dissemination of information.

[307] The General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN

[308] Judgment of the Court of 6 November 2003 in ECJ—C-101/01 (Reference for a preliminary ruling from the Göta hovrätt): *Bodil Lindqvis*t, OJ 2004 C7/3 [Lindqvist]

One of the burgeoning issues arising from privacy on the Internet is the nascent "right to be forgotten"[309]. This is in a sense a descendant from the data protection issues mentioned above. The digitisation of personal data and information means that once privacy has been either surrendered or breached it is extremely difficult to claim back; the duplication of data, its rapid dissemination and the ability to recall even deleted items has profound implications for privacy. There are a number of other considerations related to competing rights and interests such as free speech and access to information, but from a pure privacy perspective the current situation where very often information put online or stored digitally cannot be removed shows a vast alteration in practical notions of privacy.

The fact that the EU is working hard to try and catch up with the altering terrain demonstrates this. However, even the new EU Regulation would have limited effect[310]. As mentioned there are competing interests (e.g. commercial, security), but further than that the Internet respects no border or jurisdiction so even compliance by European bodies may have scant impact. Another reason why these measures may be relatively ineffective on the new terrain is the while governments and companies who process the vast majority of data in the traditional sense we understand it (factual information on specific topics such as health or consumer choices) will have to respect their obligations, other forms of information circulated between private citizens are likely to escape the dragnet of data protection initiatives. It is a common refrain that large Internet entities like Facebook, Amazon, or Google have volumes of information about most people that the Stasi could only dream of. Beyond data specifically collected by these commercial identities, vast amounts of information are what we voluntarily, even enthusiastically, share online.

This brings us to the issue of online social networks (OSNs). While the impact of social networks on the Internet is but a logical linear extension of the two concepts above, in the sense that personal information is being disseminated and digitised, it has perhaps the most unique and pervasive impact on the central question of this chapter: the alteration of notions of privacy.

[309] Bennett, Steven C. 'The Right to Be Forgotten: Reconciling EU and US Perspectives' Berkeley Journal of International Law, Vol. 30, Issue 1 (2012), pp. 161-195

[310] For a general discussion of the Regulation's impact see de Hert, Paul and Papakonstantinou, Vagelis 'The new General Data Protection Regulation: still a sound system for the protection of individuals?' C.L.S. Rev. 2016, 32(2), 179-194.

This is due to the fact the concept of social networking is the active, willing and often gratuitous sharing of very personal information in a quasi-public forum that goes far beyond traditional locations where such information was confined e.g. between close friends and family. Facebook, Myspace, Twitter and a host of smaller but not insignificant sites like Pinterest, Foursquare, Tumblr, Instagram, Snapchat, and also blogging sites likes Wordpress, have created an online realm where a great many people are perpetually exchanging vast torrents of information. These networks are specifically designed to facilitate the online publication of information that in a traditional sense would have been considered private or semi-private, shared among close friends on a one-to-one or small group basis. The sheer volume of information uploaded is difficult to fathom, Facebook having over 1.23 billion unique users posting over 350 million photos per day[311]. As with any form of communication there is a huge variation in type and form of information, much of it is fairly innocuous (though the phenomena of "over sharing" is well established); but regardless of this, the willingness of great swathes of society to step beyond the traditional formations of personal communication and traverse the established boundaries of privacy is bound to impact the shape of individual and collective notions of these concepts.

There have been a number of excellent studies both qualitative and empirical about the impact of OSNs and associated Internet forums upon how people view privacy. Levin and Sanchez Abril undertook one such study to examine the attitudes college age students in the US and Canada had to OSNs particularly in regard to privacy and protection of their personal information[312]. The results cover a wide variety of topics but a number of conclusions are particularly salient for the current discussion**.**

Firstly, there appears to be a clear division or distinction with the concerns and expectations of respondents, over privacy in relation to personal information shared on OSNs, based upon the audience viewing said information[313]**.** Thus, the subjects were much more concerned with strangers, or employers accessing the personal information rather than the friends for whom it was intended. This indicates a tendency to compartmentalise differing notions of privacy and certainly seems to reflect the theory of privacy espoused in the preceding

[311] 'Facebook Inc', United States Security and Exchanges Commission, Form 10-K, available http://investor.fb.com/secfiling.cfm?filingid=1326801-13-3 (accessed 30th June 2016)
[312] Avner Levin and Patricia Sánchez Abril, Two Notions of Online Privacy Online, 11 Vand J. Ent. & Tech. L. 1001 (2009)
[313] supra p.1025

chapter regarding control of access based upon constructing social relationships. This is explicitly recognised later in the study when participants were asked directly about the issue of separating different areas of their lives, e.g. work and home, and that diverging standards of publicity and privacy are relevant depending on those circumstances[314].

Another very interesting conclusion drawn from the study's data is the sense that the users of OSNs did not blame the website/network for the consequences of sharing personal information perhaps indicating users agree with the privacy disclaimers of the OSN, and additionally that OSNs serve simply as a forum or conduit for sharing, and as such the subject/poster of the personal information remains responsible[315]. Additionally, and crucially for our purposes, this may be an indication that there is a tangible sense among users of OSNs that the boundaries of privacy have moved to a certain extent and there must be an acceptance of reduced expectations when utilising the Internet and OSNs in particular.

The revelations about mass surveillance by the NSA (National Security Agency) and GCHQ (Government Communications Headquarters) among other intelligence agencies is informative in a number of ways[316]. Firstly, and perhaps somewhat surprisingly was the public's reaction to the stories, which somewhat reinforce the theme of a changing and slackening attitude toward individual privacy[317]. A sizable proportion of people seemed to presume, even prior to the leaked documents, that governments and corporations had both the ability and intention to monitor their correspondence and online activity. Equally sizable percentages of respondents believed that the activities revealed were justified. While these surveys are not conclusive they do indicate a sense that the public has adapted its attitude in the face of the realities of the modern technological age, which will in turn alter attitudes to privacy more generally.

A second, and equally important conclusion that can be drawn from the NSA/GCHQ saga is that private companies are either willing to allow, or unable to prevent, the surrender of customers' personal data to government security agencies, depending upon which version of

[314] supra p.1040
[315] supra p.1031
[316] 'Edward Snowden: Leaks that exposed US spy programme' BBC 25th October 1013 http://www.bbc.co.uk/news/world-us-canada-23123964 (accessed 30th June 2016)
[317] 'Edward Snowden: public indifference is the real enemy in the NSA affair' The Guardian 20th October 2013 http://www.theguardian.com/world/2013/oct/20/public-indifference-nsa-snowden-affair (accessed 30th June 2016)

events one chooses to believe[318]. Either way, the conclusion is the same: information provided online to companies, particularly social media and search engines, is in no sense secure with them, nor does its collation and dissemination conclude with the company to whom an individual gives explicit permission to gather. It has been pointed out that the evolution of 'terms and conditions' agreements have created surreptitious catch all clauses enabling the transfer of information on very broad grounds[319]. Both these points create unique sets of challenges for the law, explored below.

Linked in many ways to the OSN issue is the slightly broader issue of general technology capable of recording data, but especially images. Concerns over CCTV use by government and private business has been prevalent since the 1980s but the proliferation of high quality digital camera technology to the mass public through mobile phones and other devices has created a society where anything can and is recorded at any given time. Combined with technology like Google Earth and Google Streetview there is a palpable sense that at any given time we may be being observed and more importantly recorded; this is obviously something that can have a profound impact upon expectations of privacy. An important issue on its own of course, but in conjunction with the issues explored immediately above regarding the ease of dissemination - the 'viral' effect of the Internet- and the permanency of information shared on digital platforms the issue is greatly magnified.

There are numerous examples of instances where the combination of photo/recording technology and the Internet has served to impinge greatly on an individual's privacy. Daniel Solove gives a number of high profile examples such as "Star Wars Boy", "Bus Uncle", "Poop Woman" who have suffered consequences as a result of their privacy being invaded[320]. Now barely a week passes without a viral video or photo recording an ordinary member of the public in an embarrassing or compromising position.

Aside from these relatively new phenomena there is another sense that photo and video has a marked impact on the social and legal theory of privacy. It is widely recognised that it is

[318] 'NSA Prism program taps in to user data of Apple, Google and others' *The Guardian* 7th June 2013 http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data (accessed 30th June 2016)
[319] 'We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity…' Section VI 'Facebook Data Use Policy' https://www.facebook.com/full_data_use_policy (access 30th October 2013)
[320] Solove, Daniel. *The Future of Reputation, Gossip, Rumors and Privacy on the Internet*. (New Haven: Yale UP, 2007) p.1

not simply the content of information in a potential privacy breach but also the format of the content/information[321]. Examination of the prominent privacy cases in the UK and under the ECHR shows the issue of photography to be crucial in respect to what the courts deemed to be an unreasonable breach of privacy.

In *von Hannover*[322] and *Campbell*[323] respectively it was the paparazzo's photography, used to illustrate the newspaper story in question, that tipped the scale toward the court finding a breach of privacy. Even in public places there was a reasonable expectation of privacy against being recorded. It is speculative to say the court would have decided differently if the publications had simply given verbal descriptions of the activities, but both courts made specific mention of the particularly intrusive impact that the photos had on a person's privacy. In the context of this chapter's theme it is worth noting that both cases were decided in 2004 and much of the technological advance in cameras, OSNs and the Internet has taken place in the nine years since. As such the exact impact upon the reasonable expectation of privacy at the heart of these cases, by the ubiquity of digital imagery and social change in light of rapid sharing and publicity of such material, remains unclear but undoubtedly significant.

4.3 Impacts and Responses

Having established a workable definition of privacy (in the previous chapter) and now highlighted a cross-section of the technological changes that are influencing and changing the social sphere in which privacy operates we must splice the two to try and identify some of the consequences these social/cultural changes are having on the legal and social definition of privacy, and also what the response should be within those two contexts. Perhaps the most important outcome is the idea that at an individual level and crucially at a collective or societal level our understanding of what is private and what is a reasonable expectation of privacy may have altered due to the tectonic changes in technology and by extension society. This will have a direct impact on the social and, perhaps even more importantly, the legal definition proffered in the preceding chapter.

[321] Lipton, Jacqueline D. 'Mapping Online Privacy', 140 N.W.U. L. Rev. 477, (2010) p.512-513
[322] *Von Hannover* (n.167)
[323] *Campbell* (n.166)

There are a number of straightforward and possibly self-explanatory impacts arising out of the developments explored in section 4.3. The most obvious is the simple idea that the digital storage of data, the ease at which information spreads across the Internet, the permanency of publication and communication, and the vast proliferation of image gathering technology, means that the traditional sphere of privacy has shrunk quite considerably. The boundaries in our lives that we could call private – i.e. the quantity of our personal information under our control and inaccessible to others – is not the same as it was 20 years ago. Thus, pervasively, incrementally, and perhaps unconsciously our ideas of what we can reasonably expect to be private have altered.

At a more specific level, our willingness to voluntarily give up our personal information or data has a fascinating and more nuanced impact on notions of privacy. There is of course a crucial divergence of motivation in the different types of information surrendered and the circumstances in which it is offered. Very often on the Internet data is surrendered reluctantly, be it to commercial websites or search engines through the use of cookies, or by bartering for a free service online by filling out registrations[324]. Conversely, as we have seen in the cases of OSNs, blogging and other "sharing" websites personal information is often actively and enthusiastically shared at the behest of nobody but the subject themselves. This, however, does not simply mean that once data is given up there is no more expectation of privacy or that the subject surrenders all interest in its use and/or exposure. Thus, perhaps the biggest impact of the evolving landscape of technology and the Internet and OSNs in particular is that it has shattered the old dichotomy of private and public.

From this idea of intermediate levels of exposure, there is evolving a "social networks theory of privacy", an idea which actually precedes widespread *online* social networking but has found perfect applicability in this emerging context[325]. Lior Strahilevitz develops this idea from the fact that in the complicated circumstances of our lives, humans very often reveal certain pieces of personal information within certain social circles and hide the same revelations from others. Thus, the information is not secret (it being important here to remember the distinction between privacy and secrecy) and in a sense it has been revealed in public, or at least to a certain section of the public. But this does not mean that the information

[324] Xu, Heng 'Reframing Privacy 2.0 in Online Social Networks' 14 U. Pa. J. Const. L. 1077, p.1087

[325] Strahilevitz, Lior Jacob 2005, 'A Social Networks Theory of Privacy', The University of Chicago Law Review, vol. 72, no. 3 (Summer, 2005), pp. 919-988

itself is 'public' in the wider sense of the word, the subject still wishes to retain a level of control over who has access to the information. It is clear to see how this idea reflects the theory of privacy espoused by the Rachels-Fried school of thought, touched on in the preceding chapter, that retention of control over who has access to intimate details of one's life is a determinant in the formation of social relationships.

This offline social network theory transfers extremely well to an online context. The empirical research of Levin and Sanchez Abril referenced earlier shows also how there is a real sense that users of OSNs are transferring their offline expectations of behaviour to an online environment. There are of course inherent dangers in this, the multitude of stories about embarrassing photos, emails, status updates etc that leak well beyond the intended audience are testament to that. However, in terms of creating a new paradigm of privacy between the traditional dichotomy of private and public, the social networking theory is illuminating. In a legal sense courts, when judging whether there has been a breach of a reasonable expectation of privacy, take into account the actions of the claimant in their own exposure and publicity[326].

In the case of information revealed to a small group on OSNs this is extremely difficult terrain for the law to navigate and perhaps the social networking theory can be of some assistance. One of the chief difficulties is the fact that, even with enhanced privacy settings, the Internet and OSNs remain treacherously porous; information can be easily passed deliberately or accidently beyond the intended online social boundary and be rapidly and permanently spread i.e. "go viral". This is the reason the privacy policies of most OSNs shy away from protecting the dignity of the user and remain in the black and white realm of the access that they can and cannot control.

How then should the law evolve to meet the changing social and technological landscape? This is an enormous question with a complex answer and I would not presume to be able to answer it fully in this chapter. However, the central inquiry might be: should the law adapt and change to reflect the altering notions of privacy or should it remain steadfast to protect traditional concepts against ever encroaching erosion? At the risk of sounding contradictory, it should do both. This point can be illustrated by two examples of how the law has reacted already.

[326] Hughes, Kirsty "Photographs in Public Places and Privacy" (2009) 1(2) Journal of Media Law 159. p.165

Firstly, in the reaction to data collection and retention we have seen that in certain jurisdictions (notably the EU) that law has taken genuine, if slow and cumbersome, steps to help protect privacy. The legislation acknowledges that in the altered terrain of the digital and Internet age there is going to be a loss of traditional control of personal information but in lieu of this it has tried to create alternative controls by allowing citizens to know what information is kept, by whom, and for what end. Additionally, it is developing a right to have redundant or unnecessary data removed through the 'right to forget'. This initiative is a good example of the law adapting to the new landscape of technology and privacy expectations, rather than attempting to protect an outdated conception. However, the *Lindqvist* case above also shows how old laws can be misapplied to new situations (bearing in mind a certain degree of laissez-faire judicial policy of the ECJ to Member States domestic application of directives). That case was decided in 2003 and the strict application of data retention standards to websites in the Web 2.0 age is inconceivable and serves as a cautionary tale against filling old skins with new wine.

Secondly, the case of *Reklos v Greece*[327] before the European Court of Human Rights produced a result difficult to reconcile with the social and technological changes we have explored in this chapter. The Court held that Greece had inadequately protected the Article 8 privacy rights of a new-born baby who had been photographed without permission. The facts are complicated by a number of factors including the fact that the subject was a child, the privacy of the hospital setting and the retention of photographic negatives, but again great emphasis was put in the issue of the photographic element. While on balance there may have been a legitimate breach of privacy, the ruling may have profound influence on future cases involving the type of candid photography and publication that is ubiquitous in this age.

The dichotomous dilemma facing the law – whether to defend an older notion of privacy or adapt to the new conditions – can also be framed in a slightly different manner. The law can either concentrate on trying to stop private information being accessed or disseminated in the first instance, this is increasingly akin to trying to put a genie back in a bottle or, to switch metaphors, closing the stable door after the horse has bolted. Alternatively, the law can instead attempt to give individuals rights and recourse over that private information even after it has

[327] (App No 1234/05) [2009] EMLR 16

leaked into the public or semi-public sphere, thus accepting the realities of the new information paradigm we find ourselves in yet trying to adapt with innovative and realistic solutions.

The second of these choices offers less protection for what is, according to our posited definition, the essence of privacy: control over personal information. However, it could be convincingly argued that there is little point in offering cosmetic or symbolic protection to privacy and against the spread of private information while in reality this protection is rendered practically and pragmatically worthless by technology. Is it not better then to accept that the level of control individuals have over personal information has been irrevocably altered by the technological developments we enjoy, and instead concentrate on measures that will have practical use to people trying to comes to terms with the altered landscape of data rights and access?

The absurdity of trying to apply old laws and outdated modes of thinking to the current technological terrain is well demonstrated by an analogous situation involving the use of Twitter and other social media to contravene or bypass anonymity orders and super injunctions. These legal measures were created for a world where the courts had a much greater deal of control over the press because the number of news outlets was comparatively small, usually physically identifiable and locatable newspapers who took seriously the threats of contempt of court and other legal sanctions. When Ryan Giggs gained an injunction over his affairs with various women it was quickly undermined by the wildfire spread of the information over the Internet, and yet we were faced with the surreal situation where anyone with even a passing interest in the topic knew the information that was the subject of the injunction yet the established press was still under a pointless and ineffectual obligation not to publish said information[328]. Likewise in the recent *PJS*[329] case, the injunction was upheld in the UK Supreme Court despite the fact that the details of the affair had been published in America and anyone with a Twitter or Facebook account knew exactly who was involved, with Lord Toulson making precisely this point in his dissent[330].

It will behove the law to adapt its understanding of privacy to reflect the changing social norms provoked by technology. At the same time, it will be incumbent upon legal protection

[328] 'Ryan Giggs named by MP as injunction footballer' 23rd May 2011 http://www.bbc.co.uk/news/uk-13503847 (accessed 1st June 2016)
[329] *PJS (Appellant) v News Group Newspapers Ltd (Respondent)* [2016] UKSC 26
[330] Ibid at para 79

to robustly defend the sense of privacy that remains in our society given its evident importance. Perhaps most importantly the law must foster a sense of openness and understanding about what exactly our rights are over personal information and even where it has becomes public ensure the value of dignity remains central to our conception of privacy.

4.4 Conclusion

There can be no doubt that the evolution of technology and the corresponding change in society has had a great impact upon our individual and collective attitudes to privacy. However, an important distinction must be recognised and emphasised; the way we define privacy as a concept has not changed but rather it is the way we approach this conception which has altered. Privacy as the ability to control certain personal information in given social contexts is as valid a definition now as it was in the days of Brandeis and Holmes, or the 1970s when the philosophers examined tackled the problem in earnest. The elements set out in section 4.3 – a consistent value (personal information control) drawn from a conceptually blank canvas, and both subjective and objective elements to give a legally effect meaning – remain every bit as valid in the new technological terrain.

What has altered though is how individuals and we as a society judge privacy in both those subjective and objective elements i.e. what information we deem appropriate for the public, semi-public, or private spheres in any given context or social situations. The various technological changes charted in section 4.2 have all had discernible but differing levels of impact on what we now consider private or personal information. As individuals are prepared to both share more via social networks, and accept more intrusion through data aggregation and both government and commercial recording of information, this is having an impact on the objective society-based understanding of privacy that we use to give legal effect to the right enshrined in Article 8. Although Robert Post was correct to distinguish between what this objective standard was not (an aggregate of individual attitudes) and what it was (an instantiation of a community reasonableness threshold) there is no doubt that the latter is impacted by the collective alteration of individual privacy standards as the former.

In light of this, the law must straddle the difficult line between protecting the old values against further erosion and adapting to changing circumstances that we have seen will move on with or without the law's blessing. The legislative process will always struggle with this, as

will the common law, given the inherently sluggish speed of the two. But the fact that officials and governments have already recognised the fundamental distinctions between preventing the collection of information, which may now be nigh on impossible, and providing continuing rights over information (such as access to data collections or deletions of unwarranted/expired data), and offering remedies for egregiously misuse or violations, shows that sensible legal approaches are indeed possible. This is crucial because the evolution and indeed revolution of information technology is only going to gather pace in the future.

Part Three: Speech, the Press and Article 10

The purpose of Part Three of this thesis is to explore and outline the social, political, philosophical and, most importantly, legal underpinnings of the rights protected by Article 10 of the ECHR.

Having defined the fundamental values that are protected by Article 8 privacy rights, it is incumbent upon this thesis to attempt a similar exercise with the central counterweight in disputes over press/privacy cases and that is freedom of expression.

This presents a different set of challenges to those faced in defining privacy rights. Freedom of expression, or freedom of speech as it is more commonly known, is one of the most fundamental principles that underpins the modern liberal democratic political system.

We will see as this part of the thesis unfolds, that freedom of expression is an ages old right that predates codified rights. As such there has an enormous amount of scholarly debate about its meaning and extent. While this means that there is already a vast pool of sophisticated discourse upon which to build, it presents a unique challenge of distilling these ideas into the most salient to this thesis.

This is reflected in the structure of these chapters. The structure equally reflects two crucial points. Firstly that speech is not simply 'any other right' but is inextricably linked to the prevailing Western political philosophy of liberalism. And secondly, that freedom of the press has a unique place in the broader idea of free speech.

In this light Chapter 5 begins by placing speech in the wider context of modern political theory while trying to define some of the key principles underpinning our protection of freedom of expression.

Chapter 6 then builds upon this by looking at the relationship and interaction of the free press with free speech; attempting to place the values of free speech into a context that will allow us to understand them in the wider debate about privacy and the press.

Chapter 5. Political Theory and Freedom of Speech

5.1 Introduction

Various historical events and circumstances led to the human rights regimes that are enjoyed in western liberal democracies today. The Enlightenment, the American and French Revolutions, World War Two and the Cold War were amongst the epochal events that for myriad reasons created the conditions where the political and civil rights of the individual were seen as paramount. For the large part this state of affairs is taken for granted. However, on closer inspection there is a perpetual tension between the rights of individuals and other interests be they collective, social or otherwise. The late 20th century saw significant political and philosophical movements rise to give question to the putatively sacrosanct nature of rights. These movements, including but not exclusively the broad church of communitarianism[331], began to ask whether our shared vision of society and the individual was correct, and whether it was right to protect rights even at the expense of broader society. In response, those of a liberal bent were forced to articulate defences for rights and the autonomy of persons in the face of collectivist pressure. The debate encompassed all areas of culture and society but was particularly keenly felt in the realm of human rights law where the discourse relating to rights versus other interests was well rehearsed.

In that light this chapter, in the broader context of exploring the relationship between privacy and free speech/press, will examine the terrain of this debate. Section 5.2 will attempt to contextualise this issue within the wider concerns of my research. Section 5.3 will take a broad look at the background positions of the discussion and section 5.4 will try to utilise these ideas in a review and assessment of how these conceptions affect the way we view the right to speech in particular.

This chapter cannot cover the breadth and depth of these complex and extensive topics. However, it is hoped that it will shed enough light on these issues to be used in conjunction with the following chapters to answer the central question about privacy and free speech.

[331] Communitarianism as opposed to utilitarianism which as we well see below straddles a somewhat uneasy divide in giving justification to both liberal theories and communitarian theories depending on both the circumstances and the strand of utilitarianism.

5.2 Context

In simple terms the context of this chapter is how the competing values of liberalism, with its emphasis upon autonomy, and communitarianism with its valuing of collective interests, impact upon the exploration and elucidation of where the 'public interest' lies in disputes between the press/free speech right and the right to privacy or reputation (privacy for shorthand). Both speech and privacy are in the first instance included in human rights charters as protections of individual action, expression, or existence against government interference. The European Convention makes this clear through part (a) of both Art. 10 and Art. 8. The US Constitution's First Amendment and the American common law right to privacy, bolstered by the Fifth Amendment, are differently constituted but are similar enough for the purposes of comparison in this chapter. Both rights can be limited in two main ways, firstly by necessary and proportionate government action to protect or promote other interests, as laid out explicitly in the European Convention, and drawn out by the jurisprudence in the American system through judicial reading of implicit limitations to the bare enumerated constitutional rights. Secondly, they can be limited by a direct clash or opposition of another right. This secondary limitation is obviously very relevant to the debate over press rights versus privacy, (this will be explored to a greater degree in Chapter 8). The primary concern for this Chapter, focussed as it is on competing philosophical underpinnings and understandings of rights, is the former: the balance between individual right and the alternative collective interest.

If the debate about the public interest between press freedom and privacy concerned just one of these rights, then understanding the political-philosophy underpinnings would still be crucially important to understanding the limitations and scope of that single right. However, the fact that it involves two rights, ostensibly equal and in direct opposition - often in a zero sum scenario - make it significantly more critical to understand the underlying philosophical justification for the respective rights. It cannot be simply reduced to a simple formulation of "a liberal understanding of rights favours wider free speech scope, while the communitarian view advocates right limitations to promote social interests"; or alternatively "liberals promote the autonomy of privacy while communitarians would reduce this if collective action deems it necessary". Rather, what we have is a matrix of interests deriving from privacy *and* speech rights. These two rights – whose very opposition means that both can often not be accommodated and given full expression – contain justifications from both a liberal and communitarian standpoint. Thus a classical libertarian could simultaneously argue for strong

speech rights based upon individual autonomy, and at the same time advocate the need to protect privacy for the same reason: the role of privacy in the autonomous nature of the individual. Concurrently, communitarians can advocate their understanding of the roles and consequences of these rights from a social/community perspective, for example the democratic value of speech and discussion, and the social benefits of having privacy in communities.

Furthermore, the natural inverse or mirror to this is that each of these philosophical camps can proffer objections or countervailing arguments to the other's justification. Communitarians often argue for limitations on speech when social harm is caused, and while a pure understanding of liberalism would not call for limitations on rights, a liberal could very well object to the fundamental underpinning that communitarians attribute to rights if they saw them as undermining the individual or 'atomistic' nature of rights which they consider crucial.

Therein lies the nature of the aforementioned 'matrix' of privacy and speech justifications. For the purposes of this chapter, and the wider thesis, the matrix can be distilled into four main categories:

Speech – liberal	**Speech – communitarian**
Privacy – liberal	**Privacy – communitarian**

Each quadrant representing what could be described as the 'political imperative' of the philosophy to the right. The value-philosophy relationship of each right has been traditionally seen as liberal expansion and communitarian contraction, but this is not the exclusive direction of the interaction, and as we can see in both speech and privacy the communitarian or social justification for rights may be framed as an alternative rather than an objection.

An example of this would be the idea, explored more extensively in section 5.4 of this chapter, that in opposition to an absolutist approach to free speech two alternative approaches can be taken, either separately or in tandem. Firstly, the idea that there must be limitations on speech in light of pressing societal needs; or secondly, that the absolutist approach to the right is erroneous and a more limited approach is needed, based on a social outcome such as democratic deliberation.

It is worth noting at this juncture that the two schools of thought described here are not clearly defined homogeneous blocs. The different philosophers, lawyers, and thinkers who

have contributed to the debate are diverse in their views and often both liberals and communitarians have great differences within their own groups in approaches and goals. The broad categories are used foremost for convenience and also importantly to reflect the dichotomous relationship of legal disputes regarding rights – in all cases there will be those arguing for the applicability of a right and those arguing against it. Therefore, a dichotomous approach to the broad philosophical underpinnings allows for a more commodious transition into legal debate. However, the difference within and among the philosophical camps must be borne in mind because simple monolithic definitions or explanations will inevitably be belied by the nuances of differing emphases and viewpoints within each broad camp that are encountered when exploring these issues more deeply.

The theoretical roots or underpinnings of rights generally, and those specifically in question – speech and privacy - are important insofar as they aid the understanding of the right's purpose and meaning, but what is far more crucial is the current justification and rationale behind the continuing power and weight of the right. As such, explained in more depth below, this analysis will not be merely descriptive i.e. reacting to how things are in jurisprudence or the philosophy of legal systems; but will be extensively normative hoping to understand arguments about *how* we should treat the right in question. After all, the central question for the wider thesis is how the law should approach the conflict of speech and privacy in response to the oft repeated mantra, "Nobody has defined precisely what the public interest is". This chapter will not bring the answer but it will elucidate the question. This chapter is inextricably linked to the subsequent chapter relating to the best approach to balancing conflicting rights, and should be read in that light. But the starting point is better understanding the philosophical approach and justification of those rights and extrapolation of the matrix of interests that inform them.

5.3 Political Theory

The task of understanding and advocating approaches to the defining political theory of liberal democracies has been the subject of countless books and treatises; as such this section makes no claims to attempt an exhaustive review. Rather this section merely hopes to sift out of that great maelstrom of political and academic debate the chief strands that can help inform the section of the discussion that concerns the intersection of privacy and speech rights. There

are major strands in political theory represented by cross-sections of thinkers and philosophers that can both set the context and provide the tools to better conceptualise the specific debates concerned with here; foremost the justifications for free speech and secondly for privacy.

Even in light of the communitarian revival in the late 20th century, the predominant political philosophy in the West has been liberalism. Stretching back to the father of modern liberalism Immanuel Kant, the single most important entity in our society has been the individual or autonomous person[332]. Kant built his broader philosophy of morality and the categorical imperative upon this basis, but this idea would germinate and spread through the body of Enlightenment philosophy which was the birthplace of modern conceptions of rights.

Perhaps no one can lay greater claim to expounding and formulating the modern liberal form of government than John Locke and he too reflected (although predating Kant) these ideas of autonomy through the conception of his social contract theory[333]. This idea is fundamentally based upon the premise that shorn of government control and societal obligations man is in a Hobbesian[334] "state of nature", a state of pure freedom. It is only through the "contract" of collective surrendering of certain freedoms in exchange for other benefits such as security that this freedom can be curtailed. While this might appear to be quite basic philosophy, the fact remains that these foundational building blocks are still hugely important to our modern understanding of rights. The ubiquity of these norms means they are often taken for granted but that does not dampen their importance in trying to solve rights dilemmas.

Of course, in recognising the distinct role this fundamental liberalism has played in modern political arrangements one does not have to accept the rationale behind them and many communitarians do not. The philosophy of utilitarianism sits comfortably in neither camp but does offer uncomfortable criticisms of the philosophical underpinning of the liberal approach to rights. Jeremy Bentham's "nonsense upon stilts" maxim cuts at the legs of liberal ideas by calling into question the deontological presumptions that support the Kantian or Lockean framing of the rights of individuals[335]. The 'natural rights' foundation of much of liberal philosophy can be called into question in modern secular societies, and Bentham's searing

[332] Kant, Immanuel; translated by James W. Ellington [1785] (1993). *Grounding for the Metaphysics of Morals* 3rd ed.. Hackett.
[333] John Locke, *The Two Treatises of Civil Government* (Hollis ed.) [1689]
[334] First coined by Thomas Hobbes in *Leviathan* (1651)
[335] Jeremy Bentham, "Critique of the Doctrine of Inalienable, Natural Rights", *in Anarchical Fallacies*, vol. 2 of Bowring (ed.), Works, 1843

assessment is echoed in many modern critiques of rights and rights culture, either by justifying limitations upon rights or offering a different consequentialist rationale for rights.

What is not easily denied, however, is the atomistic or individualist conception that in fact pervades the current formulation and codification of the law around rights. Much of the utilitarian argument, regardless of its actual merits, was undermined by historical events. Utilitarianism, especially in pure or maximalist form (as opposed to modified or 'rule utilitarianism') was fatally undermined by the events of World War Two and the 'collective' nature of fascism. Debate rages over the justification of this association but in factual terms the plethora of human rights accords that emerged in the immediate post-war era were designed explicitly to protect individual rights from state or collective violation.

Thus in pragmatic terms the situation we find ourselves in is that in fact the liberal conception of rights is prevalent and a fixture in the existing legal landscape. It is therefore not within our scope to rake through the more fundamental arguments further than the rudimentary treatment above. Rather our concern turns to the differing perspectives on the rights that rightly or wrongly are presented to us. Essentially, the two camps can be divided into those advocating a status based approach, reflecting the Lockean/Kantian conception of inherent rights; and those arguing from a consequentialist point of view i.e. rejecting ideas of presumed or a priori rights and instead arguing from a perspective that puts the consequences or outcomes of the given right to individuals and society as the primary concern. This latter approach, as we will see, is favoured by communitarians, most of whom do not reject the concept of individual rights outright but rather prefer a modified approach. It is also, however, adopted by some liberals looking for a rights theory that is practical and robust in the face of competing social interests and pressures. The discussion in section 5.4 of the justification of free speech is a prime example of this debate concerning as it does the competing ideas of an autonomy-based right, and a right based in democratic deliberation.

5.3.1 Liberalism

The extreme form of the first view is that of the libertarian absolutist view. The term "atomistic" is used to formulate the necessary image of individuality; society broken down to its basic element: the autonomous individual. Indebted somewhat to the Lockean baseline, Robert Nozick is perhaps the chief modern advocate of this political philosophy, and certainly his writing is a useful distillation of the viewpoint. Nozick essentially argues from a maximalist

stance on the scope of individual rights, that is to say that if a right is recognised then by definition it should not and cannot be violated by the state or another citizen; the exception being where it interferes directly with the right of another[336]. Society is but a collection of such individuals and the state itself should be recognised only in a minimal form (primarily to safeguard individual rights). Broader social or collective interests should never take precedence over the individual right as this is a violation and runs against the essential concept of human autonomy i.e. to decide themselves on their behaviour, choices and use of resources insofar as it is possible.

Constraints of space prevent an exhaustive critique of this viewpoint but suffice it to say there are a number of significant problems with Nozick's philosophy that directly impact upon the wider question of this thesis. The first is the practical obstacle that Nozick's view, while idealistic from his perspective, is not reflective of society as it is and as the majority of its constituents would have it. To take Nozick's system on board one has to accept his central philosophical premise about the desirability of this atomistic existence[337]. On top of this there is the issue of clashing rights. Our central problem of speech and privacy have shown that the full expression of these rights can often be mutually exclusive, and Nozick's scheme would thus require a hierarchy or ranking of rights, but without taking on board the broader social interest imbued in these rights any ranking is open to accusations of arbitrariness[338]. Finally, Nozick's theory is not one of pure anarchy but rather allows a minimalist state for reasons of security, contract adjudication etc. which opens the door for state actions and raises the question about who then decides the limitation of that state action. Again, despite various arguments presented by Nozick there is a hint of arbitrariness in the decisions over this point.

While Nozick may not be the practical solution for our rights disputes his philosophy acts as a good starting point to migrate incrementally toward the opposite end of the political/philosophical scale. Indeed Nozick's seminal work (Anarchy, State and Utopia) is often cited as a response to the work of John Rawls' *A Theory of Justice*[339]. Rawls' magnum opus is a wide-ranging work tackling a more comprehensive model of moral, political and legal philosophy, but it stands as totem of the broad church of liberalism which aims to reconcile the

[336] Nozick, Robert. *Anarchy, state, and utopia*. New York : Basic Books, [1974]
[337] ibid
[338] Ibid p.59
[339] Rawls, John, *A Theory of Justice*(Cambridge, Mass. : Belknap Press of Harvard University Press, 1999)

liberty of the individual with the needs of society, including equality; a position that departs from Nozick, primarily in the scope Rawls makes available for alternatives to a laissez-faire quasi-anarchist system. Of the two principles of justice expounded by Rawls, and refined in later works[340], the first: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others", is that which applies to rights controversies. Again we see that a basic idea is laid out - which might be labelled the mantra of liberalism. However, the full extent of those basic liberties is not exhaustively explained, nor is the more specific practical problem of how to deal with opposing basic rights.

It is here that Rawls' contemporary Richard Dworkin takes up the baton, his signature work deals with precisely this issue[341]. In *Taking Rights Seriously*, and then subsequently in the essay "Rights as Trumps"[342], Dworkin addresses precisely our concern about how to formulate a rights system that has meaning operating in a society with numerous other claims; the now famous maxim "rights as trumps" gives an indication. Dworkin argues that if rights are to be taken seriously against other pressures bearing on governments and communities then they must have the power to 'trump' or override those other interests. It is plain to see how this idea has a great impact on the debate we are concerned with, for if both speech and privacy (in the widest scope of their understanding) serve as trumps then we will have twin difficulties of acknowledging any limitations – despite there being numerous ostensibly justifiable curbs – and the fact that the rights in question cannot trump each other simultaneously[343].

Dworkin's answer is twofold, regarding the pressing issues of society he argues that the broad right will have to be more narrowly tailored in order to maintain its role as a trump, recognising as he does the legitimate limitation on some maximalist conceptions of given rights. And relating to the issue of direct clashes, Dworkin advocates, like Nozick, a hierarchy of rights. (Handily he specifically places speech, in its democratic capacity, near the top. However, as we shall see the democratic justification is not the only argument for speech rights, which can set us back to square one).

[340] Rawls, John, *Political Liberalism* (New York, N.Y.: Columbia University Press 1993)
[341] Dworkin, Ronald, *Taking Rights Seriously* (Gerald Duckworth &Co Ltd London 1977)
[342] Dworkin, R., 1984, "Rights as Trumps", in Waldron *Theories of Rights,* Oxford: Oxford University Press 1984, pp. 153–67
[343] It is important to note that Dworkin was speaking slightly more abstractly about moral rights, and would not see legal or even constitutional rights as automatically trumps, especially in an absolute form.

Regarding the first point, Dworkin's concession that in practical cases a broad abstract right will need to be narrowed for practical legal application has been termed "specificationism". The idea being that a maximalist conception of rights (such as that propounded by Nosick) was difficult to defend both practically and in principle. To demand that broad scope rights are able to trump pressing and specific social needs undermines the case for rights generally and rights as trumps specifically. So the solution of specification is that if rights are pared down to their most critical essence, it will be justifiable to present them as trumps. An example would be explicitly political speech carved out of the broader right to free expression.

The most glaring problem with Dworkin's conception, and other liberal theories of rights that adopt narrower forms of legal rights as trumps, is that specificationism is difficult to separate in practical terms (i.e. terms of outcomes) from the idea of merely qualifying the right when other interests require it. Whittling the right down to a nub in order to preserve its "trump" status seems counter-productive[344]. Specification simply shifts the "balancing" of the right in question, against another interest, to the beginning of the process. By way of example: if we take a maximalist conception of the right to free speech including racist or obscene expressions, libellous or dishonest commercial speech - it is clear that at some point this all-encompassing right will need to be curbed in the face of pressing social interests. Armed with this knowledge we can either balance the broad right against those social interests when they come into conflict; or we can use specification to reduce significantly the scope of the speech right (e.g. to purely political speech) in the initial codification of the right so that it will only trump social needs in a much narrower set of circumstances. The outcome is ultimately the same – the social needs override the broad-scope right, it is simply the mechanism that changes.

The key difference between Dworkin and Nozick is their differing approaches to residual liberty. Dworkin understands the necessary enumeration of the legal rights if they are to be trumps in any practical sense, whereas Nozick assumes a general right of non-interference unless absolutely necessary. However, they are both built on the bedrock of the individual, a basis that the eminent jurist H.L.A. Hart was critical of, while still defending the need for

[344] Additionally, for the purposes of serving the specific problem of speech and privacy there still would need to be an in-depth exploration of the theoretical underpinning of the respective rights in order for the shape of the "trump" right to be determined.

rights[345]. Hart also criticises Dworkin's approach to choosing his moral or essential rights, through the process of "filtered preferences" – the exclusion of moralistic or paternalistic utilitarian calculations - which as mentioned above runs the risk of subjectivity or even arbitrariness. Hart was trying to balance the two theories of rights and utilitarianism, finding a system that could accommodate them both. Hart could see the necessity of protecting individuals against iniquitous utilitarian calculations while leaving flexibility for social or communitarian interests. This search for a workable balance reflected his essential position as a legal positivist.

In effect those of a liberal disposition get, through rights regimes, part of what they wish: an explicit set of codified rights that serve as a buffer or backstop against rampant utilitarianism be it by the state or other social pressures. For strong proponents of autonomy as the central value of rights, the mere consideration of rights in a weighing process is unsatisfactory, but that remains the pragmatic reality in most legal systems and the approach of most courts. This opens up the field for communitarian considerations to act as the countervailing weight. The communitarian movement (insofar as this disparate and often differing set of commentators and theorists can be considered a movement) can be seen as a reaction to the presumption in legal reality, as well as academic consideration, toward the sanctity of individual rights regardless of the broader social consequences or costs. There is of course a deep and wide body of work encompassing the various approaches but for the purposes of this chapter only a few salient points need be extrapolated.

5.3.2 Communitarianism

Besides the broader critiques of universalism in human rights (versus cultural relativism), and the necessity of grounding the facilitation of rights within a social and collective political system, which we will return to momentarily in the consideration of positive and negative rights, the chief relevance of communitarian thought to the privacy/speech debate comes in the broader conception of rights and their relationship with other interests. Communitarians such as MacIntyre and Sandel have strongly criticised the liberal view of the person expounded by Dworkin and Rawls, which underpins their liberal conception of rights[346]. In very broad terms the deontological presumptions about individual rights, the rooting in a

[345] Hart, H.L.A. 'Between Utility and Rights' (1979) 79 Colum Law Rev 828
[346] Mulhall S. and A. Swift *Liberals and Communitarians*. (Oxford: Blackwell, 1996)

sense of moral objectivism and perfectionism, and the focus upon autonomy as the central human value, ignore or reduce the role of community and society in both the construction and maintenance of rights.

It is Charles Taylor, however, who perhaps takes the most focussed aim at the atomistic view of humanity and its implications for our system of rights and competing interests[347]. Taylor rejects the sense of 'self' conceived of by liberals and replaces it with a conception drawn from the social context in which human beings develop. He explicitly criticises the idea that individuals create their own source of self and are thus intrinsically imbued with choices and values through autonomy, rather it is social and community institutions that create meaning and identity. Taylor extends this idea into the need for individuals to strive toward higher, stronger goods thus creating social or moral obligations.

While much of this theorising is chiefly relevant to academic understandings of human relations, and then into broader social and political arrangements, it does have an impact upon the balancing of rights. If the liberal underpinning of rights is mistaken then the commitment to trumps or a maximalist approach to liberty can be traversed with justification. This will manifest itself in the two ways that are emerging as a recurring theme in this chapter: the ability for rights to be curbed due to other social interests; and also in terms of how we define and justify those rights in the first place. (Indeed it is worth noting that Taylor does not reject the concept of rights, but merely questions the nature of their formation, which will of course impact upon their character[348]. Additionally worth pointing out is the efforts made by Dworkin to bridge the gap between liberal and communitarian by finding common ground[349]).

The first impact of an alternative non-liberal view of rights is relatively straightforward; the sense that rights are not the only interest in a society and that while they may have an important or even relatively exalted role, they will still have to be weighed against other factors. There is a great amount of discussion and debate about this process and how it is organised, but the terms of reference are fairly straightforward. What is of much greater interest is the impact that a more socially or collectively sensitive conception of the content of rights will have. This leads us into important legal and political discussion of positive and negative rights.

[347] Taylor, Charles 'What's wrong with negative liberty?' in A. Ryan (ed.), The Idea of Freedom (London, Oxford University Press, 1979)
[348] Ibid p. 101
[349] See generally: Dworkin, R "Liberal Community", 77 Cal. L. Rev. 479 (1989)

5.3.3 Positive and Negative Rights

The phrase "positive and negative" rights is most often associated with Isaiah Berlin who popularised the idea in his essay of the same name[350]. Berlin's central thesis is that rights can be broken into two broad categories; negative rights: those that simply require a prohibition of action against interference; and positive rights: those that need a further proactive pursuit. Berlin's ideas started essentially as an idea about an individual's relationship with those rights he may desire i.e. with negative rights it is simply the case that to achieve the right the subject merely has to be free from any interference; and with positive rights the individual has the capacity to realise a goal, and they are free to do so. Berlin linked these foremost to the inner person, but the concept has now evolved into a sense that a prohibition against interference against the state or another person is negative, but positive rights are those in which an external force or action is necessary to give actuality to the right. This way of understanding rights intersects with the Hohfeldian categorisation of rights[351]. This is a system to break down various rights into how they could be understood as interactions between two or more agents.

Hohfeld's scheme of rights outlines the different 'rights' that it is possible to have and then assigns both a 'correlative' and an 'opposite' e.g.

Right, Duty, No Right.

Or

Power, Liability, Disability.

Now while the theory is too in depth and expansive for our purposes here, what it does give us is the sense that rights need not be merely viewed in a single dyadic relationship i.e. right and obligation. Even so-called negative rights, those that ask simply for non-interference have consequent impacts upon the rights, duties, or obligations of others. This is quite clear in the understanding of positive rights. Positive rights require an actor, under obligation, to take positive steps to fulfil the duty owed to the right-holder. We will see clearly below and in the

[350] Berlin, Isaiah *Liberty (*Oxford University Press, 2002)
[351] Hohfeld, Wesley. "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 Yale Law Journal 16 (1913).

wider discussion of interaction of competing rights, how even negative conceptions of rights such as speech cannot simply withdraw or ignore the further implications of their demand[352].

One notable criticism of the conception of positive and negative rights comes from Gerald McCallum[353]. McCallum argues that the focus upon positive and negative liberty, and arguments about which concept is 'right' or better, makes scholars miss the important discussions about rights and obligations. Fundamentally, McCallum argues that the negative 'freedom from' and the positive 'freedom to' are incorrectly constituted, and in fact every rights question is actually a triadic relationship or interaction. Each legitimate statement or question involving a rights claim 'positive' or negative' in fact follows the three point formula:

"*of* something (an agent or agents), *from* something, *to* do, not to do, become, or not become something"[354].

As long as time is taken to flesh out the factual scenario, involved in a rights claim, to identify the corresponding part of the triadic relation the formula remains consistent. Having accepted this, rights scholars can concern themselves with issues that matter such as the acceptable scope of each of the three elements and their impact on a given rights scenario. This explanation has gained more traction in philosophy than in law where dyadic or dichotomous relations and interactions are ingrained through adversarial systems. But it can help us to understand for example how there is a similarity between positive and negative conceptions of speech or autonomy.

Unfortunately, McCallum's theory leaves two important questions still open. The first is based on the fact that the direction of any rights claim i.e. who is the passive and who is the active member still has a strong relevance in discussions of rights. For example, if private facts about a person are revealed then it will have taken a positive action by one party to violate the passive right of another not to have their privacy breached. And the second, which McCallum himself points out, that there is still much room for debate about the scope of each of the three elements. For example in speech the '*from* something' element might involve being able to speak without interference or it may alternatively be to have a forum for speech. Equally the '*to* do something' element might be to debate political ideas or it may be to spread racial hatred.

[352] Frederick Schauer, 'Hohfeld's First Amendment', 76 Geo. Wash. L. Rev. 914
[353] MacCallum, G, C, 'Negative and Positive Freedom', Philosophical Review, 76 (1967),. 312-34
[354] Ibid p.314

Different values on the three elements will give different results. McCallum never claimed to solve the problem of competing rights theories but merely to shift it to the proper emphasis.

With that in mind we can move to apply the differing concepts of legal philosophy into the specific context of speech, bearing in mind that adjustment is needed from the general context to a specific one.

5.4 Theories of Speech

If there is one thing that is generally agreed among liberal legal scholars it is the importance of free speech and its prominent role in the pantheon of civil and human rights[355]. This is reflected not merely in the vast amount of literature committed to the topic and its explanation but to the longstanding commitment within covenants and bills of rights to its protection and finally in the lip service perpetually paid to it in courts and legislatures alike whenever disputes arise or reforms are implemented. However, even within this general tide of concurrence there is much disagreement. The centrality and fundamental importance of the right is based upon the sense, instinctively, that the right to speech is a foundational right, a right that is crucial to the engendering of other rights and then to their subsequent protection. This sense might arise from historical precedent as alluded to in the introduction.

