THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT: A NEW THEORY FOR MEDIA FREEDOM IN THE AGE OF CITIZEN JOURNALISM

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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ABSTRACT

This thesis contends that the law's treatment of media freedom as a normative concept needs to be modernised. In doing so it draws upon the notion that there are two categories of free speech: (i) the personal right to freedom of expression; and (ii) media freedom. It argues that the latter ought to be treated differently to the former. However, in the current categorisation of who belongs to which group, there is a gap, as there is a definable category of actors who are, as citizen journalists, effectively, 'media', but are not recognised as such. This is problematic, as citizen journalists, facilitated by social media, are no longer an outlier of free speech. Rather, they are central to how we receive and impart information and ideas. Consequently, it offers a new workable definition of media based on a 'media-as-a-constitutional-component concept'. This concept is underpinned by social responsibility theory (as opposed to libertarianism which, it is argued, is an inappropriate foundation for modern media speech despite it being the de facto communication theory for online speech) and the argument from democratic self-governance, which provides the appropriate framework to facilitate this modernisation and 'plug the gap'. Throughout the thesis, a comparative approach is taken to the formulation and application of the concept, and to the legal challenges presented by citizen journalism that it attempts to meet, including the media's standards of behaviour and norms of public discourse, anonymous and pseudonymous speech, contempt of court, defamation and regulation. Ultimately, the thesis concludes by setting out principles for a new regulatory framework that would effectively capture citizen journalists.

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INTRODUCTION

1. OBJECT OF THE ENQUIRY: THE PROBLEM AND THE THESIS

In 2011 1.2 billion users accessed a social media site, a 6% increase from 2007.[1] Four years later, in 2015, over 2 billion people used social media globally. By 2019, this figure is projected to grow to 2.72 billion users, or 39% of the world's population.[2] These figures illustrate the exponential growth of social media. In a little over a decade, it has developed from crude and relatively small and exclusive online communities to the platforms that we associate with it today. As a result, the likes of Facebook, Twitter and Instagram, among many others, have become intertwined within our cultural and social fabric, to the extent that these platforms permeate every aspect of our lives:[3] in the words of Marshall McLuhan, they have become an 'extension of man.'[4]

The growth of social media, and the way in which it has emerged as a new infrastructure for speech, has stimulated two phenomena that are the focus of this enquiry. Firstly, by facilitating the convergence of audience and producer, it has encouraged the growth of citizen journalism. The role played by social media in citizen journalism's ascendance was observed by Leveson LJ in his *Inquiry into the Culture, Practices and Ethics of the Press* (*Inquiry*), in which he referenced the ability of citizen journalists, operating through social media, to reach vast amounts of people almost instantly,[5] and the United

[1] Comscore Report 2011, http://www.comscore.com/Insights/Presentations-and-Whitepapers/2011/it_is_a_social_world_top_10_need-to-knows_about_social_networking.

[2] L. Kawasaki, Strategy Analytics Global Social Network Forecast, 23rd March 2015 https://www.strategyanalytics.com/access-services/media-and-services/in-the-home/digital-media/digital-media/reports/report-detail/global-social-network-market-forecast#.VuFWXYs7alI.

[3] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 25; J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 4-5.

[4] See generally: M. McLuhan, *Understanding Media: The Extensions of Man* (MIT Press, 1964).

[5] In relation to blogs, Leveson LJ refers to *Guido Fawkes* that, according to its founder, Paul Staines, can, when big stories are being broken, be visited by up to 100,000 people per hour. Leveson LJ also makes specific reference to the usage of social media sites, such as Facebook and Twitter. See Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 168, [4.3]-[4.4], 173, [5.2] respectively. The role that social media now plays in how we communicate was summed up by the Criminal Court of the City of New York in *New York v Harris* 2012 N.Y. Misc. LEXIS 1871 *3, note 3 (Crim. Ct. City of N.Y. N.Y.

Nations Human Rights Committee (HRC), which has stated that the Internet and social media has created 'a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries'.[6] Secondly, a symbiosis with the traditional media (which, for the purpose of this thesis, is defined as the printed press and broadcast media), in which citizen journalists, often operating on social media, increasingly act as a 'source' of news. A 'side-effect' of this symbiotic relationship is that false information published by citizen journalists can have an even greater impact, as it is often 'recycled' by the traditional media. In turn, the fact that the traditional media has published it serves to justify and support the false information. Thus, the cycle becomes self-fulfilling.

This thesis argues that citizen journalism, and its symbiotic relationship with the traditional media, has not only permanently altered the media ecology, but has shifted the media paradigm. Consequently, citizen journalists are no longer an outlier of free speech. Rather, they are central to how we receive and impart information and ideas. This creates a problem that this thesis seeks to address: It argues that the enhanced right to media freedom attaches to the 'media'. This right affords media entities privileged protection, over and above non-media actors and, as a result, carries with it concomitant responsibilities and obligations. Thus, it advances the notion that there are two categories of free speech: (i) the personal right to freedom of expression and; (ii) media freedom, and that the latter ought to be treated differently to the former. In a world where citizen journalists are reporting on matters of public interest, being able to identify the beneficiaries of media freedom is critical to the effective operation of the right. However, in the current categorisation of who belongs to which group, there is a gap, as there is a definable category of actors who are, as citizen journalists, effectively, 'media', but are not recognised as such. This is because the methods for distinguishing those entities operating as media from those that are not, and therefore who should be subject to the enhanced right, at best lack merit and, at worst, are redundant.[7] Under the methods currently employed a citizen journalist who publishes a story of public concern would be afforded no greater protection than, for instance, a 'casual' social media

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County, 2012): 'The reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate.'

[6] Human Rights Committee, General Comment 34: Freedoms of opinion and expression, CCPR/C/GC/34 (GC 34) 12th September 2011, [15]; See also, M. O'Flaherty, 'Freedom of Expression: Article 19 of the ICCPR and Human Rights Committee's General Comment No 34', (2012) 12 *Human Rights Law Review,* 627.

[7] See Chapter Three section 5; P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 37.

user, whereas a traditional media actor would, even if what it, or they, are reporting is of 'lower value'.

This problem is understandable. The dominant philosophical theories that underpin free speech and media freedom are John Stuart Mill's argument from truth[8] and, particularly in the context of online expression,[9] the marketplace of ideas, which was laid down by Justice Oliver Wendell Holmes in *Abrams v United States*.[10] However, these libertarian arguments are based on nineteenth and early twentieth century means of communication. They are not suitable for twenty-first century speech, and the modern media,[11] of which citizen journalism is a central component.[12] Consequently, as it stands, the law relating to the operation of free speech and media freedom is lagging behind reality. For it to catch up its theoretical foundations must do the same. The purpose of this thesis is to offer an alternative normative framework for understanding media freedom, in light of twenty-first century means of receiving and imparting information and ideas, and the legal challenges that face it. Ultimately, this thesis contends that the law's treatment of media freedom as a normative concept needs to be modernised. The new definition of media based on the media-as-a-constitutional-component concept, as underpinned by social responsibility theory and the argument from democratic self-governance, provides the appropriate framework to facilitate this modernisation and 'plug the gap'.

To do this, in Chapter Three, the thesis advances a new workable definition of the media, based upon a media-as-a-constitutional-component concept, which effectively delineates media from non-media actors. As opposed to libertarianism, which is currently the de facto normative paradigm for online speech, a position that, in Chapter Three, this thesis discredits, the concept is underpinned by social responsibility theory and the argument from democratic self-governance.[13] This normative foundation supports the concept's premise that the performance of a constitutional function, and the dissemination of speech of constitutional value, such as reporting on a matter of public interest, rather than the

[8] J. Mill, *On Liberty and Other Essays*, (Oxford University Press, 1991).
[9] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 579; L. Dahlberg, 'Cyber-libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination' *Cultural Politics* (2010) 6(3), 331-356, 332-333.
[10] 250 US 616 (1919).
[11] See Chapter Three sections 2 and 3.
[12] P. Coe, '(Re)embracing social responsibility theory as a basis for free speech: shifting the normative paradigm for a modern media', *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431.
[13] See sections 4 and 5.

education, training or employment of the actor, should define the beneficiaries of media freedom (and therefore those subject to the responsibilities and obligations attached to this enhanced right). Thus, the concept's underlying rationale provides a far more effective doctrinal framework than libertarianism, and its inherent philosophical arguments, for dealing with the legal and doctrinal challenges that emanate from twenty-first century methods of receiving and imparting information and ideas.

Section 3 provides a 'roadmap' for the enquiry, which sets out in detail the focus of each chapter. However, by way of brief introduction, Chapter Two sets out why media freedom should be distinguished from freedom of expression.[14] This is followed by analysis of the 'contents' of media freedom, and how this protects media speech and the media as an institution. As explained above, Chapter Three advances the media-as-a-constitutional-component concept, whereas Chapter Four explains the parameters for media freedom that are set by the concept, and what standards of behaviour and norms of discourse this imposes on media actors. Chapter Five considers how the concept offers a more appropriate way to deal with the challenges deriving from the proliferation of anonymous and pseudonymous speech. In Chapter Six the concept is applied to contempt of court and defamation, and the principles that underpin them. The chapter argues that the standards of behaviour and norms of discourse it imposes could, if adopted, help to address the imbalance between the state and claimants and the media. Finally, Chapter Seven concludes the thesis by advancing tenets for a new regulatory framework, underpinned by the concept's rationale, which effectively captures citizen journalists.

Citizen journalism and media freedom have global scope and significance. The benefits they bring to the facilitation of free speech and democracy, and the challenges they create, are not confined to borders. Unsurprisingly, the jurisprudence and scholarship pertaining to them are equally international and, in respect of some countries, such as the United States (US), more developed than the United Kingdom (UK). Thus, throughout the

[14] In this thesis no distinction is made between 'free speech', 'freedom of speech' and 'freedom of expression'. These terms are used interchangeably. According to Eric Barendt, if there were some difference: 'one would expect courts such as those in Germany or the European Human Rights Court to give coverage to a wider range of expressive conduct than, say, US courts [on the basis that] the former are required to apply "freedom of expression" provisions, the latter the "freedom of speech" limb of the First Amendment [yet] there is no evidence that courts draw any distinction between the two concepts.' E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005), 75.

thesis, a comparative approach is taken to the formulation and application of the concept[15] and to the legal challenges presented by citizen journalism that it attempts to meet.

2. PLACE OF THE ENQUIRY WITHIN THE ACADEMIC LITERATURE

With the exception of Ian Cram's monograph *Citizen Journalists Newer Media, Republican Moments and the Constitution*[16] there are no publications on citizen journalists or social media's interaction with free speech specifically. What little literature there is looks at social media's interaction with different areas of law, including, for example, privacy, reputation, the criminal law, contempt of court, public order and national security. Notable scholarship in this area includes Laura Scaife's work[17] and David Mangan's and Lorna Gillies' edited collection *The Legal Challenges of Social Media*.[18] More generally, Doreen Weisenhaus and Simon Young have co-edited a collection entitled *Media Law and Policy in the Internet Age* which offers broad comparative analysis from a number of jurisdictions on the Internet's impact on the media, and associated law, policy and regulation.[19] Similarly, Saul Levmore's and Martha Nussbaum's edited collection *The Offensive Internet* looks at how the Internet has 'complicated' privacy, reputation and speech.[20]

To the contrary, there are many commentators researching and publishing within the field of free speech that have provided rich scholarship on freedom of expression and, more specifically, media freedom. In respect of the former, the leading work in this area is Eric Barendt's second edition of *Freedom of Speech*.[21] As well as this work, Barendt has also written on free speech in respect of particular issues. For instance, in 2016 he published a

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[15] For example, the thesis draws on scholarship and jurisprudence from the United States, Australia and New Zealand. It also applies jurisprudence from the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee in relation to the European Convention on Human Rights, the American Convention on Human Rights and the International Covenant on Civil and Political Rights respectively.

[16] I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015).

[17] L. Scaife, *Handbook of Social Media and the Law,* (Routledge, 2015); L. Scaife, *Networks as the New Frontier of Terrorism #Terror,* (Routledge, 2017).

[18] D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017).

[19] D. Weisenhaus and S. Young, *Media Law and Policy in the Internet Age* (Hart Publishing, 2017).

[20] S. Levmore and M. Nussbaum (eds) *The Offensive Internet* (Harvard University Press, 2010). See also L. Edwards, *Law, Policy and the Internet* (Hart Publishing, 2018); P. Bernal, *The Internet, Warts and All* (Cambridge University Press, 2018).