The rights gained through the Enlightenment began with discussion and argument, the proliferation of ideas, the utilisation of the printing press and the breaking down of the barriers of censorship. Conversely, the tyrannies of the 20th century, be they fascist, communist or otherwise have been quick to shut down channels of dissent and impose restraints on speech as a prelude to a broader programme of political repression. However, beyond the prosaic truisms of these observations, these facts reveal very little about why speech occupies the role it does and remains the jewel in the crown of rights and liberties. It is here that disagreements and differences between legal or political philosophers come into view. It has been noted that, "Freedom of expression is a liberal puzzle. Liberals are all convinced of its vital importance,

[355] See the entire bibliography of this chapter for evidence, a notable exception being: Fish, Stanley *There's No Such Thing As Free Speech. And It's a Good Thing, Too.* (1994 OUP)

yet why it deserves this importance is a mystery"[356] ('liberal' here taking the broad form inherent in western political regimes).

This is why it is crucial that we draw in the strands and influences of political thought that were briefly explored in section 5.3 in order to understand the perimeters of this debate. It might be argued that arcane or abstract discussion of the theoretical underpinnings of free speech are broadly irrelevant to the practical work of courts and arbitrators dealing with disputes over press complaints or public order, but this would be to miss the central point. These disputes arise because of the value infused in the rights of free expression and any solution must be uncovered within a framework of that understanding. There two very practical reasons for this, one specific and one general.

The first, pointed out by Eric Barendt, is that when the right to free speech is enshrined in constitutional texts it is usually done so in a basic and simple fashion (to differing degrees)[357]. The formulation is broad and gives but a sign-post to the relevant court as to how it should resolve the difficulties of any dispute. For example in the US the First Amendment says simply, "Congress shall make no law ... abridging the freedom of speech, or of the press..." This could be taken literally[358] i.e. no limitation whatsoever; but that creates more problems than it solves and so it is generally accepted that there are limitations and caveats to the broad principle. Thus interpretation is necessary. This will involve looking at the current conditions and necessities of the situation, but rights would be pointless if they were subject completely to the expediencies of the day. As such the court is obliged to give effect to the meaning and purpose of the right. This can only be done by understanding properly why this right is/was constituted in the first place - by looking at the political philosophy that influenced the drafters of the given bill or convention. But in the interest of giving relevance to the evolution of rights and their meaning, we must extend this examination to the philosophy and political theory which underpins the right, in a broader and contemporary sense, and thus identify the enduring justification for its prominence.

Secondly, in a more general sense, the safeguarding of our civil rights and their central role in our democracy is far too important to simply disengage from understanding their central

[356] Raz, J 'Free Expression and Personal Identification' (1991) 11 OJLS 303, 303
[357] Barendt (n.1) p.3
[358] See for example the views of Justice Hugo Black of the US Supreme Court, a First Amendment literalist and free speech absolutist.

purpose. If they are to fulfil their role as safeguards then their extent and underpinnings must be understood otherwise they are prone to erosion or hollowing. Those advocating for freedom of expression and those arbitrating disputes involving the rights are both served well in understanding the theoretical justification of those rights, and furthermore might be incapable of discharging their duty in the absence of said understanding.

There are a number of different rationales for free speech, some more prominent and convincing than others. They can be split into two broad groups that in very rough terms echo the discussion and dichotomy outlined in section 5.3 of this chapter. However, it must be strenuously pointed out, as section 5.3 demonstrated, that there is often overlap in conceptions and theories, and any attempt to draw simplistic, indelible or bright-line distinctions is opening the door to misunderstandings and inaccuracy. Having said this, just as liberal and communitarians have broadly different perspectives of the promotion of individual and public goods, so too do scholars of free speech.

The two essential columns into which theories of free expression fall might be described as "intrinsic" and "instrumental". (They might alternatively be seen as "deontological" and "consequentialist"). Essentially, the crucial difference comes in whether one considers free speech to be a right inherent in the holder and thus protected due to the liberty owed that person as human; or whether one thinks that a greater reason is needed to treat speech as a particularly important right, subject to greater protection than other expressions or actions of generalised human liberty and freedom. Again the division in theories might be described as individual vs. collective conceptions of free speech, or autonomy vs. public participation. It is the latter pair of terms coupled with the ideas of intrinsic/instrumental motivations that best fits this chapter's purposes. However, a crucial note must be made about the term 'autonomy' before proceeding.

It is very important that we establish the differing definitions of 'autonomy' in different contexts. The word is used in many different forums to mean very different things[359]. Even in this thesis it has had three distinct meanings. Unfortunately, this is the accepted and widely used term by theorists in the differing contexts and thus we are bound to continue in this vein.

[359] See for example the differing use in: Sunstein, Cass R., 'The Autonomy of Law in Law and Economics' 21 Harv. J. L. & Pub. Pol'y 89 (1997-1998), and Epstein, Richard A., 'The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FDA and IRBs' 96 Geo. L.J. 559 (2007-2008)

Autonomy, in the broader discussions of liberty and human rights, is a very wide concept indeed and can encompass human freedoms to engage in a whole host of activities or expressions related to the ideas of positive and negative liberty explored above. In this section, explicitly related to free speech theory, the definition of autonomy must be much more narrowly tailored to this context and refers, as we extrapolate in greater detail below, the freedom to engage in communicative expression commonly subsumed under the headings of convenience "speech" or "expression".

There are two other related and important points to note in this discussion. The first is the fairly straightforward observation that different jurisdictions have implemented, protected and understood free speech in slightly different fashions. It is no secret that the United States has a broader protection than most European jurisdictions including that of the ECHR. This should not greatly affect our discussion of the philosophical underpinnings of free speech. In theory if free speech/expression is a universal human right then the justifications should be consistent and equally applicable across jurisdictions, even if we can see that in actual fact different courts have viewed it in diverging terms.

This leads to the second point relating to the relative importance of normative or descriptive function in our understanding of speech. Should we be concerned if our preferred conceptions fit the jurisprudence of a given jurisdiction? Or should we be arguing about how speech *should* be understood and protected, divorced from the outcome of cases? While the descriptive aspect is important and cannot ultimately be ignored, at this juncture our concern is much more with how freedom of expression should be understood from a normative viewpoint. The outcome of lines of case law, and the difference between US and European jurisprudence will be much more prominent in subsequent discussions of how speech is balanced or limited. But prior to that it is essential that an understanding of its pure theoretical background is garnered.

While the autonomy theory can be seen as one philosophy, albeit with alternative interpretations, the public discourse theory has two or three conceptual strands including democratic deliberation, the search for truth and dissent.

5.4.1 Autonomy Based Theories

The autonomy rationale or justification is based upon the premise that due to free speech being an inherent liberty and a basic function of humanity; it should be given as wide an interpretation as possible. At a level approaching absolutism the boundaries of free speech based on theories of autonomy should be delimited only when directly interfering with another right[360]. Consequent to this, speech should not be curbed or reduced in light of other competing social interests or indeed interests falling short of an equivalent human/civil right. There will clearly be a number of definitional issues to flesh out, as alluded to earlier in this chapter, but the mainstream conceptions of autonomy based free speech theory evolve from this common tenet.

We can see how this idea, this platform for understanding freedom of expression is drawn from many of the ideas and works of thinkers focussed upon in section 5.3. The minimalist conception of the Lockean social contract envisaged by Nozick is reflected to some degree in this sense of autonomy. This relationship with a broader sense of libertarianism and the wider understanding of autonomy is crucial to understanding this conception of free speech. As mentioned above, part of the importance is not confusing different uses of the term 'autonomy'; but additionally differentiating autonomy of speech from general autonomy of action, or conscience, or thought etc. is essential to understanding why speech is special. The liberal model of rights, as we saw in section 5.3, is broadly (but not exclusively) concerned with negative conceptions of rights. This is also the conception of speech that we will be primarily concerned with immediately here – a non-interference. It is essentially the definition of a sphere of non-interference which gives the central autonomy theory of free speech its shape[361], and which categorises legitimate and illegitimate restrictions on speech. As has been pointed out, short of being absolute, some restrictions will always be necessary; thus, it is incumbent upon those professing a negative autonomy theory to defend the minimum restriction while maintaining a coherent and consistent rationale. This negative approach to autonomy – encompassing minimum restriction/maximum liberty – is contrasted with more positive conceptions of autonomy which are explored below. Some autonomy conceptions

[360] See for example: Black, Hugo L, 'The Bill of Rights', 35 N.Y.U. L. Rev. 865 (April 1960)p.880

[361] Note: this argument is necessarily broad at the beginning of this discussion, but will become more refined. It is no way mean to preclude the idea that positive conceptions of rights are not concerned with human autonomy.

have one foot within the broader intrinsic justification of rights but also begin to make the journey toward the instrumental theories of speech.

Perhaps the best known and certainly the most intellectually rigorous exponents of the negative or intrinsic theory of speech is C. Edwin Baker who has formulated a consistent and impressive (if not uncontroversial) justification for protecting speech[362]. Baker, while recognising the 'positive' aspect and role of autonomy in public goods, could not reconcile it as giving sufficiently wide and consistent protection to free speech and so focussed his theory on the 'negative'. One formulation of this idea of autonomy that perhaps explains it most succinctly is "free speech as self-fulfilment"[363]. This view of free speech autonomy is coming exclusively from the point of view of the speaker. Baker describes his underlying sense of what autonomy is, in the rawest sense, as such,

"A person's autonomy might reasonably be conceived as her capacity to pursue successfully the life she endorses- self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts."

This is a remarkably succinct yet thorough articulation of the cornerstone idea of autonomy, but it is in quite obvious need of both explication and qualification to fit as a coherent theory of speech freedom in a world of competing rights and interests. The first and perhaps most crucial caveat is that this formulation of autonomy is concerned with 'formal' autonomy as opposed to 'substantive' autonomy. This differential echoes the earlier discussion in this chapter of positive and negative liberty. Formal liberty/autonomy is ensconced in the sphere of non-interference i.e. the right not to have one's autonomy (as conceived in Baker's definition above) curbed unless this directly interferes with another individual's similarly constituted autonomy. This is different from substantive autonomy in that substantive is positively conceived; it is the promotion of the conditions, be it through manipulation of circumstances or allocation of resources that allow a fuller potential or shape of autonomy to be realised. For example, paying for a child's education can be seen as a form of substantive autonomy, promoting, as it does, the prospects for a fuller realisation of at least some aspects of Baker's definition of autonomy above. We will see how substantive promotion of autonomy can be achieved in the speech realm through provision of fora for debate later in this chapter.

[362] Baker, C. Edwin, 'Harm, Liberty, and Free Speech', 70 S. CAL. L. REV. 979. (1997)
[363] Barendt (n.1) p.13

Baker does not argue against the value or utility of the substantive view of autonomy but rather sees it as the purview of democratic/legislative prerogative as to its promotion or contraction. In contrast, the formal sense of autonomy - the non-interference principle - is that which needs to be rigorously defended by the recognition of a right, and through constitutional means.

This formulation leaves two essential questions regarding the autonomy theory of free speech. Firstly, how does it link and/or differentiate between speech and other actions of autonomous nature for example sexual expression, commercial practices, or even something as simple as dancing, which do not attract the same rights/constitutional protection? Another way to frame it would be: what is speech for the purposes of autonomy theory? The second question is: why should this speech receive that special constitutional/rights protections and be afforded all but total immunity from interference?

Baker's definition of speech is not simply attuned to simple conceptions like 'speaking' or 'writing'. (Notably public deliberation theories of speech will have their own formulation of what forms of 'speech' deserve rights/constitutional protection. 'Speech', like the interchangeable 'expression', is but an avatar for a more refined concept). There are numerous examples of verbal behaviour that do not in actuality receive free speech protection and would not under an autonomy theory either e.g. perjury or fraud[364].

The idea of 'communication' is both too broad and too narrow. The examples just given show the broadness - they are not protected despite being communicative. As to 'communication' being too narrow - there are non-verbal, non-communicative acts that deserve protection such as writing a diary or painting a picture. Rather, Baker conceptualises protected speech as being 'expressive liberties', based upon what these do and how they do it:

"Freedom of speech encompasses (i) self-expressive or substantively valued or voluntary interactive behaviour (ii) that operates non-violently and without coercively intruding into other entities' realm of decision making authority"[365].

If this definition can be accepted it still lacks sufficient explanation of how it differentiates in importance from the broader sense of autonomy/individual liberty and thus

[364] Baker (n.362) p.983
[365] Ibid p.986

deserves special rights and constitutional recognition and protection. Pausing for a moment it is worth noting that this is the most consistent and convincing criticism of the autonomy based theories of speech[366]. In order to receive special recognition above the general residual freedom inherent in common law and other systems, speech must show its 'uniqueness', however in order to do so it often must veer into the sphere of the purposive or instrumental justification. It is an enormous challenge to show free speech autonomy is above and separate from the broader sense of liberty while retaining its essential 'intrinsic' nature and not abandoning itself to instrumental purposes.

Baker attempts this task by focussing upon "legitimacy"[367]. In essence this justification for rights/constitutional protection revolves around the need for any political system or democracy, in order to be legitimate, to respect the expressive liberty of each individual it purports to govern. Baker does not denigrate the significance of public discourse to the concept of legitimacy, in fact the use of autonomy in democracy related theories of speech is applauded, and he merely sees them as inadequate to justify the constitutional imperatives of democracy. Baker focuses his criticism of democracy based theories of speech (explored below) upon the idea that they require 'promotion of selected conceptions of the good'. This is to say that theories based on anything more restrictive than a full respect for the formal autonomy of individuals necessarily involves subjective normative decisions upon what constitutes protected speech within the system envisaged. This is borne out to a certain extent by the analysis below. Baker argues that this undermines the purported legitimacy of such a society and insists that his conception avoids this.

Baker argues that essentially any system of law and democracy (in a narrower sense) must make decisions, and those decisions may not be acceptable to all the members of that society. For a section of society to be able to veto a law or decision based on this dissent would be to allow power of the minority to illegitimately reign. So while the decision might ultimately be in the favour of the majority, that system or government must respect the formal autonomy of those subject to it; the respect and protection of formal autonomy acts as a check against governments or authorities substituting its judgements for individuals' own within that realm. It therefore serves both the democratic process of collective government while protecting the

[366] Post, Robert, 'Participatory Democracy as a Theory of Free Speech: A Reply' 97 Va. L. Rev. (2011) 617 p.626
[367] See note 365 and text.

individual notion of self-government. Baker sees the two as inextricably intertwined and any system maintaining a sense of legitimacy:

"...a legitimate legal order must fully respect (among other things e.g. equality) both individual and collective autonomy – both non-political and political speech"[368]

Thomas Scanlon, who himself formulated (and then later partially repudiated) a similar theory of autonomy, has criticised Baker's idea as too narrow a failing to make the distinction between political speech and examples like false advertising of cigarettes, which while substituting judgements against formal autonomy are still legitimate restrictions on speech[369].

There are further criticisms of the theory of autonomy based speech that will be explored at the conclusion. But it should be noted that there are other broader theories of autonomy that have been proposed and shed light on the values that are being pursued in this conception. Seana Shiffrin attempts to bridge the divide between *speaker* and *listener* based theories of speech by focussing on the impact of the *thinker*[370] i.e. focus protection of speech based on this impact upon freedom of thought. This tries to tackle the contentious issue of whose autonomy is legitimate when two people's autonomy clash (Baker might answer precedence must be given to the formal autonomy of the individual being interfered with). However, the most interesting idea in these arguments related to the value of autonomy speech is that self-fulfilment and self-expression, in the correct conditions of non-inference, with the free exchange of ideas, will result in the growth of the speaker as an individual. There has been some doubt cast on this theory (which is often taken as given in these discussions) by recent psychological research about 'autonomous' behaviour[371]. But this is beyond the scope of this discussion.

Additionally, Joseph Raz for example puts forward a fascinating conception of autonomy as necessary for personal identification[372]. But this is not personal identification in the narrow sense but rather the non-interference with autonomous self-expression allows the promotion and development of tolerance and lifestyles/choices within society. Raz does not purport to present this as a comprehensive doctrine for free speech, he like Scanlon sees a

[368] Baker, C. Edwin 'Autonomy and Free Speech', 27 CONST. COMMENT. 251 (2011) p.266
[369] Scanlon, T 'Comment on Baker's Autonomy and Free Speech' 27 Const. Comment. 319 (2011)
[370] Shiffrin, S.V. 'A Thinker-Based Approach to Freedom of Speech' 27 Const. Comment 283 (2011)
[371] Moles, A.. "Autonomy, Free Speech and Automatic Behaviour." Res Publica 13, no. 1 (2007): 53-75.
[372] Raz (n.356) p.303

plurality of overlapping justifications, but he thinks this aspect has a unique value. While accepting that a wider view of autonomy outside of autonomous speech can serve a similar purpose, Raz says that expression has unique ability to promote and consolidate tolerance and pluralism of views. However, while drawing its inspiration from the idea of autonomy, Raz's theory ends up quite quickly resembling a consequentialist view of the value of speech, focussing as it does upon the positive effects on society. This draws us into the second broad group of free speech theories.

5.4.2 Democratic Deliberation

There are a number of different free speech rationales (enumerated below) that can be broadly grouped as 'public discourse' theories. They are of course distinguished most obviously from autonomy theories in that they are instrumental rather than intrinsic, their essential characteristic is their consequentialist nature. It is important to note that the speech involved does not necessarily have to be public as in uttered or published in a public forum, though it often is. Rather the consequences or motivation behind the speech or expression is to affect society rather than simply the autonomous notion of self-fulfilment or self-expression. As has been noted above, the delineations between the two broad concepts are not fixed or impermeable and as will be seen below the interests of individual autonomy can be quite important to public discourse rationales, though crucially it will be from the point of view of better informing the autonomous individual as a listener/recipient of information rather than as a speaker pursuing notions of fulfilment or expression.

Even among these speech theories concerned with the public or wider societies there is both overlap and crucial difference (and it is perhaps the differences that distinguish the different arguments in terms of their overall credibility and consistency). For example both 'the search for truth' rationale and the 'dissent' rationale are much thinner and more niche that 'democratic participation', they talk about a narrower and more tailored purpose for protecting speech which while easier to defend as intellectually consistent fails to encompass a wide enough scope to properly explain the extent to which we can and should protect freedom of expression. It is 'democratic participation' that is perhaps the most widely used and easily accessible[373].

[373] Barendt (n.1) p.18

The two foremost exponents of the democratic participation, Alexander Meiklejohn and Robert Post, take quite different approaches to the concept, indeed Post coming some years after Meiklejohn had built his theory in part as a critique, repudiation or refinement of Meiklejohn's seminal thinking on the topic. Both will be explored in turn but the fundamental difference is the priority placed upon the focus of the speech. Both men agree in essence that the purpose of speech – as constitutional value – is self-government, the functioning of democracy through the exchange of ideas. However, Meiklejohn's primary concern is the listener or audience, or in other words he sees the point of free expression to ensure that ideas are received by the populace or citizenry in order than they might make informed decisions[374]. Post in contrast focuses upon the speaker – hence the emphasis above that not all divisions between intrinsic and instrumental are clear cut. Post sees the autonomous individual engaging in the exchange of ideas and acting as a participant in the democratic process as the essence of free speech protection. Autonomous expression above and beyond simply adding to self-fulfilment and self-realisation is in fact the bedrock of democratic participation and consequently legitimacy. There are additionally a number of positions taken by theorists that extend or alter these two core precepts that we will also briefly explore.

Meiklejohn's maxim, and the basis of his theory of democratic participation, was famously articulated thus: "The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone will have opportunity to do so. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said"[375]. This as we can see is a radical departure from the autonomy based theories of Baker and Raz, and a direct challenge to the libertarian principles explored in section 5.3.

There are a number of key points to note about Meiklejohn's conception of free speech. The first and foremost is that Meiklejohn has no problem with the idea of a broader interest in autonomy, that is to say the residual right that all men might claim in the absence of properly constituted prohibitions, rather he simply rejected the idea that this was the correct focus of free speech rights protection. In the American context in which he operated he couched this idea in terms of the First and Fifth Amendments. The First Amendment, concerning as it does freedom of speech must concern itself with expression strictly relevant to informing the public

[374] Meiklejohn (n.169)
[375] Ibid pp.25

and the citizenry of a democracy about ideas, information, and issues that are related to democratic self-governance. The residual speech, that of self-expression or "talkativeness", valued by autonomy free speech theorists like Baker is more correctly placed with other broader autonomy interests e.g. sexual conduct, artistic expression etc in the less stringent protection of the Fifth Amendment. The residual-liberty speech under the Fifth Amendment is of course not as stringently protected as the First and thus the "lesser" non-democracy forms of speech would be entitled to similar protections as other residual freedoms under that broader autonomy/liberty umbrella.

The converse side of this formulation as pointed out by James Weinstein is that a narrower interpretation of constitutionally protected free speech gives much stronger grounds for robust protection[376]. This reflects the Dworkinian formulation of 'rights as trumps', and also the 'specificationism' explored in Section Two; the if the fat is trimmed away from the conception or scope of the right then it is much simpler to justify a strong protection of the essential element of the right, than if you are attempting to justify a large and unwieldy conception encompassing many different facets of free speech.

As discussed, the autonomy theory of speech as espoused by Baker sees as absolute any 'expressive liberty' that fell within the definition given unless they directly impacted on a similar formal autonomy, but this created many difficulties in terms of justifying this protection against broad societal interests such as protection against harm. The Meiklejohn formulation aims to avoid this over stretch by consigning constitutionally protected speech to that necessary for democratic deliberation. Meiklejohn then argues his freedom of speech can be seen as legitimately and defensibly absolute. While he accepts, as he argues you must, practical limitations on when and where you may speak, any content restrictions will be deemed illegitimate. Meiklejohn uses a metaphor of a town hall meeting, popular in America, to demonstrate the distinction[377]. As such the limitations on speech would be limited to those that would be legitimate in a town hall meeting specifically: any speech that threatens the entire meeting (democratic system), speech irrelevant to the topic (democratic deliberation), formal practical limits on speech uttered at a time/place disruptive to the process of deliberation. No

[376] Weinstein, James 'Participatory Democracy as the Central Value of American Free Speech Doctrine'97 Va. L. Rev. 491 (2011)
[377] Bloustein, 'The First Amendment and Privacy- The Supreme Court Justice and the Philosopher', 28 RUTGERS L. REv. 41 (1974)

content related restrictions would be allowed (beyond the element in the first). These limitations are in force so that the chief focus of Meiklejohn's conception of speech can be delivered: successful communication to the audience of the relevant information for democratic government.

One criticism of this system is that the disallowing of speech threatening democracy undermines the very system of democracy. However, as Barendt points out, this is to avoid falling prey to a majoritarian concept of democracy that might undermine the better placed constitutional conception of democracy espoused by Dworkin[378]. This is to say that speech is a foundational right of democracy and as such should not be taken away because a majority so wishes.

Post's criticism of Meiklejohn is more fundamental and is based on two distinct but linked ideas. The first is related to Meiklejohn's idea that there is a fundamental assumed agreement on the rules and regulations governing the great "town hall" that is a liberal democracy, that there is a consensus (usually national) about the form and values that underpin the discussion and discourse. Post argues that Meiklejohn merely assumes this and makes no attempt to justify or theorise why or if it is so. Post describes Meiklejohn's conception of democratic discourse, along with the related theories below, as a "collectivist theory" of freedom of speech. That is to say this theory is forged through a presumption of a collective identity. This precludes the sort of criticism and renewal necessary in a democracy and is related to the objection cited above that to disallow speech that undermines the system is to engage in content based judgment counter to the very purpose of free speech. A further manifestation of this misstep, as seen by Post, is the idea of excluding that which is deemed irrelevant to the democratic discourse or deliberations. A narrow conception of what constitutes the political runs the risk of excluding many social or artistic topics of discussion that might be relevant to a broader sense of public debate. But besides that practical objection the notion of these limitations runs counter to what Post sees as the very essence of democratic discourse and that is its very indeterminacy and heterogeneity. The need to protect many different conceptions of what is good or valuable is fundamental to understanding democracy, and runs directly counter to the collectivist cornerstone of Meiklejohn's theory.

[378] Barendt (n.1) p. 19-20

Post extends his criticism then by proffering an alternative conception which better suits both the normative and descriptive sense of freedom of expression. As mentioned above, Post's is a theory based on the sense that the speaker is central to the process of democratic deliberation, the autonomous individual espousing their view or trading information is at the core of this view of a public discourse theory. Post builds his theory upon the central idea that, in order for the democratic process to be legitimate, each individual must be free to contribute freely and equally to said process by adding his/her views. This is what free speech should and does protect. Thus any law that the individual disagrees with can or should be respected because each autonomous individual in that society was at liberty to shape the outcome even though it may not have gone his/her way. This is the cornerstone of what Post calls "democratic self-governance" and the motivation echoes Baker's desire for legitimacy as a grounding principle. This theory puts great stock in the idea of 'authorship', that only through each autonomous citizen being free to contribute their opinion can a true sense of public discourse be found. Post finds value in the process itself; it is not necessarily the outcome that is important when speech is exercised and these heterogeneous ideas and identities can be put forward and co-exist without restriction.

Post recognises that it is not simply enough to put forward an abstract sense of the individual's relationship with public discourse and so he applies his conception to the practical realities of when restrictions on speech are legitimate. This involves the crucial and very American step of separating what is public speech and what is private speech, "The function of public discourse is to enable persons to experience the value of self-government. Within public discourse, therefore, persons should be regarded as autonomous in many of the ways that autonomy theory would predict. But because the source of this autonomy is political, rather than ethical, persons outside public discourse are not necessarily regarded as autonomous."[379]

Thus there are numerous forms of speech that are ostensibly private and not subject necessarily to constitutional/rights protection in the same fashion as public discourse. This based upon both the relationship of the speakers as well as that information which is communicated. Post points out that such speech e.g. that between an teacher and a pupil would not be subject to the constitutional protection afforded other speech, and this is because the falls outside his conception of 'autonomous' actors which as we can see from the quotation

[379] Post (n.366) p.483

above is based upon engagement of public/political self-government. By way of contrast, a defamatory remark between private friends is considered within the boundaries of libel regulation, whereas defamation of a political figure can invoke constitutional protection (in particular jurisdictions). Outside this realm ordinary civility rules can be enforced or encouraged.

Within this framework Post acknowledges that ultimately difficult decisions will have to be made about what exactly constitutes the public discourse that invokes the requisite autonomy necessary for constitutional/rights protection of speech. In simpler terms, what subjects are protected? Post says that ultimately this is a normative decision; while the explicitly political is clearly included, Post would also extend the sphere to things like art and literature i.e. public opinion is much wider than simply communications of government decision-making. The broad criticisms of Post's theory will be considered vis-a-vis the competing theories in the conclusion below.

It must be noted that with the broad heading of "public discourse" theorists there is an exceptional but perhaps expanding group who have no truck with the sensitivities of individual autonomy conceptualised by either Baker or Post, and instead take a controversial but intellectually pure stance advocating instrumentalism and the results of speech to be the central consideration. These arch consequentialists see speech as only valuable insofar as it serves the needs or interests of society. They might be seen as the equivalent to the communitarian in section 5.3 in their subsumption of inherent individual rights to the outcomes that benefit communities. In a sense they take Meiklejohn's idea, of only hearing that which needs to be heard, to the n^{th} degree.

Cass Sunstein offers an interesting critique of the outright rejection of "paternalism" by libertarian philosophers and argues for exploration of the scope certain forms of government action can have in improving notions of public discourse[380]. He argues that notion of preferences in autonomous individuals are influenced by speech and ideas that they are exposed to and a fuller promotion of these should not be denied simply by a salutary liberal commitment to divergent conceptions of the good. He rejects the idea that free speech precedes rather than succeeds the debate about promoting democratic deliberation.

[380] Sunstein, Cass 'Preferences and Politics', 20 Phil. & Pub. AV. 3 (1991)

Owen Fiss extends this concept by arguing that the central premise underlying the tradition of free speech may be flawed and that in fact the concepts of autonomy and strong public debate may diverge and become antagonistic[381]. Social power, money, access are all unevenly distributed so the marketplace of ideas is a fallacy, and the liberal presumption that the state and citizen should be divided and that less state action means more freedom may be need to be reassessed. This chimes with Judith Lichtenberg's longstanding argument that free speech is not simply about non-interference (or formal autonomy as Baker termed it) but rather there is an obligation upon states and societies to promote voices that lack access and to more fairly distribute the promotion of disparate viewpoints[382].

These concepts are an anathema to those from a liberal/libertarian tradition who value the negative conceptions of autonomy. Their faith is in what Holmes called "the marketplace" of ideas[383]. This idea is behind the 'search for truth' conception of freedom of speech. In fact this theory is widely accepted as too thin to support a strong concept of free speech but was and is instrumental in understanding and evolving the broader theories of public discourse. The idea came from Mill's argument that no idea should ever be banned or restricted as 'wrong' because there is no way to be sure what is 'right' or 'wrong' in the absence of infallibility; and additionally even a wrong idea can serve a purpose in testing the mettle of right ideas. This line of thinking retains a strong vein through public discourse theories of speech such as Meiklejohn's.

The last major strand of public discourse theories is the idea of dissent as a free speech value. It is clear to see how it is overtly political while not necessarily having the character of democratic discourse or discussion. Steve Shiffrin for example argues that the idea of citizen participation and democratic deliberation in most states is a myth[384]. The uneven power structures and existence of elites mean that decisions are taken on behalf of the people. What the public do retain is the right to freely and without censure criticise those in political office and other powerful bodies. It is easy to see how this theory is subsumed under the broader theories of democratic expression but it is important to note that the conceptual underpinning

[381] Fiss, Owen M. 'Free Speech and Social Structure', 71 Iowa L. Rev. 1405
[382] Lichtenberg, Judith. "Foundations and Limits of Freedom of the Press," Philosophy & Public. Affairs, Vol. 16, No. 4 (Autumn, 1987), 329-355
[383] *Abrams v. United States*, 250 U.S. 616, 630 (1919)
[384] Shiffrin, Steven 'Dissent, Democratic Participation, and First Amendment Methodology' 97 Va. L. Rev. 559 (2011)

of dissent theory is much narrower if one accepts the rejection of notions of collective self-government that run through many of the theories above.

5.4.3 Speech and Harm

Before drawing conclusions from the discussion above, there is an important element which needs to be addressed: the relationship between (free) speech and harm. The 'creation' or 'production' of harm as a by-product of the exercise of a right, or the pursuance of an interest, is not unique to free speech or the type of rights protected by Article 10. Rather, we can see that the prevention of harm in its many guises is an important element in the exceptions listed to a number of ECHR rights[385]. Equally, the courts in the United States have read exceptions into the Bill of Rights based on preventing harm[386]. However, we can see from the discussion in this chapter above that there are those who believe that speech is a special case and who would approach the position of 'free speech absolutism', a position which would preclude the invocation of 'causing harm' as a reason to restrict speech/the press.

This debate both dovetails and overlaps with the discussions which will occur below (in Chapters 7, 8 and 9) but it important at this juncture, in the midst of the discourse around the definition of speech and the reasons for its protection, to outline a number of important points around harm.

There are a number of different forms of harm which can be manifested through speech. The discussions in Chapters 2, 3 and to a lesser extent 4 were dominated in large parts by an attempt to understand why we protect privacy and reputation rights. And the shadow of 'harm' cast heavily on much of these justifications. In terms of reputation the direct harm that is caused by the dissemination of untrue statements about an individual is almost self-explanatory – in fact as we saw in the central definition of 'defamatory' the statement in question served to reduce the standing of the individual in the eyes of his peers. Equally, the damage done through the revelation of true (or false) private facts is often quite clear, for all the reasons outlined in Chapter 3: the need for social barriers and the transgressions of rules of civility cause the loss

[385] See for example Article 9.2 of the ECHR, Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[386] See for example *District of Columbia v. Heller*, 554 U.S. 570 (2008) where the Supreme Court, while upholding gun rights in the 2nd Amendment, pointed out the limitations of those rights.

of an ability to manage one's image and the subsequent impacts of peace of mind, personality, and individual development are clear to see.

One need only take a rudimentary glance at the evidence presented by victims to the Leveson inquiry to understand the real impact that publication of false and true stories can have on an individual[387]. The interference in the private grief of the McCann and the Dowler families, and the exposure of humiliating and degrading stories about celebrities like Sienna Miller or Charlotte Church[388]. Indeed the litany of cases discussed in Chapter 3 provides ample evidence, none more starkly that the fate of William James Sidis in the American case that bears his name[389].

There are countless other examples of a direct and individual harm caused by speech, however, there is also the wider social or 'indirect' harm caused. The exception to Article 10 of the ECHR which specifies the "public safety, for the prevention of disorder or crime, for the protection of health or morals" is a good articulation of this idea. The examples of this around restrictions on pornography, commercial speech and even some political speech are discussed below, however, there is a third slightly more tangential and controversial harm that has been invoked around speech.

Some commentators, including Owen Fiss, have contended that the current state of the press and public discourse is in fact harmful to the functioning of democracy and the need to have an informed body politic,

"The premise is that autonomy will lead to rich public debate. From the perspective of the street corner, that assumption might seem plausible enough. But when our perspective shifts, as I insist it must, from the street corner to, say, CBS, this assumption becomes highly problematic. Autonomy and rich public debate-the two free speech values-might diverge and become antagonistic. Under CBS, autonomy may be insufficient to insure a rich public debate. Oddly enough, it might even become destructive of that goal."[390]

[387] For a good summary see Wragg, P. (2013) 'Time to end the tyranny: Leveson and the failure of the fourth estate'. Communications Law, 18(1), 11–20.
[388] Ibid p.13-15
[389] *Sidis* (n.222)
[390] Fiss, Owen M. 'Free Speech and Social Structure', 71 Iowa L. Rev. 1405 (1986), p.1410

Fiss is talking in the context of American broadcasting but the principle is equally applicable to the press in the UK and this is a neat summation of the inherent tension between the right to speech as autonomy and the right to speech as a promotion of the public discourse. Fiss has suggested, to a chorus of criticism, that it may be necessary to actually curb the expression of some autonomous speech in the press in order that the expression related to participatory democracy be promoted[391]. Given the hysterical reaction of the press in this country to the comparatively mild idea of an independent regulator one can only wonder at their reaction should any politician seriously suggest Fiss's idea. There are major problems with it though on a normative as well as a practical level. Fiss's concept strays well in to the territory of restricting speech – speech which does not directly cause harm or a violation of other's rights - based on its content, which is a red line or Rubicon in liberal democracies. There is a vast difference between the idea of positively promoting speech based on its democratic content, or giving it a favourable and robust constitutional protection because of its public discourse value, and impeding speech because it lacks those qualities. Making judgments to ban expression based on the perceived quality of the content is always going to be too subjective, and is a step too far for most people, regardless of the potential benefits to our democratic discourse. But Fiss's contribution does bring into sharp focus the dichotomy of speech value that is present in our public notion of free expression in the form of the press.

If we then focus back more specifically upon the obvious, direct and indirect harms caused by speech to individuals and society respectively, we need to understand why this issue is particularly important in the context of this thesis. It is because - alluded to at the start of this subsection and further above in this chapter - there is a school of thought, prevalent in the US in particular, that the special status of speech means that it should not be restricted even in the event where it causes harm. The most articulate exposition of this positions comes once again from C. Edwin Baker[392]. It is Baker's contention that speech, correctly constituted as 'expressive liberty', should not be restricted by arguments relating to the harm said speech causes. This is due to the unique nature of speech as an expression of autonomy. As we saw in the discussion above in this chapter, this thesis finds the argument unconvincing. However, it does provide a touchstone from which one can begin to hew a coherent place for harm in the balancing that is discussed in this and subsequent chapters (8 & 9 in particular). The problem

[391] Ibid p.1425
[392] Baker (n.362)

with the position distilled by Baker is that it drives doctrinally from an arch-liberal position which is inherently antithetical to the notion of balancing. Baker admits as much[393]. As will be discussed thoroughly below, in Chapter 7, this thesis takes the view that balancing is both descriptively and normatively the correct approach to rights adjudication. Therefore, courts should be entirely comfortable placing harm into the weighing process. The question then becomes about the weight to be applied. Again this is discussed below.

The key justification for this view is simply that we restrict numerous forms and types of speech on account of the harm they cause. Commercial speech is a prime example – the increasingly restrictive regulations on tobacco advertising are part of a concerted and successful drive to protect public health and individuals against the harm of cigarette smoking[394]. Likewise, increasing restrictions and the advent of criminal sanctions against those who would use racist, homophobic, or misogynist speech is designed (whether one agrees with criminalising such speech or not) to prevent harm to the individual victims but also to foster a society where such harmful behaviour is not acceptable[395]. The European Court of Human Rights has also upheld the right of Member States to restrict political speech designed to undermine democracy or the foundations of the state in question. This is obviously aimed at preventing an imminent threat to the nation but also to dampen the broader threats to an orderly society posed by such speech[396].

The key question, in the light of an acceptance of balancing, regards the correct weight to give to harm in the weighing of rights. This is discussed in greater detail in subsequent chapters, however it is clear how the principle of courts requiring an objective "offensiveness threshold" in privacy cases, (explored in Chapter 3) show how this measuring of harm takes place even in considerations of claims to privacy, in advance of a formal balancing against speech. Similarly, the discussion in this chapter around the matrix of interests is impacted upon by considerations of the individual and societal impacts or 'harm' caused by speech, as well as the obvious benefits of certain forms of speech which have led to its robust protection across the jurisdictions examined. The important point to draw from this section is that although harm

[393] Ibid p.979
[394] Tobacco Advertising and Promotion Act 2002 http://www.legislation.gov.uk/ukpga/2002/36/contents (accessed 30th June 2016)
[395] See for example the Liam Stacey case 'Student jailed for racist Fabrice Muamba tweets' https://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets (accessed 30th June 2016)
[396] *Brind v United Kingdom* (1994) 18 EHRR 76 (CD)

is not *always* a cause for restricting speech, it is an important element in why we might counterbalance any notions of unfettered freedom of expression.

5.5 Conclusion

It is fairly obvious that there are real and perhaps irreconcilable differences between the diverging conceptions of free speech. It is clear judges sitting in real cases with practical decisions to make will be torn between differing theories and what weight to give them. A focus on the actual outcome of cases and the descriptive element, which is beyond the scope of this chapter, shows unsurprisingly that there is no consistent line in term of political theory by judges in any jurisdiction. This is not surprising because individual judges will have greatly differing backgrounds and diverging political and philosophical beliefs. There are of course what might be described as 'traditions'; the general and vague sense of a direction or obligation to move the law in the direction of a broad philosophical camp. This of course is aided by the respect for precedent in common law systems and the quasi-mythological assumptions about a state's commitment to a broad philosophical/legal culture. Even a rudimentary look at the differing outcomes of free speech cases in Europe and the United States gives testament to this idea. The US has oft-cited commitment to the nebulous idea of 'liberty', 'freedom', and 'small government' and in a loose sense this can be found in judicial thinking regarding topics such as speech and autonomy. The European system is much more open, as in economics, to curbing individual freedom in the interest of social goals.[397] But even the scholars most insistent that their theory or philosophy is borne out by the case law, and is therefore descriptively as well as normatively the best fit, will admit to numerous exceptions, divergences and contradictions.

As mentioned above this shadow that falls between the normative and the descriptive, the theory and the practice, the idea and the reality, does not render close philosophical examination moot or futile. It does not excuse us our duty to fully understand the basis of our system of law and rights that protect us but also set limits on positive government action that might benefit society, in fact it may make this duty more imperative.

[397] Viljanen, V 'Abstention or Involvement? The Nature of State Obligation under Different Categories of Rights', in Krzysztof Drzewicki, Catarina Krause, Allan Rosas (eds) Social rights as human rights : a European challenge (Turku/Åbo, Finland : Institute for Human Rights, Åbo Akademi University, 1994) p.46

In choosing a philosophical conception that best protects rights it is best to look at the flaws as well as the strengths. The majority of section 5.4 was spent looking at the arguments *for* given theories, because the arguments *against* are best seen by way of comparison with the overall terrain of the debate.

As was alluded to in the discussion relating to autonomy and Baker's theory in particular, the single biggest weakness of autonomy theory is the difficulty in separating speech from the broader sense of autonomous action that is often rightly curbed in the face of pressing social interests. Baker attempted valiantly to couch this exceptionalism in terms of 'legitimacy', that the state's action in collective decision-making, promoting the 'good' and substantive autonomy is only legitimate if it respects the decision-making of individuals within the sphere of formal autonomy concerning 'expressive liberties', as he defined them. The difficulty and perhaps where his theory falls down is that it is still quite vague as to *why* the expressive liberty elements of autonomy are more important to legitimacy than other forms of autonomy. Building on that, if Baker is to argue that it is because those self-same expressive liberties are what give legitimacy to the collective notions of democracy or substantive autonomy, then he has strayed into what is essentially a purposive, consequentialist, or instrumental realm of free speech justification.

This brings us the crux of the matter. Any theory of free speech is obliged to define and explain, beyond presumption or deontology, why the right to free speech is exceptional and why it deserves protection above and beyond lesser interests. The moment this is done the explanation ceases to be intrinsic and become instrumental. Even arch-libertarians like Nozick admit to some need for state interference and once that door opens the path leads to compromises and normative decisions about the scale of that interference. The logical conclusion to that journey is where Baker and the autonomy theorists find themselves in attempting to justify free speech exceptionalism among other forms of autonomy, but trying to avoid surrendering to consequentialism.

At this juncture the question evolves into: what is the instrumental or consequential theory that best explains our commitment to free speech? There appears to be no better or more consistent explanation than the protection of public discourse. This is not to say that there are not major problems with this group of theories. The central criticism, and one openly admitted by political/public discourse theorists, is the fact that there must be difficult decisions (usually

by the courts) about what constitutes public speech. This strays dangerously close to content regulation which of course is an anathema to liberals and rights advocates. But as noted immediately above, any openness at all to government interference (into the Hobbesian/Lockean "natural state" of man), begins the making of such decisions. In law we must put faith the courts to make those decisions wisely and correctly.

One way to attempt to tackle concerns of this is to envisage what might be considered a sliding scale of free speech with the weightiest most heavily protected senses of speech at one end and the less important "unbridled talkativeness" at the other. This is somewhat descriptive of the approach taken by the courts in the UK and the ECHR system, but runs contrary to American enthusiasm for categorisations which they feel much more robustly bolsters rights especially speech against infringement[398]. This would protect overtly political speech with the foremost protection infringed in only extreme circumstances, and then those public discourse issues that Post referred to such as art, culture, and morality close by and have more frivolous subjects toward the other end of the scale. This is clearly only a loose sketch and the scale would have to include the difference between factual statements and opinions, also the public or private nature of the forum[399]. The scale idea here serves simply to offer a version of the public discourse argument that does not rely on hard lines of categorisation but a sense of gradient that can offer sufficient protection in a liberal democracy.

Finally, as was stated at the end of section 5.2 this chapter will not solve the issue of balancing speech against another right such as privacy. Rather, this chapter aims to illuminate the philosophical and political underpinnings of our political system related to rights, and subsequently the application of those rights theories to the specific issue of free speech. It is impossible to cover every theory of speech, nor to do justice to the complexity of the myriad debates, rather, this chapter aimed to illuminate the key philosophies and in doing so build a platform for the next chapter which extends the discussion of free speech as it relates to the subsidiary and extended right to freedom of the press.

[398] For a good general discussion see Schauer, Frederick. "Categories and the First Amendment: A Play in Three Acts." 34 Vand. L. Rev. 265 (1981)

[399] These will be explored further in the concluding chapters.

Chapter 6. Press Exceptionalism

6.1 Introduction

"Press freedom is essential to our democracy... The free press, after all, is the central nervous system of a democratic society. No true democracy, as we understand the term, can exist without it" - Walter Cronkite[400]

The idea expressed above that democracy cannot survive without a free press has almost become a truism. No discussion on the media, free speech or the nature of democracy can pass without some variation of these words being uttered[401]. Indeed this concept is often articulated toward the beginning of judicial opinions in media cases as though the mantra must be repeated before any substantial discussion of the issues can take place[402]. However, further meditation on these words provokes more questions than answers. Among these are: "What is the press?" "Is it possible to define such an amorphous concept?" "What is the specific role of the press in a democracy?" "Does this role imbue the press with a privileged status?" "How does the legal and judicial system deal with a free press?" "How does press freedom differ from freedom of expression?" This is by no means an exhaustive list of issues raised but it is these, among others, which will be examined in the course of this chapter.

Virtually every liberal democracy around the world has enshrined in some form, constitutional or otherwise, protection of the right to free speech or expression. In the United Kingdom this is through the common law tradition and more so now through the Human Rights Act (HRA)[403] incorporating Article 10 of the European Convention on Human Rights (ECHR) into British law[404]. The HRA contains Section 12 which requires special regard to be given to free speech in certain circumstances[405]. In the United States of America, the First Amendment of the Constitution bars Congress from making laws that would abridge "the freedom of speech, or of the press"[406]. The Canadian Charter, South African Constitution and the German Basic

[400] Cronkite, Walter, A Reporter's Life (Knopf 1996)
[401] US State Department website- Press Freedom www.state.gov/g/drl/press/index.htm accessed 28/09/16
[402] For example *Goodwin v UK* (1996) 22 EHRR 123
[403] The Human Rights Act 1998
[404] The European Convention on Human Rights and Fundamental Freedoms
[405] Supra n.4 Section 12
[406] The Constitution of the United States of America, First Amendment

Law all contain similar provisions[407]. The importance placed upon free speech by liberal democracies arises from a legal tradition forged from histories that demonstrated the importance of ideas and their expression and dissemination as a check against abuse of power, a buffer against tyranny and a means to inform the public who would form the electorate.

The idea of "a press" as either an instrument or extension of free expression evolved over time and came to prominence particularly during the Age of Enlightenment and the political tumult of the late 18th century[408]. As a result the majority of these free speech provisions in modern liberal democracies have an explicit or implicit protection of a free press. The difficulty has been and remains defining what that protection is above and beyond the ordinary protection of individual speech.

This definitional difficulty, which we will see was often fudged or ignored in the interest of expediency, has come to the fore in the last ten to fifteen years through the rapid and ubiquitous rise of what is often termed "new media" fuelled in particular by the widespread use of the Internet and the proliferation of cheap technology. It is almost a cliché to remark that in this day and age anyone with a computer and a modem can be a journalist but in essence this is true, at least insofar as they can write, publish and disseminate their views and/or facts that they have collated. Things have evolved enormously from the days when it was quipped that freedom of the press was extended only to those who owned one[409]. Judges, academics and policy makers can no longer make vague or sweeping references to "the press" or "the media" and hope that a broad idea of newspapers and the evening news will suffice. If anyone can be a journalist then there ceases to be any difference between "freedom of speech" and "freedom of the press" if there was ever a difference to begin with. This convergence of constitutional norms and evolving technology is particularly prevalent in the United Kingdom where the coming into force of the Human Rights Act, which completely altered old common law attitudes to free speech and the press, coincided with the popularisation of new media and the Internet.

[407] Canadian Charter of Rights and Freedoms Art 2(b); Constitution of South Africa Chapter 2, Section 16; Basic Law for the Federal Republic of Germany Art 5.
[408] Hesse, Carla "Print Culture in the Enlightenment" in Fitzpatrick, Martin (ed) The Enlightenment World (Oxford: Routledge 2004) p.366
[409] A.J. Liebling "The Wayward Press: Do You Belong in Journalism" The New Yorker, May 14, 1960

There are of course those who are not content to simply accept the anarchic mass democratisation of the roles and definitions of "the press", "journalism" and "the media". Not least among these are what are often termed the "traditional" or "institutional" press. Almost as soon as amateur or non-traditional journalists took to the World Wide Web to publish their thoughts and news stories, articles with titles such as "Matt Drudge is not my colleague"[410] appeared in magazines and journals as traditional journalists attempted to mark out and differentiate their territory in a style that smacked of equal parts panic and snobbery. Unfortunately, many of these polemics could not pin down what separated the proverbial sheep from goats outside of vague and abstract concepts such as "responsibility", "professionalism" and "accountability"[411]. The representatives of the traditional press were failing to define concretely what it is to be a journalist.

Equally, however, legal scholars and academics in the media field felt that the idea of the press, especially in regard to press freedom and the privileges and responsibilities that entailed needed to be differentiated from the volumes of information, opinion and conjecture that was growing exponentially in the ether of cyberspace[412]. This was, they argued, due to the essential role that the press play in a democracy. If this crucial function is to be adequately protected in society the law must avoid what has been termed "the chilling effect"[413]. This is essentially the choice conscious or unconscious by individuals or the collective media to hold back on publishing or investigating based on either strictness or uncertainty within the law. The essential function of the press within a democracy cannot be fulfilled while chilling effects are affecting their editorial decisions.

Thus it is incumbent upon us to attempt to define and delineate what can be seen as two broad concepts: Firstly, what is a journalist for the purposes of the law and free expression? And secondly, what is the impact of this definition on how the law treats those who operate as journalists? The conceptual arrangement of this chapter would be infinitely simpler if these two ideas were separate, distinct, monolithic concepts, however, unfortunately they are not.

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[410] Borger, Gloria "Matt Drudge is Not My Colleague" The International Journal of Press/Politics June 1998 vol. 3 no. 3 132-136

[411] See for example National Union of Journalists- Ethics http://www.nuj.org.uk/innerPagenuj.html?docid=25 (accessed 30th June 2016)

[412] See generally Kovach, Bill and Rosenstiel Tom *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (New York: Three Rivers Press 2001)

[413] Barendt, Eric and Laurence Lustgarten, Kenneth Norrie, Hugh Stephenson *Libel and the Media: The Chilling Effect* (Oxford: Oxford University Press 1997)

Rather, the two ideas are deeply intertwined and are perpetually informing each other. For example the existence of a free press with duties toward the flow of ideas in a democracy will have an impact on how the law views those engaged in this process but concurrently the impact and restrictions of the law will have an effect on the very role that the press can play. For the purposes of pragmatism this chapter attempts to divide the myriad issues and questions that affect this broad area of the law into two parts - section 6.2: Definitions and section 6.3: Impacts. But as we shall see there is a great deal of cross pollination in terms of influence and impact.

The chief concern is naturally how these ideas and concepts affect the law in the U.K. and England in particular, however, these ideas and their impact, like the Internet, are not confined by borders. In fact, the examination of other jurisdictions' attempts and efforts to look at the issue of the press and its place in the law offers juxtaposition and contrasts with the attitude in the English legal system. For example the French attitude to privacy of public figures is very different to the English and so offers an alternative view of the press's role in public life[414]. As with all forays into comparative law it is the common law systems that offer the most nuanced reflections, similar as their norms and values are. However, it is the United States that I will rely most heavily upon for comparative and definitional purposes. This is due to the fact (as highlighted in previous chapters) that through coincidence of a number of factors the situation in the United States has created a "perfect storm" for the analysis of the principle of press freedom in relation to freedom of speech in the law. The U.S. system uniquely combines a constitution which overrides ordinary federal and state legislation and within this system lies the First Amendment which in conjunction with historical fears of tyranny or oppression has created a commitment to free speech extraordinary even by Western liberal standards. However, the most crucial factor comes about by what some might consider an historical and semantic anomaly in that the First Amendment protects against restriction of both free speech and the press. This delineation of the two concepts, regardless of the intentions of the Framers of the Constitution created the conditions for in-depth debate about the difference between ordinary speech and press speech. Indeed, reams of judicial, legislative and academic analysis have been committed to the question of the relationship between free speech and the press, creating a body of work on the issue that far outstrips similar legal

[414] Dupre, Catherine "The Protection of Private Life versus Freedom of Expression in French Law" in Colvin, Madeleine (ed) *Developing Key Privacy Rights* (Hart Publishing 2002)

systems. These definitional discussions provide a great deal of context and help in the search for the role of the press in the British legal system.

6.2 Definitions of the Press[415]

This section will broadly attempt to identify what it is that defines and differentiates the press or media in a modern democracy. To do so first we will look briefly at the historical context and its impact on the rise of the press and our understanding of the modern media. More substantially we will look at theories of the press concentrating on definitional attempts, whilst attempting to frame and test notions about the nature of the media against legal norms, exigencies and examples, which will fold into the subsequent section and the impacts that press exceptionalism has on the law.

6.2.1 History of the Press

Because of men such as John Wilkes, John Stuart Mill and Thomas Paine, England is very often seen or represented as the spiritual home of free speech and the free press. The reality, in law at least, does not always match the perception. Geoffrey Robertson and Andrew Nicol lightly rebut John Betjeman's idealistic portrayal of an England where free speech runs through the water supply like fluoride[416]. Indeed, it has been pointed out many times that under English common law everything is allowed except that which is expressly forbidden[417]. This is applicable to free speech also and numerous laws and decisions have passed through English legal history that have greatly restricted what can and can't be said or published[418]. In the first

[415] A Point about Definitions: It is somewhat of a Catch-22 situation that in writing about the definition of the concepts of "the press", "the media" or "journalism" the only way to refer to the ideas you are attempting to define is to use the very phrases that you are striving to imbue with a specific meaning. As such, in the interests of simplicity I will use the terms above interchangeably and with the broad meanings just as they are construed in the everyday lexicon even as I try to test the presumptions inherent in those usages. When it is necessary to differentiate modes of press or media they will be referred to specifically. The terms "traditional press" or "institutional media" will refer to mainstream historical entities such as newspapers, TV and radio news, magazines, periodicals etc. While the term "new media" will refer broadly to those modes of communication that have come into prominence over the last 15 to 20 years such as the Internet and its constituent parts such as blogs and social networks. There is of course a great deal of overlap between the two as we shall see but this will be discussed in the relevant context as and when necessary.

[416] Robertson (n.18) p.1

[417] *Malone v. Commissioner for the Metropolitan Police (no.2)* [1979] Ch. 344, 357.

[418] See for example past and present the laws on defamation, sedition, blasphemy, confidentiality and more recently the development of privacy law

chapter of their seminal work on media law Robertson and Nicol give a potted history of press freedom, as a corollary to free speech under English Common law and identify four key principles that evolved to protect the press despite a tendency for the legal establishment, from the courts to legislators, to close down free speech when it threatened powerful interests[419]. Those principles were A) Jury trial which allowed 12 men to decide that on the facts of a case to enforce the letter of the law would be to restrict the press in a way contrary to the public interest. B) The principle of open justice which allowed the press to cover trials and report them to the public save in the most exceptional circumstances where justice warranted secrecy. C) The rule against prior restraint, summed up by the Duke of Wellington as "publish and be damned" ingraining the principle that such was the importance of free speech that punishment should be enacted after any legal infringement and not subject to injunction beforehand, save for an extreme situation where the damage would be severe and irreparable for example in cases of national security D) Non-interference from government i.e. that the government will not directly interfere with the editorial decision of news organisations except in the most pressing of circumstances[420].

These were the traditional common law guarantees of a free press but they were only in existence by the grace of the courts and Parliament and could be abolished or curtailed, as they often were, if they became inconvenient. It is only since 2000 and the incorporation, through the HRA, of the ECHR and Article 10 in particular that specific regard must be given to free expression as a standalone right. Now in theory, though not always in practice, the courts and public authorities should err on the side of free speech when a dispute arises[421]. In fact the name of the White Paper which led to the Human Rights Act was "Rights Brought Home"[422], ostensibly a comment on the British tradition of civil liberties and British lawyers' involvement in the drafting of the ECHR. However, it inadvertently drew an unfavourable light upon the lack of robust constitutional protection for rights in the U.K. including free speech/press rights.

This of course is not the situation in the U.S. where free speech and press rights are protected almost to a fault through the First Amendment. It has been pointed out that, "As

[419] Supra n.15 p. 7-38
[420] ibid
[421] Roberston (n.18) p.88
[422] "Rights Brought Home: The Human Rights Bill" available http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm (accessed 30th June 2016)

nature abhors a vacuum the law cannot abide a redundancy"[423]. Yet despite often synonymous use of the terms "free press" and "free speech" the Framers of the U.S. Constitution chose to include both terms within the First Amendment thus sparking the debate that we continue here today. Why did the authors of this amendment include both a speech and a press clause if the two were synonymous and entirely interchangeable? What is the meaning of 'the press' in this clause and does it convey a separate right to an identifiable group or is it merely a clarification that the speech referred to includes written or widely disseminated expression rather than a narrow interpretation of "speech" as spoken word?

This historical anomaly in the U.S. is a useful introduction into the definitional mire surrounding press and speech rights, not only does it provide a dichotomy of the two concepts but allows us to view how understanding and conceptions of the press have evolved. The first point to be made is that the news/media industry did not exist at the time of the framing of the Bill of Rights rather "the press" meant merely the physical machine used to mass produce quickly and cheaply copies of publications[424]. Much has been made of the role of "the lone pamphleteer" in the history of ideas in 18th century United States. Indeed one need only look at the import attached to The Federalist Papers to show how this fledgling nation valued the ability to produce and disseminated ideas in written form[425]. In the absence of an understood concept of journalism it is postulated that the Press Clause was merely a definitional extension of the broader idea of free speech and the Framers included it for fear that a narrow interpretation of speech could be taken to include only that which is literally "spoken". This view is advocated by the historian of the First Amendment Professor Levy who points out that at the time the two phrases were interchangeable and used that way[426]. Just as an individual was free to speak his mind, he was free to use a press to publish and disseminate his views.

This interpretation is consistent within the English context, which of course was overwhelmingly influential upon the fledgling American legal system at that time. Blackstone in his commentaries said:

[423] Nimmer, Melville "Introduction—Is Freedom of the Press a Redundancy?" 26 Hastings LJ 639, n.57 (1975). P.640
[424] Anderson, David A. "Freedom of the Press" 80 Tex. L. Rev. 429 (2002) p.446
[425] *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961)
[426] Levy, L. *Legacy of Suppression* 183-185 (1960) as quoted in Nimmer (n.423) p.641

"Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press...[427]"

This reflects the idea that freedom of the press was an individual right rather than today's conception of it as an institutional or collective right.

Peculiarly it appears that the decisive factor in this debate may come in the punctuation; as all the other clauses that make up the First Amendment are separated by semi-colons whereas the Speech and Press Clauses are divided only by a comma indicating that the two are bound together as two aspects of the same right.

However, as is well established, the meaning of the law is not permanent but subject to evolution and the same is true of the role of the press. The rise of the newspaper is the crucial development that changed our understanding of the idea of 'freedom of the press' from an individual right to something significantly different. It began in the 19th century but the first half of the 20th century is when the newspaper and what we think of as the established press came into its own on both sides of the Atlantic. The courts and the legal system had to now deal with the concept of institutions and collections of individuals having free speech rights. The press took on the roles that we identify with it today. It began to disseminate news and information, it passed opinion and comment on issues of the day, and it began to act as a check on the powerful. Each of these functions required 'speech', or more accurately publishing, which as with all disseminations of information provoked limitations and restrictions at law giving rise to theories of press rights and responsibilities as we see below. Would this institutional press have additional rights beyond the speech that every individual held? If so who would qualify? And what would these rights entail?

A fascinating aspect of this discussion which bridges the historical conceptions of the press to modern theories and definitions of the media is the semantic bedrock upon which this examination rests. As we saw above, the literal original meaning of 'press' was the machine created by Gutenberg for the mass production of written material such as books or pamphlets, the medium for the dissemination of ideas. At some point the term 'media' became prevalent for the various ways that we transmit information. The press was the first medium which is

[427] Blackstone, Sir William *Commentaries on the Laws of England* (1765-1769) Book IV Chapter 11

now evolved into the plural "media". This semantic evolution was attached to the technological evolution as the press produced books, periodicals, magazines and newspapers, subsequently technology created a plethora of modern media most notably radio and television. Now in a new generation they are joined by Internet based technology. The definite article was given to both concepts as we use them today; "the press" and "the media". These new uses of these old words bring inherent understandings but equally they are vast umbrellas, and different subsidiaries within them have very different roles.

The press produced, for example, both newspapers and pulp novels yet only one fulfilled the public interest responsibilities that we associated with free press rights. Equally the media such as television consists of both the nightly news and soap operas yet the functions that make the media crucial to a democracy are unlikely to be fulfilled by the latter. There is, however, often no clear delineation between different media and the advent of the Internet has further blurred the lines between news and entertainment, that which serves the public interest and that which merely interests the public. This creates deep difficulties for the law when deciding what forms of speech and which aspects of the media to protect and to what degree. One of the foremost scholars of free press rights in the United States Prof. Randall Bezanson predicted in the 1970's that technology would force us to confront these questions of what defines the press and its relationship with wider free speech rights[428].

6.2.3 Theories of Press Rights

There are myriad theories relating to the nature of the press, its role and responsibilities. In the interest of manageability this chapter will focus upon definitional theories and subsequently those that relate to how the press is viewed and treated by the law.

It is only through a combination of theoretical and practical approaches to defining press freedom that we can understand the place of journalism and the media in the legal and democratic landscape.

Justice White commented in his majority opinion is the seminal U.S. Supreme Court Branzburg v. Hayes[429] that:

[428] Bezanson, Randall P. Taxes on Knowledge In America: Exactions on the Press from Colonial Times to the Present (Philadelphia: University of Pennsylvania Press, 1994) p.2-3
[429] Branzburg v. Hayes, 408 U.S. 665 (1972)

"The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the lonely pamphleteer who uses carbon chapter or a mimeograph just as much as of the large metropolitan publisher who utilises the latest photocomposition methods"[430].

This quotation highlights a number of things relevant to the discussion of press rights. Firstly, Justice White was speaking about a specific right – the right to protect confidential sources – in an American constitutional context. The Supreme Court specifically did not rule out such a protection or "shield" on a state level. So although he appears to be equating a newsman's rights with those of any citizen he is only doing so within this narrow context. Secondly, the quotation raises the crucial idea of a shield against revealing confidential sources; a rights claim which as we will see below is perhaps the most useful in differentiating press freedom and ordinary speech freedom because it asserts not merely a negative right but a positive right to be excused from giving testimony which other citizens would be obliged to do. It in effect forces us to confront our definition of journalism. As Justice White so plainly foresaw this is riddled with difficulty.

However, it is the case that for pragmatic reasons the distinction, right or wrong is made between journalist and ordinary citizen[431]. For example the spaces in the press gallery at Westminster and the White House are limited, press credentials cannot be awarded to everybody attending a sports event, and requests for interviews to politicians or celebrities must be filtered on a practical basis. So despite Justice White's prescient reservation, judgments and definitions about who is or isn't a journalist do have to be made on a daily basis. However, it is worth noting at this stage that even while making the distinction in the examples above - press conference, credentials etc. - it is usually made among a group who could safely be considered journalists; it is merely a matter of limiting numbers. The point being that it is often easier to identify who is a journalist than who is not. For example, it is clear that Jon Snow[432] is a journalist, Bob Woodward[433] is a journalist; rather it is those who lie at the fringes of what

[430] Ibid p.703

[432] Jon Snow is a journalist and presenter of Channel 4 News in the UK

[433] Bob Woodward is a reporter and writer most notable for his exposure of the Watergate Scandal while at the *Washington Post*

we might consider journalists that cause definitional difficulty, but equally compel us to examine the essence of journalism and its contribution to society.

It is worth noting here that journalist's rights are not *theirs* in the sense that they emanate from the journalist, but rather that they spring from the public's right to know. As we see in the US jurisprudence discussed around journalistic privileges and shields, these rights of journalist are designed by the law to facilitate newsgathering in order that the public receives information. The ECHR jurisprudence reflects this idea also[434].

It has been well established that definitional difficulties surrounding the press have been exacerbated by technology. It has been claimed that prior to the Internet "...the answer to that question was easy... journalists were typically attached to an established organisation... a newspaper, magazine radio or TV station..."[435] While this is a greatly over simplified view, ignoring for example the noble tradition of the lonely pamphleteer in the history of journalism, it does highlight the broadly correct point that the Internet has lowered entry costs to taking part in what is, ostensibly at least, a form of journalism. From Matt Drudge to Guido Fawkes, The Huffington Post to Wikileaks, online sources are presenting both news and commentary, very often ahead of traditional media[436]. Depending on one's stance these new media sources are of varying quality and relevance to the public interest but their advent undoubtedly has profound implications for the law of the media, and the press itself.

The changing face of media has caused much introspection from the journalism profession itself as it seeks to define a role for itself in the radically altered news landscape. This was particularly true in the early years before traditional news institutions embraced, or co-opted new media portals. A number of articles appeared in media journals and other publications divining for a definition of journalism that could separate the professionals from the hoi polloi scrambling to have their opinions read on the World Wide Web. These insights concentrated on vague concepts such as experience and professionalism:

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[434] See for example *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843 para 59

[435] The Monitor's View, "What is A Journalist?" Christian Science Monitor, March 18th 2005 available http://www.csmonitor.com/2005/0318/p08s02-comv.html accesses 28th Jan 2011

[436] "The Drudge Report" http://www.drudgereport.com/ "Guido Fawkes" http://order-order.com/ "The Huffington Post" http://www.huffingtonpost.com/ "Wikileaks" http://wikileaks.ch/

"Who then is a journalist? The answer lies in a sum of training, character and attitude... Anyone who recognises the sanctity of what we do, who subscribes unswervingly to an ethical canon grounded in balance, fairness, restraint and service"[437].

"Not everyone who simply gathers information and disseminates it can be called a journalist. The craft requires skill in finding story ideas and facts, cultivating sources, and then presenting news in a way that serves the public interest"[438].

These definitions may be useful among journalists in attempting to locate a cogent raison d'etre but they are insufficiently certain or testable to be much use in defining journalism or the press within the legal sphere. Additionally, these faintly elitist definitions are somewhat discredited by the mainstream traditional media's consistent failure to adhere to the very same standards they would thrust upon the bloggers and reporters of the new media[439]. However, such definitions do serve to highlight a crucial distinction in approaches to defining the press. Journalists seem to concentrate on the protection of the individual whereas a more useful approach may be to look at the status of the information or speech that they are trying to disseminate. To put it another way; does the nature of the journalism give special status to the journalist or vice versa? This becomes a key distinction in discussions of press theory within the law.

Prof. Eric Barendt makes the deceptively simple point that there are essentially three ways that one can view the press's status under law, each extrapolated from the relationship that the concept of freedom of the press has with that of freedom of speech/expression[440].

The first approach takes the view that the two ideas are synonymous and interchangeable, essentially that there is no difference in the rights conferred to the press and those to ordinary citizens through free speech. As we saw above in *Branzburg v. Hayes*[441] the U.S. Supreme Court occasionally takes such an approach (though it must be noted that different factual circumstances can produce different approaches). This is because the Court is loath to

[437] Gup, Ted (1999) "Who's a Journalist?" Media Studies Journal (Spring/Summer): 34-37 p.37
[438] The Monitor's View, "What is A Journalist?" Christian Science Monitor, March 18th 2005 available http://www.csmonitor.com/2005/0318/p08s02-comv.html accesses 28th Jan 2011
[439] See generally Davies, Nick *Flat Earth News* (London: Vintage Books 2009) and Herman, Edward and Chomsky, Noam *Manufacturing Consent: the political economy of the mass media* (New York : Pantheon Books, 1988)
[440] Barendt (n.1)) p.419
[441] *Branzburg* (n.429)

create different classes or categories between citizens in enjoyment of their civil rights[442]. Equally, the U.S. prison access cases take the approach that the press can only have equivalent access to the public[443]. The English Courts have pronounced similar sentiments for example in the Spycatcher case[444]. Of course, the Spycatcher decision was subsequently found to be a violation of Article 10 of ECHR by the Strasbourg Court[445] and the U.S. cases are notable that the journalists were asserting positive rights to access or news gathering and not merely negative rights against restrictions on press publication or speech.

This first approach while attractive in its simplicity, simply does not reflect the reality of the press's role in a democratic society. Numerous examples of concessions toward what might be termed "press exceptionalism" can be found in the constitutional instruments and their interpretation within liberal democracies. The United States has its Press Clause and the Supreme Court has made explicit reference to the unique role the press plays in democracy, for example Mr Justice Brandeis stated in *Whitney v. California*[446]:

"Those who won our independence... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth... that public discussion is a political duty; and that this should be a fundamental principle of the American government.[447]"

The German constitutional or basic law has a separate and specific provision of freedom of the press called Pressefreiheit[448] and the courts there robustly defend this idea given their historical linking of the restriction of the press and the abolition of democratic rights[449].

Article 10 of the ECHR, while not specifically mentioning the press has been consistently read by the Strasbourg Court as inferring a special role for the press within democracies, particularly what the Court calls the media's "watchdog" role[450]. This case law

[442] Berger, Linda "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" 39 Hous. L. Rev. 1371 (2003) p. 1376
[443] *Shoen v. Shoen,* 5 F.3d 1289, 1292 (9th Cir. 1993) and *Saxbe v. Washington Post Co*., 417 U.S. 843 (1974).
[444] *Attorney-General v Guardian Newspapers* Ltd [1987] 1 WLR 1248; [1987] 3 All ER 316
[445] *The Observer and The Guardian v United Kingdom* (1991)14 EHRR 153
[446] *Whitney v. California*, 274 U.S. 357 (1927)
[447] Ibid p.375
[448] Article 5, Basic Law for the Federal Republic of Germany
[449] Barendt (n.1) p.418
[450] *Financial Times Ltd & Others v United Kingdom* (Application No. 821/03 Judgment of 15 December 2009) para. 59

emanating from the ECHR began with *Handyside* and has developed through the jurisprudence discussed in this chapter and others. As mentioned above, the European Court has not taken a one dimensional view concerning press rights as inherent or incumbent in the person of a journalist, but rather has taken a more functional view relating to the right/need for the public to *receive* information; and this process as a central function of democracy. This is reflective of the debates in the previous chapter surrounding justifications for speech as intrinsic or instrumental. The U.K. has of course integrated these ideas through the Human Rights Act which also gives particular regard to the media through Section 12[451].

If Barendt's first approach to press rights does not stand up to scrutiny, perhaps his second will. This is the approach that states the Press as an institution should have a unique set of expression rights above and beyond the ordinary citizen. This idea, particularly in the U.S. Constitutional context, was most famously articulated by Supreme Court Justice Potter Stewart in his seminal speech to Yale Law School entitled "Or Of the Press"[452]. Justice Potter essentially set out a theory that the Press acted as a fourth branch of government checking the power and function of what in America are the executive, legislative and judicial branches. The press, unique in this aspect, deserved special rights and particular protection;

"... the Free Press guarantee is in essence a structural provision of the Constitution. Most other provisions in the Bill of Rights protect specific liberties of specific rights of individuals... In contrast the Free Speech Clause extends protection to an institution"[453].

This speech and approach have been widely critiqued even in the narrower context of the U.S. First Amendment theory and Justice Stewart's approach has not been adopted by his Supreme Court colleagues or successors[454]. Equally the ECHR, UK and German systems all draw their press rights out of a broader free expression right applicable to all[455].

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[451] "Human Rights Act, S,12 (4)
The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
(a)the extent to which—
(i)the material has, or is about to, become available to the public; or
(ii)it is, or would be, in the public interest for the material to be published;
(b)any relevant privacy code."
[452] Stewart, Potter "Or Of the Press." 26 Hastings Law Journal 631 (1975)
[453] Ibid p.633
[454] Anderson (n.424) p. 429
[455] Barendt (n.1) p.423

Barendt offers then a third approach to press rights within a free speech framework; this in essence a hybrid or compromise between the first two. The practical application varies from jurisdiction to jurisdiction but fundamentally says that press rights are drawn from the broader free expression or speech right and the press is given special status insofar as it promotes or protects the essential elements and functions of free speech. This approach has been followed and promoted by jurisprudence and academics from a variety of jurisdictions[456] and it leads to what is the central issue of concern for debate over the role of the press; that is to identify the ways in which the press engages with its duties as a watchdog or essential element to democracy in order that the law can promote or protect this function.

One way of achieving this is to try and identify the specific characteristics that make one a journalist. An example of where this has been attempted in earnest is in American state shield laws[457]. Although the Supreme Court rejected a constitutional protection for journalists wishing to protect sources it specifically left the door open for individual state legislatures to protect what Justice White called the "news gathering" function[458].

Thirty-six states have done so to date by enacting individual shield laws which naturally requires some definition of those, in most cases journalists, who qualify for protection against revelation of confidential sources[459]. These definitions range from the broad to the very specific. For example California's law defines a journalist as "publisher, editor, reporter or other person connected or employed upon a newspaper, magazine or other periodical publication, or by a press association or wire service, or any person who has been so employed"[460]. It has been pointed out that the shield laws require two factors for protection:

"(1) He or she must have a substantial connection with or relationship to a recognized or traditional news media entity, and (2) he or she must be engaged in recognised traditional news media activities."[461]

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[456] See for example: Iancu, Daniela Valeria, 'Freedom of the Press - A Component of Freedom of Expression', 2010 Acta U. Danubius Jur. 57 (2010), and Nimmer (n423) p.639

[457] Berger, Linda "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" 39 Hous. L. Rev. 1371 (2003).

[458] *Branzburg v. Hayes* (n.429)

[459] "Reporter's Privilege" The Reporters Committee for Press Freedom http://www.rcfp.org/privilege/ (accessed 30th June 2016)

[460] California Shield Law quoted in Berger, Linda "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" 39 Hous. L. Rev. 1371 (2003) p.1393

[461] ibid

These statutes of course only relate to a narrow protection in certain circumstances but they serve to highlight the inherent difficulties in defining journalists or journalism by rigid physical characteristics. These definitions rule out a sizable proportion of new media sources not to mention investigative authors, academics, part-time or amateur journalists not connected to traditional news media entities. It would even rule out the lone pamphleteer who was a bastion of free speech before institutional media existed. The limitations of such definitions have been recognised by the lower federal courts in the U.S. who untethered by state legislative restrictions have extended a federal protection to newsletters, periodicals and book authors [462]. In fact in the case *Shoen v. Shoen*[463] the Ninth Circuit Court made the point upon which this debate really turns when it said "What makes journalism journalism is not format but content"[464].

Content is the focus of most academic and jurisprudential analysis. The logical flow is usually as follows: if anyone can be a journalist in its broadest sense, but we wish to protect journalism insofar as it contributes to the process of democracy then the only way to do so is to identify and differentiate the content and purpose of the press speech that is deemed essential to democracy.

Alexander Meiklejohn, as we saw in the discussion of free speech in the preceding chapter, is perhaps the foremost free speech scholar to make the explicit link between free speech and democracy or as he termed it "self-government"[465]. Meiklejohn's theory is extensive and relates to a great many aspects of American democracy, including social contract theory, excessive individualism and moreover he is concerned with free speech generally as well as other First Amendment freedoms. Those are beyond the scope of this chapter, but Meiklejohn's linking of speech protection and promotion, including that of the press, with its contribution to a robust democracy has been very influential and provides a strong basis for looking at the definition of press through what they write and say rather than who they are. This creates a much more equitable idea of the role of speech and journalism and is much more fidelitous to the origins of free speech, from which sprung the press, espoused by the likes of

[462] Alexander, Laurence B. "Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" 20 Yale Law and Policy Review 97, 110 (2002) p.188-120
[463] *Shoen* (n.443)
[464] Ibid p. 1293
[465] Meiklejohn (n.169)

Mill and Paine. It gives much more credence to the idea of the citizen-critic than a protection exclusively for a credentialed mainstream journalist regardless of how supine or frivolous his content may be. For example an expose on government corruption would be given equal protection whether it was by a blogger or on the front page of The Times.

An extension of this idea of the press and speech as a force for democracy is the "checking theory" of free speech. Articulated most prominently by Vincent Blasi this is essentially the theory that free speech should be used as a counter balance to governmental power i.e. a check of their power[466]. Blasi identified this as an important if undervalued underpinning of American First Amendment reasoning. For example, the seminal defamation decision in *New York Times v. Sullivan*[467], which made actual malice a prerequisite before a politician could prove defamation, is an example of this. Because of the power and influence wielded by politicians they would be subject to a higher level of scrutiny. This reasoning was continued in subsequent cases so that defamation of any public figure is very difficult to prove in the U.S. Blasi also posited the idea that newsgathering, insofar as it served to check abuse of power, was vital to democracy under certain conditions. It should be noticed that a key difference between Meiklejohn and Blasi is in the view of the relative roles of citizen and press. Meiklejohn would see the role of the press to use its speech rights to inform the citizenry to enhance democratic choices and maintain an informed populace. In Blasi's checking value theory the citizenry is more passive and the press serves as an agency of the public doing what it has neither the time nor resources to do individually – control government abuse[468]. The two views of the press are not mutually exclusive. In fact, Blasi states clearly that "checking value" is but one rationale underpinning free speech rights, and uses a critique of Meiklejohn as his basis[469]. After all, one can have simultaneously both an informed participatory citizenry and vigilant press acting in their agency against abuse of power.

An interesting and perhaps controversial view of the relationship between press and speech is that which posits the two can often be in opposition to each other. Judith Lichtenberg identifies two chief purposes for freedom of speech/press (1) the idea of non-interference to

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[466] Blasi, Vincent "The Checking Value in First Amendment Theory" 1977 Am. Bar Found. Res. J. 521 (1977)
[467] *Sullivan* (n.8)
[468] Alexander, Laurence B. "Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" 20 Yale Law and Policy Review 97, 110 (2002) p.106
[469] Blasi, Vincent "The Checking Value in First Amendment Theory" 1977 Am. Bar Found. Res. J. 521 (1977)
[469] *Sullivan* (n.8) para.555

write, speak or express what one wants free of censorship and (2) to allow or ensure a multitude of voices or opinions to be heard[470]. These, Lichtenberg says, can be in conflict when the press reinforces the voice of the powerful at the expense of plurality due to a lack of accessibility. A famous concrete example of this came in the case of *Miami Herald Publishing Co. V. Tornillo*[471] where a Florida statute which allowed a right of reply to criticism to be published in a newspaper, was struck down by the Supreme Court on the basis that editorial independence was compromised against the freedom of the press[472]. It has been claimed that this is an example where free press, in the form of editorial control, has trumped free speech, in the form of access to a forum of expression and the plurality of voices[473]. This interpretation appears to be in conflict with the (broadly) prevalent underpinning of free press (as distinct from to broadcasting) and its interface with positive and negative rights. The fundamental foundation of the right to a free press is non-interference. There is no right to a forum even if that promotes diversity because that is a positive right, or a privilege if you will. This is not to say that Lichtenberg's analysis is without merit but rather that "content prescription" in the press is deeply controversial and has not gained traction in theory nor in practice. Non-interference is an essential element to our understanding of free speech and free press: that our speech is protected against restriction except in strictly defined and construed circumstances; if we take on the role of the press as an individual or an institution by giving information or opinion which is contributive to the functioning of democracy then that speech is protected further still and any restriction needs greater justification.

There are naturally strengths and weakness to this approach of using a content-based approach to deciding what information or "news", and subsequently those who disseminate it, is to be protected by the law. Perhaps the key strength is that all forms of journalism are potentially protected. As long as the information is newsworthy then it is protected regardless of whether it is transmitted into the public sphere by a blogger, a book author, the editor of a newsletter or a specialist periodical. If the law views the information as contributing to the, admittedly somewhat elusory, concept of democratic debate then it should be both protected and promoted by the law.

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[470] Lichtenberg (n.382) p. 105

[471] *Miami Herald Publishing Co. v. Tornillo* 418 U.S. 241 (1974)

[472] The ECHR has similarly recognised that it is for journalists not judges to make editorial decisions, see for example *Belpietro v. Italy* - 43612/10

[473] Nimmer (n.423) p.657

This idea harks back to the origins of the idea of freedom of the press, the fundamental idea that the press was medium for communication and both its content and means of communication were protected. This idea is borne out, as we saw above, by the courts that reject the idea that only those identified as professional journalists can possibly make this crucial contribution to democracy be it through providing news to inform and enlighten society or to act as a check against abuse of power. This idea of a higher form of protected speech has been articulated in the American context as follows:

"If there is a different interest that requires protection under the Press Clause, it must flow from the belief that there is a subset of speech so important that it requires constitutional protection... This subset of speech is rarely defined and the reasons for singling it out are rarely articulated, but they presumably have to do with special societal purposes, such as self-government or the maintenance of society."[474]

Translated into a universal principle the idea is that there is a type of speech that needs protecting even above other forms due to its importance to democracy- an echo of the mantra identified in the opening paragraph of this chapter and the broader discussion of speech in the preceding chapter. We have identified this as the type of information we call "journalism" ("quality journalism" may be a more accurate characterisation to differentiate from tabloid gossip which may not qualify for this exalted status). Perhaps the crucial aspect upon which this point is based, and one which identifies a thread running from the original historic concept of freedom of the press as synonymous with free speech through to our modern day understanding of free press/media rights, is that journalists are provided with this protection most often because they are the people who put themselves in this position the most often. The media or press put forward information for the benefit of society or the protection of democracy disproportionately when compared to the rest of the population. As such, the protection of that information has become associated with the profession and thus the concept of freedom of the press morphed into protection of journalists. However, a content based approach restores the protection to the information and by extension to any member of society wishing to put it into the public domain. This idea is borne out by the case law from virtually all jurisdictions. The vast majority of free speech cases are concerned with restrictions upon journalists, and the resistance thereof. However, the protection they seek is drawn from a universal right to free

[474] Anderson (n.424) p.527

speech and the courts must decide then whether the content of the information trumps the restriction based on its importance to democracy/society.

An illustration of this point comes from the, not uncontroversial, claim by Justice Stewart that democracy could survive even in the absence of the existence of an autonomous press[475]. Whether you agree with this sentiment or not, what is important is that in this hypothetical circumstance individuals would almost certainly begin to fill the vacuum, left by the absent press, with their views and presentation of the facts, then groups of people would band together to do this and would attempt to disseminate their content as widely as possible. Thus it is shown that a press would evolve from the need and desire to have a plurality of independent source of news and information about society, demonstrating that the importance of the press grows from content and not vice versa.

The content based approach has its critics and obvious drawbacks also. A major difficulty comes in defining the uncertain concept of the press or journalism through an equally uncertain concept such as "newsworthiness" it is essentially a form of circular logic[476]. It has been pointed out that (like defining 'obscenity') attempting to identify what is 'newsworthy' is "trying to define the indefinable"[477]. Essentially this is saying that there is no such thing as an objective standard of newsworthiness. One man's tabloid tittle-tattle is another's news, summed up neatly by High Court Judge Sir Melford Stevenson QC:

"I believe that newsworthiness is a firm realisation of the fact that there's nothing so much the average Englishman enjoys on a Sunday morning – particularly a Sunday morning – as to read a bit of dirt"[478].

This is demonstrated by the running battle in the UK courts and beyond, in privacy and injunction cases, as to what is newsworthy or to use the parlance of the judicial system "in the public interest"[479]. The fact that The Sun is the UK's most popular daily newspaper, replete as it is with the minutiae of celebrity private and sex lives, shows that what many people want in

[475] Stewart, Potter "Or Of the Press." 26 Hastings Law Journal 631 (1975) p.636
[476] Calvert, Clay "And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law" 103 Dick. L. Rev. 411 (1999) p.450
[477] Justice Potter Stewart quoted ibid p.449
[478] Sir Melford Stevenson QC quoted in Media Legal Defence Initiative submission (23rd March 2010) to European Court of Human Rights in Mosley v United Kingdom Application 48009/08
[479] See for example *Campbell* (n.166) para.56

their "news" has very little to do with what is loftily described as essential to democracy or the robust defence against abuse of power. Indeed this draws attention to the blurring of news and entertainment which further complicates attempts to isolate information or content that is worthy of heightened protection by the law.

If the truism "there is a difference between what interests the public and what is in the public interest"[480] is taken as fact then the law, and more specifically the courts, will have to make distinctions based upon what is worthy of greater protection, in essence creating a hierarchy of news, information or content. This process is deeply controversial and provokes the sternest criticism of a content-based approach to press freedom. The decision by lawmakers, judges or the press itself as to what is worthy news is elitist and paternalistic and in certain respects counter to the concept of a marketplace of ideas espoused variously by John Stuart Mill and Justice Wendell Holmes among others, that all speech is equally valid and the efficacy of an idea can only be tested through its exposure to scrutiny[481].

However, the concept of judging levels of speech worthy of greater protection is most dangerous due to the fact that it allows governments and legal systems to taper restrictions to a greater or lesser degree based upon what it considers acceptable speech. The danger inherent in this idea is obvious and opens up the idea to accusations of censorship. This is the type of attitude once prevalent in discussions of morality which lead to the banning of works such as Ulysses and Lady Chatterley's Lover. Such an application to worthy or unworthy political speech would be counter to the entire philosophical ethos that underpins the concepts of free speech and free press in the first place. The US Supreme Court has been loath to embark down this road for just such reasons, upholding the First Amendment rights of those whose view would be considered abhorrent by the majority of society[482]. The fact is that free speech and the freedom of the press must protect even unpopular speech otherwise its purpose is defeated; protection of only popular views is indeed no protection at all and brings with it an inherent danger of tyranny of the majority.

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[480] House of Commons, Culture, Media and Sport Committee, Press standards, privacy and libel, Examination of Witnesses, 28th April 2009 available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9042806.htm (accessed 30th June 2016)

[481] Blasi, Vincent "The Checking Value in First Amendment Theory" 1977 Am. Bar Found. Res. J. 521 (1977) p.549

[482] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)

However difficult it is, we have to accept that there are limitations upon speech and some speech is treated differently. For example, falsely shouting "Fire!" in a crowded theatre is a widely cited example of unacceptable speech[483] and so it is for courts and judges to make reasoned judgments on the value of speech that is protected under the law due to its democratic function. However, in the absence of competing rights or interests this category should be given the widest definition possible so as to maximise the protection given to speech and the press. The courts should avoid wading into discussions about acceptable editorial content as far as possible and subscribe to the view that in most case those best placed to make journalism decisions are journalists themselves[484].

Prof Bezanson believes that content analysis has a role in identifying the news that is to be protected under free speech but is for many of the reasons above at risk of fault in its assessment or application[485]. Bezanson argues that an additional element should be added and this is defined as "editorial judgment". Defined by the examination of the purpose of publication, signalled by such journalistic ideals as impersonality, independence and reason, one can discern a motivation for contribution to the broader societal good that provides an additional dimension to examination of content to judge its essential "newsworthiness". A perfect demonstration of this concept is provided in the following example. A person comes across sensitive government information and publishes it in a newspaper as an expose then it could be reasonably argued this falls under the heading of press freedom, but should one pass the same information onto a foreign government then it is nigh on impossible to see this as worthy of press protection[486]. The information is the same yet the intent and purpose of its dissemination make the difference. Expediency prevents an exhaustive critique of Bezanson's extensive theory but one can broadly agree with the above sentiments with the caveat that too heavy a reliance upon formal editorial processes tips the law back into the formal realm of "Who is a journalist?", rather than the function driven "What is journalism?". The law should by all means take the purpose into account when looking at newsworthiness but only in the broader context of content based analysis.

[483] Justice Oliver Wendell Holmes in Schenck v. United States, 249 U.S. 47 (1919) para.52
[484] Zimmerman, Diane L. " Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" 68 Cornell L. Rev. 291, (1983) p.353
[485] Bezanson, Randall P. "The Developing Law of Editorial Judgment" 78 Neb. L. Rev. 754, (1999)
[486] Nimmer (n423) p.563

6.3 Impacts of Press Rights

In light of the extensive debate about the definition and role of the press relative to democracy and society the question becomes how this has affected the way the law treats different types of information disseminated through the various media. As was noted at the beginning of the chapter the concepts of definition and impact cannot be disentwined, they are in a form of symbiotic relationship. Just as the law is inevitably influenced by the actions of the media and the way that society both defines and reacts to it, so the media is equally shaped and moulded by the obligations and encumbrances placed upon it by the legal landscape.

There is a vast array of approaches taken by the law and judicial systems to the media in many different jurisdictions. There are many excellent and extensive accounts charting the evolution of jurisprudence in different countries or regions, however this chapter will select a number of cases, and jurisprudential trends to attempt to highlight the broad impact that theories on freedom of the press have on judicial and legal attitudes toward the media and the content it disseminates. The philosophy underlying free speech decisions relating particularly to differentiating classes of speech remain unspoken[487]. Occasionally judges will refer to broad philosophical points about free expression and its importance to democracy but will avoid becoming embroiled in lengthy and detailed discussions about the definition of newsworthiness. Much of our understanding of judicial attitudes toward press freedom comes through inferences drawn by examining the outcome and the judges' reasoning in light of the type and content of the speech in question, rather than explicit elucidation from the bench. My focus will continue to be on the UK and the ECHR regimes with the US as useful juxtaposition given their uniquely expansive approach to free speech and press.

6.3.1 USA[488]

Given the size of the country and the multi-layered legal system there is a plethora of examples of free speech/press cases but for our purposes the seminal decisions emanate from the Federal system and the Supreme Court dealing with the First Amendment and the speech/press dichotomy. We have already touched on a number in the discussion above.

[487] Anderson (n.424) p.513

[488] For a more comprehensive review of US cases see Barendt (n.1) Ch XII

The attitude taken by the US toward authority, and reflective of Blasi's checking theory, is demonstrated best by the landmark case of *New York Times v Sullivan*[489]. The case concerned criticism of a local politician in Alabama which prompted him to sue the newspaper. The Supreme Court ruled that actual malice need be proven in order for such a suit to be successful. A politician was expected to put up with a harsher degree of criticism than an ordinary citizen due to the power that he held and the importance of citizens and the press being able to criticise their government. The Court in its decision made much of the idea that the media needed to be sure it was unencumbered in its ability to criticise elected officials and the government unless it acted in a deliberately or recklessly malicious way. Justice Goldberg specifically mentions the "chilling effect" of the Alabama defamation law in question on the press[490]. An interesting aspect of this case is the refusal of a number of other jurisdictions to follow the reasoning. In the UK, for example, the standard is much lower than actual malice given the regard in which reputation rights are held. Thus the Supreme Court was prepared to put the concepts of clarity and sureness of the law for press freedom ahead of the reputational rights of public figures. Additionally, it should be noted that five of the defendants in the suit were in fact individual citizens as well as the institutional press such as the New York Times, showing that the content of the criticism was what was protected rather than the role of the individuals/organisations espousing it.

The two "positive" rights (if "negative" rights are defined as non-interference rights) claimed by journalists most often are the right to protect confidentiality of sources and access to information. These are claimed on the basis that they are corollary rights without which the very act of newsgathering and by extension news disseminating cannot effectively take place, thus restricting freedom of the press and free speech. *Branzburg v Hayes*[491] is the crucial case relating to protection of sources. The case is landmark but nonetheless resulted in years of judicial and academic confusion due to the mixed message the opinions sent[492]. The Court decided that journalists could not legally reject a grand jury subpoena to reveal confidential sources, yet the decision recognised a "newsgathering" protection under the First Amendment.

[489] *Sullivan* (n.8)
[490] Ibid p.530
[491] *Branzburg* (n.429)
[492] Alexander, Laurence B. "Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" 20 Yale Law and Policy Review 97, 110 (2002) p.112

Subsequently lower Federal Courts of Appeal have recognised a limited right[493], and as we discovered above many states have enacted shield laws[494].

The key cases regarding special access for journalists comes through applications for additional access to prisons. In both *Pell v. Procunier*[495] and *Saxbe v. Washington*[496] the Supreme Court ruled that the press had no additional right of access to prisons above and beyond what was provided to the public defined by the practical limitations toiled under by prison authorities. The rationale of the Court was that while the public had the right to know how the authorities were running the prison the press were not the sole medium for this process. The situation may have been different if no access was granted to anyone but the prisons were deemed to be doing all that was reasonable to allow broad public access when appropriate.

The summation of these cases seems to be that, at least in a constitutional sense, imposing positive rights of confidentiality and access is much less easy to justify. While the Court recognises both a limited newsgathering right and the importance of that right in facilitating the broader rights of free speech and free press it is not a constitutional right in the sense that non-interference is.

Miami Herald Publishing v. Tornillo[497] was a case that was touched on previously in which the Supreme Court struck down a Florida statute requiring a right to reply for political candidates. This case showed the willingness of the Court to protect the fundamental free speech right, to say what one wants, rather than be obliged to espouse somebody else's views. This right trumped any attempt to promote a plurality of voices through publications obligations, the position advocated above by Judith Lichtenberg[498]. For the media it was confirmation that freedom of the press included editorial control, the state or government had no place interfering with what an organisation or individual says in relation to their editorial content.

[493] *Shoen* (n.443)
[494] Berger, Linda "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" 39 Hous. L. Rev. 1371 (2003)
[495] *Pell v. Procunier*, 417 US 817 (1974)
[496] *Saxbe* (n.443)
[497] *Miami Herald Publishing Co* (n.471)
[498] Lichtenberg (n.382)

Finally, the case which demonstrates the US Constitutional commitment to free press and speech is the Pentagon Papers case[499]. The US government sought an injunction against the publishing of leaked sensitive documents relating to the conduct of the Vietnam War. The Supreme Court ruled that the government has failed to show that the circumstances were so pressing that a prior restraint of the press was necessary. Justice White articulated:

"Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases"[500].

This demonstrates the level to which the constitutional presumption is in favour of free speech. Justice White predicted that the public interest would be damaged yet still came down on the side of speech due to height of the hurdle needed to be cleared to justify a prior restraint.

6.3.2 ECHR[501]

The European Convention on Human Rights, unlike the US Constitution, contains no explicit reference to the press or the media within its Article 10 freedom of expression provision. However, despite this, most Article 10 cases and certainly those of greatest influence and import relate to issues of journalism and the media. This reinforces the idea articulated above that even though freedom of expression rights are universal, the nature of journalism and its role as discoverer and disseminator of important and often controversial material means it will disproportionately be communicating information close to the edges of what governments and the law perceive as "in the public interest". The wording of Article 10 is much more extensive than the simple Press and Speech clauses within the First Amendment. Crucially the article outlines not only the scope of the freedom but the circumstances under which it can be restricted[502].

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[499] *New York Times Co. v. United States*, 403 U.S. 713 (1971)
[500] Ibid p.731
[501] For a comprehensive review of ECHR case law see Robertson (n.18) Ch. II
[502] "ARTICLE 10
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

A key aspect to the Strasbourg jurisprudence relates to the European Court of Human Rights' (the Court) essential function. Under the ECHR the Court acts in a supervisory role, in contrast to the US Supreme Court which has the power to strike down legislation. An extension of this philosophy is that the Court affords member states a margin of appreciation; that is a certain leeway when it comes to matters of morality to take account of national cultural sensibilities[503]. This is crucial to shedding light upon the attitudes under the Convention to free expression and especially speech of public concern and interest. For while the margin of appreciation can be relatively wide for matters of morality it has been established that in matters relating to political speech the margin is much narrower[504]. Thus demonstrating an alignment with the idea discussed in the section above that the protection for the press is drawn not from their role but from the importance of the content they disseminate.

The case that established, like *New York Times v Sullivan* in the US, that public figures[505] were subject to a greater level of scrutiny than private figures was *Lingens v Austria*[506]. The case was related essentially to the defamation laws in Austria which were relatively restrictive upon the press, the Austrian courts holding that criticism by the magazine *Profil* of an Austrian politician was an offence against his reputation. The Strasbourg Court found for Mr Lingens but crucially based its reasoning the upon the idea that as a politician one's character and activities are in the public interest and the press in particular has a role in communicating ideas around such subjects:

"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."[507]

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[503] See for example *Otto-Preminger-Institut v. Austria*, (13470/87) [1994] ECHR 26

[504] See for example: *Incal v Turkey*, ECtHR Case No 41/1997/825/1031

[505] For a conflicting view on criticism of public figures see the dissent in *Oberschlick v. Austria (no. 2)* (47/1996/666/852) 1 July 1997

[506] *Lingens* (n.5)

[507] Ibid para 29

This theme was extended by the Court in *Thorgeir Thorgeirson v Iceland*[508] when it ruled that under Art.10 the public interest was not merely extended to politicians or politics but to matters of wider societal concerns, in this case two press articles containing accusations of police brutality. Both the accuracy and the exaggerated tone of the articles were called into question but the Court held that the necessity to encourage rather than stifle or chill public debate gave particular protection to the press.

The Strasbourg Court has broadly continued this commitment to the idea that matters of public concern need to be discussed and the press's particular role in doing this is to be given special consideration. For example, the Court extended this protection to criticism of the judiciary[509], public health issues[510] and the environment[511].