[21] E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005).

monograph that comparatively considers the treatment of different types of anonymous speech, predominantly in the US and UK, entitled *Anonymous Speech: Literature, Law and Politics*.[22] Other academics have also written on different aspects of free speech. For example, Jacob Rowbottom has analysed the 'value' attributed to different 'types' of speech.[23] Eric Heinze has written on hate speech and democratic citizenship from both European and US perspectives.[24] Similarly, Ivan Hare[25] and James Weinstein[26] have written widely on hate speech, in addition to co-editing one of the leading works on the subject.[27] Roger Shiner has written specifically on commercial expression[28] and Ian Leigh has produced work relating to religious speech.[29] Ronald Dworkin[30] and Cass Sunstein[31] have produced scholarship on pornographic expression. Paul Wragg has written widely on the free speech/privacy dichotomy[32] within different contexts, whereas Dario Milo has provided scholarship on the relationship between free speech and defamation.[33] In addition to his work on citizen journalism, Ian Cram's contributions to this area draw on the intersection between the media, politics and constitutional law generally. [34] These contributions tend to focus on

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[22] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016). See also: R. Arnold and M. Sundara Rajan, 'Do Authors and Performers Have a Legal Right to Pseudonymity' (2017) 9(2) *Journal of Media Law* 189.
[23] J. Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355.
[24] E. Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016).
[25] I. Hare, 'Inflammatory Speech: Cross Burning and the First Amendment' [2003] *Public Law* 408; I. Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred' [2006] *Public Law* 521.
[26] J. Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999); J. Weinstein, 'Hate Crime and Punishment' (1994) 73 *Oregon Law Review* 345; J. Weinstein, 'First Amendment Challenges to Hate Crime Legislation: Where's the Speech?' (1992) *Criminal Justice Ethics* 6.
[27] I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009).
[28] R. Shiner, *Freedom of Commercial Expression* (Clarendon Press, 2003).
[29] I. Leigh, 'Hatred, Sexual Orientation, Free Speech and Religious Liberty' (2008) 10(3) *Ecclesiastical Law Journal* 337.
[30] R. Dworkin, 'Is there a right to pornography' (1981) *Oxford Journal of Legal Studies* 177.
[31] C.R. Sunstein, 'Pornography and the First Amendment' (1986) 35 *Duke Law Journal* 589.
[32] P. Wragg, 'The benefits of privacy-invading expression' *Northern Ireland Legal Quarterly* (2013) 64(2) 187-208; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*' (2010) 2(2) *Journal of Media Law* 295-320. P. Wragg, 'Enhancing press freedom through greater privacy law: a UK perspective on an Australian privacy tort' *The Sydney Law Review* 36.4 (2014), 619-641.
[33] D. Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008).
[34] I. Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009), 311-330; I. Cram, *Contested Words – Legal Restrictions on Freedom of Expression in Liberal Democracies* (Ashgate, 2006); I. Cram, 'Regulating the media: some neglected freedom of expression issues in the United Kingdom's counter-terrorism strategy' (2006) 18 *Terrorism and Political Violence* 335; I. Cram, 'Political Expression, Qualified Privilege and Investigative Journalism – An Analysis of Developments in English Defamation Law post *Reynolds v. Times Newspapers*' (2005) 11 *Canterbury Law Review* 143; I. Cram, *A Virtue Less Cloistered – Courts, Speech and Constitutions*, (Hart Publishing, 2002); I. Cram, 'Beyond Madison? The US Supreme Court and the regulation of sexually explicit expression' [2002] *Public Law* 743.

the judicial treatment of different types of speech, supported to an extent by consideration of the theoretical arguments that underpin freedom of expression.

The philosophical foundations that underpin free speech have been subject to specific and significant academic coverage, particularly by US scholars, although, as demonstrated by Barendt's,[35] Helen Fenwick's and Gavin Phillipson's[36] and Wragg's[37] work, this area has not been ignored by UK-based researchers. Despite Frederick Schauer's book *Free speech: a philosophical enquiry* being published in 1981, it arguably remains the most influential work on freedom of expression's philosophical foundations.[38] Other contributors to this area include Joseph Raz,[39] Kent Greenawalt[40] and Larry Alexander. Alexander's work has questioned the viability of a coherent right to free speech.[41] Notable theoretical research relating to the specific philosophical foundations underpinning free speech include the contributions of John Stuart Mill[42] to the argument from truth; Alexander Meiklejohn[43] to the argument from democratic self-governance; Thomas Scanlon[44] to the argument from autonomy; Thomas Emerson,[45] C. Edwin Baker[46] and Martin Redish[47] to the argument from self-fulfilment; and Lee Bolinger[48] to the argument based on tolerance. Barendt has offered critique of all of these arguments,[49] in particular the marketplace of ideas.[50]

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[35] E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005); E. Barendt, 'The First Amendment and the Media' in I. Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA*, (Hart Publishing, 1998), 29-50.
[36] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).
[37] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', (2013) *Public Law*, Apr 363-385.
[38] This book advanced the theory for protecting free speech based on the 'suspicion' or 'distrust' of government. See: F. Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1982), 81, 148, 162-163. See also: E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005) 21-23.
[39] J. Raz, 'Free Expression and Personal Identification', (1991) 11 *Oxford Journal of Legal Studies* 303.
[40] K. Greenawalt, 'Free Speech Justifications', (1989) 89 *Columbia Law Review* 119.
[41] L. Alexander, *Is There a Right of Freedom of Expression?* (Cambridge University Press, 2005); see similarly: S. Fish, *There's No Such Thing As Free Speech And It's a Good Thing Too*, (Oxford University Press, 1994).
[42] J. Mill, *On Liberty and Other Essays*, (Oxford University Press, 1991). See also: J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 110; K.C. O'Rourke, *John Stuart Mill and Freedom of Expression The genesis of a theory*, (Routledge, 2001).
[43] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, 1960), 42; A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245; A. Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper, 1948).
[44] T. Scanlon, 'A Theory of Freedom of Expression' in R. Dworkin (ed) *The Philosophy of Law* (Oxford University Press, 1977); T. Scanlon, 'Freedom of Expression and Categories of Expression' (1979) *University of Pittsburgh Law Review* 519.
[45] T. Emerson, *The System of Freedom of Expression* (Random House, 1970).
[46] C.E. Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989).
[47] M. Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591.
[48] L. Bollinger, *The Tolerant Society* (Oxford University Press, 1986).
[49] E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005).