Two cases in particular demonstrate a commitment in ECHR jurisprudence in protecting content of public interest and the press who disseminate it. In *Jersild v. Denmark*[512] a television journalist was convicted under race hate laws for broadcasting (aiding and abetting was the offence) the racist comments of neo-Nazis in a documentary. The Strasbourg Court held that this was a violation under Art.10 as it was clear that the journalist had disassociated himself from the racist remarks but was broadcasting them to contribute to the debate surrounding this topic that was in the public interest:

"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so"[513].

This sentiment is reflective of Bezanson's idea discussed above that editorial judgment is a key factor in the definition and protection of journalism. The purpose of the speech was important to the Court; if the journalist had simply uttered the words himself it would have been unlikely to have fallen under the protection of Art.10 yet his purpose in including the

[508] *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843
[509] *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1 97/7
[510] *Bergens Tidende and others v Norway* (2001) 31 EHRR 16
[511] *Bladet Tromso and Stensas v. Norway* (2000) 29 EHRR 125
[512] *Jersild v Denmark* (1994) 19 EHRR 1
[513] Ibid para.35

same words to contribute to public debate rendered the content protected under the umbrella of discussion crucial to a democratic society.

Similarly in the case *Thoma v Luxembourg*[514] the Court remarked:

"A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas"[515].

This reiterated the importance of the type of content and its purpose when determining if a restriction by a member state is proportionate to the aim being pursued.

The UK, given the robust nature of its press has been involved in a number of the seminal Strasbourg cases related to the press and freedom of expression[516]. As Robertson and Nicol have pointed out Art. 10's potential for expanding press freedom was first demonstrated by the UK case of *The Sunday Times v. United Kingdom*[517] when it specifically extended the scope of Art.10 to the media and made it clear that any restriction on discussions of public interest would need to serve a pressing social need that was strictly defined.

The UK case of *Goodwin v UK*[518] reflects the debate in the US Supreme Court over the idea of a journalistic privilege to protect confidential sources. The Court recognised that the protection of these sources, and by extension the newsgathering function, was an essential part the press's watchdog role. This is extremely interesting due to the fact that it recognised this positive right for "journalists" and thus went a stage further than the US Supreme Court in *Branzburg*. It has yet to face the definitional difficulties so feared by Justice White, this may be due to structural obstacles of such a case reaching Strasbourg, but it would be fascinating to see how the Court would approach this definitional question that the Supreme Court went out of its way to avoid. Perhaps it will be raised domestically under the Human Rights Act[519].

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[514] *Thoma v Luxembourg* (2003) 36 EHRR 21
[515] Ibid para.64
[516] Robertson (n.18) p.70
[517] *The Sunday Times v. United Kingdom (No. 1)* (1979) 2 EHRR 245
[518] *Goodwin v United Kingdom* (1996) 22 EHRR 123
[519] See for example the case of the Northern Irish journalist Suzanne Breen. The PSNI was denied its application to have journalistic sources turned over as it would violate Ms Breen's Art. 10 and Art. 2 rights - IN THE MATTER OF AN APPLICATION BY D/INSPECTOR JUSTYN GALLOWAY, PSNI PARAGRAPH 5 SCHEDULE 5 OF THE TERRORISM ACT 2000, No. [2009] NICty 8

6.3.3 England and Wales[520]

The UK, it has been pointed out, has a somewhat chequered past relating to freedom of expression and the press. The courts pre- and post-HRA were under different obligations and this is reflected in the jurisprudence. The courts in the UK are obliged to take the Strasbourg jurisprudence under consideration in their decisions, but more importantly they must construe legislation, insofar as it is possible, to fit with the requirements of the European Convention or otherwise make a declaration of incompatibility. In respect of free expression and the press judges should, in theory at least, be obliged to err on the side of free expression except when there is an exception justified under Art.10(2). The attitude of the English Courts is markedly different either side of the HRA. Previous to 2000 the courts were much more protective of concerns such as property, reputation and national security than freedom of the press.

A fine example of this is the previously mentioned *Spycatcher*[521] case. The facts are somewhat convoluted and verge on the farcical, but the fundamental point is that the House of Lords was prepared to uphold an injunction against the Guardian revealing details of the content in the *Spycatcher* book written by a former MI6 agent on the grounds that a duty of confidentiality was owed, regardless of the newsworthiness of the content. This is of course despite the fact that book had been published around the world, adding the aforementioned farcical element. This decision can be contrasted with that taken by the Supreme Court in the Pentagon Papers[522] case. The UK courts had no qualms introducing a prior restraint in this case. There were a number of other factors including the desire to punish what was viewed by the establishment as treachery but the case demonstrates the lack of presumption toward a free press when balancing considerations.

Equally, in the case of *Attorney-General v Mulholland and Foster*[523] two journalists were jailed for contempt of court for their refusal to reveal confidential sources. This demonstrates the traditional English approach which put what it deemed the greater interest of the courts ahead of free press or free speech rights.

[520] For a fuller exploration of UK cases under HRA see Barendt, Eric "Freedom of Expression in the United Kingdom Under the Human Rights Act 1998" 84 Ind. L.J. 851 (2009)
[521] *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248; [1987] 3 All ER 316
[522] *New York Times Co. v. United States* (n.499)
[523] *Attorney-General v Mulholland and Foster* [1963] 2 QB 477

One nod the UK courts gave to idea of the press as a check on the powerful was in the case of *Derbyshire County Council v Times Newspapers Ltd and Others*[524]. The House of Lords was prepared to hold that a public body, in this instance the council, could not sue in defamation. The rationale behind this was that people and the press should feel free to criticise the organs of the state, Lord Keith of Kinkel stating:

"It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."

This of course has echoes of the "checking theory" of free speech, however does not follow fully down the American path of rendering public figures virtually without recourse to defamation suit short of actual malice.

Post-HRA the Lords (now the UK Supreme Court) were obliged to take the ECHR and its jurisprudence into account. The correct position for the courts to take is to presume a right to free speech and only restrict it in the presence of the strictly defined exception in Article 10(2). There is still an innate tendency for the UK courts to revert to a traditional balancing act approach. However a number of cases show the inroads made in expanding free speech and free press rights since 2000.

London has the dubious reputation of being the "libel capital of the world" due to its allegedly stiff defamation laws with favour plaintiffs. This reputation is belied by the facts[525], but nonetheless some of the most influential media freedom cases arise from this area of the law. The *Reynolds*[526] case is perhaps the most famous defamation case of recent years because it espoused what has become commonly known as the "Reynolds Privilege". *Reynolds* came after the passage of the Human Rights Act but before it came into force, however, the Lords were clearly and explicitly influenced by the need to have regard to Art.10. The case arose from accusations in The Times newspaper that former Taoiseach Albert Reynolds has misled Dáil Éireann. Mr Reynolds sued in England and although The Times lost the case the Lords created a new qualified public interest defence to libel in light of the Art.10 right to free

[524] *Derbyshire* (n.86)
[525] See for example https://inforrm.wordpress.com/2010/03/24/defamation-round-the-world/ (accessed 1st June 2016)
[526] *Reynolds* (n.43)

expression. This Reynolds defence, although not restricted to press defendants, is based upon the idea of responsible journalism. The principle was that in the event that a defamatory allegation against a person of public interest was shown to be untrue, the nature of the allegation and conduct of the defendant could create a defence. Lord Nicholls set out ten individual factors that could be taken into consideration. Among these were "The nature of the information, and the extent to which the subject-matter is a matter of public concern" and "The urgency of the matter. News is often a perishable commodity". This, along with the tone of the *Reynolds* judgment, clearly outlined an understanding by the courts of the need to take a content based approach to assessing free speech claims particularly in the media.

The Reynolds privilege was refined by the Lords in *Jameel and others v Wall Street Journal Europe*[527] by making in clear that the Nicholls factors outlined in the former case were not a set of hurdles, but rather were to be seen in the context of the case. More important was the emphasis upon the idea of public interest as a qualification for a higher standard of protection for speech under the law, defined according to Baroness Hale as "...a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public - the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it".

The public interest defence has since been codified in legislation through the Defamation Act 2013 section 4, which also abolishes the Reynolds defence. The legislation applies to cases occurring after its commencement on 1 January 2014, and as such there is still relatively little case law to indicate how the new defence will be interpreted vis-à-vis the old *Reynolds/Jameel* interpretations (although the *Yeo* case, predating the coming into force of the 2013 Act, indicated that the new statutory defence will most likely follow the same lines as the Reynolds defence[528]).

This idea of a differentiation of types of content worthy of different levels of protection reflects earlier statements by the Baroness in *Campbell v Mirror Group Newspapers Ltd*[529] where she said "There are undoubtedly different types of speech, just as there are different

[527] *Jameel and others v Wall Street Journal Europe* [2006] UKHL 147
[528] *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB)
[529] *Campbell* (n.166)

types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech"[530]. As outlined in Chapter 3, in the *Campbell* case the Lords fashioned a kind of hybrid privacy right out of the old law of confidentiality and ECHR Art.8 privacy considerations. There was a broad acceptance that the fact Ms Campbell was a public figure and had lied about her drug use made this an instance of public interest. The case then seemed to turn upon whether photos of her leaving Narcotics Anonymous were an unnecessary level of intrusion. This was accepted by the majority to be the case. The crucial elements for the media being a) that public interest news was afforded a high level of protection b) the newsworthiness definition seemed to include celebrities' lives but that c) the courts were still tipping the scales toward privacy rather than giving a compelling presumption to speech.

It is worth noting the emerging "reportage defence" also, which has emerged in English law as a parallel but distinct doctrine alongside (or subsidiary to) the "public interest" defence. The doctrine allows a defence for journalist where they have reported, in a neutral fashion, defamatory comments made by another party in a matter of public interest[531].

These cases show that the HRA is having a tangible, if limited, impact on English law. It has been noted that through *Jameel*[532] the courts now develop Art. 10 jurisprudence independently domestically and give a stronger weight to free speech considerations especially if they are concerned with content deemed in the public interest[533]. *Campbell*[534] shows that the English courts are some way off giving the media and speech the protection afforded by the Supreme Court in the US which would be unlikely to find the private feelings of a dishonest celebrity a compelling enough reason to restrict speech and feed a dangerous chilling effect.

[530] Ibid para.148
[531] See for greater discussion: Bosland, Jason John, "Republication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales" Oxford Journal of Legal Studies 31(1) · June 2010)
[532] *Jameel* (n.527)
[533] Robertson (n.18)
[534] *Campbell* (n.166)

6.4 Conclusion

The expanse of this area of the law is vast and there are many important contributions, not included here, toward an understanding of the press and the law such as special privileges in taxation or the different treatment of broadcast versus written media that could further inform perceptions on this debate. The blurring of entertainment and news and whether we categorise Internet news sources as broadcast or written are worthy of theses all of their own, as would be an extensive critique and any one of the many press theories or seminal cases touched upon. Equally, the approaches of other jurisdictions could shed further light upon the topic, for example the way that France treats the private lives of its politicians provides a stark contrast to the UK. Other common law jurisdictions such as Canada or Australia can offer nuanced positions between the transatlantic divide of US and UK jurisprudence. However, the scope of this chapter is more modest; to attempt to identify the essence of journalism that made it essential to democracy and explore how the law can and does treat the press in light of this role.

Two broad ways of approaching this definitional difficulty presented themselves; a formal approach based upon the characteristics that made a journalist, and a content based approach that looked at the nature of the information being disseminated in order to judge whether it qualified as journalism. The former approach has limited pragmatic uses in certain situations that require expedient identification of formal journalists, for example, in limiting number for a press conference. However, in the broader picture relating to the legal landscape and the protection of free expression rights it was too narrow and too adrift of the original and true meaning of freedom of the press.

The content based approach, not without its critics, is much truer to the spirit of what is trying to be achieved by protecting both freedom of speech and drawn out of that freedom of the press. The fundamental philosophy that underpins these rights is a contribution to sum of thought, opinion and fact in a democracy and to serve to inform the people and check abuse of the powerful. Any individual should be able to embark on this noble task and his voice heard through the medium of the press as we understand it in its broadest meaning. The media or the press is just that, a vessel through which information crucial to a vibrant democracy can be transmitted. The institutional press has chosen to come together and make it their purpose to provide such information, and they should be protected under the law as such, but never at the

exclusion of the citizen-critic. The news story must provide protection for the journalist not vice versa.

The drawback of this content based approach is the unavoidable difficulty of defining and identifying that which should be deemed "newsworthy". There is a subjective element to this distinction which is dangerous. When dealing with political speech, criticism of government and social commentary allowing the courts to make a distinction about what is and isn't worthy of protection creates a perilous scenario. In this light the definition should be drawn as widely as possible in order to protect discussion of even the most unpopular views and rejected in only the most extenuating of circumstances. By giving journalists a wide berth and putting broad editorial trust in their hands, the courts can create greater certainty and avoid chilling effects.

The additional factor of editorial judgment can inform the content driven approach. Essentially it introduces a consideration of the purpose of the content and helps to distinguish the press speech from ordinary speech. The editorial element also helps to justify claims of positive rights such as protection of source or access rights. The courts in US, UK and Strasbourg have recognised that newsgathering is essential to the function of the press and this can be justified by examining the editorial judgment and purpose of a piece of journalism when deciding whether these additional rights are applicable i.e. is the content designed to contribute broadly to democratic debate.

What must be kept in mind though is that the rights of free speech and free press are essentially negative rights. Their purpose is to prevent government from restricting what can and cannot be said. This is how both the First Amendment and Article 10 are set up; as a broad right to express ideas that should only be transgressed in restricted and exceptional circumstances. While the promotion of plurality in the media is to be admired and encouraged, the right to have a specific forum, above and beyond what an individual or organization can provide for themselves, is not fundamental to this idea of non-curtailment.

This brings us to what is perhaps the crux of the entire issue and conclusion of this chapter. The argument that deciding what is newsworthy is elitist and dangerous is limited by the fact that all speech is protected by free expression clauses (in liberal democracies at least) and can only be curtailed in the instance of a pressing social need. However, what sets apart that which is considered newsworthy, that which makes a contribution to society, that which

serves to check the abuse of power, and that which informs the citizenry is that any restriction on this particular type of speech must discharge the heaviest burden proving that there is a compelling reason to do so. In essence what sets press speech apart is that it is worthy of the utmost protection, without denigrating the basic protection that all speech should receive. This still requires a decision as to what qualifies for this status, but that is surely the very purpose of the law and the courts to help define this. Lord Bingham, in *Jameel*[535], articulated it as such:

"In this case, Eady J said that the concept of "responsible journalism" was too vague. It was, he said, "subjective". I am not certain what this means, except that it is obviously a term of disapproval… the standard of responsible journalism is as objective and no more vague than standards such as "reasonable care" which are regularly used in other branches of law."

It is worth noting, however, that the explicit inclusion of the phrase "the court must make such allowance for editorial judgement as it considers appropriate", in Section 4 of the Defamation Act 2013 has caused some speculation as to whether the definition, set out in cases post-*Reynolds* has been altered[536].

This aside, the case law examined above consistently makes a distinction about content and material based on its newsworthiness and contribution to public discourse. It is clear that the concept of press protection, even absent categorical definitions, is based on an evaluation of the 'worthiness' of the content. This can be along a scale or gradation, but that scale will be based on the public discourse value of the news or comment in question.

The concept of who/what is protected as 'press' or 'journalism' is based upon whether what is said, written, published or broadcast is worthy of the highest protection. As such, any citizen may stand up and proclaim that they are a journalist, and are exercising freedom of the press, based upon whether the content of their contribution is essential to democracy.

[535] *Jameel* (n.527)
[536] Yang, Low Kee 'Reynolds privilege transformed' L.Q.R. 2014, 130(Jan), 24-28

Part Four: Balancing Rights

The purpose of Part Four of this thesis is to outline the practical obstacles for balancing rights.

Having examined in some detail the various legal, social and political underpinnings of both the Article 8 right to privacy and the Article 10 right to freedom of expression this section will explore how rights, including the two at hand, are measured against one another.

If the values inherent in the two rights, set out in the previous two parts, are the weight to be applied to each side of the judicial scale, then the next section attempts to understand the nature of the scale.

The practical reality (which will become apparent) is that in Western liberal legal systems balancing occurs, but this de facto set of circumstances does not preclude the importance or even necessity of understanding how that balancing process takes place.

This understanding can only be done by assessing the arguments for balancing and the criticisms of the practice. This way the thesis can refine and distil a workable understanding of the balancing process which can be applied in the concluding chapter. The work of the previous two sections can only be practically applied in this light.

The nature of the discussion in this section, close as it is to legal and political theory, means there is an explicit link in particular back to Chapter 5. The pressures of space mean that the political theory explored there was necessarily truncated and limited to that strictly relevant to the following exploration of free speech theories. However, the following section will hopefully lend more meaning and depth to that discussion.

The structure of this Part 4 is a single chapter that looks at the central arguments around constitutional balancing and the weighing of competing rights.

Chapter 7. Balancing Rights: Values, Interests and Commensurability

7.1 Introduction

Deciding between the interests of enshrined civil or human rights and the interests of pressing social needs is a difficult task that most often falls to the judiciary. This is only exacerbated when choosing between the interests of two competing, and ostensibly equal rights, such as privacy and speech. Very often the choice is a zero sum game in which the victory of one set of interests will be the clear detriment of the losing side[537]. The mechanism for making these choices, in Western liberal political and legal systems can be broadly described as "balancing". But this simply raises numerous questions about what balancing is, how it operates and the various criticisms levelled at it from differing legal or philosophical standpoints. This chapter attempts to address some of these issues, but does so in the context of the wider question of this thesis regarding the clash of the rights of speech and privacy. That question cannot be adequately answered without an understanding of how a balance between the two can take place. The broader issue of balancing is very broad but we can examine it insofar as it assists with the understanding of our specific problem.

In that light, section 7.2 looks at the constitutional systems that use a form of balancing in order to understand its functioning. Section 7.3 looks at the normative criticism of balancing as a mode of rights adjudication. Section 7.4 tackles the crucial related debate about commensurability of values especially in a legal context. And the final section, section 7.5 attempts to draw conclusions that are useful to the overall aims of this thesis.

7.2 Balancing Constitutional Systems

Faced as we are with an intractable problem i.e. the impasse between the right of the press to fully express their free speech rights and the right of individuals to an equal expression of their privacy – in conjunction with the broader societal issues that are entailed – we need a solution that is practically workable. The logjam present between two diametrically opposed

[537] There are numerous examples in case law which demonstrate this, for a stark example see the Mosley case. No detail of that story was possible to publish without significantly impairing Mr Mosley's intimate privacy, and therefore it would require a complete negation of the press's right to speech to do so. Only one could be victorious and it was winner takes all.

rights and sets of interests will not by magic simply dissipate, and as such there must be a mechanism, be it judicial, political or otherwise to decide, in any given circumstances, which right will be given priority. For most constitutional regimes, in what might be called Western liberal democracies, this process has been dubbed "balancing". And this is "balancing" in the simplest and most literal sense of the word: the attempt to weigh the relative importance of two sets of rights or interests in order to determine which has more "weight". Weight in this context is, in simplified terms, what society - represented by the judicial and political system deems most important.

So far, so simple, except that once we begin to inquire as to how to define what "weight" is we run into myriad problems of definition that continue to divide all of those who have attempted to solve this conundrum. This disagreement is the chief focus of the section 7.3, but even before that, there are crucial and controversial issues relating to the correct role of balancing. The definitional issues regarding "weight" are intertwined with this discussion, but antecedent to that is a constitutional debate about the interaction of clashing sets of rights and also of rights and societal or public interests. These ideas played a significant if tangential role in the discussions of political theory in Chapter 5 but the political philosophy regarding rights and community/society comes much more sharply into focus when we are faced with pragmatic real-world questions about how we are to solve these issues when they come before the courts.

In addition, we are presented with a difficulty that is echoed throughout this thesis and indeed wider debates about rights, and that is the inherent tension between the normative and the descriptive; what we believe should be the situation and what it in fact is the reality. For example, as mentioned above the practical reality is that most Western democracies have adopted some form of balancing to deal with tensions between sets of rights or interests, and yet there are numerous sets of critics, scholars and lawyers who are dissatisfied with this set of circumstances[538]. Some would have rights as "trumps", unable to be usurped by societal considerations or other interests[539], while from the alternative end of the spectrum others think

[538] See generally Habermas, J. Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, W. Rehg (trans.) (Cambridge, MA: MIT Press 1996); Tsakyrakis, S. "Proportionality: An assault on human rights?" 7 Int'l. J. Const. L. 468 (2010);
[539] Dworkin (n.341)

the entire process "undemocratic" and would do away with judicially protected rights altogether[540].

This tension between the normative and the descriptive will not be solved here and thus it must be simply highlighted. Ultimately, as we will see in the latter sections of this chapter we will be forced to deal with the practical reality of balancing as the de facto system that deals with rights disputes, and it will in the end be our central task to try to draw out and extrapolate the meanings and mechanisms that contribute to constitutional balancing. However, this is not to say that the debate over the correct constitutional arrangement or approach to rights issues is irrelevant, far from it. In fact, the view that different judges, courts and judicial/constitutional systems take to the various critiques, both positive and negative, of balancing will impact significantly upon how the system or mechanism functions. This is clear from the examples encountered below.

It is vital to remain conscious that the ultimate and central focus of this thesis is the practical problem of free speech v. privacy. Thus, while the nature of balancing is not the primary concern overall, it is fairly clear that it will have an enormous impact upon the resolution of our central question. In turn, as mentioned, the debate over the correct constitutional approach will impact upon the practice of balancing in a given system. Without the adequate exploration and understanding of these issues, we will be prevented from a full consideration of our central debate: speech v. privacy.

7.2.1 What is Balancing?

Before moving into a discussion of the strengths and weakness of balancing, it is vitally important that we understand what balancing is. As mentioned it has been used as an umbrella term for any system that attempts to weigh the competing values of rights and other interests (judicially foremost though not necessarily exclusively). This metaphor of scales, weights and balancing is not without its critics. Frederick Schauer sees the terms as misleading due to its common and over-wide use for a number of distinct processes that have different characteristics and outcomes[541]. This is a valid point. In many contexts, including this thesis, balancing is used as an umbrella term for any of the judicial (or political) processes whereby the relative values assigned to rights and interests are compared to decide which should "win", or be given

[540]Waldron, J "The Core of the Case Against Judicial Review", 115 YALE L.J. 1346 (2006); or to a lesser extent Glendon, M.A. *Rights Talk: The Impoverishment of Political Discourse* (New York, The Free Press, 1991)
[541] Schauer, F. "Commensurability and Its Constitutional Consequences" (1994) 45 Hastings. LJ. 785 p.791

priority in the circumstances. Schauer does us a service by reminding us that the specific processes by which this is done are often technically quite divergent and may have an impact on the outcome.

That said, and keeping in mind that the term is used in a broad sense, there is a compelling argument that most if not all constitutional systems in the West use some form of balancing regardless of the label placed upon it, or the differing processes through which it is engaged[542]. In European systems it is often called "proportionality", exemplified by the German constitutional system. This is the prevalent phrasing in the ECHR system too. Much has been made of the contrast of European proportionality versus Anglo-American balancing, and it is true that there is a distinct difference of conceptual emphasis[543]. Julian Rivers speaks of a European "optimising" approach that seeks to address the broader concerns or needs of society with both rights and public interests as factors and using proportionality to optimise the outcome for all involved[544]. He contrasts the British (and American) "state-limiting" approach that sees rights as a buffer for the individual against encroachment by society, represented by the state.

When we look at the descriptive reality of how courts approach these issues they will of course have a practical impact on outcomes, but for our purposes it is important to look also at the fundamentals behind the differing processes, not necessarily in an abstract fashion, but certainly with a focus on what the central, broader purpose is. In this sense we can see that although for example, the US Supreme Court has specifically rejected the notion of "proportionality" in favour of its own system of "levels of scrutiny"[545], what is actually happening in all these systems, at a very fundamental level is the same thing: a value or weight is being assigned to rights/interests which are clashing, in order that a decision can be made about which to favour. Thus, we can continue to speak of "balancing" as this essential, fundamental process as long as we keep in mind the various caveats just raised. Balancing is the crucial point and the underlying principle that links all these constitutional systems that have a set of protected rights, be they entrenched, enshrined, or subordinate to legislation.

[542] Gardbaum, Stephen, "A Democratic Defense of Constitutional Balancing", Law & Ethics of Human Rights, Vol. 4, 2010

[543] Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins", 8(2) I.CON: Int'l J. Const. L. 263

[544] See generally: Rivers, "Proportionality and Variable Intensity of Review," 65 Cambridge L. J. 174, (2006)

[545] United States v. Carolene Products Company, 304 U.S. 144 (1938)

The American system of constitutional adjudication is one of the most heralded and provides a good example of the developing dominance of balancing doctrine. Unlike most of the other systems we will examine, the US Bill of Rights provides no set of explicit exceptions to the rights. Thus in the most literal terms there should be no opportunity to restrict or deny the rights so enumerated. Of course in reality not even the most ardent "rights purist" would argue that American constitutional rights are illimitable[546]. Rather, it is the method and extent of this limitation that provokes debate. The Supreme Court, having awarded itself the power of judicial review in *Marbury v Madison*[547], has read numerous exceptions as implicit in the Bill of Rights.

Alexander Aleinikoff gives a good condensed account of the American constitutional and judicial history in which he points out, that despite there having been limitations or exceptions to rights from the beginning, the idea of any practice of balancing has only become the dominant philosophy (to the near exclusion of others) in the post-War era[548]. This evolution is not without its critics, including liberals regarding free speech restrictions, and conservatives over issues such as gun control. The idea of exceptions to constitutional rights, their number and their degree, now widely accepted, are in stark comparison to previous philosophies of the Court. If we look back at the attitude of the Lochner-era Supreme Court, it was the very apotheosis of judicial protection of individual rights; their preponderance with the notion of "substantive due process" meant that they read into the constitution the idea that all government encroachment, except that explicitly outlined, should be limited[549]. This is not to say that "balancing" of rights did not occur but rather that it was minimised as far as possible. The Depression and the New Deal era changed things to the extent that by the 1960s the liberal Courts of Warren and Burger were much more comfortable with the explicit and articulated concept of balancing rights against societal interests.

The European system of rights protection, with its explicit exceptions set out in the ECHR, has had no such truck with balancing rights and interests. The evolution of the two systems throughout their history is so different that not much can be gleaned – for our present

[546] "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases." Justice Black, Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)
[547] *Marbury v. Madison*, 5 U.S. 137 (1803)
[548] Aleinikoff, A "Constitutional Law in the Age of Balancing", 96 Yale L.J. 943, (1987)
[549] Sunstein, Cass R. "Lochner's Legacy." Columbia Law Review. 87:873 (June 1987)

purposes - by comparison except to note that the situation where both systems engage in the broad idea of balancing rights was attained by following very different paths.

As mentioned, the technical mechanisms for judicial review in each system are not our primary concern except insofar as they demonstrate that a process of balancing does indeed take place. However, it is worth briefly noting them for that reason, and also to provide an understanding of how balancing works in practice which illuminates subsequent discussions of its validity.

The US system, in broad terms, engages in the same two-step process that all judicial systems with review powers over constitutional rights do. That is, firstly, to determine whether one of the enumerated rights has been engaged, either by a government policy/law, another "public interest", or a competing rights claim. Then, secondly, to determine whether that latter claim is so pressing or compelling as to overturn or limit the initially engaged right. Without wishing to labour the obvious point, it is at this second stage that "balancing" occurs.

In more specific terms, the US engages in an assessment of the seriousness of the potential breach of the right in three tiers of scrutiny 1) strict scrutiny 2) intermediate scrutiny 3) rational basis review. There are of course other formal tests which are subsequent to each tier that a law or policy must pass such as the 'least restrictive means' test, but it is at the stage of scrutiny that we first see the weighing of values engaged. Even the assignment of a tier to a given interference is in essence attributing a value or weight to a right or more accurately a specific expression of that right. But it is in the next step, within each respective tier, that the crucial balancing takes place of the right versus the interest in competition.

As with all judicial systems there are exceptions, inconsistencies and differing approaches internally, but broadly speaking the US system prefers what is known as 'categorical balancing' as opposed to the 'ad hoc' balancing more common in European style systems. The American judicial taste for certainty and predictability lends itself to such categorisation. These categories are essentially brackets of cases that have a general 'rule' which can be applied to like cases, rather than engaging constantly in the specific circumstance of a given case. Examples include the fact that pornography was held to fall outside the First Amendment protection of speech[550]; or conversely that, short of actual malice, no criticism of

[550] *Miller v. California*, 413 U.S. 15 (1973)

political figures could be subject to libel sanction due to the same free speech right[551]. The use of categorical balancing is not exclusive to the US system, nor is it universal but even besides the exceptions it is obvious that to produce any of the given categories in the first place requires balancing in the broad sense.

7.2.2 Proportionality

By contrast "balancing" that occurs in the European systems goes under the name "proportionality". Now is worth making a brief note about semantics and terminology at this juncture because the interchangeability of terms and the different meanings in different contexts has the potential to wreak confusion. In short, there is "balancing" in the general sense that will be used here for the most part, but there also "balancing" used in the sense to differentiate the American system from the European. "Proportionality" is used to describe the system we will shortly explore and although, as will be revealed, it involves the weighing and comparison of values (balancing in the general sense), and this is for the most part done in a specific sub-part of the judicial process known as "proportionality in the strict/narrow sense". Thus just as "balancing" is used to describe a specific system as well as a broad theme, so narrow "proportionality" is a specific test or function of the larger European system of proportionality. Moreover, just to fully complicate things, the European Court of Human Rights has taken to referring to the "balancing" of rights and interests even as it engages in the various tests of proportionality[552]. Ultimately, however, it simply confirms one of the underlying themes and arguments of this chapter, which is to say that regardless of the mechanism and terminology the processes at a basic or abstract level are engaged in the same task: weighing/balancing rights and interests based on the values that the courts (or policy-makers) assign them.

The European notion of proportionality owes much to the German system of administrative law that heavily influenced how the ECHR system would approach the problem of reconciling individual rights – the protection of which is its central purpose – with the need to accommodate societal needs, government/democratic policies, and the broader public

[551] *Sullivan* (n.8)

[552] "As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest." *Von Hannover v. Germany* [2004] ECHR 294 (24 June 2004) para 76

interest[553]. The German influence is also noteworthy given the protagonists of the debate over the legitimacy of balancing rights, explored below.

The system of proportionality, varying somewhat in technical aspects across jurisdictions, is nonetheless exemplified by the approach of the European Court. When a specified right is claimed to have been transgressed the Court will engage in the same broad and general two stage assessment that occurs in the US and all similar systems – firstly, deciding if the right in question is engaged and, secondly, if the transgression is justified. It is this second aspect that interests us, and where the idea of proportionality comes into play. By comparison with the US, however, the European system is complicated by at least two factors. The first is that for most of the rights (bar Art.3 torture) there is a specific setting out of the exceptions to the rights. Particularly in the case of Art. 8 -11, which of course include the rights of central concern to this thesis: privacy and speech, the Convention is quite explicit in setting out the circumstances which constitute exceptions to the rights. Naturally, there is much debate about the precise meanings and scope of each exception and this is where judicial definitions play their part.

The second complicating factor is the "margin of appreciation" which owes its existence in large part to the supra-national nature of the ECHR and European Court. Essentially the margin of appreciation is a mechanism of deference to national governments and legislatures when, although the given right in a case is both engaged and infringed, the "balance" is very close and thus the "essential core" of the right is not engaged[554]. As such, the national government is given leeway or the benefit of the doubt. This type of doctrine is obviously missing from national constitutional systems, and although it serves as a type of democratic safety valve for the Court it makes the process of balancing values somewhat more opaque in the sense that the Court can defer to national values in tight cases rather than be forced to make a choice and, crucially, a rationalisation of that choice[555].

Notwithstanding this, the Court has a fairly standard process when judging the infringement of a Convention right. The first test is whether the action/policy is lawful; the second is whether it is serves a legitimate aim; and thirdly whether it is necessary in a

[553] J. Christoffersen, "Fair balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, International Studies in Human Rights, vol. 99, Martinus Nijhoff, Leiden 2009, p.67
[554] Letsas, G "Two Concepts of the Margin of Appreciation", Oxford Journal of Legal Studies, 26 (2006) 4 p. 706
[555] The doctrine was of course substantially developed through Handyside (n.134), and we saw above in *Lillo Stenberg* and *von Hannover (No.2)* how it has been applied in media/privacy cases lately.

democratic society. The first two hurdles are essentially formal barriers that can be assessed with a relative degree of objectivity. They are the least controversial aspects in the sense that they are a logical deduction rather than value judgements (given the relatively broad scope of "legitimate aim").

The third part of the test is where proportionality is chiefly found, and when the Court brings into play its own sense of value/weight to the respective claims. Be they claims of a government policy as necessary to traverse a right or competing claims of two individual rights the Court will weigh the interests involved and to try to produce an equitable outcome. It is here that Rivers' distinction between Anglo-American "state-limiting" functions of rights and European optimisation principles come into play[556]. Rivers claims that proportionality is much more geared toward taking rights and, in conjunction with other compelling interests, finding what the optimum outcome is for all parties – both individuals and society. This point is important in the context of the coming critiques of balancing. However, what is essential is to note that the system of proportionality, through "proportionality in the strict sense" is reflective of other constitutional systems in its engagement of weights and values in producing outcomes.

Take for example the case of *Handyside*[557], one of the seminal cases that was instrumental in the establishing of the modus operandi of the European Court. Ultimately, the case verdict was found in favour of the United Kingdom due to the margin of appreciation doctrine, but the reasoning of the Court concerning proportionality in the strict sense shows the mode of balancing the "protection of morals" of the society in question with the right under scrutiny: Art.10 freedom of expression,

"The Court must also investigate whether the protection of morals in a democratic society necessitated the various measures taken against the applicant and the Schoolbook under the 1959/1964 Acts." [558]

The British judicial system (England and Wales in particular) has specifically adopted a version of this proportionality test[559]. Through the Human Rights Act the British Courts now regularly have to balance the objectives of challenged policies or broader societal interests

[556] Rivers, "Proportionality and Variable Intensity of Review," 65 Cambridge L. J. 174, (2006)
[557] *Handyside* (n.134)
[558] Ibid para.47
[559] See Lord Clyde in *de Freitas v Permanent Secretary, Ministry of Agriculture, Fisheries Land and Housing* [1999] 1 AC 69

against the rights enshrined in the ECHR. The obligation that all UK legislation and government actions be compatible with the rights obligations through s.3 and s.6 of the HRA is well known, and the courts have increasingly adopted the language of balancing in the broad sense. If we contrast the post-HRA approach with the previous standard of judicial review – the Wednesbury unreasonableness test – the importance of balancing becomes apparent. Under Wednesbury, administrative/executive decisions under judicial review had to satisfy a series of formal requirements (not completely unlike the more formal aspects of the proportionality test) and the only remotely value based assessment of the court would be to decide if the decision or action was 'so unreasonable that no reasonable authority could ever have come to it' (which is the essence of the Wednesbury test)[560]. By contrast, under the HRA executive decisions as well as legislative acts are regularly reviewed in light of rights obligations. Such decision-making by the courts is substantively more subjective and value laden, albeit within the constructs of jurisprudence and precedents, laid down by the European Court and common law respectively.

Numerous other constitutional systems have adopted various forms of judicial review that balance rights and other interests. Some commentators have identified what is termed the "new Commonwealth model of constitutionalism"[561]. Stephen Gardbaum cites New Zealand and Australia as examples of what he describes as "weak form judicial review" which uses balancing as a way of straddling the line between the continued adherence to enshrined rights while attempting to retain the sovereign nature of parliaments – in a sense the very essence of balancing rights and the public interest. He draws a contrast with the Canadian constitutional system, which while containing a Charter of Rights and Freedoms, retains the ability of Parliament to override this without any additional mechanism. This can be seen as a much weaker protection of rights as it hands the responsibility of "balancing" to the legislature which presumably will be more inclined to come down in favour of the very "public interest" it sees as inherent in its policy making and legislation. Conversely however, others might argue – as we will see below- that this is a much more democratically justifiable approach to human rights protection.

The debate over the merits and technicalities of varying constitutional arrangements is a large and fascinating one but is beyond the scope of this thesis; what is important here is to

[560] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223
[561] Gardbaum (n.542) p.99

recognise that despite the differing variations, and the difference – both substantive and semantic – between balancing as understood in the US system and proportionality under the European system, that the presence of an essentially two stage process is consistently present: 1) The recognition of engagement with a right followed by 2) an assessment, weighing or "balancing" of the competing interests put forward.

At this juncture, we must note a very important point, echoing from the previous Chapter 5 about the varying and often overlapping nature of the interests that are involved in balancing. In many cases there may be a straightforward situation where a specific government policy or law is challenged as being incompatible with a given right – for example the decision to fly planes over houses near Heathrow airport and the Art. 8 right to private and family life. However, in many cases the situation is more complex, for example in the central focus of this thesis, two individual rights – Art. 10 freedom of expression and Art.8 privacy – very often come into direct conflict so weighing is not simply a right vs. public policy or public interest. In such situations, the context will clearly be a very important factor but the unique circumstances of the case will not be the sole consideration as the outcome will impact upon all individuals claiming this right in the future, not simply the party to the given case. The outcome of a case like this especially in the highest court of appeal, be it the UK or US supreme courts or the European Court of Human Rights, will have much greater ramifications and this is why our understanding of the nature of balancing is so important.

In the Chapter 5 we saw what was termed the "matrix of interests", that is the idea that in clashes of rights it is not simply the interest of two individuals, nor even the value of two individual rights at play but rather that there are myriad societal interests that are inextricably linked, and there are numerous impacts and relationships between the various interests that must be considered when loading up the "scales" for balancing. It has been noted that distinct division between individual rights and public interest is both artificial and false[562]. This issue is expounded upon below (in the concluding section) but it is important to recognise that balancing in the broad sense is not merely between one right and another, or between rights and non-rights interests, but very often both simultaneously. In the example of privacy v. speech in the ECHR system, where all enumerated rights are ostensibly equal, the impact of the wider public interests will be crucial to the weighing process.

[562] Aleinikoff (n548) p.981

Furthermore, while in simpler circumstances the public interest might be neatly represented by a government policy, very often it is a much more abstract and amorphous concept. In our example the protection of Article 10 free speech obviously has societal as well as individual advantages yet there is no one specific law or policy that a government has laid down that represents this public interest. Rather, the individual who feels his privacy has been violated by a publication will argue that in protecting or promoting this broad, ethereal conception of the public interest in free speech, the government in question has failed to adequately protect his privacy under Article 8. This complex and somewhat untidy set of circumstances must be borne in mind as we discuss the idea of courts "balancing" interests: rights and non-rights alike.

7.3 Critiques of Balancing

Having established the descriptive fact that balancing of rights occurs, in the broad sense, we must turn to the normative arguments about its correct place in constitutional law. As we have seen, the technical mechanisms and the emphasis are different in alternative jurisdictions, but the normative criticism of balancing operates at a slightly more abstract level and thus is generally applicable to any system which purports to protect rights and also engages in the broad two-stage process: identifying engagement with a right, and balancing the competing interest against it. Having said this, the degree to which the mechanisms and procedures of a given constitutional regime provide robust or weak protection of rights will naturally impact upon the level of criticism from both those who would emphasise the importance of rights, and those who see public interests and popular democracy as the priority. This is important in judging balancing as a method but, at an even more abstract or normative level, there is disagreement about whether balancing should be used at all.

The critiques of balancing can be broken into two broad categories; firstly those that look at the legitimacy of balancing; and secondly those that look at its efficacy. The latter category often centres on the issue of commensurability; whether or not it is even possible to weigh or evaluate differing interests, and types of interest, such as rights and non-rights on the same scale. This type of critique influences and crosses over somewhat into discussions of legitimacy but is best examined as a separate topic and will be the subject of the following section.

7.3.1 Critiques from Rights

Those critiques based upon the questioning of the legitimacy of balancing will come from two angles: those who believe that the process undermines the protective power of rights for individuals; and then those who see the whole process of entrenched or judicially protected rights as anti-democratic. The latter criticism is more accurately aimed at the very concept of rights, but much of what is raised has a direct impact upon the concept of balancing and its operation. We will begin by focusing on the debate between those who support balancing (in all the forms outlined above, that come under the broad sense of the word) as a logical and sensible way of accommodating individual rights with the democratic and societal needs of the collective, and those who see balancing as undermining the very concept and point of rights.

As was explored in the Chapter 5, liberals and libertarians such as Ronald Dworkin and Robert Nozick have a pure conception of rights, "rights as trumps" being a popular invocation[563]. This is to say that rights once correctly, and often narrowly or specifically defined, should not be subject to further limitation, transgression or compromise by the needs, interests or desires of society. Conversely, those from the opposite part of the realm of political philosophy such as communitarians or utilitarians take a decidedly more consequentialist view that gives priority to the needs of the public or collective. The debate we are concerned with now is partially reflective of some of these ideas but in this instance is re-calibrated to concern two camps that both support the judicial protection of enshrined rights but disagree as to how this is best achieved or perhaps more fundamentally on what the goal/role of rights is.

There are numerous erudite and learned authorities who have contributed to this discourse but it is perhaps exemplified by what is now known as the Alexy-Habermas debate. This back and forth between the two eminent German academics gives a sound grounding in some of the most important issues surrounding the balancing of rights. Robert Alexy expounded a broad theory of constitutional rights in his now seminal work (unsurprisingly) entitled "A Theory of Constitutional Rights"[564]. Derived from observing not only the German constitutional system but others too, Alexy has attempted to draw together broad principles that can be applied to constitutional systems such as those discussed in the previous section

[563] See generally Nozick (n.336); and Dworkin (n.341)

[564] Alexy, Robert , *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002)

particularly regarding how we approach the issue of rights adjudication. A necessarily abridged and simplified account of this theory follows.

Perhaps Alexy's most important contribution or idea is that rights are in fact principles. He distinguishes principles from rules in this sense: that principles are norms that should be optimised to the fullest extent possible, whereas rules are norms that are either followed or not. It is this "optimising requirement" of principles, and thus rights, which forms the basis of his ideas about balancing. Optimisation means simply that the principle is realised as fully as reasonably possible. Alexy asserts that the way this process of optimisation is achieved, in the European context, is through proportionality. Alexy outlines a three-pronged approach to assessing proportionality. The first two are the more formal and objective tests as to whether the infringement of a right (so engaged) was "necessary"; and whether it was a "suitable means" of achieving this. The last and most important is "proportionality in the strict sense". It is clear to see how these principles, under different terminology and occasionally folded into one another, are reflected in the balancing arrangements of each constitutional structure of adjudication examined in Section 7.2.

This is not to imply that Alexy's ideas are universally accepted – far from it, but simply to say that Alexy and his proponents would argue that his theory of constitutional rights is both normatively the correct way of balancing rights as well as descriptively reflective of systems of constitutional adjudication that adequately address political justice, such as the German Federal Constitutional Court. Others have extrapolated from this point by attempting to transpose these ideas onto other constitutional systems[565].

There are numerous facets to Alexy's theory which are expanded upon in a great deal of detail in his book, but for our purpose the idea of central importance is how this notion of rights as "principles" and "optimisation requirements" impacts upon our understanding of balancing competing rights especially vis-a-vis other theories of constitutional rights. This concerns how the right (or principle) interacts with other interests when they come into conflict. Alexy has articulated this process in similar terms to those used above (in section 7.2), that as

[565] Kumm, Mattias "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", 2 International Journal of Constitutional Law, (2004), 574, p. 575 discussing Julian Rivers' contribution in the introduction to his translation.

optimisation requirements principles need to be realised as far as is factually and legally possible[566].

As mentioned the first two parts of the broader principle of proportionality, as present in German law but also other systems (albeit with differing terminology and configurations), are necessity and suitability, and are expressed in terms of what is factually possible rendering them more objective in their assessment by courts. The final part – proportionality in the narrow sense (which could also be termed "reasonableness" or "compelling interest" and still retain its essential character) is where the weighing of value by judges takes place. The constitutional right as a principle will be given its maximum optimisation insofar as that is possible without being disproportionately detrimental to the competing interest. Likewise, the competing interest will be optimised to the fullest extent possible without unreasonably interfering with the right. This is the essence of balancing. Alexy termed it the "Law of Balancing": "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other"[567].

7.3.2 Normative Critiques

There are, as mentioned above, a number of robust criticisms of Alexy's approach, and the doctrine of balancing in general[568]. They might be divided into the practical and the normative. The former is the focus of the following section so will be addressed there. The normative criticisms of balancing are twofold: firstly, from those who believe that rights are inadequately protected under a balancing system; and those who conversely believe that rights are overvalued to the detriment of democracy and the community. The latter will be dealt with further below and so we can turn our attention to those advocates of stronger, more robust rights protection than they believe balancing can achieve. Jurgen Habermas is a good example in that he has had a direct exchange of criticisms with Alexy[569].

Habermas, like his counterpart has had volumes of work published on the topic, far beyond our scope, and thus we focus on the two central planks of his criticism of balancing which are relevant to our discussion. Habermas's first criticism, in language and ideas that are

[566] Alexy, R. "Constitutional Rights, Balancing, and Rationality," 16(2) Ratio Juris 131 (2003) p.134
[567] Ibid p.136
[568] See Moller, Kai "Balancing and the Structure of Constitutional Rights," 5 Int'l. J. Const. L. 453 (2007); or Meyerson, Denise "Why Courts Should Not Balance Rights against the Public Interest" [2007] Melb U Law Rw 34
[569] Habermas (n.538)

reflective of Dworkin, Nozick, and other liberal political/legal theorists, is that balancing removes the 'firewall' of protection that rights deserve and need[570]. Habermas naturally extrapolates this central idea into a number of separate criticisms; that the removal of this firewall means that rights no longer have priority (trumps in Dworkin's language), and crucially that rights, through the process of balancing become but one of many considerations on a par with public policies or other interests – thus robbing rights of their very purpose. We saw this argument made in Chapter 5, but Habermas connects this idea to a further criticism – the subject of the next section 7.4, which is that the removal of robust rights protections leads to arbitrary decisions as there are "no rational standards" to use in balancing[571].

The first criticism – the lack of firewall is addressed directly by Alexy who argues that his "Law of Balancing" has three stages,

"The first stage is a matter of establishing the degree of nonsatisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first."[572]

And further, out of this conception, one can categorise intensity of interferences as "serious", "moderate", and "light". Equally a scale of importance is of the goal of the interferences as "light", "moderate", and "serious". Hence, if the intensity of interference is serious and the importance of the goal is just light or moderate then the interference is not justified. The scale is fairly straightforward and a matching value of intensity and importance means the decision is within the "structural discretion" of the decision-makers as there is no single right or wrong answer (this has its own set of difficulties which will be explored in the concluding section). Alexy argues that this rational process – assessing the degree at which the right is to be valued and protected in the given circumstances shows that the "firewall" protecting constitutional rights remains present in the balancing system.

Habermas's second plank of criticism is related to the first and has been reflected by a number of critics of balancing: that the process removes decisions from the realm of "right and wrong", or "correct and incorrect", and into the less concrete sphere of "justified or

[570] Ibid p.258
[571] Ibid p.259
[572] Alexy (n.566) p.136

unjustified"[573]. This criticism purports that rights as rules which are to be followed or not allows a greater sense of surety or certainty. We can see this idea in the American constitutional system's penchant for categories; although the judiciary recognises that the rights enumerated in the Constitution are not absolute, and indeed must be "balanced" against other interests, they try and do so in a fashion that retains a strong clear definition of the given right. This reflects, to a degree, the liberal idea of "specificationism" in a sense in that the substance of the right may be narrowed by the categorisation of the exception, but it is then robustly protected.

Habermas argues that balancing, particularly Alexy's account, robs rights adjudication of this surety. This is not simply in a practical sense that different judges may produce different results in a given set of circumstances – this is a pitfall which is almost inevitable regardless of the system of adjudication – but rather that if balancing robs rights of their normative power (as argued in Habermas's first criticism above), then deciding which set of interests or principles prevails is not about whether it is "right" or "wrong" to infringe a right, but rather whether the infringement is necessary or proportional.

Alexy counters this by arguing that the system of adjudication he expounds uses what he terms the "Disproportionality Rule". Essentially, Alexy argues that the system of "degrees of intensity" (in interference and importance) outlined above are the reasons that decisions on proportionality are made. These decisions are every bit about correctness as any other. By judging the varying degrees of intensity and deciding proportionality on this basis is both a rational and justified claim to a "correct decision".

We can see how both the two criticisms by Habermas, and the two defences by Alexy, are linked together. You can't discuss either the "firewall" or "correctness" debates without bleeding into the central essence of balancing versus robust rights protection. This is again reflected in the argument about commensurability in the following section. What is also clear is that this vignette or microcosm – Alexy/Habermas – is part of a wider debate reflected in part in the previous chapter, and in arguments about the role of rights in general.

Some critics of balancing expand the arguments of Habermas or Dworkin by arguing that proportionality or balancing, in the broad sense we are using the terms, ignore the moral reasoning or moral underpinnings of rights. Essentially by reducing human rights, or specifically constitutionally protected rights, to merely "another interest" to be balanced, we

[573] Habermas (n.538) p.430

no longer ask the moral questions about why we chose to protect those rights in particular, "With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching."[574]

7.3.3 Critiques from Democracy

There is a mirror image criticism of balancing that argues precisely the opposite of the "robust rights" camp, arguing that the process gives too much weight to rights and in fact the entire system of entrenched or constitutionally protected rights is undemocratic and should be abolished[575]. In a sense it is disingenuous or inaccurate to describe them as critics of balancing when in fact they are first and foremost critics of rights. Their dislike of balancing is only in the sense that balancing, generally speaking, accepts rights as a protected character in constitutions and courtrooms; presumably these critics are very much in favour of the broad process of balancing as takes place in legislatures between competing policies and laws.

A number of these arguments will echo themes discussed in Chapter 5 regarding communitarianism. There are obviously those legal and political scholars who argue that the prevailing conception of rights is negative and atomistic, ignoring our social dimensions and the needs of communities[576]. However, many of these writers do not necessarily call for the abandonment of constitutional rights but rather would see them adjusted to encompass social needs, welfare rights or responsibilities[577].

The criticism we are concerned with here is related but distinct in an important aspect. The central plank to this critique of rights is not their atomistic or one dimensional nature but rather that to entrench rights – and in doing so protect or prioritise one set of values or interests against others- is undemocratic. To have an elected legislature and the government creating policies which are subordinate to a predetermined and select collection of rights is unjustifiable. Constitutionally protected rights are in essence saying that the collective will and the public desire are secondary considerations in light of individual (or even group) rights.

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[574] Tsakyrakis, S. "Proportionality: An assault on human rights?" 7 Int'l. J. Const. L. 468 (2010) p.487

[575] McHarg, A. "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty of the European Court of Human Rights" (1999) 62 Modern Law Review 671, p.695

[576] Sandel, Michael *Liberalism and the Limits of Justice*. (Cambridge: Cambridge University Press 1998) p.103 - 106

[577] See for example: Taylor, Charles 'What's wrong with negative liberty?' in A. Ryan (ed.), *The Idea of Freedom* (London, Oxford University Press, 1979)

This, in one narrow sense, is indisputable. Entrenched rights, or even just constitutional judicially protected rights, are blatantly and unapologetically a check on majoritarianism or "the excesses of democracy"[578]. The question then is more about whether such a system is justified in a democracy.

There are a number of specific objections to allowing judicially protected rights to override the democratic will of a legislature or the executive. The first is the most obvious and is reflective of that mentioned immediately above – the argument from democracy. Essentially, constitutionally protected rights and the process of judicial review which accompanies them, allow unelected judges to substitute their decisions and opinions for those decided by a democratically elected body[579]. Why should we feel that appointed judges, unaccountable to the electorate (and even less diverse and reflective of said electorate than the legislature), are better placed to balance the various interests at stake in rights cases - or any cases that would limit, or overturn, or reinterpret legislation/policy?

The second chief objection is an extension of this idea in that even if a judge wished to reflect the wishes of the people or public, they are bound by the nature of constitutional rights to put greater stock in the enumerated individual rights laid out in the constitution or rights covenant. This echoes communitarian arguments that rights protect a relatively arbitrary, perhaps out-dated, set of individual interests at the expense of the current and democratically decided interests of society and communities. Additional to this is the idea that not only is the weight that the various interests are given skewed or unfair, but the interpretation of both the individual right interest and the public interest is down to a judge. Faith is placed in his/her view of the nature and value of these interests, and even if his/her interpretation wildly diverges from the public understanding of these interests, he/she is not accountable to the public anyway[580].

The third chief criticism of judicial balancing from this side of the debate is again a further extension of these preceding ideas which is to ask: why do we imagine that judges are best placed to make these decisions? Elected politicians have the advantage of time, the legislative process, amendments, committees, experts, advisers, civil servants and public

[578] Elster, Jon "On Majoritarianism and Rights" 1 E. Eur. Const. Rev. 19 (1992)
[579] See generally: J Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592; or R Berger, *Government by Judiciary* (Harvard University Press, 1971)
[580] This is obviously caveated in political systems with elected judges, but even in the US the top appellate judges are appointed with lifelong tenures.

consultations in order to decide what is in the best interests of individuals and society, yet judges are given the power to override these decisions based on their interpretations of rights and competing interests. Given the vast amount of work the courts – from the lowest to the highest – must get through is it reasonable to believe that judges can adequately weigh all the competing factors? This argument is perhaps the mirror image of Habermas's fear that judges would make arbitrary decisions; Habermas of course feared a lack of robust rights protection, but critics of judicially protected rights have the same concern about arbitrariness for the opposite reason. This argument extends into, and links into, the concerns expressed in relation to incommensurability examined in section 7.4.

Stephen Gardbaum has done a lot of work looking at constitutional balancing and the correct extent of rights protection[581]. Amongst this broader examination Gardbaum gives an account of what he describes as "limited override power". This is in essence the idea that while constitutional rights can have a role in Western liberal democracies, that role should be "presumptive shields rather than peremptory trumps"[582], when clashing with other interests. He gives the Canadian constitutional system as an example of how this notion plays out in actuality.

To expand on the theory a little, the philosophy is essentially that entrenched and judicially protected rights which have either supremacy over legislation or even, in the UK's case, cause it to be "reinterpreted", cannot be properly justified for many of the reasons explored above. Yet this theory also recognises that rights play an important role both historically and in current practice in Western legal systems. So, as occurs in the Canadian system, there is a set of enumerated civil and political rights which are actively pursued by both the courts and the legislature. Their very presence and articulation serves to keep them, in theory, at the forefront of the political and legislative process. However, crucially, the sovereignty of parliament remains paramount and so the task of balancing the rights both against each other and against public interest is the role of the legislature and the executive. A judicial review function is still available, however it only concerns itself with judging whether the legislature fulfilled its constitutional duty to properly consider the rights implications of its decisions and sufficiently engaged in the process of balancing interests. What the courts do not do is substitute their own balance, nor decide whether they would have arrived at the same

[581] Gardbaum, Stephen "Limiting Constitutional Rights," 54 UCLA. L. Rev. 789
[582] Ibid p.789

conclusion. This limited override power removes the courts from the substantive balancing of interests into decisions about whether the requisite balancing has taken place in the legislative process. Thus constitutional rights can be maintained and protected but the supremacy of the legislature is retained. There are of course those who would wish that even this system be abolished in favour of a judicial review test akin to "Wednesbury unreasonableness", but that might be considered a fringe position given the ubiquity of human rights in Western legal and political systems.

In the final section of this chapter we will view and assess all the preceding arguments about the role of balancing but before that can take place there was a very important issue that must be addressed, which while connected to these other debates is distinct: the issue of incommensurability of values.

7.4 Incommensurability and Incomparability

The debate over the concept of incommensurability is central and crucial to the wider discussion about balancing. From a simplistic, logical point of view we can easily understand the rationale that if there is no way to compare and contrast the competing values of rights or public interest then it will be extremely difficult to balance them in a way that can be justified in a liberal, equitable legal system. As such the issue is fundamental to the viability of balancing as a mode of rights adjudication. The central criticism from opponents of balancing is that, practically, it is not possible to do. There is no common scale upon which the differing and divergent values inherent in rights and other interests can be accurately measured against each other. This difficulty has been characterised by the late US Supreme Court Justice Antonin Scalia thus,

"...the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy"[583].

Before we assess and unpack this argument further an important technical point must be observed, that is the difference between the concepts of "incommensurability" and "incomparability" which are often confused, or used interchangeably despite a crucial

[583] *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988)

divergence of meaning. Incommensurability means that values assigned to two or more given items or ideas lack a common or "cardinal" measure of scale, for example, rights and equality. Whereas incomparability denotes that two entities which carry a value cannot be compared in any meaningful sense. "Incomparability" might be the term better applied to Justice Scalia's example but as noted it is important to keep in mind that these definitions are not settled nor used universally, and continue to be used interchangeably despite the objections of some philosophers. The key point for us is that just because some set of values cannot be measured 100% accurately upon a common or cardinal scale does not preclude any comparison at all. For example one can still rank items or concepts in order of preference despite the lack of an exhaustive and precise scale: "I prefer football to music". Equally, even things that are conceptually closer but cannot be placed into mathematically accurate or precise scales can still be compared and ranked with a degree of justification: "The Beatles are better than One Direction".

It is not the purpose of this chapter to solve the greater philosophical issues surrounding incommensurability of values, and it would not be in our interest to get bogged down in discussions of semantics and the deeper theoretical aspects, rather we must simply understand the ideas insofar as they impact upon the practical reasoning undertaken by the courts when faced with a choice between competing individual rights or wider public/governmental interests.

In the common vernacular the idea of incommensurability is expressed in the terms 'it is like comparing apples with oranges' which is not completely unlike Scalia's example above. But as has been pointed out that, in relative terms, apples and oranges are quite easy to compare[584]. They have monetary value set through a market based on seasonal factors, scarcity, demand etc. In this sense there is a monist scale upon which the value of apples and oranges can me compared – their monetary value is commensurable. However, if we adjust the focus slightly to refer to the taste of apples and oranges then it is much more difficult to form a scale of values that can be examined in order to deduce which tastes better in an objective sense. In the absence of an agreed and universal scale of taste, any decision is open to the criticism of arbitrariness and subjectivity. But, as noted above, this does not mean that the taste of apples and oranges are incomparable, rather as we have seen above the very fact that the two value-

[584] Schroeder, Jeanne L. "Apples and Oranges: The Commensurability Debate in Legal Scholarship" in Cardozo Law School, Public Law Paper No. 48 (2002)

carrying bodies in this example, apples and oranges, have a common benchmark – taste – means that they are comparable despite the difficulties with their commensurability. Despite the simplistic examples, these distinctions are not trivial and have important impacts on decision making and the validity of assertions about preferences for given values or interests.

It is not difficult to deduce how these simple commonplace examples will translate into our discussion of balancing and the weighing of rights and interests. But before we address that there are some further important distinctions to be noted. James Griffin, in his seminal work on incommensurability and the measurement of value, noted different gradations of how incommensurability could be viewed, the difference in which has significant ramifications for both the theoretical and practical process of decision making[585]. Griffin gives the example of what he calls "trumping" (close if not precisely the same as Dworkin's use) which means essentially that if one has two values, A and B, that no matter what the level or "amount" of value A, value B will not be able to better it or outweigh it. An alternative weaker form of incommensurability called "discontinuity" which comes when the two values A and B relate as such: "so long as we have enough of B any amount of A outranks any further amount of B; or that enough of A outranks any amount of B"[586].

Griffin is working at an abstract philosophical level but these ideas are developed in the legal sphere by scholars such as Jeremy Waldron who, in his support of balancing, sees the definition of incommensurability as a fundamental issue[587]. Waldron echoes and evolves the categories of incommensurability breaking them into two blocks: strong and weak. Strong incommensurability reflects an argument that two values cannot be meaningfully compared due to the lack of common value: "It is not the case that A carries more weight than B, and it is not the case that B carries more weight that A, and it is not the case that they carry equal weight..."[588] Waldron asserts that this is an isolated position for most moral philosophers and offers the alternative "weak" version of incommensurability which we will see is most common and applicable to our concrete problem. It is somewhat reflective of Griffin's ideas in that it reflects a simple ordering of values despite a lack of monist, cardinal or common metric,

[585] Griffin, J., Well-Being: Its Meaning, Measurement and Importance (Oxford: Clarendon Press 1986)
[586] Ibid p.85
[587] Waldron, J. 'Fake Incommensurability: A Response to Professor Schauer', (1993-94) 45 Hastings Law journal 813
[588] Ibid p.815

"The claim that considerations A and B are incommensurable in this second, weak sense connotes that there is an ordering between them, and that instead of balancing them quantitatively against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side."[589]

Waldron then gives three examples of how this weak incommensurability can work, citing the defended positions of liberal/libertarian defenders of strong rights protections. He identifies "trumping" as expounded by Dworkin; Nozick's articulation of "side constraints"; and Rawls' concept of "lexical order" as instances where despite a lack of a common scale or metric identified between competing interests or values there is a claim, intuitive or otherwise, about a "better" value when compared to another "lesser" one[590]. It is plain to see how these distinctions are fundamental to the process and legitimacy of balancing.

It should be noted that on the reverse side of the incommensurability coin we could just as easily talk about categories of commensurability. Moral philosophers have indeed taken up this task speaking about "strong" and "weak" commensurability[591]. These ideas mirror those just discussed in that strong commensurability would entail the view that all values can be measured by a common metric, making comparison simple once that scale or measure has been identified. Weak commensurability on the other hand accepts that this silver bullet of a scale may not exist in most cases but that values can ultimately be objectively or legitimately assessed against some form of value even if that is an outside value independent of the two (or more) compared. This latter idea is but one logical step away from weak incommensurability in that both theories accept there is a legitimate form of ordering; unfortunately that one final step is quite a large one because it revolves around, and depends upon, the acceptance or not of the idea of uniting scale or metric. At the risk of disappearing down the rabbit hole and trespassing into tautology some philosophers have attempted to bridge the gap by positing that the common scale or metric is "value" itself, in the sense that the underlying desire or preference to do one of any two choices must be motivated in some respect and this is in itself an underlying value[592].

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[589] Ibid p.816
[590] Ibid p.817
[591] Richardson, H., *Practical Reasoning about Final Ends,* Cambridge: Cambridge University Press (1994) p.104
[592] Wright, R. George, "Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate", 23 Loy. L.A. L. Rev. 763 (1990) p.772 quoting Professor Hallett (see quotation below).

This is obviously quite an abstract concept but we can see its relevance when we begin to apply this theorising to the practical real world of judicial decision-making. For example if a hypothetical court gives a litany of decisions, creating a precedent, where it decides to value the right of political speech over the government's interest in public order, then we can see that the court has – whether intuitively or logically – defined a value for society (represented by the legal system); it has deemed that it is able to give one priority in order to best aspire to said value (despite the criticism that the two interests in question are incommensurable). This line of logic or argument is rightly open to the criticism of rationalising backward from a conclusion (i.e. the decisions taken by the court). This does not delegitimize the central point but it does mean we might have jumped slightly ahead of ourselves. What needs to be established in advance is why precisely the critics of judicial balancing (particularly from a strong rights perspective) present incommensurability as a cornerstone of their criticism.

This criticism of balancing is based on the application of the fundamental argument above applied to the weighing of rights and other interests. To use the debate at the centre of this thesis as an example, a critic would ask: how is it possible to weigh an individual's right to privacy with a newspaper's right to freedom of expression in publishing a story about them. What is the common scale and metric we must use? And in the absence of such a scale is it not then impossible to produce consistent, rational and objective decisions on which interest should prevail. Even if we accept the proposition (put forward by the European Court and the US Supreme Court at various times[593]) that freedom of speech and particularly that of the press is particularly crucial for democracy, we still know that the press cannot and do not prevail in every dispute. Thus we realise that privacy concerns have their own weight. But what is the weight of one "unit" of press speech compared to one "unit" of celebrity "privacy"? How many units of privacy equal a unit of speech? This is of course complicated, not simplified, by the idea of a matrix of interests. Rights cases do not simply address the needs/interests of the parties involved in that individual case but the rights of all subsequent rights-holders in similar positions. Additional to this are the public or societal interests at stake. For instance a free press is not merely about the publication right of the given journalist in that particular case but also the functioning of a robust and accountable democracy. How can one unit of the public interest in a free press be measured against one unit of an individual politician's private and family

[593] See Chapter 5

life? It is the absence of firm and objective answers to these questions that lie at the heart of the incommensurability critique of balancing.

In the absence of a scientific or mathematically verifiable scale there is a strong suspicion that judges substitute their own impressions, feelings and prejudices for a correct weighing of interests and then use the language of balancing as a post-hoc justification for this process to lend it the veneer of objective legitimacy. Even judges defending the broader process of balancing themselves admit that the scientific scale is a far too literal misuse of the metaphor[594]. Aleinikoff describes balancing as taking place in a "black box" where the actual considerations are opaque and which detracts from transparency and legitimacy, "...the Court sends up smoke, supplying words that look like a balance, but in fact are something quite different"[595]. He cites a damning quotation from Supreme Court Justice Brennan to that effect,

"All of these `balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences."[596]

This analysis is echoed by the idea that there is a simple logical demonstration against the idea that such objective balancing can or does take place. This is based on the idea that two different courts can, and very often do, give different results based on the same facts. We can see this in different levels of national appellate courts; and indeed in the ECHR, it is not uncommon for the Chamber and Grand Chamber to come to different findings when applying the proportionality test (and thus balancing of interests) to the same facts. This assertion is not exclusively applicable to balancing as a form of adjudication, and opens up a much larger issue about judicial decision making, but it still offers a robust challenge to those who would propound a theory of objective balancing.

These criticisms are not without merit and cannot be ignored by those who would defend the broad process of balancing rights and interests, as well as those who specifically advocate the methods of adjudication of "balancing" and "proportionality" in their respective

[594] Coffin, Frank M. "Judicial Balancing: The Protean Scales of Justice," 63 NYULRev 16, (1988) p.18
[595] Aleinikoff (n.548) p. 943
[596] *New Jersey v. T. L. O.,* 469 U.S. 325 (1985) para 370

constitutional systems. The bulk of this critique will be addressed in the next concluding section but a number of points should be made now.

The first is that the very discussion taking place over this issue demonstrates the comparability, if not the commensurability, of interests; as does the fact that two or more interests are so often balanced in courts. As such, a challenge is set for justification by proponents of either normative position to explain this phenomenon (not merely supporters of balancing).

Secondly, Prof Schauer, himself a critic of balancing (not necessarily of the fundamental process, but of its impact on the role of constitutionally protected rights), makes the rather novel suggestion that one should accept or not accept incommensurability of values based on the outcome of that acceptance for protection of rights[597]. Thus, as a keen supporter of strong rights protection he sees incommensurability of values as the view to take because it justifies robust protection of individual rights against dilution by communal interests. While this idea is not without its critics, it does provide inspiration for a related if inverted idea.

It is clear that balancing requires the central assumption that values are in some way commensurable. Equally, it is without doubt they are comparable as just mentioned. Thus if we accept Professor Perry's broad assertion,

"I cannot think of any two things that are not commensurable- that cannot be compared in terms of the same standard. Think of any two things-any two things at all-and then consider this standard: which of the two things you would prefer to talk about right now?"[598]

Which is essentially correct if you substitute the word "comparable" for "commensurable"; and we accept Professor Hallett's point made a few paragraphs above that the common scale or metric is "value" itself[599]. We can set a ground for a defence of role for the broad role of balancing in the law – balancing as the two step process of some interest transgressing on the sphere of a right and then measuring that interest against the right. This is because what Hallett calls "value" itself we can call the correct the optimum outcome for society – both as individuals and a collective – another name for this might be "the public interest". This can only be accepted by balancers and non-balancers alike if at this stage that

[597] Schauer (n.541) p.786
[598] Perry, M. "Some Notes on Absolutism, Consequentialism, and Incommensurability," 79 Northwestern University Law Review (1985) 967, p.980
[599] Hallett, Garth "The 'Incommensurability' of Values," Heythrop Journal 28 (1987): 376, p.376

conception of 'optimum outcome' is completely neutral and devoid of a preconceived value. No one can argue realistically against the notion that courts are there to make decisions – based on law: constitutional, common, statutory etc. – about what is the correct outcome for the entire jurisdiction in question. And even if that idea, "the public interest" is vague, amorphous, ill-defined and open for contention by differing political/legal philosophies it is enough of a common metric to base a defence of the broad conception of balancing.

7.5 The Correct Role of Balancing

This thesis would not presume to be able to conclusively solve the enormous issue of the role of balancing in rights adjudication. Rather, I would simply like to lay out a conception which I think reflects a normative and descriptive sense of the role of balancing that will allow a robust and defensible consideration of the central topic of this thesis: free speech vs. privacy.

In this light we can begin with the indisputable assertion that, as outlined in the preceding sections, balancing in the broad sense is a fact of modern Western liberal judicial systems. This is clearly true in the descriptive sense; that the two step process - of identifying an infringement of a right and the subsequent weighing of said infringement against the need to protect the right - takes place. But additionally the discussion shows that in the broad abstract sense balancing is also normatively inevitable. Even the most ardent defenders of strong rights - Dworkin, Nozick, Meiklejohn, Habermas, Justice Black – accept limitations on those rights and the unavoidable logical conclusion of that fact is that one must engage in some form of weighing, measuring, balancing in order to decide when that exception should take place.

Furthermore, even if one was to maintain the position that some rights were absolute even the very selection of those rights would entail a form of balancing. To conclude that "Individual Interest A" should be protected in a rights covenant, but to reject "Individual Interest B" as not a protected right would require that the drafter of the covenant or bill of rights weigh up the need for an enduring absolute right against the need for society to override that right in a number of situations. And while we want to avoid getting caught up in increasingly abstract hypotheticals, the general point is worth making.

This idea extends into a more salient point. As mentioned in preceding sections, Dworkin accepts limitations even upon the rights he sees as trumps, for a "compelling

reason"[600]. Those limitations require a process to decide if, in the given circumstances, that exception is applicable. Supporters of Dworkin may argue that those exceptions are technical and necessary for the functioning of any system, but I would reject the distinction in the context of the need to balance. For example, Dworkin concedes that there should be time and place restrictions on speech, and would argue that this is quite different from exceptions or restrictions based upon the content of speech. I would counter by asserting that this distinction merely proves the inevitability of a broad process of balancing. While content based restrictions are clearly putting weight or value on the need for society to control certain information or opinion and are clearly balancing, the same is true of time and place restrictions: the courts have decided that the weight or value of society being able to maintain order and civility in debate overrides an absolute right to speak when and where you wish.

Even Nozick, an even more ardent occupier of the libertarian position, doesn't believe in absolute anarchy and would concede that there need to be laws and restrictions on freedoms in order to protect property rights, contracts etc. The question for Nozick then is how one comes up with the list, albeit limited, of acceptable restrictions if not by a process of weighing or attributing value to instances where society must band together in a common interest and restrict anarchy? Having made this point we can return to the more mainstream and pragmatically grounded issue of how to go about this balancing process, but it is important to be clear that not only is balancing a descriptive fact but normatively justifiable.

In the case of the specific concern of this thesis – privacy v. speech – we find ourselves in the legal system of England and Wales which, despite its Anglo-American predilections, is increasingly open to the language and methods of European balancing as mandated by the HRA. This evolving situation of drawing on the European Court's principles of proportionality has come about by moving away from the position of Wednesbury and the absolute nature of parliamentary sovereignty (despite ineffectual protests to the contrary). As we have seen there are those critics of rights who would lament this evolution and wish to restore "democracy" to the centre of legal decision making by abolishing the very process of judicially or constitutionally protected rights. These objections should be addressed with a robust defence of the conception of rights.

[600] Dworkin (n.341) p.200

A deceptively simple way to defend rights is to ask the question, why would the great number of constitutional systems protect rights were there no need for them? One of the claims from the faction who would criticise rights as anti-democratic is that elected bodies are perfectly capable of weighing all interests including those of individuals in the policy calculus untaken in the making of legislative or executive decisions. The problem is that history has shown this to be patently untrue. The entire modern conception of rights protection has arisen in reaction to the palpable failure of successive societies and political regimes to adequately protect the rights of individuals when faced with the collective pressure of the many. The US Bill of Rights after the War of Independence and the ECHR in reaction to the horrors of Nazi domination in Europe are just two examples of this idea. Indeed the rapid and willing adoption of the ECHR system into the former Soviet bloc nations in Eastern Europe show that the complete subsumption of the individual to the collective or state is very much a live issue in those places.

What the "anti-democratic" critiques of rights fail to account for is the modern definition of a liberal democracy. In the Western political and legal systems we do not literally engage in the process of "democracy" in the pure, direct or "Greek" sense. And this modern evolution of liberal representative democracy is about much more than the simple concept of majoritarian voting; rather one of the key tenets is preserving and promoting pluralism and individual liberty. This process cannot be accomplished without the robust protection of rights.

Additional to this normative de-clawing of the "anti-democratic" criticisms is a more pragmatic difficulty with a system that lacks enshrined and judicially protected rights. As we saw in section 7.3 the critics of rights make great mileage from the idea that judges are incapable, in a practical sense, of adequately balancing all the requisite considerations that are entailed in a case like this. The mirror image of that criticism can be directed at any system that would rely upon legislatures to adequately protect the interests of individuals. While in terms of resources and time they may be better equipped, the pressures of electoral politics, public opinion, financial inducements, lobbying etc. will result in short-term ill-considered policies that will usurp rights and the interests of the individual. At the risk of reductive reasoning, this can be amply demonstrated by the countless laws, created in legislatures or by governments, which fall foul of judicially reviewed rights considerations. Equally, the courts are privy to the reasoning and evidence adduced by legislature and governments in forming policies when they

make judicial decisions, a fact which further hollows to argument that courts cannot adequately consider these factors.

The entire purpose of the "liberal" in liberal democracy is to protect and retain a sphere of freedom and liberty in which individuals can act. This is not simply the "freedom" to act in ways that are considerate, or helpful or even good for us – for that is no freedom at all. But rather to retain a broad sense of liberty as well as specific enumerated rights that are deemed essential to maintaining the architecture of that freedom. Only when there are pressing needs to curtail those freedoms can infringements be justified. But as we have seen above, those societal needs are not uncommon and the only process whereby we can judge the weight of the two competing issues is a broad process of balancing.

The answer to the questions of what a justifiable system of balancing looks like is the same answer as to how robust liberal rights and societal/public needs can be adequately reconciled.

One crucial point to observe is that, shy of literal "absolute rights", balancing has to occur at some point in the process. Even those who would claim to be defenders of robust rights cheat in their avoidance of balancing. Take for example the notion of "specificationism"; this is the idea that if you pare down a right to its essential core then you can produce an understanding and definition of the right that can serve as a trump against other interests. But what is this process of specificationism if not a form of pre-emptive balancing? All specificationism is doing is shifting the weighing of interests and the assigning of values to a stage earlier in the process.

A good example would be Meiklejohn's assertion that free speech is an absolute. If we take that statement at face value then presumably there can be no restriction on the publication of private details of someone's life. But no, replies Meiklejohn, because he considers only speech that is politically useful to be covered by the absolute protection[601]. In fact what he has essentially done is weighed or balanced the value of gossip speech against personal privacy and found it wanting; yet in a further weighing of political speech against privacy he would find that the former to be the heavier consideration. In this light he has declared political speech

[601] Meiklejohn (n.169) p.25

to be the real core of the right. But balancing has still taken place; it has simply been moved from the court room by a judge to the definition of the right by Meiklejohn.

This process would similarly take place for all rights under Dworkin's specificationism, and so we can see the objection to balancing is disingenuous; it is simply moved and thus hidden in a different part of the process of rights protection. Supporters of specificationism could argue that it provides a greater sense of certainty of definition and thus protection for the rights, but this comes at the expense of flexibility for the courts to adapt to unforeseen circumstances. Additionally, the surety of definition and protection are exaggerated: a court could quite easily come to the same conclusion and just as robustly protect speech, in the example of the previous paragraph, by recognising in a rights case the imperative nature of political speech and assigning it a heavy weight and strong valuation in the balancing process, just as Dworkin or Meiklejohn do in their pre-emptive balance when defining the extent of the "absolute" right.

7.6 Conclusion: A Theory of Balancing

This leads us onto the essential factors and features included in a balancing system that can robustly protect rights and also the public interest. The first is to retain a strong commitment to individual rights in the balance. When protected rights are engaged then they should retain their presumptive priority insofar as is possible against other interests. Courts should avoid simply treating rights considerations as simply "another consideration". For this ignores the fundamental purpose of rights explained above, and explored in the previous chapter. This idea obviously has greater relevance to rights vs. societal interest cases but is important to keep in mind even in rights vs. rights cases as demonstrated by the influence of the matrix of interests explained below.

Secondly, balancing must reflect the idea that not all expressions of rights and not all interests are of equal or equivalent value. One can extend the weighing metaphor to illustrate this, if one considers not just the weight of the competing interests but the mass too. Weight is simply the pull of gravity on an object, but mass is how much matter is in said object. Thus if one has two equally sized objects, the first made of material with a greater density or mass than the second, the first will weigh more. For example, just as lead has a greater mass than aluminium, political speech will have a greater mass than gossip. And national security will

have a greater mass than public morals. It takes a greater amount of a low mass object to outweigh a high mass object.

This idea is reflective of Alexy's three categories of "serious", "moderate" and "light" explored in section 7.3. One of the questions raised about Alexy's theory is why limit the categories to three? This appears to be an arbitrary decision. One could rank all considerations from 1-10 in terms of seriousness and compare the value of interests that way. But what is a more rational and practicable method is to envisage rights and other interests on individual sliding scales of importance. For example the right to privacy could have intimate sexual details on one end of the scale and consenting everyday exposure in a public place on the other. Expressions of the privacy right could be measured along this scale and compared with the scale of a competing right or interest such as speech. The scales used for individual rights would be calibrated to give greater weight to rights interests (as opposed to general policy interests) in order to reflect the need to robustly protect rights as outlined above.

The third and perhaps most overlooked idea central to justifiable and workable balancing is the need for courts to account for the matrix of interests. In section 7.2 it was pointed out that a clear separation or distinction of individual rights interests and societal interests was a false dichotomy. The right to free speech or to privacy does not merely protect one individual in question or even the great many individuals who might invoke the right, but also the society on which those individuals live and the social fabric that binds them. The right to protest is not simply for the man sitting in Parliament Square but for all who live in an accountable democracy. And these inextricably linked considerations must be added to the sliding scale when considering the value or weight of a rights interest.

This point is reflected in one of the chief defences against those who would argue that judicial protection of rights is arbitrary and outside the sphere of "right and wrong". It is not the case that judges simply make decisions on the spot, in a vacuum. Rather they are informed by their training, experience and, more importantly, the experience, understanding and knowledge accumulated within the collective jurisprudence of their legal system and other legal systems that have faced similar conundrums. Judges will consider myriad factors when discerning the relative weights given to competing interests. It is true that systems, the ECHR in particular, are undermined by a lack of doctrinal consistency and certainty[602]. And in general

[602] McHarg, (n.375) p.691

one can still argue that courts' decisions are unscientific but that is not a criticism of balancing as much as a criticism of the entire idea or process of judicial decision making, which is a considerably larger debate beyond the scope of these pages.

These factors just listed give balancing a legitimacy and workability in assessing rights, despite them being necessarily broad stroke. Crucially and fundamentally the processes of "balancing" in the US and "proportionality" in the ECHR and UK systems should, correctly implemented, adhere to these ideas. The ideas are reflected in much of the jurisprudence of the respective courts, even if there are inevitable exceptions and variations within the systems and between courtrooms. We can see how in the basic sense balancing takes place: the individual rights in question in the case are identified as engaged and then the competing interest weighed against them. Both systems include explicit recognition of the individual nature of rights, and a need for the minimal possible interference to achieve a public goal in order to justify infringement.

The optimisation process of the German Constitutional Court and championed by Alexy perhaps strays too far into the territory of considering rights as one of many broader public concerns. The German system is much more attuned to optimising results for the whole of society than protecting individual liberty[603]. This does not preclude Alexy's sense of rights as principles and optimisations requirements, but simply would require the understanding that the robust protection of individual rights and a sphere of personal liberty is an inbuilt requirement to liberal democracy and so be valued and weighed in the optimisation process of balancing. In short, England and Wales should retain the liberal Anglo-American individual protection, but with the matrix of interests caveat in tow.

One must remember that rights are, in the abstract, simply society's and the legal/political system's way of saying that collectively we have identified the need to ensure that individuals are robustly protected in their liberty and that by entrenching or enshrining these interests as rights we can protect ourselves against our own short-termism and majoritarianism. Thus, in essence rights are the outcome of a "meta-balance" of the long-term interests of society in retaining a liberal character. And as such rights advocates should not be afraid of balancing as a mode of protecting, and not simply limiting rights.

[603] Kumm (n.565) p.594

In the final two (concluding) chapters this thesis will lay out how this balancing mechanism operates in fact. In light of what has been explored in this chapter, and in light of the distillation of the workable, defensible theory of balancing produced, we can transpose the theoretical understanding of how and why balancing is necessary into the practical situations of disputes between privacy rights and speech rights. However, it is worth pausing briefly to draw out explicitly the links between the history and theory of the rights explored in Chapters 2- 6 and the underlying tensions in balancing individual autonomy and community interests (seen in Chapter 5) and in theories of balancing rights (in this chapter).

The implicit line of thought is clear – in the early chapters' exploration of *why* we protect these enumerated rights (privacy, reputation, and speech/press) there is both an individual/atomistic and intrinsic justification for each right, waxing and waning according to one's political viewpoint; equally, there is societal/community and purposive justification for each of the rights; finally, there is both tension and symbiosis between these sets of justifications. Chapter 5 and in particular the invocation of the 'matrix of interests' shows that there is no simple or bright dividing line between community interests and the individual value in protecting a given right. There can simultaneously be communitarian justifications for protecting a right, and communitarian justifications for limiting it, whilst also retaining an individual justification for protecting the same right and an individual justification for limiting it.

This idea, upon which this thesis hinges, is why the early chapters of this thesis went into such detail in exploring the origins of the rights in question, their modern day theoretical justifications, and their practical application. Each of these must be applied through the prism of a coherent application of balancing to produce the conclusions laid out in the next two chapters. Before this, however, we can illustrate the point with practical examples drawn from the early chapters.

If we take reputation in the first instance, it is clear from Chapter 2 how the central justification for protecting a right to reputation has evolved in common law systems throughout the history of defamation law and its antecedents. From an archaic protection of 'honour' it has broadly evolved into a protection of individuals from an unjustified 'moral' reduction in the eyes of a community or society. The individual reasons for doing so, based around the ability to build and protect a good standing in one's community, are obvious - equally, the societal need to retain rules of civility and correct application of a 'moral taxonomy'.

Conversely, as explored extensively in Chapters 5 and 6 there are also individual/atomistic values in protecting speech based around self-realisation and autonomous expression; and even further than this there is the enormously important societal justification in protecting democratic deliberation and the functions provided by a free press.

When tensions arise between these two, for example, in a prominent libel case we must, through prism of the justification of the weighing and balancing of values outlined in the present chapter, put these respective values on the scale to measure which should take precedent in the unique factual circumstances of that case. Without the full and thorough exploration of the history and theory of the values and interests protected by the enumerated rights, and an understanding of the tensions and interaction of the 'matrix of interests' there can be no accurate or justifiable balancing of those values. When this thesis explores the ideas of comparability and commensurability, it is order to fully lay the foundations for a balancing of the myriad values extrapolated in the explorations of rights in Chapters 2 – 6.

In a recent article, Gavin Phillipson gives a good summation of how the competing values of privacy and speech relate to the idea of a public interest[604]. This discussion will be tackled extensively in the succeeding two chapters, but is it is worth highlighting at this juncture the relationship that the litany of values expounded in the early chapters of this thesis have with this idea of the 'public interest' and how the mechanism of balancing just explored in this chapter shapes the journey toward that idea.

Phillipson has three ideas that are germane to this thesis, and that have been reflected in the arguments proffered thus far. The first is that he gives a condensed evaluation of what we protect when we protect both privacy and free speech; and his conclusions are very much in line with those of this thesis – put simply, that privacy is about informational control, and free speech protection of the press is about public discourse value. Secondly, within the balance applied by courts (a fundamental tenet of Western judicial systems), it is crucial that we understand the nature of the values to be weighed and how the balancing mechanism impacts upon them. Which is not to say that the values are fixed; rather Phillipson specifically points out that different courts have given different weight to different values, even when the facts of the cases are very similar[605]. This leads to the third and most important point, which is the

[604] Phillipson, G (2016). 'Press Freedom, the Public Interest and Privacy' in *Comparative Defamation and Privacy Law* ed. Kenyon, A (Cambridge University Press 2016) p.136
[605] Infra p.146

bedrock of the final chapter of this thesis. Phillipson recognises that the idea of a fixed 'public interest' is a chimera. There is no one size fits all 'value' of the public interest that can be easily applied to the factual circumstances in a given case. Rather, it is the understanding and application of all the values which have a public interest element, through the balancing by the courts, that we can arrive at an approximation of the 'public interest'.

But as Phillipson points out, and is explored extensively in the upcoming chapters, the different weight given to each value by different individuals and different judges means the location of the 'public interest' can shift. For example, as we saw in Chapters 5 and 6, the public interest value in speech is viewed very differently by different legal scholars, and across different jurisdictions. Phillipson systematically explores how differing conceptions of the public interest in speech impact the balance against the competing value(s) of privacy. A process which this thesis has attempted at greater length.

In the last two chapters of this thesis there will be the concluding discussions and arguments of *how* this balance should take place between Article 10 rights and Article 8 right, and how this has happened in fact. In each example one cannot hope to explicitly re-tread each evaluation that took place across Chapter 2-6, but instead the values and the tensions explored therein must be implicitly recognised in the balance being conducted.

Part Five: Applications and Conclusions

The role of Part Five is to draw together the essential strands of the previous parts and their constituent chapters to pull out the conclusions and findings of this thesis.

Chapter 8 will look at how the values and interests inherent in both Article 8 and Article 10 rights are balanced by courts across the jurisdictions. This will involve a critical description and examination of how the balance has been applied in case law.

The individual and social aspects of the value in the respective rights posited in Chapters 2-6 are focussed through real life application. Additionally, the mechanism of balancing critiqued and defined in Chapter 7 is seen in action.

The final chapter produces the conclusion(s) to the thesis. It attempts to distil, insofar as it is possible, the essential elements of what has been learnt in all of the preceding chapters; to highlight the most essential strands of the arguments which have recurred across the 5 parts and to use them to extract a meaningful definition of, or process to identify, the public interest between speech and privacy.

Chapter 8. Applying the Balance

8.1 Introduction

Thus far this thesis has looked at the rationale and justifications for the Article 8 and Article 10 rights to privacy, reputation and speech respectively using a comparative approach with England and Wales, the United States and the ECHR. Additionally, it has examined the politico-philosophical underpinnings of the rights system, and the mechanics of balancing rights. Before the final conclusion, this chapter will briefly attempt to pull together examples and conclusions about how the balance between competing rights has taken place in fact. This will allow us to draw together some of the threads from Chapter 2, 3, 4, 5, and 6 plus it will provide some practical grounding for some of the more abstract concepts discussed in Chapters 5 & 7. Finally, it will provide a platform for the concluding chapter by tethering the conclusions there to the factual, tangible need for practical solutions to rights conflicts within legal systems.

In that light, the following sections will look firstly at defamation and some of the evolutions in how courts have approached balancing reputation with speech, and secondly at the development of ideas around privacy's interaction with public discourse. Given the slightly different approaches taken in Chapter 2 and Chapter 3 respectively, the focus in the first section on defamation will be slightly more on the evolution in the courts, and the second section takes a slightly broader view around the legal debate. This approach should lead to a smooth transition into the conclusions of the final chapter.

8.2 Balancing Reputation and Speech

As was noted in Chapter 2, the law in England and Wales has been altered significantly by the Defamation Act 2013. A number of provisions therein change the approach to libel and slander in this country. However, the provision of most interest and consequence to us is Section 4 and the advent of a statutory "public interest" defence. This abolished the common law *Reynolds* defence. However, this does not mean that the long canon of jurisprudence which led to *Reynolds* and *Jameel* is rendered irrelevant. On the contrary, given the lack of major ground-breaking new cases post- the coming into force of the 2013 Act, the reading of the new public interest defence must be done in the light of the case law and jurisprudence which

inspired it. In fact, this is explicitly laid out in the explanatory notes to Section 4 of the Act[606]. So while the law has been codified by the new Act, the principles and debates that have evolved in the courts are still highly relevant.

If it is broadly accepted that defamation's role is to protect reputations then the law has evolved in some very interesting ways over the past decade in England, echoing the development in other jurisdictions. If the right to reputation operated in a vacuum then there would be little difficulty in defending it and protecting it, however it does not. Rather it competes in a marketplace of other rights and interests not least of which is the right to free expression. The rise of the press and the proliferation of media who consider it their role to check power and hold authority to account have put pressure on the traditional English bias toward the sanctity of reputation. As we saw in Chapter 2 the law of defamation rose out of a need to retain order and for the powerful, the great men of the realm, to assert their control over the ordinary people. The burgeoning middle classes, the Enlightenment, and the rise of liberalism created tensions. Yet by and large the British preoccupation with reputation survived and was given preference in any disputes with speech or the press. In the US when these values of deference were challenged by a constitutional system that put autonomy and freedom of expression above almost all else, the hegemony of the reputational right, especially among the powerful was decimated. In the UK the Human Rights Act required the courts to take Strasbourg jurisprudence into consideration including the distinctly more robust attitude toward free speech and the watchdog role of the press. This combined with the advent of the

[606] Note 29 "This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers*(8) and is intended to reflect the principles established in that case and in subsequent case law. Subsection (1) provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to reflect the existing common law as most recently set out in Flood v Times Newspapers(9). It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances."

Note 35 "Subsection (6) abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate."

http://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted?view=interweave (accessed 1st June 2016)

Internet and other mass media, and concerted calls for a more liberal press regime have led to sea changes in the way defamation deals with its fundamental tenet of reputation.

The justifications set out in Chapter 2 for an ongoing protection of reputation as part of the Article 8 rights, despite the long and sometimes wavering evolution of the law, are partly in order to establish the ongoing need on both a societal and individual level for that protection, in light of an increasingly ubiquitous and powerful media sphere. Not only has the law moved toward a more favourable circumstance for the press both here (in the last 20 years) and in the United States (over the last 50), but as laid out in Chapter 4 the technological landscape has exacerbated this situation significantly. In the two succeeding sections of this chapter the increasing prominence of speech and press rights in the evolution of the law is charted and dissected across the UK and the USA, but it is important to retain, given the discussion of balancing and commensurability of values in the previous chapter, a sense of why reputation remains a powerful countervailing interest on the scales as laid out in earlier chapters.

8.2.1 A Public Interest Defence

When the former Taoiseach of Ireland Albert Reynolds sued the Sunday Times for suggesting that he had misled colleagues in Dáil Éireann it would create a seismic change in the English defamation law by creating what would amount to a public interest or "responsible journalism defence" to a libel suit. Up until this time, outside of the narrowly defined qualified and absolute privileges and the defence of fair comment, the only option the press had in defending itself against a writ of libel was to prove the truth of the allegations it had published[607]. In essence *Reynolds*[608] allowed newspapers, or any publisher in fact, to escape liability for libel if they could show that what they had published was in the public interest and was done so in a responsible manner. The rationale was that this was essentially an extension of the traditional defence of qualified privilege.

A privilege under English law is a set of exceptional circumstances that allow an individual to communicate information in a manner unfettered by the threat of suit or sanction. For example Parliamentarians have an absolute privilege to say what they want in the course

[607] I refer of course to these particular factual circumstances – there were other defences available in the 1990s for other sets of factual circumstances.
[608] *Reynolds* (n.43)

of their parliamentary duties, the rationale being that this is necessary in order that they fully discharge their duties in the interest of a robust democracy[609]. Equally, accurate and contemporaneous reporting of parliamentary procedures is protected by a qualified privilege. The qualification for this privilege in almost all cases being that the publisher is not motivated by malice. The need for privilege as exceptions to the law and in this case the law of libel in particular is based on a pressing social need for unfettered communication. In both of the examples above the need is clearly the smooth functioning of the democratic process through the free exchange of information. The common law continued in certain cases to recognise other instances where a general need for exception to liability was needed and thus a qualified privilege was created in cases where communications were made out of a social or moral duty. Examples include when giving a reference for an employee, reporting criminal activity, or where there is duty bound up in a contract[610].

In each instance it is clear to see why the courts recognised the need that such communications are made without the publisher worrying about a libel writ in his future. It had been argued for many years, not least by newspapers themselves, that there was a clear moral and social duty for them to report information to the public that was in the public interest, and that consequently they should be protected by a qualified privilege to do so. The courts persisted in their rejection of this argument for many years in the context of libel, maintaining the British leaning toward the protection of reputation. A stark demonstration of this attitude came in the case of *Blackshaw v Lord*[611] resulting from accusations in the Daily Telegraph that gross incompetence within the Department of Energy had cost the government £52 million. This was a matter clearly in the public interest and as such the defendant claimed a broad qualified privilege to publish. The court, adopting a somewhat narrow approach, rejected this claim, ruling that a qualified privilege had to be narrowly focussed and no such privilege existed to publish generally. Two things should be noted about the approach of the court in this instance. Firstly, despite the growing volume and importance of the jurisprudence flowing from it, the Court of Appeal made no reference to the European Convention on Human Rights[612]. Secondly, the court seemed to reject a more progressive approach that had been taken in the case of *Webb v Times Publishing*[613]. In this instance, concerning the reporting of Swiss criminal

[609] Jack, Malcom (editor) et al, *Erskine May: Parliamentary Privilege (24th edition, 2011)*
[610] Price, Duodu, Cain, (n.15) p.118
[611] *Blackshaw v. Lord* [1984] Q.B. 1
[612] Robertson (n.18) p.158
[613] *Webb v. Times Publishing Co. Ltd.* [1960] 2 Q.B. 535

proceedings, Justice Pearson indicated obiter that he considered there was a form of qualified privilege relating to the information in the public interest[614]. This was as long ago as 1960. However, the court in *Blackshaw* specifically distinguished this case saying that the ruling in *Webb* was unique to the fact that it concerned report of foreign proceedings, among other reasons.

The first ray of light for advocates of an increased right to political criticism came in *Derbyshire County Council v. Times Newspapers*[615], the House of Lords ruling that government bodies could not sue in defamation because it was of the "highest public importance that a democratically elected governmental body should be open to uninhibited public criticism"[616]. This overturned the previous ruling in *Bognor Regis Urban District Council v Campion*[617]. The Lords made specific reference to the Article 10 right, but ruled out any US-style *Sullivan* defence.

By the time of *Reynolds* the courts were prepared to take a more open approach, and one more in keeping with trends toward recognition of the importance of free speech and the dangers of a "chilling effect" upon the functioning of the press in a democracy. There is little doubt as to the degree of influence the Human Rights Act[618] had upon the case. Although the Act only came into force on 1st October 2000, almost a year after the conclusion of the case, its shadow loomed large. The Act would require all public bodies, including the courts, to take European Convention jurisprudence into consideration. This meant that English laws would have to be interpreted, insofar as was possible, to conform to Convention principles including Article 10[619] which required "a compelling countervailing consideration"[620] for the curtailment of free expression. The case law in the European Convention on Human Rights had been consistently accruing a jurisprudence that was strong in its defence of free expression especially with regards to the media and its role as a watchdog and a need for the powerful particularly politicians to endure a greater degree of scrutiny than others. For example, the case of *Castells v Spain*[621] where an opposition politician was convicted for criticising the government, the

[614] Loveland, Ian "The Ongoing Evolution of Reynolds Privilege in Domestic Libel Law" (2003) Entertainment Law Review 178
[615] *Derbyshire* (n.86)
[616] Lord Keith in ibid
[617] *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169
[618] Human Rights Act 1998
[619] Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms
[620] Lord Nicholls in *Reynolds* (n.43)
[621] *Castells v. Spain* 14 E.H.R.R. 445

Court said that not only could the government not curtail criticism but it was expected to endure it in the interests of democracy. In the *Reynolds* judgment Lord Nicholls specifically mentions a number of Strasbourg cases which influenced the creation of a public interest defence. The first is *Lingens v Austria*[622], a seminal case that established value judgements as a separate consideration from factual assertions. It was important in this instance because of the principle that provable truth is not always the sole consideration in matters of free speech. Also his Lordship made reference to the case of *Thorgeirson v. Iceland*[623] which established the importance of a more flexible approach in the law to the provability of facts in public interest cases and the fact that public interest encompasses much more than the purely political.