In respect of the general principles and normative paradigms underpinning media speech generally, Fred Siebert's, Theodore Peterson's and Wilbur Schramm's *Four Theories of the Press*[51] still remains extremely influential, despite it being published in 1956. Other important contributors to this area include J. Herbert Altschull,[52] Marshall McLuhan[53] and Denis McQuail.[54] Media power and its impact on democracy and media regulation have been widely discussed by a number of leading commentators. For instance, Thomas Gibbons has provided rich scholarship on all three issues[55] and James Curran has talked extensively on media power and its relationship with democracy.[56] More recently, the Media Reform Coalition has published a report entitled *Who Owns the UK Media?*[57] The report looks at the concentration of media ownership and argues that this leads to abuses of power and media distortion. In April 2019 the government published its *Online Harms White Paper* that proposes a new statutory duty of care to make new companies take more responsibility for the safety of their users, and tackle harm caused by content or activity on their platforms. Compliance with this duty will be overseen and enforced by an independent regulator. At the time of writing the consultation period was still open.[58]

Fenwick's and Phillipson's *Media Freedom under the Human Rights Act*[59] has remained a leading book on the concept of media freedom since its publication in 2006. Since then, it has been joined by other excellent scholarship, including that of Raymond Wacks,[60] who looks specifically at the relationship between media freedom and privacy. Of particular note is the work of Jan Oster, specifically his monograph *Media Freedom as a Fundamental*

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[50] E. Barendt, 'The First Amendment and the Media' in I. Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA*, (Hart Publishing, 1998), 29-50.
[51] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956).
[52] J. Altschull, *From Milton to McLuhan The Ideas Behind American Journalism*, (Pearson, 1990).
[53] M. McLuhan, *Understanding Media: The Extensions of Man* (MIT Press, 1964).
[54] D. McQuail, *McQuail's Mass Communication Theory,* (5th ed, Sage, 2005).
[55] T. Gibbons, 'Fair Play to All Sides of the Truth': Controlling Media Distortions (2009) *Current Legal Problems* 62(1), 286-315; T. Gibbons, 'Free Speech, Communication and the State' in M. Amos, J. Harrison and L. Woods (eds), *Freedom of Expression and the Media* (Martinus Nijhoff, 2012); T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219; T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 286-287; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487.
[56] For example, see: J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain,* (7th ed. Routledge, 2010); T. Aalberg and J. Curran (eds), *How Media Inform Democracy: A Comparative Approach* (Routledge, 2012).
[57] Media Reform Coalition, *Who Owns the UK Media?* 12th March 2019 accessible via https://www.mediareform.org.uk/media-ownership/who-owns-the-uk-media.
[58] Department for Digital, Culture, Media & Sport, *Online Harms White Paper,* April 2019 accessible via https://www.gov.uk/government/consultations/online-harms-white-paper
[59] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).
[60] R. Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013).

Right,[61] in which he develops a theoretical and doctrinal framework for the scope, content and limitations of media freedom as a fundamental right by building on the research of scholars such as Jurgen Habermas[62] and Robert Post.[63]

Finally, there is some excellent scholarship on the broad field of media law, from a number of commentators, including Rowbottom's recent book *Media Law*,[64] Oster's *European and International Media Law*[65] and earlier work from Geoffrey Robertson QC and Andrew Nicol QC.[66]

This thesis is distinguishable from the scholarship set out above as it applies the normative paradigms and philosophical arguments underpinning free speech, and the concept of media freedom, to citizen journalism and, in doing so, offers a new theory for media freedom in the form of the media-as-a-constitutional-component concept. Thus, in particular, it builds on Cram's work on citizen journalism, Barendt's scholarship on the philosophical foundations of free speech, and Oster's views on media freedom, but it differs by applying this work to a new concept of media freedom, based on constitutional value, that facilitates citizen journalism's interaction with democracy.

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[61] J. Oster, *Media Freedom as a Fundamental Right,* (Cambridge University Press, 2015); See also: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78.
[62] R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell'* (1990) 103 *Harvard Law Review* 601; R. Post, *Racist Speech, Democracy, and the First Amendment'* (1991) 32 *William and Mary Law Review* 267; R. Post, 'Reconciling Theory and Doctrine in First Amendment Jurisprudence' (2000) 88 *California Law Review* 2353; R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell'* (1990) 103 *Harvard Law Review* 601.
[63] J. Habermas, *The Structural Transformation of the Public Sphere* (1962) (translation by T. Burger; Polity Press, 1992); J. Habermas, *The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society* (1981) (translation by T. McCarthy, Beacon Press, 1984); J. Habermas, *The Theory of Communicative Action, vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (1981) (translation by T. McCarthy, Beacon Press, 1987).
[64] J. Rowbottom, *Media Law* (Hart Publishing, 2018).
[65] J. Oster, *European and International Media Law* (Cambridge University Press, 2016).
[66] G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002).

3. PARAMETERS OF THE ENQUIRY: A ROADMAP FOR THE FOLLOWING CHAPTERS

The parameters of this enquiry are set by its focal point. As stated above, this relates to the application of the normative paradigms and philosophical foundations underpinning free speech, and the concept of media freedom, to citizen journalism and its symbiotic relationship with the 'traditional' media. Thus, to properly frame this enquiry examination of the broader issues relating to communication doctrine, and the nature and operation of freedom of expression and media freedom, from both practical and theoretical perspectives, is necessary. For instance, as set out in more detail in section 1, the thesis explores libertarian and social responsibility theory; it analyses the conceptual distinction between freedom of expression and media freedom; it 'unpacks' the contents of media freedom, and; it considers the standards and responsibilities attached to the operation of media.