The viewing of the traditional common law qualified privilege based upon a legal, social or moral duty seen through the prism of human rights jurisprudence with an emphasis on leeway in instances of reporting public interest stories, set the conditions for the creation of a public interest defence in English law, and *Reynolds* arrived at the right time. A key point to note however is that *Reynolds* was not like any other instance of qualified privilege, it is more complex and sets out a series of criteria to be met; and crucially its applicability relies not simply upon the type of information conveyed i.e. that of a public interest, but also the manner in which it is conveyed. In this sense it has been described as a "responsible journalism defence". The Lords in their judgements specifically ruled out the possibility of the common law moving to a system where qualified privilege would be available for publishers of specific types of information or specific categories of people, such as political information or political figures. This configuration of the law had been used in other jurisdictions such as the USA which will be examined below. The Lords preferred a flexible approach based upon the circumstances of the case which was considered more compatible with the approach of the European Court of Human Rights. Lord Cooke recognised that such an approach created greater doubt and uncertainty regarding the applicability of the privilege but was confident that it could be judged just like any other tort with a standard of care, "It is undeniable that a privilege depending on particular circumstances may produce more uncertainty and require more editorial discretion than a rule-of-thumb one. But in other professions and callings the law is content with the standard of reasonable care and skill in all the circumstances. The fourth estate should be as capable of operating within general standards."[624] Thus it was left for Lord

[622] *Lingens* (n.5)
[623] *Thorgeirson v. Iceland* (1992) 14 E.H.R.R. 843
[624] Lord Cooke in *Reynolds* (n.43)

Nicholls to articulate his, now famous, ten factors to be considered by courts when deciding upon the responsibility of the publisher or journalist and the applicability of what has come to be known as the Reynolds defence[625].

As Nicholls makes clear these are but suggested factors, they are variable and not exhaustive. The chief problem with this approach, and that recognised by Lord Cooke above is that the uncertainty it creates is not conducive with a reduction of the chilling effect. If *Reynolds* had a purpose, demonstrated by its concern with the public interest, then it was to reduce the chilling effect in such cases where the press is dealing with issues of social or political importance. Indeed as we will see below, one of the chief reasons other jurisdictions have adopted a categorical approach is the certainty it creates for the press when it comes to reporting on stories that fall within those categories.

Nonetheless, the English law now had a public interest defence and this was greeted by the press and commentators with "cautious optimism"[626]. This was undoubtedly the correct attitude to take because despite being a move toward a greater regard for free expression anybody who believed *Reynolds* to be a panacea for the media's troubles with English libel law was sorely mistaken. In the large majority of cases that immediately followed *Reynolds* where

[625] "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up", Lord Nicholls in *Reynolds* (n.43)

[626] Loveland, Ian *Political Libels: A Comparative Study* (Oxford ; Portland, Or. : Hart, 2000.) p.177

the press attempted to put forward a public interest or responsible journalism defence the courts rejected it. For example, the Lords in *Grobbelaar v. News Group Newspapers Ltd*[627], which exposed serious wrong doing in the game of football, refused to recognise a Reynolds defence under the circumstances. Equally, the case of *Baldwin v Rusbridger*[628] the court rejected a Reynolds defence unsatisfied as it was with the circumstances surrounding the sources of the story[629]. There were successes, *GKR Karate v Yorkshire Post*[630] being a good example. But fewer successes than failures of the new celebrated defence led to an uncertainty that the defence was supposed to go some way to alleviate. The problem seemed to be that the courts were viewing the "Nicholls factors" as a series of hurdles to be met before a defence could be allowed, and not taking them in a holistic fashion with the flexibility and adaptability to the circumstances that Lord Nicholls had intended. This situation came to a head in the case of *Jameel v Wall Street Journal*[631] where the trial judge Justice Eady rejected the Reynolds defence despite the circumstances being later described by Baroness Hale with the words, "If ever there was a story which met the test, it must be this one"[632]. The result of *Jameel* was to reiterate both the existence of a public interest/responsible journalism defence in appropriate circumstances but also to clarify the application of the defence, most notably to combat the misapplication of the ten Nicholls factors as hurdles, "Lord Nicholls intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege"[633]. Similarly important was the emphasis that was put on editorial judgement by the Lords, a recognition that the courts should not persistently attempt to second guess newspaper editors on decisions of newsworthiness and responsibility. Only when there is evidence that a publisher has transgressed the lines of responsibility need the courts proffer a judgement.

Prior to the Defamation Act 2013 it was *Flood v Times Newspapers Ltd*[634] that offered the most up-to-date exposition of the common law public interest defence[635]. The case involved

[627] *Grobbelaar* (n.89)
[628] *Baldwin v Rusbridger*. Case Reference [2001] EMLR 1062
[629] Price, Duodu, Cain, (n.15) p.122
[630] GKR Karate v Yorkshire Post (No 1) [2000] EMLR 396
[631] *Jameel* (n.527)
[632] Baroness Hale in ibid
[633] Lord Bingham in ibid
[634] *Flood v Times Newspapers Limited* (SC) [2012] UKSC 11
[635] With the exception of *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB) which was decided after the 2013 Act was passed but was not applicable to the case.

accusations of corruption in the police, published by the Times, which were ultimately unfounded. The importance of the ruling was that the Supreme Court upheld a broad view of the Reynolds defence on issues such as naming the subject of the accusation despite him not being a public figure, and supporting newspapers' right to make editorial decisions in good faith based on the information available to them at the time.

It is often said that the law is shaped by the unique cultural, social and historical fabric of a country or jurisdiction. This was demonstrated in Chapter 2 which tracked the creation of defamation law in this country and its evolution forged by circumstances and the imperatives of any given time. The advent of England's public interest defence reflects a residual concern with the traditional common law deference to reputational rights. Other jurisdictions have equally had to grapple with how they reconcile their constitutional obligations toward free speech and a robust press with the individual need to protect their reputation against unwarranted accusations or imputations.

8.2.2 Speech Before Reputation?

As is often the case the USA offers the most constructive and useful comparative jurisdiction in matters of free expression, providing as it does a political, social and legal culture that places free speech and a free press near the top of its hierarchy of rights[636]. Additionally, while it has a common law right to reputation like all such jurisdictions, this is not a constitutional right. As such the courts are not under the same obligation to balance reputation or privacy against speech. Having said that, the US law of libel was virtually indistinguishable from the English common law until 1964; the belief being widely held that defamation was beyond the realm of constitutional scrutiny. This of course changed radically with the case of *New York Times v Sullivan*[637]. The facts are well rehearsed; the New York Times published an advertisement from members of the civil rights movement accusing the police force in Montgomery Alabama of brutality. The commissioner sued for libel and the Alabama court upheld this. The case went to the US Supreme Court which held that the libel law contravened the First Amendment of the Constitution. The Court went on to rule that in order for a politician or public official to successfully sue for libel they would have to show not only that the accusation was untrue but that the publisher acted with actual malice. Actual malice as a

[636] There are of course difficulties inherent in comparative law, and free speech comparatives in particular. That broader debate is beyond the scope of this thesis, however see Chapter 1 above for a brief discussion.
[637] *Sullivan* (n.8)

standard meant knowledge of falsity, or reckless disregard for the truth. This was obviously a radical departure from the common law. Firstly, it reversed the traditional burden of proof from the defendant to the claimant and additionally set that burden at a high standard indeed. The rationale of the court came down to the right of free speech under the First Amendment and the need in a democratic society to be able to criticise government without fear of censure. Justice Brennan articulated the reasoning, "...we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. ...erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they 'need . . . to survive,'"[638]

The ruling effectively left public officials and politicians in the US with little recourse or hope of vindication should they be libelled[639]. The Supreme Court recognised this but saw it as necessary in order to give full weight to the constitutional right to free speech. The right to reputation, so robust in the tradition of the common law, is given only secondary consideration.

The Supreme Court continued to expand the influence of free speech in the law of libel to the detriment of reputational rights in a series of decisions in the latter half of the 20th century[640]. In *Rosenblatt v. Baer*[641] the Court extended the scope of public figure to appointed officials such as a ski resort manager and *Curtis v. Butts*[642] to public figures such as a college coach. When the Supreme Court held in *Rosenbloom v. Metromedia Inc*[643] that even a private plaintiff would have to meet the public figure standard if the defamatory imputation concerned a public matter, it seemed there would be no end to the trumping of reputation by speech considerations. However in the case of *Gertz v Robert Welch*[644] the Court make up had altered and the bench rowed back from its *Rosenbloom* position to hold that in cases involving private

[638] Justice Brennan ibid p. 270
[639] Anderson, David A. "Is Libel Law Worth Reforming?" 140 U. Pa. L. Rev. 487
[640] For a comprehensive analysis of this case law see Langvardt, Arlen W. "Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law" 49 U. Pitt Law Review 92 1987-1988 or Loveland, Ian Political Libels: A Comparative Study (Oxford ; Portland, Or. : Hart, 2000.) p.65-83
[641] *Rosenblatt v. Baer* , 383 U.S. 75 (1966)
[642] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)
[643] *Rosenbloom v. Metromedia Inc*, 403 U.S. 29 (1971)
[644] *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974)

individuals the states could decide their own degree of liability short of common law strict liability.

The position is thus in the US, that reputation as an interest is very much subsidiary to constitutional consideration of free speech. Indeed the Supreme Court has been criticised for limiting the common law into protection of non-public figure reputations, under the auspices of constitutional necessity, without adequate reasoning or justification[645]. But that is where the law in the US stands nonetheless.

These comparative examples show how different jurisdictions deal with the pressure that the high value free expression has in a liberal democracy puts upon the common law right to protection of reputation from false accusations. English law takes a conservative approach, retaining all the tenets of the common law but allowing, based on the circumstances in certain cases, leeway toward greater protection of public speech. It is a flexible approach. The US takes a much more doctrinal approach seeking to categorise instances of speech in the search for definitional certainty.

Each jurisdiction however sacrifices the reputational right for a greater freedom of expression to a certain degree. Effectively the law in each country is expressing that although in an ideal world the balance in defamation would come down along the lines of provable truth or falsity the fact is that in reality the situation does not work like that. There is a chilling effect on speech and as such there is a necessity for allowance of a free press to get facts wrong in the functioning of a democracy. Breathing space must be given to free speech and the press even if this results in some curtailment of reputation rights.

This approach is not without its critics[646]. The argument is made that, under English law, the existence of the public interest defence (and its Reynolds predecessor) is an unwarranted denial of the right to reputation, a right protected at common law and also under the ECHR. Coad argues that because reputation is protected under Article 8 of the Convention it should hold equal weight with the Article 10 right to free expression[647]. (It has been maintained elsewhere that including reputation under umbrella of the Article 8 right to private

[645] Barendt (n.1) p. 210
[646] Coad, Jonathon "Reynolds and the Public Interest – What About the Truth and Human Rights?" (2007) 18 Entertainment Law Review 76
[647] Ibid p.78

and family life is a wilful misreading of the Convention[648], but the Court has ruled definitively upon the issue and it is their jurisprudence that is relevant[649]). Unlike the US where there is a constitutional hierarchy, neither right should be given preference and this means that to effectively artificially extend expression reducing reputational protection as *Reynolds* does is detrimental to one right and favourable to another, contravening the balance required by the convention. An extension of this argument would be that, at common law, both rights existed though in a less explicitly codified form, and the balance was adequately struck by giving reputation strong protection under libel but equally providing an absolute defence for any speech which could be proved true. Coad argues that the problem is exacerbated further by the ruling in *Loutchansky v Times Newspapers*[650] that there is no right to a declaration of falsity when a defendant pleads a Reynolds defence (now section 4 defence), which would go some way to vindicating damaged reputations[651].

A further argument against the public interest defence and the extension of free expression rights is that it essentially encourages error. It is oft repeated that there is no free speech interest in the proliferation of false information, and equally that a corollary to the right to impart information under free speech norms is the right to receive correct and true information. It has been pointed out that rather than being a wholly negative phenomenon, part of the point of libel law is to create a "chilling effect" upon false information[652]. Libel is designed to deter false information and reckless speech from doing occasionally irreparable harm to reputations.

There are naturally those that occupy the opposite side of the debate and clamour for an even more liberal approach to free speech akin to that in the American *Sullivan* ruling[653]. The chilling effect has been well documented in studies[654] and the arguments from democracy and free speech are well rehearsed. Examples like the case involving the perjurious Jonathan Aitken suing The Guardian for libel when only a last minute production of evidence saved the

[648] Robertson (n.18) p.67
[649] *Chauvy & Ors v France* (2005) 41 EHRR 29
[650] Loutchansky v Times Newspapers (No.6) [2002] E.M.L.R. 44
[651] Coad, J "The price of truth in the new law of libel" 153 New Law Journal 600, 600
[652] Mullis, A and Scott, A. "Something Rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation, Communications Law, (2009) Vol 14, No 6, pp173-181
[653] Rusbridger, Alan "The long, slow road to libel reform" The Guardian, Tuesday 10 May 2011 http://www.guardian.co.uk/law/2011/may/10/alan-rusbridger-libel-reform-speech (accessed 30th June 2016)
[654] Barendt, Eric and Laurence Lustgarten, Kenneth Norrie, Hugh Stephenson Libel and the Media: The Chilling Effect (Oxford: Oxford University Press 1997)

case for the newspaper demonstrate graphically the danger of not having a strong public interest defence. However the idea that importing the *Sullivan* ruling to English law would solve all the difficulties with free speech is somewhat unrealistic. For a start it would in all likelihood fall foul of the European Convention offering as it does little protection for the reputation of public figures, but beyond that there a number of drawbacks with the American regime at a more basic level.

As Schauer points out, echoing what was said at the beginning of this section, defamation law is a reflection of the assumptions and values of that society[655]. He posits the idea that the *Sullivan* decision "may have been more a product of the civil rights movement in the United States than of any development in first amendment theory and to that extent the decision may have been an 'accident'"[656]. Indeed there are those that consider that the *Sullivan* decision and the actual malice rule in particular should be reconsidered altogether[657]. The reputational cost in the US is too high offering virtually no protection to public figures. Anderson states that the Supreme Court has attempted to avoid facing this reality through false rationalisations that public figures are braced for greater scrutiny and besides have the platform to refute wrongful accusations without recourse to the courts[658].

There is a case which demonstrates the dangers of the actual malice rule and supports Anderson's argument also. In the case of *Ocala Star-Banner Co. v. Damron*[659] Leonard Damron the Mayor of Crystal River, Florida was involved in a mix up where the Ocala Star-Banner printed a story that he had been charged with perjury. It was in fact his brother James who had been charged. Damron lost an election held two weeks after the story and proceeded to sue the newspaper for libel. He won damages that were subsequently upheld by the Florida District Court. However the US Supreme Court ruled that despite the falsity of the story and the recklessness with which it was published Damron could not show the requisite standard of actual malice necessary for a public figure such as himself under the rule in *New York Times v Sullivan*. Damron's reputation was ruined and subsequently so was his political career, yet the US system offered him no avenue for recourse.

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[655] Schauer, "Social Foundations of the Law of Defamation: A Comparative Analysis". (1980) I Journal of Media Law and Practice 3, 3

[656] Ibid p.5

[657] Anderson (n.637) p.538

[658] ibid

[659] *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971)

The right to reputation, subordinate as it may be to speech in the US constitutional system, seems to have been jettisoned altogether in some circumstances in the pursuit of political and expressive liberty. Prof. Bezanson has arrived at a similar conclusion stating,

"The cumulative impact of the constitutional privileges has been subtly but radically to change the reputational character of the libel tort. The common law tort was premised on harm to reputation. Today the tort protects against injurious falsehood. Today the chief focus in litigation is on the responsibility of the publisher. The common law concept of reputation largely has been submerged by, if indeed it has not entirely succumbed to, the constitutional emphasis of falsity and fault. Plaintiffs whose reputational interest was most protected at common law face the greatest obstacles to recovery and succeed least often."[660]

This view is bolstered by the facts on the ground. In different studies in the US figures at 75% and 89% of all libel cases ended in a summary judgement[661]. This meant that in the vast majority the decision of the court became about whether the privilege was available to the defendant without any examination of the truth or falsity of the defamatory allegation. The focus of defamation law has moved away from reputation and into an investigation about whether the journalist, editor or publisher has been sufficiently responsible in their publication. That publication may or may not be true; that it seems is incidental.

When this is linked back to process under the Reynolds defence with the ten Nicholls factors for responsible publication, and the *Loutchansky* denial of a right to declaration of falsity it is not difficult to see the English law treading similar path, though admittedly with a much stricter standard of liability.

The broad conclusion is that each system has its strengths and weaknesses. There will be no perfect answer because the debate deals with two competing rights engaged in what is, in many circumstances, a zero sum game. To extend free speech and freedom of the press will necessarily preclude access for individuals to their full reputational rights. What can't be denied is the necessity of a free press in a democracy and as such a return to the pre-*Reynolds* regime, with the onerous restrictions on investigative reporting, the lack of breathing space for discourse and the real chilling effect upon free speech, should not be countenanced. Equally, the grass is not necessarily greener in other jurisdictions, admiration for the American

[660] Bezanson, Randall P. "The Libel Tort Today" 45 Wash. & Lee L. Rev. 535, 543
[661] Cook, Geoffrey C. "Reconciling the First. Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for. Libel Suits" (1989) 93 DICK. L. REV. 265, 268

commitment to free speech should not be allowed to obscure the fact that such a system has real drawbacks in protecting reputation and the inherent human dignity that it contains. The continued development of a strong and practically applicable responsible journalism/public interest defence combined with a mechanism for vindicating reputations when it is raised might be the best balance available.

8.3 Balancing Privacy and Speech

In Chapter 3 there was established the semblance of a workable and practicable legal definition of privacy; an examination and review of the case law in our three jurisdictions offered numerous instances where the notions and values of our conceived right to privacy have come into conflict with various competing interests - be they free speech considerations, governmental or security concerns, or other pressing societal claims. Following on from this, the key interest and concern of this thesis is in the instances where privacy and those values it represents, namely autonomy, dignity and civility, come into competition or direct opposition with the right to free expression particularly in relation to freedom of the press.

The key aspects to the definition of privacy in Chapter 3 were of course the subjective sense of an invasion of privacy tempered by the normative community standard of reasonableness related to the expectation of privacy and the perceived invasion. It is where these specific aspects come into play in considerations of the balancing of free press concerns with personal privacy that will be illuminated. This section offers the opportunity to test and probe the definition and measure its applicability to the specific balance of privacy and the free press to judge what its impact is in fact but also what it could be in an ideal situation. This serves not only as an analysis of this aspect of the thesis, but also as a foundation or touchstone for the concluding chapter.

8.3.1 Privacy in the Legal Contexts

It has been explored to some degree in earlier chapters, but it is worth reiterating the different approaches between the United States and the ECHR and latterly the English courts in weighing the competing interests of speech and privacy. Obviously this has a great impact upon the broad question of balancing rights but even more so in the specific instance of balancing that we examine here. The US has a constitutional protection of free speech which results in the basic situation where the common law right or interest of privacy (influenced by

parallel constitutional principles[662]) is, in crude terms, merely measured up to assess its impact or limitation upon this explicit constitutional imperative of free speech. Of course the ECHR takes the view, open to some criticism, that the values of speech and privacy happen to be equal, and thus clashes of Article 8 and Article 10 must be approached in this light[663].

The difference is even more greatly magnified if one considers the reverence in which the First Amendment's free speech clause is held and the view prevalent among many American jurists that it is indeed a kind of father or fountain of the other rights protected constitutionally. The reason why the difference in approach is particularly significant for our discussion here is that our definition of privacy is predicated upon the value that we as a society or community places upon those principles and functions which we identified as the unifying and coherent binds of privacy. When we limit free speech in favour of privacy, or alternately deny privacy claims for freedom of expression, we are applying a relative value to the normative idea of privacy that our society or community has recognized. In many ways the approach of the US is much simpler, though that is not to say better or more fair. By having one dominant right or value in the weighing process, and one with a great deal of understanding and constitutional definition behind, it is a lot easier to gauge the merits of the privacy interest by comparison and indeed by competition. The European approach of equal weighing means that the comparison is from a much less fixed position, and thus much less simple to comprehend at a glance.

This recognition leads us to an absolutely crucial point about the relationship between privacy and free speech in legal contexts. It is imperative that we have a clear understanding of the interaction between the value of privacy and its limitations. The legal systems and jurisprudence have what was described in Chapter 3 as 'containment anxiety', that is the concern that our society and by extension its legal sphere should protect the correct amount of privacy but no more. This elusive balance comes at the point that the functions which privacy protects, and the underlying values, are given all due consideration but simultaneously are not allowed to stifle either the natural social fabric of interaction or the democratic necessity of free speech. The subjective or personal judgment of our privacy, that point at which an individual considers another party has breached or transgressed the barrier he has erected to

[662] See extension of Fourth Amendment principles in to privacy, *Katz v. United States*, 389 U.S. 347 (1967); or around autonomy in the 14th Amendment, *Roe v. Wade*, 410 U.S. 113 (1973)
[663] See Chapter 9 (below) for further discussion of this point.

protect and control access to personal information, needs to be tempered or limited in order to achieve this. As we saw in Chapter 3 the chief way that this subjective consideration is kept in check is by the imposition of a more objective standard based on the collective concept of community norms and of privacy expectations and rules of ability. However, the second arm of action invoked by the containment anxiety is the limitation of privacy concerns by other competing rights. This was briefly alluded to in Chapter 3 and clearly, in the immediate instance, the competing right is freedom of expression and of the press. The important point, however, is that although in theory the two containment checks should be separate considerations they are in fact not.

Ideally, the process would involve the establishment of the legal right through the subjective and normative elements, then once a right to privacy has been prima facie established, that right can be objectively weighed against speech and press rights. However, this is of course not the way it works in practice. When the courts and our legal system are making judgments upon the normative value to give privacy very often one of the most prominent considerations is already, both consciously and subconsciously, the status and value of competing rights, most notably free speech. The concepts inevitably bleed into each other so that there is an inherent consideration of competing rights in the objective normative check upon privacy considerations. Indeed, it may very well be the case that even on a subjective personal level people will temper their own primary expectations of privacy based on implicit understandings of other competing interests such as speech[664].

The crux or essence of those free speech rights and the primary focus of this section is of course what is commonly termed 'the public interest'; the public interest in the ability and freedom of the press and others to utilise free speech even where that interferes with an established and recognised right to privacy, or vice versa. So it is crucial that there is an explicit understanding of the three way interaction of subjective ideas of privacy, objective limitations on that privacy, and then the weighing of competing interests, otherwise there can be confusion relating to how much the public interest concerns are prevalent in each of the above three formulations. This is particularly the case where there is an ad hoc weighing of 'equal' rights considerations, because the rights simultaneously represent their own values while impacting

[664] This is a difficult point to evidence empirically, however, common anecdotal evidence shows that people make decisions about their 'sphere' of privacy based not just on consideration of themselves but upon a perception of society's expectations, and consideration of others rights and interests.

the recognition of the countervailing right. In theory, the US system should be simpler with the theoretical principle established that the onus or burden is upon showing that speech is justified in being limited by privacy concerns. However, in practice, the US courts still have to establish the parameters of free speech in a given case or set of circumstances and this process is sensitive to the fact that an established common law right to privacy already exists. As such, you have courts and academics debating the meaning and substance of 'the public interest' and newsworthiness every bit as much as their European counterparts. It is our task thus to identify and examine briefly some of the central arguments about what constitutes these terms.

There are two preliminary issues that relate to the public interest in speech but fall outside the central and common considerations. The first is the issue of prior restraint (or pre-publication injunctions as they are known in England). The issue is not nearly as prominent in the United States when the very concept of prior restraint is taboo and has been significantly tempered by the Supreme Court[665]. Any party wishing to restrain or block speech particularly of the press in the US is under the heaviest burden to prove the absolute necessity of the action to meet an urgent need. Broadly speaking this will not occur in cases of personal privacy. In England the regime is somewhat more permissive despite a historical and theoretical commitment to the rule against prior restraints[666]. The Duke of Wellington's maxim of, 'publish and be damned', is much more often applied to libel cases where winning the case is deemed vindication and a restoration of reputation. Privacy is more complicated given that one cannot restore privacy once it has been breached. The contentious cases of anonymised injunctions as in *Terry*[667] or *PJS*[668], and so called super injunctions have brought the issue to the fore[669]. In theory one should have a higher burden to execute in order to achieve a pre-publication injunction and indeed the Human Rights Act Section 12 gives particular consideration to freedom of the press in the weighing of rights. The case law and judicial practice requires that this be a 'likelihood' of success at trial and not merely a 'possibility' for potential for success, and the House of Lords in *Cream Holdings Ltd v Banerjee* holding that "likely" meant "more

[665] *'The Pentagon Papers' New York Times Co. v. United States* (n.499)
[666] Robertson (n.18) p.88
[667] *Terry* (n.212)
[668] *PJS* (n.329)
[669] It is worth noting that there are very few such injunctions in the UK (in 2015 three applications and two awards) yet each receives a great deal of media attention see for details https://inforrm.wordpress.com/2016/03/13/news-privacy-injunction-statistics-for-2015/ (accessed 30th June 2016)

likely than not", rather than just a real prospect of success [670]. Ultimately as we can see from *Terry* or in *A v B plc*[671] the courts have rejected less pressing desires for privacy where they would restrain the press. The important point for our purposes is that despite the differing standard needed to achieve a pre-publication injunction and the current state of flux in the law, the fundamental judgment over the utility of press freedom, and the strength of the public interest claim in speech, should be unaffected given they will be only one half of the courts' consideration of the likelihood of success at trial.

The second issue is the somewhat complex and nuanced role that the intrusion element plays in considerations of freedom of the press. It is clear that the vast majority of interactions between privacy interests and free press claims will occur in the realm of publication or dissemination of private facts, but as the phone hacking scandal and other recent cases[672] have shown this is not the entire picture. In the United States a number of prominent cases have concerned whether there is a newsgathering right that is constitutive of the broader free press right. The courts in *Shoen v. Shoen*[673] and *Saxbe v. Washington Post Co*.[674] ultimately rejected this concept that intrusion or access to information could be included as part of free speech. These cases concerned access to officially held information, but the principle could easily extend to personal information if the press argued the invasion was in the public interest.

Indeed even in the absence of a constitutionally, or even legally, protected right to pry or intrude the fact is that this is exactly what the press do, hundreds of times every day. By the established definition of privacy, the press commit what many would subjectively consider to be violations and invasions of privacy every time they gather information or knowledge about a subject without permission. Crucially though, most people do not object, at least in a legal capacity, unless/until the information gathered is disseminated to a wider audience. This is in essence an indication that our normative community standard tolerates these invasions on the understanding that they are a necessary and natural process of our social interaction and fabric particularly regarding the role of the press. It takes something as transgressive and objectionable as phone hacking, which is in itself a crime, before suits for invasion of privacy are brought in instances of journalistic prying.

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[670] *Cream Holdings Ltd v Banerjee* [2004] UKHL 44
[671] *A v B plc (Flitcroft v MGN Ltd).* Reference [2002] EWCA Civ 337
[672] *Reklos* (n.191)
[673] *Shoen* (n.443)
[674] *Saxbe* (n.443)

However, some cases have indicated the difficulty and confusion that is potentially present should people begin to legally challenge the instances of intrusion that, while subjectively might be felt to be privacy violations, are generally accepted because of the higher reasonableness threshold imposed by the community. *Reklos*, discussed in Chapter 3, is an example. Although not concerning a press intrusion one can easily see the potential ramifications if *Reklos* is taken at its widest reading; that not only is the taking of a photograph a prima facie subjective invasion of privacy but that it also meets the required objective standard of unreasonableness that transgresses the community standard of decency - the implications for press freedom are enormous. One only has to open a newspaper to see how such invasions of privacy are necessary to news gathering, and though cases like *von Hannover*[675] and *Murray*[676] show that photographs are a special case, reaffirmed recently in *Weller*[677], the broader implications for commonly accepted intrusions are plain to see. It remains to be seen what the full impact of *Reklos* will be but the implications for press freedom in terms of collecting news are not to be underestimated. There could be a whole new frontier requiring public interest justifications for common journalistic practices which share the territory of intrusion as a privacy concern. However, for now the chief concern is the public interest justification related to publication of private facts or information.

8.3.2 Publicity and the Public Interest

The importance of free speech is much heralded and the arguments for the role of the press in the democratic process are well rehearsed[678]. The contention that a free press, considered in its widest possible meaning to include the opinions and statements of individual citizens engaged in a two way discussion of issues through various media, is crucial if a democracy and indeed liberal society is to correctly function can broadly be accepted at this stage. Side-stepping a repetition of the Chapter 5 & 6 debate about the various and relative merits of individual theories, the twin roles of the press in a modern democracy are to firstly act as a check or watchdog upon power, primarily governmental power but increasingly on other concentrations such as lobbyists or corporations, and secondly to keep the citizenry

[675] *Von Hannover* (n.167)
[676] *Murray v Express Newspapers Plc* [2008] EWCA Civ 446
[677] *Weller & Ors v Associated Newspapers* Ltd [2015] EWCA Civ 1176
[678] See generally Meiklejohn (n.169)

informed in order that they can make democratic choices not merely about politics in the formal sphere but about wider societal issues and judgments about morality, culture and the arts.

It is through the facilitation of a broad and open discussion that a society remains vibrant and informed in the sustenance of its own democratic nature. Very seldom does press coverage of explicitly political or clearly governmental issues or stories result in objections, especially not on the privacy basis with which we are concerned. Rather it is when newspapers or associated media discharge their broader social role as commentators and chroniclers of society and community that a cross over into the spheres of privacy occurs to spark objections and ultimately debates over the extent and constitution of the public interest. Most of the stories that engage privacy objections relate to the personal details or information of an individual. However, in a cold and cynical market based approach the fact is that in order for there to be sufficient financial incentive for publication and dissemination, in the vast majority of cases the public, or certainly significant sections of it, have an interest in the information. Obviously, however, our societal norms are not simply dictated by supply and demand market forces and it wouldn't be a discussion of the press and privacy without a reiteration of the maxim "What interests the public is not necessarily in the public interest". In fact, the public interest consideration lies somewhere between these poles of the purely political and the patently prurient.

In the US it has been shown that they use a definitional approach in order to give relative certainty to the free press rights. However, even this configuration is replete with difficulties as the public figure standard has extended beyond public office holders and candidates. Post speaks of this private-public dichotomy but shows that the lines have become blurred by the inclusion of 'voluntary' public figures such as celebrities[679]. It would be a mistake to suggest that merely by dint of becoming a public figure one gives up all rights or claims over private information, rather it is still the case that a legitimate interest must be forwarded to warrant a transgression of privacy and the definitional factor of celebrity is but one (often decisive) consideration. This is reflected in the more fluid or ad hoc approach of the ECHR and the English courts. The public status of a person will be a prominent consideration when evaluating the social or democratic value of a press story that violates their established right to privacy.

[679] Post (n.240) p.999

Even under the US definitional approach there are often compelling reasons to allow press coverage and publication of details and information about undoubtedly private figures[680].

Gouldner expounded a conception of news as a 'public and public generating social phenomenon'[681]. This is reflective of the idea that news and the public interest are self-perpetuating; that even where private citizens are involved, if the news is interested in them, then by definition the event and those involved become public, at least for the purpose of a public interest and for the duration of that story. This however is slightly too simple a formulation on the basis that it ignores the community's continuing normative valuing of privacy that cannot simply be overridden because someone or some event becomes public. If we can accept that even with a US definitional divide there are significant issues to be weighed up to decide upon the legitimacy of the public interest, regardless of the public nature of the figure involved, then we can leave it to the side and concentrate solely upon the factors that allow a justification of the newsworthiness or public interest of a violation of privacy through publication.

One approach which attempts to take consideration of all of the various competing factors and influence is the *California approach*[682]. Named because it reflects the approach formulated by the California Supreme Court, this idea asserts that three broad considerations must be taken into account when attempting to measure or judge the credence to be given to a claim of public interest or newsworthiness. These are the overall social value of the story, the extent and severity of the intrusion into private spheres and the extent to which the subject of the invasion has voluntarily assumed a position of public notoriety. This normative approach could be presented as a summary for the articulation of competing factors espoused by nearly all courts when assessing and weighing public interest considerations in privacy cases.

The public figure aspect arises in many if not most publication/privacy cases by way of the market forces, previously mentioned. The newspapers are aware that celebrity sells, and pander to this. The courts are also fully aware of the coy game that celebrities and other public figures, including politicians play with their fame, prepared to use it to further their careers and opportunities when it suits them yet wishing to turn off the tap of exposure when it does not.

[680] Examine the countless news stories published each day based upon ordinary members of the public.
[681] Gouldner, Alvin W, *The Dialectic of Ideology and Technology: The Origins, Grammar, and Future of Ideology* (Seabury Press, 1976) p. 106
[682] Woito, Linda N. & McNulty, Patrick, 'The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?', 64 Iowa L. Rev. 185

We have seen, however, in a number of cases that the definition of public figure can be the subject of debate and there are certainly grey areas. *Sidis*[683] the American case was one such example, it was clear in this instance that for some time the plaintiff had not only failed to court publicity but had actively shunned it. Yet the US court took the view that, once a person becomes a public figure, a residual public interest in their fate and activities remains. This was partly predicated on the idea that there was a legitimate social interest in understanding what had become of this child prodigy. The ECtHR was more sympathetic in the first *von Hannover*[684] case recognising that Princess Caroline was not in fact a voluntary public figure, but one by birth and that she did not court publicity, this was certainly one of the factors that led to her success in the verdict.

One further aspect of the *Sidis* case was the court's articulation of the principle of decency. In Chapter 3 the role of decency in the measure of transgressions and the community standard of privacy was explored. This idea is prominent in the weighing of the public interest of a story by the courts also. Decency as a concept highlights an important distinction in the roles of the three strands of the California approach. When weighing the rights and the public interest the social value speaks essentially to the idea of the 'worthiness' of the story/article being published or disseminated, whereas the decency stands essentially to measure whether even in the light of an ostensible public interest the invasion and thus the subsequent harm is worth the transgression. The role of the public figure consideration in effect straddles the two because not only is there very often a greater degree of interest, both legitimate and prurient, in the lives and activities of the person but they are expected to have a high expectation or threshold for privacy violations.

In terms of judging the acceptability of invasions of privacy and the standard of decency, in the face of a public interest press story there are free speech advocates who would argue that what should be protected are only the most private of facts. Emerson argues that rather than concentrate on the value of the speech or privacy transgression by the press the focus should be on defining and understanding the scope of what privacy considerations should still be protected when the countervailing consideration is free speech[685]. He suggests a three layered approach. Firstly that only the emphasis should be placed upon intimacy and thus on

[683] *Sidis* (n.222)
[684] *Von Hannover* (n.167)
[685] Emerson, T 'The Right of Privacy and Freedom of the Press', 14 Harv.C.R.- C.L.L.Rev. 329, (1979)

the most private and personal elements of a person's life; secondly, any details which have become subject to administrative or judicial proceedings should be open for disclosure given the relationship to the democratic function; and thirdly, once more the level to which the subject has injected themselves in the public eye. This narrow view of privacy appears too restrictive. It does not take into adequate consideration the important factors that were so essential to the formulation of the privacy right in Chapter 3. Of course the legal recognition of the right is dependent upon the community standard of reasonableness, and in theory if that standard extended only as far as the most intimate facts as described by Emerson then that would be the standard. However, I would contend that most societies and communities have a higher value of privacy and would extend the normative conception in a wider circle around the right of privacy. It has been pointed out, in an argument that reiterates the central premise of Chapter 3 i.e. (the relativity of privacy), that the labels "private facts" and "public facts" are essentially meaningless as they fail to take into consideration the normative nature of our consideration of privacy[686]. The move toward a descriptive conception which Emerson's suggestion would entail is counterproductive to a full understanding and appreciation of the debate.

Turning to the weight placed upon the social value of a given publication, it is this issue which really defines and sits at the centre of discussions of the public interest. As mentioned above, the contentious cases usually don't involve the clear cut political issues but rather are present in the grey area near to the fringes of what might commonly be understood to be in the 'public interest', or useful to the democratic process, in its broadest terms. These cases by and large are concerned with stories about celebrities and public figures and the way that they conduct their lives. Even the most ardent free speech advocate would not argue that the nocturnal habits of Naomi Campbell or the romantic liaisons of John Terry will have a profound impact upon the democratic or social direction of the country. So the question then arises as to how far the idea of the public interest extents into broad social commentary. Free speech advocates would argue that it does unless there is a compelling reason that it does not, and this may be the prevailing view in the US but if we are taking the approach that equal weight is to be given to privacy (as to speech) then there is an onus upon us to identify the extent of the weight given to this "grey area" especially related to celebrity lives.

[686] Paton-Simpson, Elizabeth 'Private Circles and Public Squares: Invasion of Privacy by the Publication of"Private Facts"' (1998) 61 MLR 318 p.321

Gouldner has described the public as "a sphere in which one is accountable" meaning "that one can be constrained to reveal what one has done and why one has done it"[687]. This is essentially one of the central arguments regarding the coverage and newsworthiness of celebrity lives. Paul Wragg[688] gives an excellent breakdown of the various arguments for the public interest in celebrity lives using John Terry[689] and Max Mosley as examples[690]. Based around the idea of the press's "right to criticise", the media and newspapers argue that the discussion of, and debate about, the lives of public figures offers a moral critique of society giving it the requisite public interest qualification. Wragg lists a descending cavalcade of celebrity behaviour that can justify the right to comment or criticise ranging from notions of misleading the public, through false assertions of character, to general immorality symbolising a general moral malaise.

Wragg notes one of the chief ironies is the judicial intertwining of the 'freedom to criticise' doctrine with the 'role model' doctrine, given the two entirely different characters that the press project onto their readership simultaneously. The criticiser in the reading audience would presumably be a moral arbiter judging the subject of the story, while the person searching for a role model in a modern footballer or pop star would be a wide-eyed innocent. One suspects that in this particular area the press, and the tabloids in particular are searching for a public interest fig leaf to hide their naked commercialism, a fact alluded to by Lord Woolf in his aforementioned spurious logic about the public interest in selling lots of newspapers on the back of celebrity tattle in order that a robust profitable newspaper industry remains to occasionally do the actual work of a free press and cover the real public interest[691].

There are of course a number of arguments about the social utility of gossip[692]. The social aspect of gossip is that it enforces social mores and allows a fuller development of the person through criticism and supervision. This can be extended to a wider community or societal level by applying the principle to the press and its role as social commentator a fact that has been judicially noted[693]. The irony here is that the more our private behaviour might

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[687] Gouldner, Alvin W, *The Dialectic of Ideology and Technology: The Origins, Grammar, and Future of Ideology* (Seabury Press, 1976) p. 102
[688] Paul Wragg, 'Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry', Journal of Media Law, 2(2), 295
[689] *Terry* (n.212)
[690] *Mosley* (n.272)
[691] *A v B* [2002] EWCA Civ 337
[692] Baker (n.245) p.260
[693] Zimmerman (n.484) p332

contradict social mores the more likely we are to want to protect it against exposure, but whether this subjective desire for increased privacy is reflected in the community norms is more doubtful. Whatever the merits of this argument about gossip and the public value of criticism the tide seems to be moving against it in Strasbourg and now by extension in England. The *von Hannover* decision was swayed some deal by what was considered to be a low grade of public interest in the material published. The European Court has consistently made clear that it believes in a hierarchy of speech with political expression at the top[694]. The broad freedom to criticise arguments of the UK tabloids would likely hold little water in the wake of these recent decisions.

It has been pointed out that despite this movement of the judicial tide including in England there has been little change in the press practices, and no deluge of privacy claims. This could be for a number of reasons but one could be a continuing broad respect for the freedom of the press to set the news agenda as a compromise between the base desires of the readership and nobler calling of genuine public interest coverage. American judicial theorists talk about the courts giving the press "breathing space"[695] to go about their business and this is reflected in English courts' reluctance to second guess editors. As Justice Burger said "editing is what editors are for; and editing is selection and choice of material"[696].

8.4 Conclusion

The conclusion that can be drawn is the difficulty inherent in the balancing of all the considerations that surround clashes of freedom of speech and the press and privacy. Part of the difficulty is the uncertainty surrounding the idea of what constitutes the public interest in press coverage of public lives, the key territory for these cases. The discussion in Chapter 3 gives a better idea of what people and communities expect and desire in privacy rights but that is only one half of the argument. The other is in the further balance briefly examined here. Ultimately the argument about the balancing of privacy and speech comes down to the relative weight that a society gives to the two rights individually and in comparison to each other. Which leads us to our final chapter.

[694] See for example *Vogt v. Germany* (1996) 21 EHRR 205, (17851/91)
[695] Emerson, T 'The Right of Privacy and Freedom of the Press', 14 Harv.C.R.- C.L.L.Rev. 329, (1979) p344
[696] Quoted in Bezanson, R P "The Right to Privacy Revisited: Privacy, News and Social Change 1890-1990", (1992) 80 California Law Review, 1133 p.1162

Chapter 9. Conclusion: Locating the Public Interest Between Privacy and Freedom of the Press

9.1 Introduction

The purpose of this thesis, as set out in the title, is to locate and define the essence of the public interest in clashes between freedom of the press and the right to privacy. We have seen that there is a specific 'public interest' around speech justifications, and equally there is a 'public interest' in protecting privacy. But here we must define the public interest where these two clash. There is, of course, no one single location for the public interest as the changing factual circumstances will render it a fluid or mobile concept. Rather, the key is to produce a broadly understood, but relatively finely defined, set of tools that can be used to find the public interest in any given set of circumstances. The previous eight chapters have been an attempt to lay out, define and critically assess what are the most crucial aspects of this debate. This analysis can never be exhaustive but it is hoped that the most salient aspects have been distilled in the space available. What follows here is an attempt to bind the strands together to produce a robust and critically sound concept of the public interest that can be applied to press/privacy disputes across the Western legal systems from which its understanding is drawn.

In plainest terms, the public is a collection of individuals; each of those individuals has a set of interests applicable to them as autonomous beings defined by personal circumstances and generic needs. Equally, when taken together, the collective of individuals are imbued with a set of community interests distinct but not always separate from their atomistic/individual interests. These community interests might be seen as an aggregation of individuals across society or divided into smaller sections of society[697]. And most crucially, the community interests may run parallel, perpendicular or in direct opposition to those held by any particular individual. When there are clashes, or when both sets of interests cannot be accommodated, there will need to be a trade-off or balance struck to maximise the benefit to the public both as individuals and a collective – this will involve an inventory and evaluation of all the competing interests to correctly understand the location of this balance. And this will be the location of

[697] It is of course difficult to speak about a singular homogeneous 'public', 'people' or 'community' any more (if it ever was possible). See the discussion in Chapter 2 about moral standards within smaller communities as advocated by Lawrence McNamara. The 'man on the Clapham Omnibus' survives as an idea, but a coherent aggregation of an entire society's views is, in reality, a fallacy.

the ‘public interest’. The content of this thesis up until this point has been an attempt to evaluate these interests in cases of speech vs privacy, while simultaneously elucidating the nature of the balance to be struck itself. This final chapter will lay out the conclusions produced, not simply in and of themselves, but as they relate to each other in the overall context of the thesis.

In Chapters 2 and 3 the essential interests in protecting reputation and privacy (as the two foremost Article 8 rights to clash with press freedom) were drawn out. Reputation (in Chapter 2) is understood as the right to let individuals build and promote a sense of self to the outside world without letting false information or accusations, which would reduce their standing in the eyes of others, be published unfettered and without consequence. The conception of reputation and dignity expressed by scholars such as Robert Post gives an account for the value of the reputational right both to the individual, as an expression of autonomy and a bar against social humiliation, and a value to society in allowing access to a collective process of socialisation[698]. This is expanded into the concept of the "rules of civility"– or as McNamara identified, a set of "moral taxonomies"[699]. These combined ideas of reputation as an aspect of individual autonomy and dignity protected within the context of moral standards, and the formation of individual personalities and relationships within a community, provide both the individual and the community interests in protecting the reputational right.

These ideas are echoed in the sister right of privacy (narrowly defined) in Article 8. As outlined in Chapter 3, this right is distinct from the broader “right to private and family life” and deals with the specific action of accessing and/or disseminating information about an individual. Similar to defamation, “the sociological tort”, privacy with its social foundations has parallel roles for individuals and society[700]. The exposition of the essence of privacy through the idea that the control of information and data, by an individual about themselves and their lives, is the "means by which an individual’s moral title to his existence is conferred"[701]. Again, similar to reputation, this right over private information is both central to an individual's sense of autonomy and dignity and also contributory to a community or societal set of norms around the formation of relationships – the "territories of the self"[702]. Personal

[698] Post (n.46)
[699] McNamara, (n.2) p 27
[700] Post (n.46)
[701] Reiman (n.262) p.31
[702] ibid

information, being ubiquitous, is more difficult to define as "private" (as contrasted with "defamatory") and thus an objective societal standard must be identified in order to give the right manageable legal meaning. This need to embed the right in a broader social context combined with a "containment anxiety" around subjective senses of privacy, have led to an offensiveness threshold applied to perceived transgressors of privacy[703].

The idea of an offensiveness threshold is not a fixed one. And by definition a threshold which is an instantiation of community norms will be subject to the changes or evolution of those norms. We can see every day how technological advances impact our conceptions of privacy (and free speech). The "social network theory" of privacy is an extension of the ideas around relationship formation, community codes of civility, and individual autonomy that provide the rationale for a privacy right[704]. However, technological change is impacting upon the very definition of a social network. And any understanding of the public interest will have to take such factors into consideration. If technology is altering individual – and therefore, by definition, collective – understandings of privacy then the courts will have to factor this into their consideration of an offensiveness threshold, or a "reasonable expectation of privacy". Equally, the ability of technology to disseminate information so quickly will impact not only on judges' ideas of what is in the "public interest" or the public sphere; it will also impact upon the courts' practical ability to give protection to privacy as demonstrated by the numerous injunctions and super-injunctions circumvented and undermined by social media.

In Chapter 5 and 6 the underlying tension between the liberal foundations of our legal/political system and the increasing recognition of the pressures of community needs was examined, with particular reference to the cornerstone of that liberal tradition – freedom of speech. The liberal view of the autonomous individual free to speak without censorship is reflective of a political philosophy centred on the individual and upon negative freedoms of non-interference. But this over-simplified view is belied by the increasing prominence of the communitarian movement, disparate as it may be, in the latter half of the 20th century. The development of rights rationales from the point of view of the collective also dovetails with views of free speech which, espoused by Post[705] and Meiklejohn[706], focus on the broader

[703] Austin (n.281) p.165
[704] Strahilevitz (n325) pp. 919-988
[705] Post (n.366) p.483
[706] Meiklejohn (n.169)

societal benefits of free speech in its impact upon public discourse and political participation. This movement away from rationales of autonomy for autonomy's sake in speech are both reflective and indicative of a politico-philosophical evolution away from the atomistic intrinsic view of rights and towards a consequentialist view. This is further complicated by the fact that each right has both a liberal and communitarian justification and both liberal and communitarian arguments for restriction, thus the 'matrix of interests'. The development and evolution of positive and negative rights and Hohfeldian schemes of relative interests render binary or simplistic notions of rights impotent in trying to settle real-life disputes such as those between privacy and speech. The conundrum of bridging the need for individual autonomy and the need for community value, attempted by Dworkin[707], Hart[708] and others, leads into the speech debate on justifications of free speech and arguments for privacy.