In overview, Chapter One provides context for the rest of the thesis by setting out the current media landscape. In doing so, it charts the development of social media as a facilitator of citizen journalism and the impact that citizen journalism has had on the traditional media. Chapter Two is a functional chapter which lays the foundations for the chapters that follow. Thus, it begins by distinguishing media freedom from individual freedom of expression, and establishes that the former provides enhanced protection, over and above the right to freedom of expression, for actors operating as part of the media. In doing this, it compares the jurisprudence of the European Court of Human Rights (ECtHR) with US scholarship and jurisprudence from the US Supreme Court. The dominant, although not the only view in the US, is based upon the press-as-technology model, which rejects the notion that the media has any constitutional privileges in excess of other speakers. This comparison with the diametrically opposed position of the ECtHR is useful, as it forms the foundation for section 5, which, inter alia, discredits the press-as-technology-model as a method for distinguishing media from non-media actors in the current media environment. The chapter goes on to 'unpack' media freedom. Firstly, it explains its role and why the right is conceptually important to media actors. Secondly, it sets out what the right means in reality to its beneficiaries in respect of the protection it affords media speech and the media institutionally. Finally, it identifies the shortfalls of the traditional methods adopted by courts and scholars for distinguishing between media and non-media actors (including, as alluded to above, the

press-as-technology model), and therefore who/what is subject to media freedom. Chapter Three introduces a new workable definition of the media, founded upon the concept, that effectively delineates media from non-media actors. This conceptualisation is based on the premise that the performance of a constitutional function, such as reporting on a matter of public concern, rather than the education, training or employment of the actor, should define the beneficiaries of media freedom. It essentially offers an alternative means of interpreting free speech that recognises twenty-first century methods of communication, and the legal challenges this presents, which are set out in its final section (these challenges form the subjects of Chapters Five to Seven). In doing so, it discredits libertarianism as a normative paradigm for underpinning media and, instead, argues that social responsibility theory provides a sound foundation for the re-conceptualisation of the media and media freedom. Chapter Four begins by setting out the parameters that are imposed by the concept on media freedom. This leads into a discussion as to the standards attached to media discourse and conduct by the concept. Specifically, it explores the notion of public interest, media conduct and the media's requirement to act in good faith pursuant to the concept. In respect of public interest, it argues that the concept, and the social responsibility and argument from democratic self-governance rationales underpinning it, align it clearly with the jurisprudence of the ECtHR: a position that is diametrically opposed to a divergent line of UK case law supporting a 'role model' principle. As a result, it advances three factors to be considered in providing guidance on what is in the public interest in line with the constitutional norms and values inherent within the concept.

Chapter Five considers anonymous and pseudonymous speech and how the concept enables a better balance to be struck between speaker and audience interests. Chapter Six looks at contempt of court and defamation. It argues that the adoption of the concept would go some way to address an imbalance between the state or claimants and the media, particularly in respect of the principle of open justice and the operation of the various defences available to defamation defendants. Finally, by drawing on the New Zealand Law Commission's proposals for the reform of its regulatory framework in its *News Media Meets 'New Media'* Report[67] Chapter Seven concludes the thesis by advancing principles for a new voluntary, yet highly incentivised, self-regulatory scheme that would effectively capture citizen journalists. At this juncture it is important to mention that this thesis could have

[67] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128.

concerned itself with a multitude of challenges arising from citizen journalism and online communication. For instance, it does not consider wider conceptual perspectives of media freedom, free speech policy and regulation in respect of the Internet generally.[68] Nor does it deal with certain discrete issues, such as: the interaction between new media companies and competition law and anti-trust law, or how this impacts on free speech policy;[69] criminal activity on social media,[70] in a broad sense at least; online expression in the workplace;[71] children's rights, child protection and digital literacy, and; intermediary liability.[72] Data protection is dealt with, but only incidentally. This is because these issues either fall outside the scope of the thesis, or there is already extensive coverage of them, or both. Rather, the legal challenges dealt with by this enquiry are not only currently very topical but are particularly acute in respect of citizen journalism and/or are relatively under-represented in the canon of free speech scholarship.

[68] For detailed discussions on these issues, see: A. Murray, 'Mapping the rule of law for the Internet' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media,* (Edward Elgar 2017), 13-33; D. Weisenhaus and S. Young (eds), *Media Law and Policy in the Internet Age,* (Hart, 2017).

[69] For analysis of this issue see: M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', *Harvard Law Review*, 2014, vol. 127: 2259-2295.

[70] For example, see: J. Rowbottom, 'Crime and communication: do legal controls leave enough space for freedom of expression' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 37-60; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), 24(1), 16-40.

[71] See: D. Mangan, 'Social media in the workplace' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 201-221; P. Wragg, 'Free speech at work: resolving the difference between practice and liberal principle' *Industrial Law Journal* (2015) 44(1), 1-28.

[72] A. Scott, 'An unwholesome layer cake: intermediary liability in English defamation and data protection law' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 222-248; J. Oster, 'Communication, defamation and liability of intermediaries' (2015) *Legal Studies* 35(2) 348-368.

CHAPTER ONE

SETTING THE SCENE: THE RISE OF CITIZEN JOURNALISM

1. INTRODUCTION

As explained in the Introduction, the broad concern of this enquiry are the legal issues that arise from the growth of citizen journalism, and how this has given rise to a symbiotic relationship with the traditional media, in which citizen journalists increasingly act as a 'source' of news. Consequently, it argues that citizen journalism is now vital to how information is received and imparted, which has made the ability to identify the beneficiaries of media freedom critical to the effective operation of the right, and free speech more broadly. This creates the problem that this thesis seeks to address: in a world where citizen journalists and traditional media are reporting on matters of public concern, the current methods for distinguishing those actors operating as media from those that are not, and therefore who should be subject to the enhanced right, are not fit for purpose. In dealing with this problem, it offers up a new workable definition of the media, based on a media-as-a-constitutional-component concept, that provides a method for distinguishing media from non-media actors pursuant to the fulfilment of a constitutional function, such as reporting on a matter of public interest. Thus, in broad terms, this thesis begins by exploring the concept of media freedom and, in doing so, distinguishes it from freedom of expression. It sets out its conceptual significance to media actors and what it means in reality to the beneficiaries of the right in respect of the protection it affords to media speech and the media institutionally. Secondly, it analyses the viability of libertarianism and social responsibility theory to support the concept and underpin media speech. Ultimately, it argues that social responsibility theory, rather than libertarianism, which is currently the de facto theory for online speech, provides an effective normative framework for dealing with challenges arising from: (i) anonymous and pseudonymous speech; (ii) contempt of court and defamation, and; (iii) the question of whether citizen journalists should and can be regulated.

The purpose of this chapter is to provide context for the chapters that follow. Although this thesis' primary concern is citizen journalism, as so much of it takes place on social media, for contextual purposes, section 2 charts its development in to the platforms that we associate with it today, namely the likes of Facebook, Twitter and Instagram, amongst many others. Section 3 considers, in detail, the ascendancy of citizen journalism, and how this has altered the media ecology. In particular, it looks at how this has impacted on the traditional media, and how citizen journalists have become a trusted source of news for both the public and 'professional' journalists.

2. WHAT IS SOCIAL MEDIA? DEFINITION AND DEVELOPMENT

There is no doubt that social media facilitates citizen journalism, as many citizen journalists rely on social media as platforms to publish their material. Moreover, it is no coincidence that social media's rapid development has gone hand in hand with the rise of citizen journalism. Arguably, they fuel each other. As explained in the following section, millennials are increasingly relying on citizen journalists, operating through online platforms, as a source of news, rather than going to traditional media outlets. Thus, because of the mutually beneficial relationship that social media and citizen journalists share, it is important for the sake of context to understand what social media platforms are, and how they have developed, which is the purpose of this section.

Social media has been described as 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content.'[1] Within the social media genus it is possible to identify various types, or categories, of social media. The largest social media 'type' is 'social networking sites' (SNSs), which predominantly encourage interpersonal contact between individuals or groups, by forging personal, professional or geographical connections. Examples of these sites include Facebook, Twitter, LinkedIn and Google+.[2] Sites operating for 'user-generated content' (UGC) make up the second category. UGC sites support creativity, foreground cultural activity, and encourage the exchange of amateur or

[1] A.M. Kaplan and M. Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, Business Horizons (2010) 53, 59-68, 61.
[2] Ibid.

professional content. This category includes platforms such as YouTube, Flickr and Wikipedia,[3] as well as blogs and vlogs. The third type of social media is 'trading and marketing sites'. This includes the likes of Amazon, eBay and Groupon, as they are all primarily concerned with exchanging or selling products.[4] The final category consists of 'play and game sites', and includes games such as Angry Birds and The Sims Social.[5] SNSs and UGC are the largest categories[6] and, it is submitted, the most likely types of social media to be utilised by the traditional media and citizen journalists as both a source of, and platform for, news.

So how has social media developed into what we know and use today? The advent of the World Wide Web in 1991 was the foundation of a new type of networked communication.[7] Even when the Internet was in its infancy, the potential for networked computers to enable social interaction was identified.[8] Via computer-mediated communication, programmers attempted to facilitate social networking in early online services, such as Usenet,[9] ARPANET, LISTSERV and bulletin board services.[10] Equally, features typical to social media platforms were also present in online services, such as America Online, Prodigy, CompuServe, ChatNet and The Well.[11]

The early to mid-1990s saw social media begin to emerge on the Internet, in the form of online communities such as Theglobe, Geocities and Tripod.com. The focus of these 'communities' was to encourage interaction via chat rooms and to share information and ideas on personal web pages created by virtue of accessible publishing tools and free or inexpensive web space.[12] Communities such as www.classmates.com enabled users to link to each other via their email addresses. At the turn of the century, the introduction of Web 2.0 meant that online services developed, from simply offering channels for networked

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[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media,* (Oxford University Press, 2013), 8.
[7] Ibid. 5.
[8] S.R. Hiltz and M. Turoff, *The Network Nation: Human Communication via Computer,* (Revised ed. MIT Press, 1993).
[9] M. Hauben and R. Hauben, *Netizens: On the History and Impact of Usenet and the Internet,* (IEEE Computer Society Press, 1997).
[10] L. Scaife, *Handbook of Social Media and the Law,* (Routledge, 2015), 3.
[11] K. Hafner, *The Well: A Story of Love, Death and Real Life in the Seminal Online Community,* (Carroll & Graf, 2001).
[12] L. Scaife, *Handbook of Social Media and the Law,* (Routledge, 2015), 4.

communications, into interactive 'vehicles' for networked sociality.[13] It was these vehicles that began to evolve and resemble the social media platforms we are now familiar with. The 'profiles' of individual users became central to the way in which the platforms operated as they enabled users to create lists of contacts referred to as 'friends'. Thus, as Scaife suggests: '[t]he use of profiles with user data allowed users to search for and connect with other users with similar interests or shared connections.'[14] This second generation of social media platforms[15] continued to develop and flourish in line with increasing demand for these features, and consequently began to offer users the ability to find and manage 'friends'.[16] The early part of this century saw the advent of the third generation of social media. For instance, Makeoutclub was created in 2000, Hub Culture and Friendster appeared in 2002, and 2004 saw the launch of Facebook as a Harvard University social networking site[17] which, by 2009, was the largest social media platform in the world.[18]

As set out in the Introduction, by 2019 it is expected that 39% of the world's population, or 2.72 billion people will use social media.[19] Accordingly, Benkler refers to the creation of a 'networked public sphere'[20] and Van Dijk observes that it has 'penetrated every fibre of culture today' by creating an 'online layer through which people organise their lives…[that] influences human interaction on an individual and community level, as well as on a larger societal level.'[21] The impact this has had on how we communicate was summed up by the Criminal Court of the City of New York in *New York v Harris*: 'The reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate.'[22] Similarly, in *Packingham v North Carolina*,[23] the US Supreme Court recognised that 'one of the most important places to exchange views

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[13] See generally: M. Castells, *Mobile Communication and Society*, (MIT Press, 2007); L. Manovich, 'The practice of everyday (media) life: From mass consumption to mass cultural production? *Critical Inquiry* 35(2) 2009.
[14] L. Scaife, *Handbook of Social Media and the Law*, (Routledge, 2015), 4.
[15] For example, www.sixdegrees.com.
[16] C. Romm-Livermore and K. Setzekorn (eds), *Social Networking Communities and E-Dating Services: Concepts and Implications*, (IGI Global, 2008), 271.
[17] D.M. Boyd and N.B. Ellison, 'Social network sites: definition, history and scholarship' *Journal of Computer-Mediated Communication*, (2007) 13(1): 210-230.
[18] L. Scaife, *Handbook of Social Media and the Law*, (Routledge, 2015), 4.
[19] L. Kawasaki, Strategy Analytics Global Social Network Forecast, 23rd March 2015 https://www.strategyanalytics.com/access-services/media-and-services/in-the-home/digital-media/digital-media/reports/report-detail/global-social-network-market-forecast#.VuFWXYs7alI.
[20] Y. Benkler, *The Wealth of Networks* (Yale University Press, 2006), 212.
[21] J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 4.
[22] *New York v Harris*, 2012 N.Y. Misc. LEXIS 1871 *3, note 3 (Crim. Ct. City of N.Y., N.Y. County, 2012).
[23] 582 U.S._2017.

is cyberspace, particularly social media'.[24] It is submitted that this is particularly true in the context of citizen journalists who tend to use social media platforms to publish their material. Thus, the following section will consider the ascendance of citizen journalism.