The speech debate is illuminated, if not definitively solved, by an examination of the free press right: A subsidiary right? A stand-alone right? Or a right higher on the hierarchy than "mere speech"? When viewed through the prism of the press's role in a functioning democracy the speech right becomes illuminated by its need to justify itself on its own terms. The value of autonomy is not enough on its own to separate and distinguish speech from every other mould or expression of autonomy. The argument that the press have a particular right, or particular protection, based upon their status as journalists quickly crumbles under scrutiny. Rather a focus upon the purpose of journalism, the quality and type of information expressed, and the contribution it makes to democracy provides the robust defence that the free speech/press right needs[709]. Viewing the media as a medium for information useful to democratic deliberation – defined widely – provides the key to understanding a press right, and in turn the wider speech right. Rapid technological change and its impact upon traditional notions of speech, journalism, and the media can be better comprehended, if not fully understood, when the value of speech comes through the substance of the speech and not the status of the medium.

Chapter 7 attempts to provide the final piece of the broader legal and political context for a clash of rights – speech and privacy. The idea of balancing rights is anathema to those

[707] Dworkin (n.349)
[708] Hart, H.L.A. 'Between Utility and Rights' (1979) 79 Colum Law Rev 828
[709] This is a view bolstered, as we have seen, by ECHR case law which has positioned media rights as derivative of the public interest i.e. the need for information to be made available to people.

who take a maximalist approach like Nozick[710] or see rights as trumps like Dworkin[711]. But as argued in earlier chapters even the specificationism approach to rights involves a de facto balancing at an earlier stage. Short of a state of complete anarchy a political and legal system will engage in balancing of some sort. This is reflected by all Western legal systems, which by various names and differing processes have adopted the process to balance the individual rights of citizens against each other and against the community need. Critics from either side; be they those who argue that balancing undermines rights; or that rights undermine democracy, have misunderstood that Western liberal democracies are built upon a compromise – or balance – between the individual and the collective. The legal sphere is but another theatre for this tension and balancing is both the most practically useful and normatively justifiable mould to make these choices.

If we can agree on the fundamental mechanics of balancing, then this provides a way forward. There must be an acceptance that all things are comparable and that the various values inherent in individual rights and public/community needs are commensurable. While the weighing of the two can never be an exact science the fact is that our judicial system is based upon judges making normative decisions based on values. The theories of weak incommensurability and weak commensurability give some indication of how these balances can be made. The setting out of practical factors to consider, the weight and justifications for rights and other values, and a robust and considered understanding of why we protect those rights and values can be fed into the balancing mechanism to approach the location of the "public interest." Chapter 8 is an exploration and an account of how this idea has been approached in actuality.

9.2 Common Themes

There are a series of common themes and issues that have run through the body of this thesis linking the chapters together. While the chapters have been laid out conventionally, exploring each broad theme consecutively as summarised immediately above this in chapter, in concluding I will try and draw together and elucidate the vertical strands that have appeared

[710] Nozick (n.336)
[711] Dworkin (n.342)

across the chapters and use them to draw out and distil the conclusion and findings of this thesis. I will endeavour to use the examples and authorities cited in the body of the thesis to illuminate the broader themes and tie together the thrust of my conclusions. As mentioned in the opening paragraph of this chapter the central focus is the location of the public interest in privacy and speech disputes – and to expound the idea of the "public interest" as the collective interests of both individuals and the community. This tension and this symbiosis, existing simultaneously, provides the essence of both the problem and the solution.

The first fundamental aspect to note is the role of the individual. As mentioned above the "public" is not simply the singular, collective, or aggregate interest of the community, but rather how each individual is protected as a single entity among all the other single entities. This atomistic view has been widely criticised in communitarian circles, as explored in Chapter 5. However, while we must take these ideas into our wider consideration they do not change the plain and simple fact that the individual is the cornerstone of the liberal political theory which underpins our legal and political frameworks. On a fairly basic level it is clear that individuals exist; each of us has our own thoughts, feelings, conscience and autonomy over our actions. The Hobbesian state of nature[712] and Locke's social contract theory[713], which do so much to provide the basis of our understanding of law and political power are based on the fundamental building block of the individual. Natural rights theory and the revival of political liberalism through Rawls[714] and Dworkin[715] elucidate this idea further. Perhaps most fundamental is the role that the individual plays in liberal rights regimes in Western democracies. As outlined in Chapter 5, historical factors from the American Revolution's impact on the US Bill of Rights to the Second World War and Cold War impact upon post-war rights regimes such as the ECHR, have resulted in the situation where the protection of individual rights is fundamental. Regardless of the broader argument around balancing of social or community interests, or societal benefits reaped by rights protection; at a very basic level we understand that rights as first and foremost held by the individual - held by the individual against the state and against others who might try to deny, breach, or usurp them. The idea that we surrender some of our freedom in return for protection from the state is so commonplace in

[712] Hobbes, Thomas, *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*, ed. by Ian Shapiro (Yale University Press; 2010)
[713] Locke, John *The Two Treatises of Civil Government* (Hollis ed.) [1689]
[714] Rawls (n.340)
[715] Dworkin (n.341)

liberal democratic theory as to be almost too redundant to mention; but this transaction is so fundamental to the balance which this thesis is addressing that we must explicitly bear it in mind. Likewise, the idea that the very purpose of enshrined rights is to protect against the overreach of the balancing process, and to ensure the surrender of our individual sovereignty or autonomy (which we never actually get to explicitly consent to) is limited to that which is strictly necessary.

The invocation of the second Kantian categorical imperative[716] in the exercise of our autonomy, and the Millian principle of 'doing only that which would not cause harm to another'[717], will provide illumination as we look at the nature of balancing, but they are fundamentally based upon the autonomy of the individual - likewise, Nozick's sense of "residual autonomy"[718], the notion that we retain the freedom to act in any way that is not explicitly surrendered. Even the rights theories which are predicated on a collective good or advantage accept that beyond this there remains a residual autonomy. This is played out in the Anglo-Saxon legal tradition which says 'everything is allowed that is not forbidden', and to a lesser (and different) extent in the civil law principle of "nulla poena sine lege".

Given this fundamental and central role of the individual in liberal legal systems and liberal democracies, and given its necessity in underpinning rights regimes, it is crucially important that we retain it as a principle in the forefront of our minds as we examined the balancing of the rights of the press and of privacy. The weight given by our systems and our society to autonomous expression and the broad residual autonomy inherent in each individual should not be dismissed lightly nor discounted quickly.

If we look at the example of speech rights it is clear how much the liberal sense of the individual right underpins the broader speech right. It was explored extensively in Chapter 5 and Chapter 6, firstly in the interrelationship between liberal theories of rights and the theories underpinning free speech, and then the conversion of a broader right to expression into an applicable and tangible free press right. We saw how numerous theories of speech were based upon the "intrinsic" or "deontological" essence of free speech. That as an individual each of us has a basic autonomous right to express ourselves through speech; be it for self-expression,

[716] Kant, Immanuel; translated by James W. Ellington [1785] (1993). *Grounding for the Metaphysics of Morals* 3rd ed. Hackett.
[717] Mill, John Stuart "On Liberty"
[718] Nozick (n.336) p.32-33

personal development, artistic purpose, spurious gossip, or for higher ends such as political discussion or academic pontification. Of course this thesis concluded in both Chapter 5 and Chapter 6 that justification for the more robust protection of certain forms of speech was located in the consequentialist or instrumental theories. However, this does not render the individual, autonomy based theories without any value or merit.

Theorists such as Post, Barendt and Baker to differing extents highlighted the role of autonomy in speech theory. Baker of course outlined his idea of justifications and formal autonomy:

"…"legal legitimacy—and respect for autonomy—requires both constitutional democracy and also broad speech freedom that encompasses non-political speech as a necessary limit on majoritarian or popular rule… In the formal conception, autonomy consists of a person's authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others' similar authority or rights."

"Justification" as the idea that governments making majoritarian decisions over the objections of minorities and individuals can only be justified in doing so by respecting a formal autonomy to expression by each individual's is a very valid one. However, it is almost as if Baker is dipping one toe into the waters of a consequentialist theory. What is more interesting is the idea of a "formal autonomy" which exists on its own merits as a building block of a liberal society i.e. the idea of a "residual liberty" that is not surrendered to the state and allows self-expression or, as Raz describes it in Chapter 5, "personal identification"[719]. Post, of course co-opts the "individual right" of speech into one of democratic deliberation, which as described in Chapter 5 and Chapter 6 is in actuality a contribution to a public good while also being an individual expression of a right.

The most important elements of this discussion of the idea of an individual atomistic value in the free speech right are twofold. The first is that the "residual liberty" of speech and the notion of self-expression or personal identification, comes with a difficulty in distinguishing this speech right from a broader right to autonomy. This leads to the second

[719] Raz (n.356) p.303

point, which Baker has explored in some depth[720], which is that the autonomy principle can only extend in as far as it causes no harm to another, or impinges on the rights of another. This cornerstone of Kant and Mill mentioned above, remains extremely relevant to rights theory and rights disputes to this day. The "harm principle" is an unavoidable and stark presence in press vs. privacy controversies because the perceived harm caused to those whose privacy has been invaded proves a formidable obstacle to autonomy theories of speech and of the press.

As explored in Chapter 6 the "press right" as distinct from the broader speech right is predicated upon the nature of the content rather than the status of the holder – it is a consequentialist right and based upon contribution to the public discourse – however, it retains an important individual element because despite the traditional idea of the "press" or "media" as plural or collective, these rights are still held by individuals and expressed (for the most part) in this way – hence this discussion in Chapter 6 around the definition of a journalist in the Internet age and ideas of a "loan pamphleteer". So while the conclusions around autonomy as a justification for freedom of speech are hamstrung by the need to both distinguish it from the broader idea of autonomy, and the need to imbue it with an exceptionalism which can overcome the "harm" barrier, it is important to retain in our deliberations around balancing rights, the essential place of individual expression and atomistic ownership of rights.

This is of course equally, if not more so, applicable to the privacy rights explored in Chapters 2, 3 & 4. These specific privacy elements drawn from the broader category of Article 8 protection (i.e. the right of reputation and the right to privacy), are undoubtedly and firmly entrenched in ideas of individual autonomy. In this thesis's attempts to distil a definition of privacy (and reputation) the idea of being "let alone" was the starting point. Although ultimately rejected as too broad (in the same way the wider sense of autonomy was also too broad) these ideas gave a strong hint as to the underpinning value of privacy to the individual, and to the sense of the privacy right as an individual right.

Although in Chapter 2, 3 & 4 this thesis outlined the societal benefits of privacy (and reputation) – which will be important in the succeeding discussion in this conclusion (below) - there is little question around the importance of the expression of privacy as an individual right; a right which protects a very personal and fundamental ability to control information about oneself. The control of that personal information being the very foundation of this

[720] Baker (n.362) p.983

thesis's definition of privacy. Additionally, there can be little question that privacy's importance is rooted in the individual, more so than in the case of speech (even in an intrinsic or deontological understanding of the speech right).

In our Chapter 2 analysis of defamation it was clear that this protection was provided by firstly the common law and subsequently Article 8, to arm the individual against the destruction of their reputation. Reputation, in this context[721], is a starkly individual right. As with the privacy right, it cannot be divorced from its societal context, but is the right for an individual to protect the reputation which they have built which has provided the impetus behind the modern torts of libel and slander. In fact, it is the very positioning of the individual in the context of community or society which highlights the atomistic nature of this right i.e. to protect oneself against imputations of immorality which would lessen one's standing among one's peers. McNamara's taxonomy of morality[722] explored heavily in Chapter 2 evidences this superbly: the individual as an entity with moral standing in his community and with the right to retain that standing will be vindicated in the face of untrue allegations.

This is reflected in the privacy right explored in Chapters 3 and 4. The same sociological relationship with the individual is at work. To be able to control the information about oneself that enters the public sphere is a deeply personal interest or right. To have control over the value of personal information which will cause others to form judgement or opinions about oneself is the very cornerstone of this aspect of Article 8.

When we examined the rationale or "why" behind these rights to privacy and reputation this sense of dignity was ever present. As with speech rights there is of course a consequentialist rationale also - in this case it is the need to create "rules of civility" so that society can adequately function. Notwithstanding, the foundation of even this societal function is down to the understanding that individual dignity, along with considerations like an individual's need to reflect, to rest, or to self-examine, are protected by having control over the information – both false and true – which enters the public realm.

And thus, as with speech, we can see the importance of the individual as a building block in the rights regime[723]. But equally, as with speech, individual rights of privacy do not

[721] As opposed to organisational or collective reputations.
[722] McNamara (n2) p.9
[723] Notwithstanding the evolution and application of both Art. 10 and Art. 8 rights to corporate entities.

have a blanket or monopolising role in society, nor in law. As we invoked the harm principle around speech so too it applies, albeit differently, to privacy. A blanket protection of privacy and reputation would have a profound impact on speech and political discourse; it would restrict/harm others' ability to self-expression; and it would have a deleterious impact upon the self-same community cohesion and 'rules of civility' it is supposed to be a party to. This was borne out in our Chapter 3 analysis of 'thresholds of offensiveness' and an objective standard for privacy. Therefore this brings us back to the role of balancing in adjudication between these individual and societal interests in speech and in privacy.

There is a complex relationship at play between how we view the correct way to balance rights generally (as explored in Chapter 7), the evolution of theory of the particular rights at hand, and their current application in practical circumstances. This is, in essence, the connection between the justification of privacy rights (including reputation) and speech/press rights, which were extensively explored in Chapter 2-6, and the discussion in the final chapters of how those values are assessed and then compared in light of the conclusions in Chapter 7.

Once again, among our conclusions we have invoked the idea of a matrix of interests to visualise the interactions between the myriad values which have emerged in the intertwining histories and applications of privacy and speech rights. However, an explicit example can illuminate the connection across the chapters of this thesis and their relationship with our ultimate conclusions around the 'public interest'. Both privacy and reputation have long histories in common law systems and even across jurisdictions they have followed similar (though not identical) paths to arrive at today's understanding of the rights in law. Much time was spent in the early chapters of this thesis justifying understandings of these rights that are defendable both normatively and descriptively. Through that process, common themes arose repeatedly around the need to protect rights for individual and societal reasons; take for example privacy and the 'rules of civility', or 'containment anxiety', in addition to the individual need and desire to retain control over information about one's self. Equally applicable is the extensive exploration of individual and collective interests in strong speech protections, for example Chapter 5's 'autonomy vs democratic deliberation' debate.

However, the central crux of this entire thesis is that those values often come into competition and are mutually exclusive, so it is the task of the conclusions, in these last two chapters in particular, to draw out from the preceding seven chapters the correct way to do this

to achieve the 'public interest'. To do so we attempt to extrapolate the key principles and apply them in practice. This would not be possible without the understanding provided by the exploration of theory and history in the opening chapters. Without a clear understanding of why both privacy and reputation are crucial, justifiable, and rights-protection-worthy expressions of individual autonomy *and* societal harmony, we cannot hope to compare them in any justifiable sense with the societal need for a free press. This concluding chapter makes clear that so much revolves around the role of the press - we can see this below through the 'public interest' factors laid out by the courts in figures 9(a), 9(b) and 9(c) - but it is only through the conclusions drawn from the history and theory of the rights across Chapters 2-6 that we can hope to achieve an equitable balance between those values and interests. The four enumerated conclusions in Section 9.4 and the two consequent premises in Section 9.5 are the final distillation of the myriad principles drawn from Chapters 2 – 6.

9.3 Balancing Values

In the Chapter 7 analysis of balancing, one of the key discussions was around the validity of balancing in the context of comparability and commensurability. It was concluded that, in the accepted meaning, rights were of course comparable. In fact this entire thesis, and furthermore the entire legal systems of Western countries, are founded on the principle that abstract concepts such as rights are indeed comparable. When a judge sits down to hear arguments between conflicting rights it is based on the fundamental premise that those rights are comparable. The difficulty of course comes in the "how" of the balancing – or in other words, the commensurability. As explored in Chapter 7, in the right balancing context, 'commensurability' essentially means the scale of value used in the comparison, or balance.

A simple utilitarian view would be to draw up a list of the societal benefits, or "public goods" served by the exercise of each right and use this as the scale. However, as we have seen immediately above and as a recurring theme in this thesis, there are profound limitations on such utilitarian calculations in liberal political and legal systems. The role of rights as individual protections, the need to protect a sphere of formal autonomy, and what John Rawls calls "the priority of liberty"[724], means that rights adjudication must go above and beyond

[724] Rawls (n.399)

utilitarian or communitarian balancing. The tension between liberalism and communitarianism is well exemplified through conflicts between speech and privacy. Both rights contain elements of individual expression, autonomy, and protection which coexist with societal and community goods.

This is why the "matrix of interests" outlined in Chapter 5 is crucial to the balancing of the two rights:

Speech – liberal **Speech – communitarian**

Privacy – liberal **Privacy – communitarian**

It is here that we discover the complex nature of the values inherent in competing rights. The competition of value is non-binary – this is to say it is not simply the protection of individual autonomy of speech, and individual autonomy of privacy, but that there are myriad strands of value running across the rights both liberal and communitarian in nature; and occasionally both simultaneously, e.g. political speech as both individual expression and also a good of the community.

Bearing this in mind, we will first look at the broadly liberal value of the two rights. There is a school of thought which says that in a liberal rights system the value of a right can not be gained or advanced from interference with another right[725]. However, in the specific context of speech vs privacy it is extremely difficult to see how this idea is applicable. We can take a simplified version of the most common incarnation of this conflict found in case law as an example: a member of the press writes a story about an aspect of a celebrity's private life. We can plainly see that the full expression of the two rights is not possible – the celebrity cannot maintain control over the personal information i.e. privacy, while the journalist expresses themselves on the topic at hand i.e. speech. The expression of either right negates the other.

[725] Heyman, Steve 'Righting the Balance', 78 B.U. L. Rev. 1275, 1375–76 (1998) p.1356

By the rationale expressed by Steve Heyman, neither right can gain value from this process of negation[726]. And yet through the fairly extensive examination of the nature of Article 8 rights (Chapters 2, 3 & 4) and Article 10 rights (Chapters 5 & 6) we can see in fact that this is not the case. The rationale for these respective rights, the values imbued in them, and their expression and protection are complex, but are necessarily fulfilled in ways that will inevitably involve negating other rights. Speech, for example, in its purest and most valuable form – political discourse – routinely interferes with the reputational and privacy right of politicians. In fact, the case law examined shows that the courts will specifically protect speech at a higher level despite, or perhaps because, it impacts upon the other rights held by politicians[727]. This understanding leads onto two important central points in this conclusion.

The first is the idea is that rights are equal; which is to say that enshrined fundamental rights, prima facie, have the same value or weight in any balancing process. In theory, or in the abstract, this may well be true. Some might conversely argue that in fact there are foundational rights such as the right to life or personal integrity which are necessary for any other right to exist. In fact, it could be argued that speech is a foundational right in that without the protection of the expression of ideas other rights may not exist. However, the reality is that in Western legal systems, with enshrined fundamental rights, the convention is that rights are not "ranked" but rather that they are ostensibly equal. This is because rights are not practised or expressed in the abstract; rights can only be given meaning, and thus value, when they are expressed in the real world. So while a celebrity's right to privacy and the journalists right to expression might in theory be equal, it is only through the factual circumstances of their concrete expression that value can be given to the right.

The second, and perhaps more crucial point is how the idea of how conflicting and mutually exclusive rights are impacted upon by the ideas of positive and negative liberty. In Chapter 5, Isaiah Berlin's concept[728] and its evolution were examined. The most important conclusions being that a) the idea of all rights being "negative" or "non-interference" rights is enormously simplistic and practically belied; and b) that even adding a "positive" conception of rights fails to fully explain the complexity and nuance of rights expression as we saw in

[726] Ibid, though Heyman goes on to extrapolate his ideas in much more nuanced detail.
[727] See *Lingens* or *Reynolds* for example.
[728] Berlin, Isaiah *Liberty (*Oxford University Press, 2002)

McCallum's critique[729].

If we take the concrete examples of privacy and speech it is clear to see how the practical formal expression of these rights is fundamentally different. By its nature the expression of privacy is (broadly speaking) a passive right. It is a right of non-interference that can be expressed, quite literally, by doing nothing. On the other hand speech is an active right: one cannot express oneself without speaking, writing or otherwise acting. Both rights have both negative and positive aspects depending on the circumstances, but the *nature of expression* of the rights is fundamentally different. Therefore we cannot fall back on the simple idea of tying the "non-negation of another right" to the value of those rights to find the answer to our balancing problem. To do so would be to give an unassailable advantage to passive rights over active rights.

Additionally, this will impact upon the correct weight to a tribute to the "harm principle" in balancing or rights adjudication. A number of times in this thesis it has been pointed out the importance of the Millian or Kantian idea that liberties can be fully expressed insofar as they do not harm others. But again this is much easier to abide by if one is expressing a "non-interference" right. This is not to say that the harm principle is not important, because it is, but rather to highlight that its weight in balancing processes must be carefully calibrated in light of our understanding of positive and negative expressions of rights. This point about the harm principle will be once again examined (below) when we approach the central 'crux' of the respective rights.

Firstly though, we must draw conclusions as to how the positive and negative, and passive and active, nature of right impacts upon the values attributed, respectively, in the balancing process in the specific context of speech versus privacy. The first thing to understand is the somewhat fluid and non-binary relationship between the liberal 'negative' sense of right and the communitarian 'positive' sense as expounded in the matrix of interests. At this point we must make a more sophisticated distinction between the notions of passive/active rights and positive/negative rights. Non-interference is simply the mould by which a right is expressed. So both active and passive right can be protected through non-interference, e.g. a person can speak politically without fear of sanction – this is an active right and protected through non-interference. Equally a passive right like privacy can be expressed through non-interference.

[729] MacCallum, G, C, 'Negative and Positive Freedom', Philosophical Review, 76 (1967),. 312-34

However, where active and passive differ from positive and negative is through the mechanisms of how the rights are imbued with value. Having dealt with the issue of whether active rights which interfere with or negate passive right can still have validity, what is much more important is how positive and negative incarnations of rights jointly give value to rights. It is important to note the conceptual distinction between understandings of negative right as "a lack of obstacles" and positive rights as "active promotion of the conditions of rights", from the concept which is much more useful to us: which is seeing negative rights as solely based on an atomistic, intrinsic, liberal concept, and positive as consequentialist, instrumental, communitarian justifications. This distinction is not always made clearly. It was the conclusion of this thesis (in Chapters 2, 3, 5 & 6 respectively) that reputation, privacy, and speech rights could not be either wholly understood nor justified on a purely individual or atomistic basis and that they both had strong, although to differing degrees, consequentialist or instrumental elements. It was judged that both the reputational and privacy aspects of Article 8 were "sociological" in nature and that the unique aspects of speech that see it so heavily protected in the courts were due to its contribution to political discourse. Therefore, for this thesis to conclude the essential "crux" or nature of both speech and privacy we must understand the relationship of liberal and communitarian purposes of each, across the matrix of interests.

9.4 Defining Findings

The use of both privacy, reputation, and speech as modes of autonomy are well established. The role of "dignity" in privacy in particular is important in this respect (and, as mentioned, an increasingly important theme in academic research into privacy[730]). The retention of control over information about oneself and the management of others' access to, and perception of, one's personality are crucial tools in the protection of individual dignity. It is by protecting these controls that individuals are able to retain space for reflection and growth, and ultimately personal development.

Likewise, the basic right of expression, the residual autonomy that comes even before purposive or public speech is a crucial element in an individual's ability to move towards self-

[730] Bloustein (n.172)

realisation or what Raz called "personal identification"[731]. Several of the theories of speech explored were based upon the impact upon the individual, or "speaker", Barendt calling it speech as "self-fulfilment"[732].

In both speech and privacy it is clear that there are two aspects of the liberal conception of the respective rights. There is a broader sense of autonomy – that is the right to do what one wishes simply because of the autonomy and liberty inherent in being a human. This is of course reflective of social contract theory – we are free to do what we wish as long as there are no grounds for restriction. These ideas are the heart of liberal political theory. However, the second aspect pertains to the reason "why" individuals express these rights in the atomistic, liberal sense. And we can see that even in this form there is a purposive element e.g. self-expression, personal identification, self-actualisation, personal dignity, and growth. It is these ideas, applicable to both Article 8 and Article 10 rights, which provide the liberal value in the matrix of interests. However, as has been repeated numerous times over the course of this thesis, when the rights clash there is a need within the balancing process to ascertain where there are additional purposes or value which can be attached to the rights to increase their weight. It is here that the public, purposive and communitarian aspect of the rights come into play. It is important to keep in mind, as explained previously, that there is no clear delineation between the liberal and communitarian; and the two overlap and intertwine regularly.

Both the tort to protect reputation and the tort[733] to protect privacy were respectively described as "sociological", and this was in essence due to their contribution to societal or communitarian values (as well as individual liberal values). Post called this idea the "rules of civility"[734] i.e. the sense that societal relations and community were based upon a respect for these and written rules. This was reflected in McNamara's theory around moral taxonomies[735] – that society creates a set of moral expectations and that it is the (generally false) accusation that an individual has transgressed these standards that creates a defamatory statement. In both cases – reputation and privacy – the control of information about an individual by that individual is the mechanism for creating social constructs and relationships.

[731] Raz (n.356)
[732] Barendt (n.1) p.14
[733] I refer to the evolving tort of 'misuse of private information' but there are of course a group of torts, equitable claims and crimes around privacy invasions.
[734] (n.240)
[735] (n.2)

These social norms inherent in both reputation and privacy give space to individuals to operate in society; they keep society together with a kind of centrifugal force – by retaining space between people it allows them to stay as a cohesive whole. The communitarian elements at hand and the liberal elements discussed above are often mutually enhancing and mutually dependent. The dignity and autonomy inherent in the value of privacy can only be present in a society which respects those boundaries. Therefore, it is when elements within this society transgress these boundaries that legal protection, through legal rights (and torts), are activated.

These themes are replicated in speech. The public discourse justifications for speech are still constitutive of individuals expressing what they wish to see in society. The contribution to society is in itself fixed to the benefit of individuals and vice versa. Equally, the communitarian values in free speech are linked in a strong sense to those of privacy. The need for a robust discussion of public life and society hinges on a respect for those rules of civility - and the rules of civility are conducive to this discussion.

However, there is a danger that such discussions can become mired in soft generalities. So there are four concrete conclusions which can be drawn from the discussion above which will give shape to the final conclusions of this thesis. I will examine one after the other:

1) There is a legitimate sense that liberal and communitarian interests can be linked within the values underpinning rights.

2) It is usual beyond the margins of the cooperation and symbiosis (in the point above) that conflicts of interests/rights occur and it is here that balancing must occur.

3) Despite overlaps in values, there is a fundamental difference in how the right of privacy and speech are expressed which impacts upon balancing.

4) There are different motivations/justifications for the expression of rights which can influence how the value is ‘weighed’ in balancing.

In this thesis there has been much discussion about the differing approaches to rights values through liberal and communitarian lenses – most notably how atomistic, residual autonomy-based theories need an instrumental/purposive aspect to give full ‘weight’ to respective rights when they are subject to dispute. But what has consistently emerged from the

exploration of these ideas – particularly through 'the matrix of interests' - is that there is no clear delineation between liberal and communitarian interests in rights and they are often both compatible and mutually reinforcing. This conciliation is an important part of the work of Dworkin and indeed Rawls[736]: the idea that there needs to be an accommodation between these equally valid views.

Part of the difficulty may arise from the traditional Anglo-Saxon framing of rights as negative protections against state interference - a configuration which does not always square with the increasingly evolved and nuanced theory of rights. Indeed, the French idea of liberalism has traditionally had a much more sophisticated conception of the relationship between individual and community within rights theory[737]. The work of Rousseau, de Tocqueville, and Guizot amongst others is undoubtedly framed by French historical influences no less than their Anglo-American influences counterparts were by theirs[738]. But the substance of this understanding of the relationship between the individual and society can be extremely beneficial in our balancing of privacy and speech rights, so heavily laden are both sets of rights by individual and societal interests.

The crux of the French liberal theory is the inescapable location of the individual within the community and the rejection of the false dichotomy of liberal vs. communitarian – a theme that runs through this thesis, in the discussion of the substance of the respective rights. The French concept of "free *moeurs*" is the apotheosis of this idea: the idea of *moeurs* as the embodiment of rights within a social context; the use of civil liberty and freedom within community is the basis of social relations[739]. When we see how the respect for autonomy in privacy is the foundation of social interaction and rules of civility, and how the autonomous right to self-expression gives force to public discourse, this French liberal theory is very attractive.

However, despite this helpful evolution in thought there are still clashes between rights, and between individual expressions of rights. This is of course the very subject of this thesis. The second of the four conclusions above addresses this.

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[736] Dworkin (n349); Hart (n.345)
[737] Seidentop, L "Two Liberal Traditions." in *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, ed. Alan Ryan, 53-74. (Oxford: Oxford University Press. . 1994)
[738] Ibid p.55
[739] Ibid p.57

It is at the fringes of the expression of these rights that clashes occur, and by their very nature are necessarily outside the greater mass of situations where an easy resolution can be found. If we estimate (unscientifically) that 99% of all expressions of privacy and speech pass uncontroversially, then it is the remaining 1% which concern us. These are the instances where a full expression of speech and a full expression of privacy are not possible. The legal textbooks are replete with such instances. It is here, among the *Mosley*s, the *Lingens*, the *Campbells*, and the *Reynolds*, that we find the furnace out of which we can forge an understanding of the essence of Article 10 and Article 8 rights. These disputes are why it is imperative to understand the very essence of privacy, reputation, and speech within the context of our legal, political, and social systems so that we can engage in the balancing mechanism, which we have collectively chosen, in the fullest awareness of what weight and value is attached to each right. This is done so that even as the individual circumstances and factual outlines change from case to case we are armed with the fundamental understanding of speech and privacy that can be applied across case law.

When this balance, coming at the fringes of privacy and speech expressions, is necessary, we do not only need to understand the values and interests inherent in the right (though this is clearly essential), but here also needs to be consideration of what is included in point 3 above i.e. the nature of how rights are expressed and the impact upon balancing which this has. It was touched on briefly, earlier in this chapter, in the discussion of positive and negative rights: that the expression of one's right to privacy and the expression of speech are fundamentally different in nature.

The nature of privacy, as expressed (almost always) passively as a non-interference right, and the expression of speech, (almost always) as an active right, has a profound impact upon their relationship, especially in the context of judicial balancing. If we examined the interaction across the expanse of case law in England, the US, and the ECHR, the nature of the relationship and the mechanics of the interaction of the two rights follow a similar pattern, however broad. Both in the expression of reputation and the narrow sense of privacy, these rights become engaged when an actor, through the active expression of speech, impacts upon the passive right of an individual to control information about himself. It is the active role of the speech exerciser which nearly always brings about the conflict. If we recall the

circumstances in *von Hannover*[740], or *Jameel*[741], or any of a hundred less renowned cases we can see that the right of reputation or privacy is not positively or actively asserted until the interference arises from an expression of speech. This is obviously of significance. And yet, as has been argued extensively above, the active nature, or "aggressive" nature of its expression (for want of a better word) does not invalidate or negate the value of speech in any way, as this is the immutable and frankly unavoidable mould of expression for what is universally accepted as a fundamentally important right.

So how does this impact upon balancing? Firstly, we can see that even in cases in the ECHR where Article 10 violations are found, it is only due to the Court finding the member state overzealously protecting the passive (Article 8) privacy right - rather than an individual "pro-actively" turning up to a newspaper and imposing a sense of privacy over speech. The case arises on the back of an act of speech which is then restricted by law in the first instance. Domestic case law follows a similar pattern i.e. the active speech is the trigger. So the biggest impact of this relationship, and these mechanics of interaction, is on *how* the factual circumstances are impacted upon. Courts must retain awareness of the idea that a passive right is not more valuable simply by dint of the mechanics of non-interference.

This idea must be held in conjunction with the other conclusions of this chapter i.e. that we live in a fundamentally liberal political system and the individual expression and protection of rights is the cornerstone; that the individual need not be separated from society in the expression of his right and that a sophisticated reading of rights values will understand the complex and reinforcing nature of the individual and society, of liberal and communitarian values.

With an understanding of the basic mechanics of the interaction of the two rights, there is the final point of the four listed above – the idea of the 'motive' or 'justification' behind the expression of a right, which will impact upon both the correct balance and the expression of the values and interests in the right. This idea is directly, if slightly differently, relevant to the final conclusions below, in the sense that what might be clumsily termed as 'motive' here, is in a legal sense much more akin to discovering whether the facts of the expression in a given case match with the intended spirit or purpose of the right protected. (We can see this

[740] (n.167)
[741] (n.527)

throughout the case law, but what is important to note is that "motivation" is just a shorthand for this discussion rather than any legal term of art.)

By way of example, when Ryan Giggs or John Terry took out injunctions to protect their privacy, was their motivation to protect their family and private life from unwarranted invasion? Or was it to shield their misdemeanours from their wives and the wider world, and protect their commercial interests? Equally, when Paris Match published photographs of Princess Caroline was it motivated by the need to provoke a discussion on political and constitutional roles in modern society? Or was it because it would sell magazines? It is crucial to note that motivation is often not necessarily a deciding (or sometimes even an important) factor in courts consideration, and the law is perfectly happy to protect rights despite questionable motives of the rights-holders[742]. But where motivation is important, is in helping us discern whether the expression and protection of the right matches the purpose of that right (in the circumstances at hand). Does the expression of the right by the rights holder match closely enough the underlying, fundamental reasons that we as a society, and a legal system, protect that right? Motivation in this sense impacts upon whether the 'speech' used matches the values laid out in Chapters 5 & 6 and whether 'reputation' and 'privacy' rights invoked square with the interests expounded in Chapters 2 & 3 respectively. This thesis has given considerable space to understanding the essence of Article 10 and Article 8 rights, but the individual circumstances of each case will be every bit as important in the balancing process.

As we approach the final conclusion of this thesis, and analysis of where the public interest lies between speech privacy, we must retain these four conclusions in the forefront of our minds.

9.5 The Public Interest

The summation of the discussion above and the preceding eight chapters is a conclusion about where the public interest lies between privacy and free speech when they come into conflict. As mentioned numerous times, this is one of the foremost legal conundrums of our time, and it would be highly presumptuous to assume this could be categorically resolved here,

[742] *Grobbelaar* (n.89)

and naive to think that all factual circumstances could be made contingency for. But accepting that each individual set of circumstances will produce its own individual outcome in a given case, it is not unreasonable to say this thesis has laid out the essential building blocks for a flexible and malleable guide to locating the public interest in clashes between Article 10 an Article 8 rights.

We can begin by moulding the four conclusions above into two central, established premises: (a) that despite overlaps in liberal and communitarian values, the balancing and proportionality test will be applied to the "difficult" cases around the edges of normal societal interaction; and (b) the conflicts will, in the vast majority of cases, necessarily be a clash between a passive privacy expression and an active speech expression – either of which could contain the correct "motive" or value of the right depending on the individual circumstances of the case.

The result of the first premise is that we see that such cases, and particularly the cases that go to the appellate courts, are at the sharp edge of the law. But this allows us to fully test the boundaries of the rights in question. If we take for example the *Mosley*[743] case, we can see how two issues at the edges of the broad spectrum of privacy and speech rights come into play. The first is the expectation of privacy that a public figure has around his sex life, even one conducted in a less than private arena. The other is the news or public discourse value in discussing the sex life of a public figure - given the particular predilections Mosley was (falsely) accused of having and his family's past. There was the complicating element that some of the information turned out to be untrue. We can see that the case became so prominent, legally, because it tested the boundaries of the rights.

Equally, in cases with more prosaic circumstances such as *Murray*[744], we can see the cutting edge of rights being engaged. In this case the question was around how far a public figure and her family could expect privacy in public places, and the degree to which there was news value in discussing this self-same private life.

If we look at a similarly important defamation case such as *Reynolds*[745], the situation is altered slightly. The right of the public figure to a reputation is not in question as such, however

[743] (n.272)
[744] (n.208)
[745] (n.43)

it is tested in the sense that a qualified privilege or 'public interest' defence is only applicable to matters with that public interest element which in this case arose as a result of the claimant being a high profile politician. So the practical result was that a politician can be left with a reduced right to protect his reputation. Concerning the speech right, it is well established in this thesis that this case hinged on the very question of whether the information was newsworthy (whether or not it was true).

This brings us to the second point which frames the entire debate. If we understand the dynamic of the interaction of the speech-privacy disputes correctly, it shows the overwhelming prevalence of a passive privacy expression and an active speech expression. And while one can argue about nuances in this dynamic or interpretations of the semantics, the essence is one of passive v active expressions. Therefore, as explored above, there is an order of establishment: firstly that there is a reasonable expectation of privacy that has been violated, or a reputational right that has been infringed; and then an obligation upon the transgressor to show that the speech which caused the 'breach' was justified. This is crucially important in the mechanics of balancing, because it draws in, in the first instance, the individual and community justifications for privacy as explored in this thesis, and then it does likewise for speech. And so we start to get a sense of how those interests will compete in terms of value and weight in the balance. But what is crucial is that the privacy side of the balance is loaded on to the scales first, followed by the speech. This makes the justification of the speech the deciding factor in these Article 10 v. Article 8, or speech v. privacy, conflicts.

If we take one step back then and examine how this decision on balancing, and how the weighing of rights has been approached by the courts, this will allow us a platform to draw in the various discussions of the values/interests explored extensively in the chapters above. We have seen in this thesis three different examples of courts attempting to lay out guidelines as to how we might approach the idea of "the public interest", from three different jurisdictions, and drawn from both privacy and defamation cases. They are laid out below[746]:

[746] The *California Approach* set out in *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43 (Cal. 1971) ; The *Alex Springer Factors* set out in *Axel Springer AG v Germany* (No.2) ([2014] ECHR 745) ; and the *Nicholls Test* laid out in *Reynolds* (n.43)

Fig. 9(a) The California Approach

When approaching the question of newsworthiness the courts should consider the following criteria:

(1) the social value of the information,

(2) the depth of the intrusion into ostensibly private affairs,

(3) the extent to which the complaining party has voluntarily placed himself in the public eye.

Fig. 9(b) The *Axel Springer* Factors

When balancing expression against privacy courts should take into account:

(a) Whether the information contributes to a debate of general interest

(b) The notoriety of the person concerned and the subject matter of the report

(c) The prior conduct of the person concerned

(d) Method of obtaining the information and its veracity

(e) Content, form and consequences of the publication

(f) Severity of the sanction imposed

Fig. 9 (c) The Nicholls Test

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

Some of the criteria across the three, but with Nicholls in particular, are concerned with the practical steps journalists can take to ensure responsibility/reasonableness. However, for the purposes of this thesis the elements that address the idea of a 'public interest' or 'newsworthiness' are what concern us.

This convergence of privacy and defamation around a 'newsworthiness' aspect of the public interest is bolstered by the recent case law emerging from Strasbourg. Firstly, as explored above there is the (mis)application of the Axel Springer criteria in the *Lillo Stenberg*[747] case, offering little protection to a conventional and reasonable privacy claim. Even more interesting is the application of the Axel Springer criteria to defamation cases[748]. The privacy circumstances from which the criteria emerged are quite different to those which they are being applied to in the defamation cases. As explored extensively in Chapter 2 & 3 there are crucial differences in the two rights at play. And yet this convergence underpins the thrust of this thesis and this conclusion relating to the essence and character of the balance to be struck between the competing rights.

We can see the emergence of two central themes which reflect the subject of this thesis. The degree of privacy that an individual can expect, and the value of the speech which impacts upon that privacy. This means that courts, in deciding on matters of conflicting rights of speech v. privacy have to look at the inventory of interests and values inherent in these rights, and in light of the specific circumstances of the case decide which bears the greatest weight. These values and interests were set out across Chapter 2-6 in this thesis. The values of the rights as both liberal and communitarian goods, the interest in rights as individuals and as a society.

If we take some of the cases as examples: In *Murray*[749] and *van Hannover*[750] the courts had to weigh the value of privacy of the individuals in question. They had to decide what the privacy value to JK Rowling and to Princess Caroline as individuals was. This is impacted upon by their status as public figures (one voluntary, the other less so)[751]. The court had to

[747] *Lillo Stenberg* (n.194)
[748] See *Print Zeitungsverlag GmbH v. Austria* (Judgment of 10 October 2013); *Ristamäki and Korvola v. Finland* (Judgment of 29 October 2013); *Ungváry and Irodalom Kft v. Hungary* ([2013] ECHR 1229)
[749] (n.43)
[750] (n.167)
[751] As outlined in the discussion in Chapter 3 there is rarely a 'clean' consideration of the circumstances affecting the 'reasonable' or objective standard of privacy. The fact that this assessment takes place in a dispute with the expression of a speech right means the courts will already be considering the expectation of privacy in the light of the 'public interest' claim of the speech right. This is a complex point and hard to evidence empirically but should be borne in mind.

judge whether their presence in a public place impacted the objective standard of reasonableness in their expectation. The courts judged the community value in retaining spheres of privacy even in public places, a value that (as explored in Chapter 4) is constantly contracting and changing. Equally, in the case of *Mosley*[752] or *PJS*[753] the issue was the individual value of privacy around the sex lives of these individuals, coupled with the societal value of maintaining 'rules of civility' in respecting those boundaries (even when applied to public figures). In *Lingens*[754] or in *Reynolds* the issue for the courts was the extent of the value of the reputation to the individual in question and the community's benefit from creating social conditions in which reputations (of public figures in this case) can be built and protected as a mechanism for social development. In the US cases where privacy/reputation rights are perhaps less valued (certainly in comparison to speech) we can see through *Sidis*[755] or *Florida Star v. B. J. F*[756] that the courts had to evaluate the value to a former child prodigy, and to the victim of a sexual assault, in retaining their individual spheres of privacy, and the subsequent objective standard of privacy in such circumstances. Equally, in this evaluation there was the consideration of the societal value in creating a social space where former publicity could be forgotten or victimhood could be shielded.

In each of these cases the circumstances are somewhat different, however, even at the 'edges' of the vast terrain of everyday privacy each of these cases the person asserting the privacy/reputation right could make a meritorious argument that there were both individual and community interests in the protection of their right. And it is here that the importance of the mechanism and nature of the balance becomes crucial because these rights can be passively respected, and yet they are challenged by an active expression of speech in each case.

Therefore the crux of each balance will be based upon whether there is enough justification, newsworthiness, or 'public interest' in the speech expression (to both individual and community) to usurp the 'public interest' value of the privacy/reputation right (to both the individual and the community). It is from this matrix of interests that the public interest emerges. Therein lies the importance of fully understanding the nature and the value of the respective rights.

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[752] (n.272)
[753] (n.329)
[754] (n.179)
[755] (n.222)
[756] (n227)

It is here that the importance of commensurability of values becomes apparent. The courts will have to assess the value of the rights, firstly in the abstract, then in the given circumstances of the case. The courts will have to make normative decisions about the weight of each expression of the conflicting rights. As explored in Chapter 7, each jurisdiction has developed its mechanisms for doing so. The supra-national nature of the European Court means it is weighing rights in the context of judging whether a member state has violated a given right, the doctrine of proportionality gives the ability to do so. In the US the tiers of scrutiny are used to perform the same task. Categorisation is preferred in the US compared to the more fluid balance in the UK and under the ECHR. But as outlined in the conclusions of Chapter 7, what is important is that we understand a balancing evaluation is taking place across the jurisdictions and mechanisms. This balance is based on the weight attached to the rights in the individual circumstances of the case; the courts accepting the commensurability of these values as inherent to our legal system, make a normative judgment on which right contains more weight in the given case.

In virtually all cases which reach the higher appellate courts, and are thus drawn to our attention (the edges as described above) the privacy right holder will be able to establish at least a creditable semblance of the right's value in the circumstances. Then subsequent to the passive right of privacy being established, valued, and placed upon the 'scales', the balancing will be completed by the consideration of the weight/value of the competing speech right. It is then down to whether the public interest is better served by allowing the speech or protecting the privacy.

As was explored in Chapter 5 and outlined above in this chapter there is an important value in the liberal, intrinsic autonomy value of speech. But that once that speech comes up against a robust, or 'heavy', expression of a privacy/reputation right, then negating that privacy and therefore causing harm to the holder will require a further consequentialist justification, such as 'public discourse' or 'checking government'. The cases cited above dealing with privacy in public, children's privacy, rape victimhood, the right to shun former publicity, and sexual mores all have considerable weight as privacy interests. Therefore there must be a convincing argument to allow their negation. This is where we draw in the individual and community value in speech discussed in Chapter 5 & 6, and the tensions drawn out in Chapter 8.

In the case law, across the jurisdictions, we have seen a variation in the width given to the definition of 'public discourse'. The US commitment to free speech has meant that even in cases like *Sidis*, *BJF*, *Time v Hill*[757], and *Damron*[758] the 'weight' of the speech was considered heavier than the privacy/reputation right. These cases would probably run afoul of the UK/European balance. However, we can see how the US courts justified what they saw as public discourse – each case dealing with a serious matter. In the European sphere, and particularly the UK, the problem comes in what was discussed in Chapter 8 and above in this chapter surrounding the inclusion of lucrative, newspaper-selling gossip as 'public discourse'. Of course, where this has been challenged in the high profile cases the courts have often rejected the 'newsworthiness', deeming the weight of such speech to be insufficient to tip the balance from the established privacy right.

Because the matrix of rights (which outlines the various values of rights to be placed upon the 'scales' in balancing) contains both individual and community interests which are intertwined and often co-reliant, it is difficult to cleanly distinguish them. However, we do understand as laid out in above in this chapter that the expression of privacy is the more 'individual' right with the societal aspects being drawn from this. With speech there is the inherent right of autonomy to speak and express oneself. Both these individual aspects can cancel each other out, or at least cause a stalemate in the balance. This would lead to a default victory for the passive/non-interference right i.e. privacy. So the fate of the balance will be decided by the further societal/community contribution that the respective expressions of the speech and privacy/reputation rights make. Given both the importance placed in Western legal and political systems on speech as foundational right, and as an absolutely crucial aspect of our democracy; and given the fairly wide definition given to 'public discourse' speech; the essence of the public interest in disputes between privacy and speech will come down to the ability of the speaker to show that his speech falls within that broad remit; that he reasonably and objectively was pursuing a public interest end to his freedom of expression. Where the press or other speakers have failed to do so such as in *Campbell*[759], *Mosley* or *von Hannover* they have failed to show that their expression was reasonable or truly in pursuit of the public interest. And in cases such as *Jameel*, *Lingens*, *Time v Hill*, the courts have felt that the holder of the

[757] (n.225)
[758] (n.659)
[759] (n 166)

speech right has sufficiently made the case the expression was reasonable and in the public interest.

This brings us to the fundamental point about the 'public interest' in this thesis and in the case law relating to disputes between privacy and free speech. The much invoked idea of the 'public interest' is not one entity in itself. It is not a single pre-packaged value that can be applied by courts to the circumstances of a case. Judges cannot look to an abstract idea of the public interest, or as an independent value to be weighed alongside the others invoked by the holders of respective rights. Rather, the public interest will be located as the *result* of the weighing of competing values when they clash. The public interest will be the location of the accommodation when all relevant factors are measured against each other to determine the fairest outcome for all involved.

In the most reduced terms, the 'public interest' is (in the numerous scenarios in which it is invoked) simply the best accommodation of the competing rights and interests for the various representations of the 'public' – the individual members of the public as rights holders, the collective members of the public banded together as individuals, and the wider collective interests of the 'society' or 'community'. This is why this thesis has gone to such lengths to explore the essential nature of each of the rights invoked in these cases. Each of the Chapters 2-6 painstakingly categorises the individual and collective values and interests in the rights to privacy/reputation and free speech press. Because it will only be through this understanding that the public interest can be located. Likewise, both the political theory aspects of Chapter 5 and the critique of balancing in Chapter 7 allow this thesis to draw out the impact of the very process of balancing upon the balance itself.

To draw this out further it must be clearly understood that there is no single instance of the 'public interest'. There is a public interest in protecting privacy and reputation, there is a public interest in protecting freedom of expression and a free press, and there is a public interest in finding the correct balance between them when they clash in a particular set of factual circumstances (as we have seen throughout the thesis and demonstrated most explicitly in the examples in Chapter 8). It was the purpose of the various explorations undertaken in Chapters 2-6 to understand what the public interest(s) was in protecting each right. There is a public interest in each individual member of that public having their right to privacy and reputation protected – to allow dignity, autonomy, self-fulfilment etc. – and there is the societal or community aspect embodied by the rules of civility and the enforcement of moral taxonomies.