3. THE RISE OF CITIZEN JOURNALISM

3.1 TRADITIONAL MEDIA VERSUS CITIZEN JOURNALISM

The origins of the traditional media, and in particular the press industry, may well be founded on freedom of expression philosophy,[25] and the notion that, as 'the Fourth Estate', its primary function is to act as a 'public watchdog',[26] in that it operates as the general public's 'eyes and ears' by investigating and reporting abuses of power.[27] Prior to the evolution of the Internet into a network available throughout the world and, in particular, the social media revolution, which transformed that network into an accessible form of mass media, creating an audience and producer convergence[28] that has facilitated citizen journalism, the traditional media, which includes the press and broadcast (television or radio) companies, was the only institution that had the ability to reach mass audiences through regular publication or broadcasts.[29] Consequently, as observed by Leveson LJ in his Inquiry, in recent years, the traditional media, and in particular the press, has played a critical role in informing the public on matters of public interest and concern.[30]

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[24] The Court cited its decision in *Reno v American Civil Liberties Union* 521 U.S. 844, 870 (1997) in which it found that cyberspace offers a 'relatively unlimited, low-cost capacity for communication of all kinds.' *Reno* is discussed further in relation to anonymous and pseudonymous speech in Chapter Five.

[25] See Chapter Two for a discussion on the distinction between freedom of expression and media freedom and Chapter Three for analysis of the philosophical foundations of free speech.

[26] *Observer and Guardian v UK* (1992) 14 EHRR 153, [59].

[27] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 418; D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577.

[28] See generally: A. Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Produsage*, (Peter Lang Publishing, 2008).

[29] See generally: J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 3-23.

[30] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 455-470.

However, in contrast to Leveson LJ's examples of high quality investigative public interest journalism,[31] there is no doubt that an increasing number of traditional media outlets choose to engage with 'sexy' stories that sell, as opposed to reporting on matters of public concern.[32] Thus, a number of commentators have argued that the media's public watchdog role gradually diminished towards the end of the twentieth century. Instead, the focus shifted onto the commercially viable stories referred to above.[33] It is submitted that media ownership, and the power derived from it, means that there is a constant conflict between the traditional media's role as a watchdog, or gatekeeper, and commercial reality. Indeed, it has been observed that, during the twentieth and twenty-first centuries, there has been a dilution of news media ownership, which is now vested in a relatively small number of large and powerful companies.[34] Accordingly, this ownership concentration has had a detrimental effect on investigative journalism.[35] Although these issues in respect of the traditional media existed prior to the advent of citizen journalism, and therefore would have probably occurred regardless of its increasingly important role, arguably it has contributed to this state of affairs. This is due to citizen journalists often replacing the traditional media as the public's watchdog, as will be discussed below.

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[31] Ibid.

[32] Numerous examples are provided by Leveson LJ in his Inquiry: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 539-591.

[33] For example, see: C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain,* (7th ed. Routledge, 2010), 96-98; T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 214; T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 296; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 485; R. McChesney, *Rich Media, Poor Democracy* (University of Illinois Press, 1999), 275.

[34] On this point, Thomas has commented that a handful of 'media giants', including Time Warner, Bertelesman, Viacom, Disney and News Corporation, own vast swaths of the world's most lucrative media real estate, such as the press, television, radio, the music industry, cable, satellite and the Internet. Thomas cites News Corporation as a particular case in point: 'News Corporation's ownership of 60 to 70% of newspaper circulation in the [UK] and Australia, its close association with conservative politics and social agendas, and its anodyne or noncontroversial and soothing content is often cited as a contemporary example of dumbing down.' See also: P. Thomas, 'Media Democracy' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2,* (Sage, 2009), 627-630, 628; Media Reform Coalition, *Who Owns the UK Media?* 12th March 2019 accessible via https://www.mediareform.org.uk/media-ownership/who-owns-the-uk-media.

[35] S.L. Carter, 'Technology, Democracy, and the Manipulation of Consent' (1983-1984) *Yale Law Journal* 581, 600-607; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 189; T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 286-287, 286; O.M. Fiss, 'Free Speech and Social Structure' (1985) 71 *Iowa Law Review* 1405, 1415. See also Leveson LJ's assessment of the commercial pressures on the press: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 93-98; Ibid. (Media Reform Coalition).

Until relatively recently, the public were, to a great extent, limited as to what they were exposed to reading or seeing, by what large proportions of the traditional media chose to publish or broadcast. Such decisions may have come down to editorial control, based on, for instance, the owner's bias or political agenda,[36] commercial revenue,[37] or all three, rather than being based on the results of sound investigative journalism.[38] Indeed, according to Cohen, although the press cannot determine what people think, it is 'stunningly successful' in influencing what they think about.[39] However, the emergence of social media, that has enabled citizen journalists to communicate with, potentially, millions of people almost instantaneously, means that the ability to reach mass audiences is no longer reserved to traditional media institutions and, therefore, for the purposes of media freedom, can no longer be relied upon to distinguish between media and non-media entities. As explained in the Introduction, this is part of the problem that this thesis seeks to address.[40]

Thus, citizen journalism has changed the media landscape, as it has altered our perceptions of the limits of communication, and reception of information. It is no longer the case that communication is constrained by boundaries, such as location, time, space or culture,[41] or dictated by a media organisation's ownership, political bias or commercial partners. Access to multiple media outlets 24 hours a day that are instantaneously accessible,

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[36] B.H. Bagdakian, *The Media Monopoly* (6th ed. Beacon Press, 2000), xxvii-xxxi; R.W. Chesney, *Rich Media, Poor Democracy* (University of Illinois Press, 1999); N. Chomsky, *Media Control* (2nd ed. Seven Stories Press, 2002); J. Curran and M. Gurevitch, *Mass Media and Society* (Edward Arnold, 1991), 88; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 485; Ibid. (Media Reform Coalition).

[37] T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 214; E. Barendt, *The First Amendment and the Media*, 30-31 in I. Loveland (ed), *Importing The First Amendment Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing, 1998).

[38] This criticism is advanced by Barendt with regard to the marketplace of ideas theory (see Chapter Three section 3.2): E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12; See also: T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 286-287, 296. Similar issues have arisen in the print press relating to commercial advertising. For example, in January 2015, a number of Daily Telegraph journalists voiced their concerns over the newspaper allegedly discouraging them from writing un-favourable stories about advertising and commercial partners. Furthermore, the journalists provided examples to Newsnight of how commercial concerns impacted upon coverage given to China and Russia. See: C. Cook, 'More Telegraph writers voice concern', 19th February 2015, http://www.bbc.co.uk/news/health-31529682.