Likewise, there are clear benefits to individual members of the public in expressing free speech rights from self-realisation, autonomy to influence over the public discourse; and societal benefits around political participation.

When the two rights clash, the individual and collective values imbued in those respective rights will give the courts the tools to fairly and adequately produce an outcome from the process of balancing, in the unique circumstances of the case. The application of the weight of the rights to the facts at hand will allow the court to identify the 'public interest' in that case. Therefore, it would be mistaken to envisage the 'public interest' as a tool which courts can produce independently to magically resolve disputes between rights. Rather, the 'public interest' is the destination that is arrived at when the court has properly balanced competing rights.

As highlighted in the preceding sections of this chapter, the actual modes of expression of the rights in question are different, which affects the way their respective values can be balanced. The predominantly passive/non-inference expression of privacy allows both the individual and community value of privacy to be effected. The individual or atomistic expression of speech is given value through self-expression, individual growth and autonomy (as explored in Chapter 5). However, when the free speech right impacts upon another's privacy right in the press sphere, the justification is nearly always based upon the societal value or 'public interest' in the speech. This is explored below, but it is important to be clear that simply because the modes of expression of the rights and the mechanism of balancing results in the scales being tipped by the public discourse vale of the speech, does not mean that the 'public interest' between privacy and speech is *only* about that public interest value in speech.

9.6 Final Conclusions

In one sense it is overly simplistic to reduce the entire issue to the single point of whether the expression in a given case is justified as 'public discourse' speech. It is belied somewhat by the complex and nuanced discussions in the preceding nine chapters. There are clearly a great many factors that contribute to the overall balance.

However, it is the contention of this thesis that the location of the 'public interest' between privacy and freedom of speech is to be found when the full inventory across the matrix

of different values and interests inherent in the respective rights is applied to the specific circumstances of a given case.

Given the importance (noted throughout the chapters above) of the individual in rights regimes and liberal political systems, the central protection must be given to individual expressions of rights. However, as has been noted, most cases of privacy v. speech which make it to court become zero-sum games. The individual expression of the two rights cannot be mutually accommodated. There is in essence a stalemate between an individual wishing to retain control over their personal information, and another individual who wishes to disseminate that information through speech. As the active expresser of the right, the 'creator' of the conflict, and the causer of 'harm' in the interaction, it will be incumbent upon the party claiming a speech right to show a further justification.

However, it is clear that there is much more to rights justifications than simply the individual, atomistic expressions of autonomy. Therefore, in order to end the impasse between rights claims, the courts must look beyond the intrinsic justifications towards consequentialist counterparts. The societal value of privacy and reputation are drawn from their use in constructing social relationships, and they are inextricably linked to the individual justifications – if one can justify a reasonable expectation of privacy then by default one has justified the social value that flows from that. The societal or 'public' justifications for speech are an additional evolution beyond the individual expression of autonomy, and require a separate further justification i.e. one can have an autonomous expression of speech that fails to satisfy any form of public discourse justification.

In Western liberal legal systems where faith has been placed in the possibility of balancing the values of competing rights, and the ability of judges to make normative determinations on the weight to apply, the correct outcome will be determined by a sufficient understanding of the interests inherent in the rights, and an understanding of how the practical mechanisms impact upon the balancing process. This thesis has tried to outline each of these factors. An application of this understanding to the facts of given cases will allow the determination of the 'public interest' between speech and privacy.

Bibliography

Books

Alexy, Robert , *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

M. Amos, J. Harrison and L. Woods (Eds.) *Freedom of Expression and the Media*: (Leiden: Martinus Nijhoff, 2012)

Baker, Roy *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (Cheltenham, UK : Edward Elgar 2011)

Barendt, *E Freedom of Speech* (OUP Oxford; 2 edition 2007)

Barendt, Eric and Laurence Lustgarten, Kenneth Norrie, Hugh Stephenson *Libel and the Media: The Chilling Effect* (Oxford: Oxford University Press 1997)

Bentham, Jeremy *Anarchical Fallacies*, vol. 2 of Bowring (ed.), *Works*, 1843

Berger, R *Government by Judiciary* (Harvard University Press, 1971)

Berlin, Isaiah *Liberty* (Oxford University Press, 2002)

Bezanson, Randall P. Taxes on Knowledge In America: Exactions on the Press from Colonial Times to the Present (Philadelphia: University of Pennsylvania Press, 1994)

Blackstone, Sir William *Commentaries on the Laws of England* (1765-1769)

Colvin, Madeleine (ed) *Developing Key Privacy Rights* (Hart Publishing 2002)

Cronkite, Walter, *A Reporter's Life* (Knopf 1996)

Davies, Nick *Flat Earth News* (London: Vintage Books 2009)

Dworkin, Ronald, *Taking Rights Seriously* (Gerald Duckworth &Co Ltd London 1977)

Fenwick , Phillipson and Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP, 2007)

Fish, Stanley *There's No Such Thing As Free Speech. And It's a Good Thing, Too*. (1994 OUP)

Fitzpatrick, Martin (ed) *The Enlightenment World* (Oxford: Routledge 2004)

Glendon, M.A. *Rights Talk: The Impoverishment of Political Discourse* (New York, The Free Press, 1991)

Goffman, Erving *Relations in Public: Microstudies of the Public Order* (New York: Basic Books, 1971)

Gouldner, Alvin W, *The Dialectic of Ideology and Technology: The Origins, Grammar, and Future of Ideology* (Seabury Press, 1976)

Griffin, J. *Well-Being: Its Meaning, Measurement and Importance* (Oxford: Clarendon Press 1986)

Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg (trans.) (Cambridge, MA: MIT Press 1996)

Herman, Edward and Chomsky, Noam *Manufacturing Consent: the political economy of the mass media* (New York : Pantheon Books, 1988)

Hobbes, Thomas, *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*, ed. by Ian Shapiro (Yale University Press; 2010)

Hoffman, David (Editor) *The Impact of Human Rights on Private Law* (Cambridge University Press 2011)

Jack, Malcom (editor) et al, *Erskine May: Parliamentary Privilege* (24th edition, 2011)

Kant, Immanuel; translated by James W. Ellington [1785] *Grounding for the Metaphysics of Morals* (3rd ed. Hackett 1993).

Keane, John *The Media and Democracy* (Cambridge: Polity Press, 1991)

Kenyon, Andrew (ed.) *Comparative Defamation and Privacy Law* (Cambridge University Press 2016)

Kovach, Bill and Rosenstiel Tom *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (New York: Three Rivers Press 2001)

Lichtenberg, Judith (ed) *Democracy and the Mass Media* (Cambridge University Press 1990)

Locke, John *The Two Treatises of Civil Government* (Hollis ed.) [1689]

Loveland, Ian (Ed.) *Importing the First Amendment – Freedom of Expression in American, English and European Law* (Oxford, Hart Publishing, 1998)

Loveland, Ian *Political Libels: A Comparative Study* (Oxford ; Portland, Or. : Hart, 2000.)

Lunney, Mark and Oliphant, Ken *Tort Law: Text and Materials: Fifth Edition* (Oxford: OUP 2013)

McChesney, Robert W. *The Political Economy of Media: Enduring. Issues, Emerging Dilemmas* (New York: Monthly Review Press, 2008)

McNamara, Lawrence *Reputation and Defamation* (Oxford : Oxford University Press, 2007)

Meiklejohn, Alexander *Free Speech and its Relation to Self-Government* (New York: Harper and Brothers 1948)

Mill, John Stuart *On Liberty* found at https://www.gutenberg.org/files/34901/34901-h/34901-h.htm

Milmo, P *Gatley on Libel and Slander 11th Ed*. (London : Sweet & Maxwell, 2008)

Milo, D. *Defamation and Freedom of Speech* (2008 Oxford University Press)

Mitchell, Paul *The Making of the Modern Law of Defamation* (Oxford : Hart, 2005.)

Mulhall S. and A. Swift *Liberals and Communitarians*. (Oxford: Blackwell, 1996)

Mullis, Alastair & Doley, Cameron (general editors) *Carter-Ruck on Libel and Privacy 6th ed*. (London : LexisNexis, c2010.)

Murphy, Thérèse (ed.) *New Technologies and Human Rights* (Oxford: Oxford University Press 2009)

Nozick, Robert. *Anarchy, state, and utopia*. New York : Basic Books, [1974]

Outhwaite, William *Habermas: A Critical Introduction* 2nd Ed. (Cambridge: Polity Press, 2009)

Price, D. Duodu, K. Cain,N *Defamation : law, procedure & practice. 4th Ed*. (London : Sweet & Maxwell/Thomson Reuters, 2010)

Rawls, John, *A Theory of Justice* (Cambridge, Mass. : Belknap Press of Harvard University Press, 1999)

Rawls, John, *Political Liberalism* (New York, N.Y.: Columbia University Press 1993)

Raz, Joseph *The Morality of Freedom,* (Oxford: Clarendon) (1986)

Richardson, H., *Practical Reasoning about Final Ends* (Cambridge: Cambridge University Press 1994)

Robertson G, Nicol A, *Media Law 5th ed* (Sweet & Maxwell Ltd 2007)

Rossiter, Clinton (ed.) *The Federalist Papers* (New York: New American Library, 1961)

Rozenberg, Joshua *Privacy and the Press* (OUP Oxford 2004)

Ryan, A. (Ed) *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford: Oxford University Press. 1994)

Sandbothe, Mike *PRAGMATIC MEDIA PHILOSOPHY: Foundations of a New Discipline in the Internet Age* published online at http://www.sandbothe.net/pmp.pdf

Sandel, Michael J. *Liberalism and the Limits of Justice*, (Cambridge: Cambridge University Press, 2nd edition 1999)

Solove, Daniel. *The Future of Reputation, Gossip, Rumors and Privacy on the Internet*. (New Haven: Yale UP, 2007)

Taylor, Charles *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press 1992)

Tugendhat and Christie *The Law of Privacy and The Media* (OUP Oxford; 2 edition 2011)

Vincent, Andrew *The Politics of Human Rights*. (New York: Oxford University Press, 2010)

Viljanen, V 'Abstention or Involvement? The Nature of State Obligation under Different Categories of Rights', in Krzysztof Drzewicki, Catarina Krause, Allan Rosas (eds) Social

rights as human rights : a European challenge (Turku/Åbo, Finland : Institute for Human Rights, Åbo Akademi University, 1994)

Waldron, Jeremy *Theories of Rights*, Oxford: Oxford University Press 1984

Journal Articles

Adler, Matthew D. 'Incommensurability and Cost-Benefit Analysis', 146 University of Pennsylvania Law Review 1371-1418 (1998)

Afia, J. and Hartley, P. "Lord Lester's Defamation Bill 2010: A Practical Analysis" 2 J. Media L. 183 (2010)

Aleinikoff, A "Constitutional Law in the Age of Balancing", 96 Yale L.J. 943, (1987)

Alexander, Laurence B. "Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" 20 Yale Law and Policy Review 97, 110 (2002).

Alexy, R. "Constitutional Rights, Balancing, and Rationality," 16(2) Ratio Juris 131 (2003)

Alexy, Robert 'On Balancing and Subsumption: A Structural Comparison' Ratio Juris 16(4):433 - 449 · November 2003

Anderson, David A. "Freedom of the Press" 80 Tex. L. Rev. 429 (2002)

Anderson, David A. "Is Libel Law Worth Reforming?" 140 U. Pa. L. Rev. 487

Anderson, David A. "Reputation, Compensation, and Proof", 25 Wm. & Mary L. Rev. 747 (1984)

Andre, S 'Privacy as an Aspect of the First Amendment;, Selected Works of Steven J. Andre, January 1989

Austin, L "Private Law: The Dilemma of Justification," (2010) 55 McGill L J 165

Baker, C. E. 'Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment' (2004) 21(2) Soc. Phil. & Pol'y, 215

Baker, C. Edwin "Harm, Liberty, and Free Speech," Southern California Law Review 70 (1997), 979

Baker, C. Edwin "Media Structure, Ownership Policy, and the First Amendment" 78 S. Cal. L. Rev. 733 (2004-2005)

Baker, C. Edwin. "Private Power, the Press, and the Constitution" Constitutional Commentary, Volume 10, Number 2 (Summer 1993), pages 421-441

Baker, C. E. "Scope of the First Amendment Freedom of Speech," 25 UCLA Law Review 964 (1978)

Baker, C. E. "The Media That Citizens Need", 147 U. Pa. L. Rev. 317 (1998)

Balter-Reitz, Susan "In Search of Truthiness", 2 FIU L. Rev. 7 (2007)

Balin, R., Handman, L., and Reid, E., 'Libel Tourism and the Duke's Manservant—An American Perspective' (2009) EHRLR 303–31

Barak, 'Proportionality and Principled Balancing' (2010) 4 Law and Ethics of Human Rights 1

Barbas, Samantha, "The Death of the Public Disclosure Tort: A Historical Perspective," Yale Journal of Law and the Humanities, 22 (Summer 2010), 171

Barendt, E 'What is the Point of Libel Law?' (1999) 52 CLP 110

Barendt, Eric 'Balancing Freedom of Expression and Privacy: The. Jurisprudence of the Strasbourg Court', 1 J. MEDIA L. 49 (2009)

Barendt, Eric "Freedom of Expression in the United Kingdom Under the Human Rights Act 1998" 84 Ind. L.J. 851 (2009)

Barendt E (1993) 'Libel and freedom of speech in English law' Public Law 449–464

Baum, M.A. and Groeling, T, "5, No. 4, September 2008: pp. 1–39 Political Communication New Media and the Polarization of American Political Discourse" Political Communication, 25:345–365, 2008

Beattie, K "New Life for the Reynolds 'Public Interest Defence'? Jameel v Wall Street Journal Europe" [2007] 1 E.H.R.L.R. 81

Bellah, Robert N. "The Meaning of Reputation in American Society", 74 Cal. L. Rev. 743 (1986)

Bender, Paul, "Comment on Robert C. Post's Community and the First Amendment"(1997). Arizona State Law Journal, Vol. 29, p. 485, 1997

Bennett, Geoffrey and Weaver, Russell L., "Is The New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective" (1993). Scholarly Works. Paper 635. http://scholarship.law.nd.edu/law_faculty_scholarship/635

Bennett, Steven C. 'The Right to Be Forgotten: Reconciling EU and US Perspectives' Berkeley Journal of International Law, Vol. 30, Issue 1 (2012), pp. 161-195

Berger, Linda "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" 39 Hous. L. Rev. 1371 (2003).

Bermann, George A., Patrick Glenn, Kim Lane Scheppele, Amr Shalakany, David V. Snyder, and Elisabeth Zoller. "Comparative Law: Problems and Prospects." American University International Law Review 26 no. 4 (2011): 935-968

Bezanson, R P "The Right to Privacy Revisited: Privacy, News and Social Change 1890-1990", (1992) 80 California Law Review, 1133

Bezanson, Randall P. “Libel Law and the Realities of Litigation: Setting the Record Straight” 71 Iowa L. Rev. 226

Bezanson, Randall P. “Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law,” with Kathryn L. Ingle, 90 Dickinson Law Review 585 (1986)

Bezanson, Randall P. “The Developing Law of Editorial Judgment” 78 Neb. L. Rev. 754, (1999).

Bezanson, Randall P. “The Libel Tort Today” 45 Wash. & Lee L. Rev. 535

Bignami, F “The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts” 41 CORNELL INT’L L.J. 211 (2008)

Black, Hugo L, ‘The Bill of Rights’, 35 N.Y.U. L. Rev. 865 (April 1960)

Blasi, Vincent “The Checking Value in First Amendment Theory” 1977 Am. Bar Found. Res. J. 521 (1977).

Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’, 39 N.Y.U.L. REV. 962

Bloustein, The First Amendment and Privacy- The Supreme Court Justice and the Philosopher, 28 RUTGERS L. REv. 41 (1974)

Bloy, Duncan “What Price Irresponsible Journalism? Reflections on the Galloway Litigation”, Communications Law 11, no. 1 (2006):13. 143

Bollinger, Lee C. “The End of New York Times v Sullivan: Reflections on Masson v New Yorker Magazine” The Supreme Court Review Vol. 1991 (1991), pp. 1-46

Bonner, D. and Fenwick, H. and Harris-Short, S. R. (2003) 'Judicial approaches to the Human Rights Act.', International and comparative law quarterly., 52 (3). pp. 549-586

Borger, Gloria “Matt Drudge is Not My Colleague” The International Journal of Press/Politics June 1998 vol. 3 no. 3 132-136

Bork, Robert H. “Neutral Principles and Some First Amendment Problems”, 47 IND. L.J. 1 (1971)

Bosland, Jason John, “Republication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales” Oxford Journal of Legal Studies 31(1) · June 2010)

Bowman, L. (2008). ‘Re-examining gatekeeping’ Journalism Practice, 2(1), 99–112.

Busuttil, Godwin; McCafferty, Patrick ‘Interim Injunctions and the Overlap between Privacy and Libel.’ 1 Journal of Media Law 2 (2010)

Cali, Basak, Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions (1 2, 2007). Human Rights Quarterly, Volume 29, Number 1, February 2007

Calvert, Clay “And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law” 103 Dick. L. Rev. 411 (1999).

Carney, D 2009, 'Theoretical underpinnings of the protection of journalists’ confidential sources: why an absolute privilege cannot be justified' Journal of Media Law, vol 1, no. 1, pp. 97-127.

Christoffersen, J “Fair balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, International Studies in Human Rights, vol. 99, Martinus Nijhoff, Leiden 2009, p.67

Coad, Jonathan “Reynolds and Public Interest: What About Truth and Human Rights?” Entertainment Law Review 18, no. 3 (2007): 75. 172

Coad, J “The price of truth in the new law of libel” 153 New Law Journal 600

Coad, Jonathon “Reynolds and The Public Interest – What About the Truth and Human Rights?” (2007) 18 Entertainment Law Review 76

Coenen, Dan T. "Rights as Trumps" Georgia Law Review, Vol. 27, No. 2 (Winter 1993), pp. 463-472

Coffin, Frank M. "Judicial Balancing: The Protean Scales of Justice," 63 NYULRev 16, (1988)

Cohen, J “Examined Lives: Informational Privacy and the Subject As Object,” Stanford Law Review 52 (2000): 1373–1438

Cohn, Margit, Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom (May 3, 2010). American Journal of Comparative Law, Vol. 58, pp. 583-629, 2010

Cook, Geoffrey C. “Reconciling the First. Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for. Libel Suits” (1989) 93 DICK. L. REV. 265

da Silva, Virgilio Afonso 'Comparing the Incommensurable: Constitutional Principles, Balancing, and Rational Decision' (2011) 31 OJLS 273–302

de Hert, Paul and Papakonstantinou, Vagelis ‘The new General Data Protection Regulation: still a sound system for the protection of individuals?’ C.L.S. Rev. 2016, 32(2), 179-194.

Descheemaeker, Eric, “Protecting Reputation: Defamation and Negligence” (February 10, 2012). 29 Oxford Journal of Legal Studies (2009)

Descheemaeker, Eric “'Veritas non est defamatio'? : Truth as a Defence in the Law of Defamation.” Legal Studies, Vol. 31, No. 1, 03.2011, p. 1-20

Donnelly, ‘History of Defamation’, 1949 Wis. L. Rev. 99

Dupre, Catherine “The Protection of Private Life versus Freedom of Expression in French Law” in Colvin, Madeleine (ed) Developing Key Privacy Rights (Hart Publishing 2002)

Dworkin, R “Liberal Community”, 77 Cal. L. Rev. 479 (1989)

Dworkin, R. “Rawls and the Law: Keynote Address”, 72 Fordham L. Rev. 1387 (2004)

Elster, Jon “On Majoritarianism and Rights” 1 E. Eur. Const. Rev. 19 (1992)

Emerson, T. “Comment, An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases”, 124 U. PA. L. REV. 1385 (1976)

Emerson, T ‘The Right of Privacy and Freedom of the Press’, 14 Harv.C.R.- C.L.L.Rev. 329, (1979)

Epstein, Richard A., ‘The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FDA and IRBs’ 96 Geo. L.J. 559 (2007-2008)

Feldman, David "Human dignity as a legal value - Parts I and II" [1999] Public Law 682-702 and [2000] Public Law 61-71

Feldman, David “Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47 Current Legal Problems 41

Fiss, Owen M. “Building a Free Press”, 20 Yale Journal of International Law 187 (1995)

Fiss, Owen M. “Free Speech and Social Structure.” 71 Iowa L. Rev. 1405 (1986).

Fiss, O "In Search of a New Paradigm," 104 Yale Law Journal 1613 (1995)

Fiss, Owen M. “State Activism and State Censorship”, 100 Yale Law Journal 2087 (1991)

Fiss, Owen M. 'Two Constitutions,' (1986) 1 1 Yale J. of Int'l L 492.

Flyvbjerg, Bent, Habermas and Foucault: Thinkers for Civil Society? (April 1, 2012). Mark Haugaard and Stewart R. Clegg, eds., Power and Politics, Vol. 2, London: Sage, pp. 117-140

Fried, Charles “Privacy”, The Yale Law Journal. Vol. 77: 475, 1968

Fried, Charles (1992) "The New First Amendment Jurisprudence: A Threat to Liberty," 59 University of Chicago Law Review 225

Fogle, R “Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech” 3 Law & Sexuality 165

Foster, Steve (2004). "Freedom of expression, prior restraint and section 12 of the Human Rights Act 1998". Coventry Law Journal. Coventry University. 9 (2). 86

Gardbaum, Stephen “Limiting Constitutional Rights,” 54 UCLA. L. Rev. 789

Gardbaum, Stephen, “A Democratic Defense of Constitutional Balancing”, Law & Ethics of Human Rights, Vol. 4, 2010

Gavison, R 'Privacy and the Limits of Law' (1980) 89 Yale Law Journal 421

Geddis, A 'What We Cannot Talk About We Must Pass over in Silence: Judicial Orders and Reporting Parliamentary Speech' [2010] Public Law 443.

Gibbons, T. (2009). "Fair play to all sides of the truth": controlling media distortions. Current Legal Problems, 62(1), 286-315

Gibbons, T. “Defamation Reconsidered” Oxford Journal of Legal Studies. Vol. 16. 1996. Oxford. 587

Gilles, Susan M. (2006) 'The Image of “Good Journalism” in Privilege, Tort Law, and Constitutional Law’ 32 Ohio N.U. L. Rev 485 (2006)

Gilles, Susan M. And Marshall, William P. “The Supreme Court, the First Amendment, and Bad Journalism” 1994 Sup. Ct. Rev. 169

Glendon, Mary Ann (1992) "Rights in Twentieth-Century Constitutions," University of Chicago Law Review: Vol. 59: Iss. 1, Article 16

Godwin, Mike (1999) “Who's a Journalist? II: Welcome the New Journalists on the Internet” Media Studies Journal (Spring/Summer): 24–31

Goldie, Janis, Virtual Communities and the Social Dimension of Privacy. University of Ottawa Law & Technology Journal, Vol. 3, No. 1, 2006

Gottlieb, Stephen E., The Paradox of Balancing Significant Interests (1994). Hastings Law Journal, Vol. 45, No. 825, 1994.

Greer, S. '“Balancing” and the European Court of Human Rights: A ... Habermas-Alexy Debate' (2004) 63 Cambridge Law Journal 412

Griffin, James “Are There Incommensurable Values?” 7 Philosophy and Public Affairs, 1977

Grisez, Germain (1978) "Against Consequentialism," American Journal of Jurisprudence: Vol. 23: Iss. 1, Article 2

Gup, Ted (1999) “Who's a Journalist?” Media Studies Journal (Spring/Summer): 34-37

Gutmann, Amy. "Communitarian critics of liberalism." Philosophy & Public Affairs, Vol. 14, No. 3 (Summer, 1985), pp. 308-322

Habermas, Jürgen ‘Paradigms of Law’, 17 Cardozo L. Rev. 771

Hagans, William G “Who Does the First Amendment Protect?: Why the Plaintiff Should Bear the Burden of Proof in Any Defamation Action” Summer, 2007 26 Rev. Litig. 613

Hallett, Garth “The 'Incommensurability' of Values,” Heythrop Journal 28 (1987): 376

Hart, H.L.A. 'Between Utility and Rights' (1979) 79 Colum Law Rev 828

Hartshorne, John. ‘The Value of Privacy’ Journal of Media Law, Volume 2, Number 1, July 2010 , pp. 67

Hartzler, Shannon ‘Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant’, 41 Val. U. L. Rev. 1235 (2007)

Heaton, Greg 'Privacy – boldly going where defamation hasn't gone before', Media & Arts Law Review, vol. 9 no. 4, pp 295- 316

Henkin, Louis ‘Infallibility under Law: Constitutional Balancing’, 78 Colum. L. Rev. 1022, 1041 (1978)

Hesse, Carla “Print Culture in the Enlightenment” in Fitzpatrick, Martin (ed) The Enlightenment World (Oxford: Routledge 2004)

Heyman, Steve ‘Righting the Balance’, 78 B.U. L. Rev. 1275, 1375–76 (1998)

Hohfeld, Wesley. "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 Yale Law Journal 16 (1913).

Hooper, D “The importance of the Jameel case” (2007) Entertainment Law Review, volume 18, issue 2

Hooper, D & Jordan, B “The Leveson Report and the Future Regulation of the Press” Entertainment Law Review (2013) vol. 24. no. 2

Hughes, K "Photographs in Public Places and Privacy" (2009) 1(2) Journal of Media Law 159.

Iancu, Daniela Valeria, ‘Freedom of the Press - A Component of Freedom of Expression’, 2010 Acta U. Danubius Jur. 57 (2010)

Johnson, B ‘Untagging Ourselves: Facebook and the Law in the Virtual Panopticon’ 13 T.M. Cooley J. Prac. & Clinical L. 185 (2010-2011)

Jones, LW “Alexander Meiklejohn on Skokie”, 35 NAT'L LAWYERS GUILD PRACTITIONER 84 (1978).

Jowell, J “Judicial deference: servility, civility or institutional capacity” [2003] PL 592

Kagan, E “A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The ... Amendment (1991))," 18 Law and Social Inquiry 197 (1993)

Kalven, Jr., Harry ‘The New York. Times Case: A Note on “The Central Meaning of the First Amendment,”’ 1964 SUP. CT. REV. 191

Kalven, Jr., Harry “Upon Rereading Mr. Justice Black on the First Amendment” 14 UCLA L. Rev. 428 (1966-1967)

Kenyon, A. T. 'What Conversation? Free Speech and Defamation Law', Modern Law Review, 73(5) 2010, 697—720

Kenyon, A. T., & Marjoribanks, T. (2008). The future of “responsible journalism.” Defamation law, public debate and news production. Journalism Practice, 2(3) 372-385

Kenyon, Andrew T. and Milne, Esther, ‘Images of Celebrity: Publicity, Privacy, Law’ Media & Arts Law Review, Vol. 10, No. 4, 2005; U of Melbourne Legal Studies Research Paper No. 142

Kumm, Mattias “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice”, 2 International Journal of Constitutional Law, (2004), 574

Kundu, A 'Defamation, reputation and the community: an analysis of the doctrine of presumed harm in defamation law' (2005) 10 MALR 53.

Kutner, Peter B. “Suspicion, Investigation and Truth: A Continuing Evolution in English Defamation Law.” Journal of Media Law;Jul2011, Vol. 3 Issue 1, p61

Kuzma, J, ‘Empirical study of privacy issues among social networking sites’ J. Int'l Com. L. & Tech. 6, 74, 2011

Langvardt, Arlen W. “Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law” 49 U. Pitt Law Review 92 1987-1988

Lehrer, B “A Million Little Murrows: New Media and New Politics” SPRING 2008, 17 MEDIA L. & POL’Y

Levin, Avner and Abril, Patricia Sánchez ‘Two Notions of Online Privacy Online’, 11 Vand J. Ent. & Tech. L. 1001 (2009)

Levinson, Sanford “Public Lives and the Limits of Privacy” Political Science & Politics, Volume 21, Issue 2 April 1988, pp. 263-268

Lewis, Anthony ‘Journalistic freedom and privacy: a case of relative compatibility’. 43 Suffolk U.L. Rev. 79-88 (2009).

Lewis, Anthony, "A Preferred Position for Journalism?," 7 Hofstra Law Review 595 (1979).

Lichtenberg, Judith “Foundations and Limits of Freedom of the Press” in Democracy and the Mass Media (Cambridge University Press 1990)

Lidsky, LB 'Defamation, Reputation and the Myth of Community' 71 Washington Law Review 1 (1996)

Lipton, Jacqueline D. ‘Mapping Online Privacy’, 140 N.W.U. L. Rev. 477, p.499-500

Loveland, I "Defamation of 'government': Taking Lessons from America?" (1994) 14 Legal Studies 206

Loveland, Ian “The Ongoing Evolution of Reynolds Privilege in Domestic Libel Law” (2003) Entertainment Law Review 178

Luizzi, ‘Balancing of Interests in Courts’, 20 Jurimetrics J. 373, (1980)

MacCallum, G, C, 'Negative and Positive Freedom', Philosophical Review, 76 (1967),. 312-34

Markesinis, Basil S “Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons From Germany” [1998 Wilberforce Lecture], 115 Law Quarterly Review 47 (1999)

Matthiesson, Sophie ‘Who's Afraid of the Limelight? The Trafigura and Terry Super-Injunctions, and the Subsequent Fallout’ 2, J. Media L. 153 (2010)

McChesney, Robert W. “FAREWELL TO JOURNALISM? Time for a rethinking” Journalism Studies 13(5-6):682-694 · October 2012

McCloskey, H. J. “Rights”, Philosophical Quarterly 15 (59):115-127 (1965)

McCrudden, C. “Human Dignity and Judicial Interpretation of Human Rights”, 19 Eur. J. Int’l L. 655, (2008)

McEvedy, V., 'The Secret Source of Free Expression', (2006) 156 NLJ 444

McHarg, A. “Reconciling Human Rights and the Public Interest: Conceptual ... of the European Court of Human Rights” (1999) 62 Modern Law Review 671

Meyerson, Denise "Why Courts Should Not Balance Rights against the Public Interest" [2007] Melb U Law Rw 34

Millar, G., 'Whither the spirit of Lingens?' 3 European Human Rights Law Review (2009), 277–288

Miller, Jeremy M., ‘Dignity as a New Framework, Replacing the Right to Privacy. Thomas Jefferson Law Review’, Vol. 30, No. 1, 2007

Milmo, P 'Courting the Media" (2003) EHRLR 1

Mindell, Rob, “Rewriting privacy: the impact of online social networks“, 23(3) Entertainment Law Review, 52, 2012

Mitchell, P., (2011) 'The Nature of Responsible Journalism' 3 Journal of Media Law 19

Moles, A. “Autonomy, free speech and automatic behaviour” Res Publica (2007) 13: 53

Moller, Kai “Balancing and the Structure of Constitutional Rights,” 5 Int'l. J. Const. L. 453 (2007).

Moon R “The Social Character of Freedom of Expression” 2 Amsterdam L.F. 43 2009-2010

Mora, Paul David, “The Compatibility with Article 10 ECHR of the Continued Publication of a Libel on the Internet: Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom” Ent. L.R. 2009, 20(6), 226-228

Mora, P & Savage, A, ‘The Protection of Journalistic Sources, Norwich Pharmacal orders and Article to ECHR: Financial Times Ltd v The United Kingdom’, Entertainment Law Review, Volume 21, Issue 4, 2010, 137.

Moreham, N "Privacy in Public Places" [2006] Cambridge Law Journal 606-635

Moreham, N 'Privacy in the common law' (2005) 121 LQR 628

Morgan, J “Privacy, Confidence and Horizontal Effect: “Hello” Trouble” (2003) 62 (2) Cambridge Law Journal 444

Moshe Cohen-Eliya and Iddo Porat, American Balancing and German Proportionality: The Historical Origins, 8(2) I.CON: Int'l J. Const. L. 263

Mullis, A and Scott, A. “Something Rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation, Communications Law, (2009) Vol 14, No 6, pp173-181

Nagel, Thomas ‘Personal Rights and Public Space’ Philosophy and Public Affairs 24 (2):83–107 (1995)

Newman, Daniel E. “European Union and United States Personal Information Privacy and Human Rights Philosophy—Is There a Match?” (2008) Temp. Int’l & Comp. L.J. 307

Nicholson, Marleen 'McLibel: A Case Study in English Defamation Law', 18 Wisconsin International Law Journal, 1 (2000), pp. 1–145

Nickel, James, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’ (November 21, 2008). Human Rights Quarterly, Vol. 30, pp. 984-1001, 2008

Nimmer, Melville “Introduction—Is Freedom of the Press a Redundancy?” 26 Hastings LJ 639, n.57 (1975)

Nissenbaum, Helen, ‘A Contextual Approach to Privacy Online’ (2011). Daedalus 140 (4), Fall 2011: 32-48.

Note (Unattributed) (1949), 'The Community Segment in Defamation Actions, A Dissenting Essay' 58 Yale Law journal 1387

O'Flynn, Ian 'Deliberating about the Public Interest' (2010) 16(3) Res Publica 299

Parker, R A ‘Definition of Privacy’, 27 Rutgers L. Rev. 275 (1975).

Paton-Simpson, Elizabeth 'Private Circles and Public Squares: Invasion of Privacy by the Publication of‘Private Facts’" (1998) 61 MLR 318

Pavlakos, G. 'Constitutional Rights, Balancing and the Structure of Autonomy', Canadian Journal of Law and Jurisprudence 24:1 (2011) 129—54

Penney, Jon, Privacy and the New Virtualism (2008). 10 Yale Journal of Law & Technology 194, 2008.

Penzi, “Libel Actions in England, a Game of Truth or Dare?” Spring, 1996, 10 Temp. Int'l & Comp. L.J. 211

Perry, M. "Some Notes on Absolutism, Consequentialism, and Incommensurability," 79 Northwestern University Law Review (1985) 967

Peonidis, Filimon “Freedom of Expression, Autonomy, and Defamation”, 17 LAW AND PHILOSOPHY 1 (1998). 2

Phillipson, Gavin “Trial by Media: The Betrayal of the First Amendment's Purpose”, 71 Law and Contemporary Problems 15-29 (Fall 2008)

Pildes, R. "The Structural Conception of Rights and Judicial Balancing," 6 Review of Constitutional Studies (Revue d'etudes constitutionnelles) 179 (2002)

Posner, Richard A., "The Right of Privacy" (1978). Sibley Lectures. Paper 22

Post, RC “Community and the First Amendment”, 29 Ariz. St. L.J. 473 (1997)

Post, Robert “Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse,” 64 University of Colorado Law Review 1109 (1993)

Post, Robert “Reply to Bender”, 29 Arizona State Law Journal 495 (1997)

Post, R. C. (1991). “Rereading Warren and Brandeis: Privacy, Property, and Appropriation”. Case Western Law Review, 41(3), 647-680

Post, R.C. “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74. California Law Rev 691

Post, Robert ‘Social Foundations of Privacy’, 77 Calif. L. Rev. 957 (1989)

Post, Robert ‘Participatory Democracy and Free Speech’, 97 Va. L. Rev. 477

Post, Robert, ‘Participatory Democracy as a Theory of Free Speech: A Reply’ 97 Va. L. Rev. (2011) 617

Post, Robert C., "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell" (1990). Faculty Scholarship Series. Paper 210. http://digitalcommons.law.yale.edu/fss_papers/210

Post, RC “Viewpoint Discrimination and Commercial Speech”, 41 Loyola of Los Angeles Law Review 169 (2007)

Poole, Thomas ‘Proportionality in Perspective’ LSE Law, Society and Economy Working Papers 16/2010. London School of Economics and Political Science https://www.lse.ac.uk/collections/law/wps/WPS2010-16_Poole.pdf

Prosser, W ‘Privacy’, 48 Cal.L.Rev. 383 (1960),

Powell, C.D. ‘Privacy for Social Networking’, 34 U. Ark. Little Rock L. Rev. 689 (2012).

Powell, C.D. “You already have zero privacy. Get over it!” Would Warren and Brandeis Argue for. Privacy for Social Networking?, 31 Pace L. Rev 146 (2011)

Rachels, J. ‘Why Privacy Is Important’. Philosophy and Public Affairs 4:323-333, 1975

Rappaport, Aaron J. ‘Beyond Personhood and Autonomy: Moral . Theory and the Premises of Privacy’, 2001 Utah L. Rev. 441

Raz, J “Free Expression and Personal Identification” Oxford J Legal Studies (1991) 11 (3): 303-324.

Redish, Martin H. “Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination”, 41 Loy. L.A. L. Rev. 67 (2007)

Reiman, Jeffrey H. (1976). ‘Privacy, Intimacy, and Personhood’. Philosophy and Public Affairs 6 (1):26-44

Richards , N ‘The Puzzle of Brandeis, Privacy, and Speech’ · 63 Vand. L. Rev. 1295 (2010).

Richardson, M, “Whither breach of confidence: a right of privacy for Australia? ” (2002) 26 Melbourne University Law Review 20

Rivers, “Proportionality and Variable Intensity of Review,” 65 Cambridge L. J. 174, (2006)

Robertson, Michael, “Principle, Pragmatism and Paralysis: Stanley Fish on Free Speech.” Canadian Journal of Law and Jurisprudence, Vol. 16 (2003) 287

Rogers, H and Tomlinson, H' Privacy and Expression: Convention Rights and Interim Injunctions' [2003] European Human Rights Law Review 38

Rolfs, Jacqueline R. ‘The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure’, 1990 Wis. L. Rev. 1107

Rubel, Alan, The Particularized Judgment Account of Privacy (July 1, 2010). Res Publica 17(3): 275-290 (2011)

Sanderson, M. A. 'Is von Hannover v. Germany a step backward for the substantive analysis of free speech and privacy interests' (2004) 6 E.H.R.L.R. 631

Scanlon, T ‘Comment on Baker’s Autonomy and Free Speech’ 27 Const. Comment. 319 (2011)

Scanlon, Thomas ‘Thomson on Privacy’. Philosophy and Public Affairs, Vol. 4, No. 4. (Summer, 1975), pp. 315-322

Schauer, Frederick, “Balancing, Subsumption and the Constraining Role of Legal Text” (February 18, 2009).

Schauer, Frederick. “Categories and the First Amendment: A Play in Three Acts.” 34 Vand. L. Rev. 265 (1981)

Schauer, Frederick, ‘Fear, Risk and the First Amendment: Unraveling the "Chilling Effect" , 58 B. U. L. REV. 685-732 (1978)

Schauer, Frederick “Hohfeld's First Amendment”, 76 Geo. Wash. L. Rev. 914

Schauer, F "Social Foundations of the Law of Defamation: A Comparative Analysis". (1980) I Journal of Media Law and Practice 3

Schauer, F. "Commensurability and Its Constitutional Consequences" (1994) 45 Hastings. LJ. 785

Schroeder, Jeanne L. “Apples and Oranges: The Commensurability Debate in Legal Scholarship” in Cardozo Law School, Public Law Paper No. 48 (2002)

Scordato, Marin Roger, “The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law”. Connecticut Law Review, Vol. 40, No. 1, 2007

Seidentop, L "Two Liberal Traditions." in The Idea of Freedom: Essays in Honour of Isaiah Berlin, ed. Alan Ryan, 53-74. (Oxford: Oxford University Press. . 1994)

Sellars, S. (2011) 'Online privacy: do we have it and do we want it? A review of the risks andUK case law'. European Intellectual Property Review, 33(1), 9–17

Shiffrin, S.V. ‘A Thinker-Based Approach to Freedom of Speech’ 27 Const. Comment 283 (2011)

Shiffrin, Steven ‘Dissent, Democratic Participation, and First Amendment Methodology’ 97 Va. L. Rev. 559 (2011)

Skolnick, Jerome H “The Sociological Tort of Defamation” (1986) 74. California Law Review 677

Slagle, Mark “An Ethical Exploration of Free Expression and the Problem of Hate Speech” Journal of Mass Media Ethics 24(4):238-250 · October 2009

Slaughter, MM, 'The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society' (1992) 14 Cardozo LR 351

Smolla, Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell, 20 Ariz. St. L.J. 423 (1988)

Solove, Daniel J. ‘Conceptualizing Privacy’, 90 Cal. L. Rev. 108

Solove, Daniel J., ‘A Taxonomy of Privacy’. University of Pennsylvania Law Review, Vol. 154, No. 3, p. 477, January 2006

Steinbock, D. (2005) 'Data Matching, Data Mining, and Due Process', Georgia Law Review, p1-84

Stewart, Potter "Or Of the Press." 26 Hastings Law Journal 631 (1975)

Strahilevitz, Lior Jacob 2005, 'A Social Networks Theory of Privacy', The University of Chicago Law Review, vol. 72, no. 3 (Summer, 2005), pp. 919-988

Strahilevitz, Lior, Reunifying Privacy Law (May 24, 2010). California Law Review, Vol. 98, 2010; U of Chicago, Public Law Working Paper No. 309

Sullivan, Kathleen M. ‘Post-Liberal Judging: The Roles of Categorization and Balancing’, 63 University of Colorado Law Review 293-317 (1992)

Sunstein, Cass R. "Incommensurability and Valuation in Law," Michigan Law Review 79 (1994): 779-861

Sunstein, Cass R. "Lochner's Legacy." Columbia Law Review. 87:873 (June 1987)

Sunstein, Cass R. “Preferences and Politics” Philosophy & Public Affairs Vol. 20, No. 1 (Winter, 1991), pp. 3-34

Sunstein, Cass R., ‘The Autonomy of Law in Law and Economics’ 21 Harv. J. L. & Pub. Pol'y 89 (1997-1998)

Taylor, Charles 'What's wrong with negative liberty?' in A. Ryan (ed.), The Idea of Freedom (London, Oxford University Press, 1979)

Thomson, Judith ‘The Right to Privacy’. Philosophy and Public Affairs, Vol. 4 , No. 4. (Summer, 1975), pp. 295-314

Thorgeirsdottir, H (2004) 'Self-Censorship Among Journalists: A (Moral) Wrong or a Violation of ECHR Law', EHRLR 4, 383–99

Treiger-Bar-Am, Leslie Kim "Defamation law in a changing society: the case of Youssoupoff v Metro-Goldwyn Mayer" 20 Legal Studies 2 (2000) 291

Trindade, F 'When is Matter Considered "Defamatory" by the Courts?' [1999] Singapore. Journal of Legal Studies 1

Trouille, Helen "Private Life and Public Image: Privacy Legislation in France" International and Comparative Law Quarterly, 49, January 2000, p. 199-208

Tsakyrakis, S. "Proportionality: An assault on human rights?" 7 Int'l. J. Const. L. 468 (2010)

Veeder, Van Vechten. "The History and Theory of the Law of Defamation I" (1903), 3 Colum. L. Rev. 546.

Waldron, J "The Core of the Case Against Judicial Review", 115 YALE L.J. 1346 (2006)

Waldron, J. 'Fake Incommensurability: A Response to Professor Schauer', (1993-94) 45 Hastings Law journal 813

Waldron, J 'Kant's Legal Positivism', 109 Harvard Law Review (1996) 1535.

Wallace, Stuart "The Journalist-Source Relationship in Context: A Comparative Review of US and English Law" Common Law World Review, Volume 38, Number 3, September 2009, 268.

Wallach, John R. "Liberals, Communitarians, and the Tasks of Political Theory". (1987). Political Theory 15 (4):581-611

Warren, S & Brandeis, L "The Right to Privacy" Harvard Law Review. Vol. IV December 15, 1890 No. 5

Weaver, R Kenyon, A Parlett, D Walker, C "Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English Media" 37 Vand. J. Transnat'l L. 1255 (2004)

Weinstein, James "Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish", 41 Loy. L.A. L. Rev. 133 (2007).

Weinstein, James 'Participatory Democracy as the Central Value of American Free Speech Doctrine'97 Va. L. Rev. 491 (2011)

Weinstein, J "Symposium: Free Speech and Community: A Brief Introduction to Free Speech Doctrine", 29 ARIZ. ST. L.J. 461 (1997)

Whitman, JQ "Enforcing Civility and Respect: Three Societies", 109 Yale L.J. 1279 (2000)

Whitman, JQ "The Two Western Cultures of Privacy: Dignity Versus Liberty." The Yale Law Journal 113(6):1151

Woito, Linda N. & McNulty, Patrick, 'The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?', 64 Iowa L. Rev. 185

Wragg, Paul ‘Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry', Journal of Media Law, 2(2), 295

Wragg, P. (2013) 'Time to end the tyranny: Leveson and the failure of the fourth estate'. Communications Law, 18(1), 11–20

Wright, R. George, “Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate”, 23 Loy. L.A. L. Rev. 763 (1990)

Xu, Heng ‘Reframing Privacy 2.0 in Online Social Networks’ 14 U. Pa. J. Const. L. 1077

Yang, Low Kee ‘Reynolds privilege transformed’ L.Q.R. 2014, 130(Jan), 24-28

Youm, Kyu Ho “Liberalizing British Defamation Law: A Case of Importing the First Amendment?” Communication Law And Policy Vol. 13 , Iss. 4,2008

Zimmerman, Diane L., 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 Cornell Law Review 291

Newspaper/Online Articles

“Defamation Round the World” https://inforrm.wordpress.com/2010/03/24/defamation-round-the-world/ (accessed 29 June 2016)

‘Edward Snowden: Leaks that exposed US spy programme’ BBC 25th October 1013 http://www.bbc.co.uk/news/world-us-canada-23123964 (accessed 30th June 2016)

‘Edward Snowden: public indifference is the real enemy in the NSA affair’ The Guardian 20th October 2013 http://www.theguardian.com/world/2013/oct/20/public-indifference-nsa-snowden-affair (accessed 30th June 2016)

‘Facebook Inc’, United States Security and Exchanges Commission, Form 10-K, available http://investor.fb.com/secfiling.cfm?filingid=1326801-13-3 (accessed 30th June 2016)

Liebling, A.J. “The Wayward Press: Do You Belong in Journalism” The New Yorker, May 14, 1960

‘NSA Prism program taps in to user data of Apple, Google and others’ The Guardian 7th June 2013 http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data (accessed 30th June 2016)

‘News: Privacy Injunction Statistics for 2015 published’ https://inforrm.wordpress.com/2016/03/13/news-privacy-injunction-statistics-for-2015/ (accessed 30th June 2016)

The Monitor's View, “What is A Journalist?” Christian Science Monitor, March 18th 2005 available http://www.csmonitor.com/2005/0318/p08s02-comv.html accessed 28th June 2016

‘Ryan Giggs named by MP as injunction footballer’ 23rd May 2011 http://www.bbc.co.uk/news/uk-13503847 (accessed 30th June 2016)

‘Student jailed for racist Fabrice Muamba tweets’
https://www.theguardian.com/uk/2012/mar/27/student-jailed-fabrice-muamba-tweets
(accessed 30th June 2016)

Rusbridger, Alan “The long, slow road to libel reform” The Guardian, Tuesday 10 May 2011
https://www.theguardian.com/law/2011/may/10/alan-rusbridger-libel-reform-speech
(accessed 30th June 2016)

Reports

Faulks Committee Report on Defamation (1975) Cmnd. 5909

House of Commons, Culture, Media and Sport Committee, Press standards, privacy and libel, Examination of Witnesses, 28th April 2009 available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9042806.htm (accessed 28/06/2016)

“Liberty’s submission to the Department for Culture, Media and Sport on two Royal Charter proposals for the future regulation of the press” https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-submission-to-department-for-culture-media-and-sport-on-two-royal-.pdf

National Union of Journalists- Ethics http://www.nuj.org.uk/innerPagenuj.html?docid=25

Report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation (1991)(the Neill committee)

“Reporter’s Privilege” The Reporters Committee for Press Freedom http://www.rcfp.org/privilege/ accessed 28/01/11

“Rights Brought Home: The Human Rights Bill” available http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm

Websites

“The Drudge Report” http://www.drudgereport.com/

Facebook https://www.facebook.com/full_data_use_policy

“Guido Fawke’s Blog” http://order-order.com/

“The Huffington Post” http://www.huffingtonpost.com/

“Wikileaks” http://wikileaks.ch/

US State Department website- Press Freedom www.state.gov/g/drl/press/index.htm