[39] B.C. Cohen, *The Press and Foreign Policy* (Princeton University Press, 1963), 13.

[40] The media-as-a-constitutional-component concept is advanced in Chapter Three to address how media actors, and therefore the beneficiaries of media freedom, can be identified.

[41] See generally: F. Webster, *Theories of the Information Society*, (4th ed, Routledge, 2014), 20; I. Barron and R. Curnow, *The Future with Microelectronics: Forecasting the Effects of Information Technology*, (Pinter, 1979); G. Mulgan, *Communication and Control: Networks and the New Economies of Communication*, (Polity, 1991); S. Coleman and J. Blumler, *The Internet and Democratic Citizenship – Theory, Practice and Policy*, (Cambridge University Press, 2009), 27-28.

allows citizen journalists to transmit and receive information without the need to consider, what have become, the arbitrary boundaries and restrictions mentioned above.[42]

This potential reach of citizen journalists amplifies the way in which the media in general envelopes our existence. Thus, citizen journalism has shifted the media paradigm, as traditional media organisations no longer monopolise the methods we use to find and facilitate news-gathering, communication or reception, or indeed how we express opinions and ideas.[43] Rather, the emergence of citizen journalism has created a symbiosis with the traditional media, as it has become an increasingly important source of news for the press and broadcast media.[44] Incidentally, these traditional media entities are now largely operating online in addition to their 'staple' method of communication, whilst outlets such as the Huffington Post, which may be classed as 'traditional professional' media, operate exclusively online.[45]

The available evidence relating to emerging trends in how news content is generated and disseminated in both the US and the UK demonstrates the shift in the paradigm. In September 2012 the Pew Research Centre published a report that analysed trends in news consumption by US citizens between 1991 to 2012.[46] The report confirmed that print newspaper sales were declining,[47] and that a younger demographic of news consumers, comprising of adults under 30 years old, were turning to citizen journalists, operating online, rather than television news. Indeed, between 2010 and 2012, the percentage of US citizens,

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[42] See generally: B. Wellman, 'Physical Space and Cyberspace: The Rise of Personalised Networking', *International Journal of Urban and Regional Research* 25(2), 227-51; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology La*w, (2015), Vol. 24, Issue 1, 16-40, 21-22.

[43] Consequently, it has addressed the concern raised by the US Supreme Court in *Cox Broadcasting Corporation v Cohn* 420 US 469, 491-492 (1975) that 'in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.'

[44] See generally: L. Durity, 'Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium' (2006) 5 *Duke Law & Technology Review* 1; J.S. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can save the Press' (2006) 9 *New York University Journal of Legislation and Public Policy* 751, 754; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 63.

[45] Ibid. (Oster).

[46] Pew Research Centre, 'In Changing News Landscape, Even Television is Vulnerable', 27th September 2012 http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/.

[47] This particular trend has been detected by the Pew Research Centre in a report which considers the diminishing financial viability of newspapers in the US over a period of two decades. This has coincided with regular occurrences of ownership change as successive owners tried and failed to prevent declining circulation levels. In turn, this led to less advertising revenue. See Pew Research Centre, 'The declining value of US newspapers' 22nd May 2015 http://www.pewresearch.org/fact-tank/2015/05/22/the-declining-value-of-u-s-newspapers/; see generally: I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015), 1.

across all age groups, receiving their news from social media, and in particular SNSs, increased from 9% to 19%. Accordingly, the report states that SNSs were the preferred source of news for 33% of the under-30s age group; with just 13% of this group obtaining their news from either the print or digital newspaper formats. These figures are reflected in a further report from the Pew Centre,[48] which confirms that 'millennials' (persons born between 1981 and 1996) were most likely to obtain information about the 2016 presidential election via social media, with Facebook the most used platform, followed by Twitter and YouTube. The report states that of the 91% of all US adults who 'learned' about the election between the 12th to the 27th of January 2016, 14% claimed social media was the 'most helpful' source of information. Similarly, 13% claimed that news websites and mobile applications were the most helpful. However, in comparison, only 3% and 2% felt that local and national print newspapers respectively fell into the 'most helpful' source category. Despite the Facebook and Cambridge Analytica scandal, the Pew Centre has recently confirmed the continuation of this trend, from a US perspective at least. According to research published in December 2018, online platforms continue to 'outpace' print newspapers as a source of news.[49]

As Cram suggests, the Pew Centre's figures are indicative of a broader trend outside the US and, significantly, in the UK.[50] Between March 2014 to March 2015 average national daily newspaper sales fell by half a million, or 8%, from 7.6 million to just over 7 million per day. During this period, *The Daily Mail* and *The Times* were the 'best performers', but even they recorded significant losses in circulation. *The Mail's* year-on-year circulation decreased by 4.7%, whereas *The Times* saw its sales decline by 0.9%.[51] According to the Audit Bureau of Circulations (ABC),[52] this overall decline is continuing at a rapid rate. It suggests that the overall daily newspaper market is shrinking by more than 8% per year, and the Sunday market by a little over 9%, with daily and Sunday red-tops falling faster than the rest. In a

[48] Pew Research Centre, 'The 2016 Presidential Campaign – a News Events That's Hard to Miss', 4th February 2016 http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/; See also: Pew Research Centre, 'News Habits on Facebook and Twitter', 14th July 2015 http://www.journalism.org/2015/07/14/news-habits-on-facebook-and-twitter/.

[49] Pew Research Centre, *Social media outpaces print newspapers in the US as a source of news* 10th December 2018 https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/.

[50] I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015), 2.

[51] J. Jackson, 'National daily newspaper sales fall by half a million in a year', *The Guardian*, 10th April 2015 http://www.theguardian.com/media/2015/apr/10/national-daily-newspapers-lose-more-than-half-a-million-readers-in-past-year.

[52] http://www.abc.org.uk.

year, *The Sun*, *Daily Mirror* and *Daily Star* have seen their circulation fall by more than 370,000, or 10.9%. The four Sunday red-tops (*The Sun*, *Mirror*, *Star* and *People*) have, collectively, seen a 12.3% decline in circulation since 2014; a fall in sales of 400,000. Broadsheets have not been immune to the fate suffered by the red-tops. For instance, ABC statistics show that *The Independent* and *The Guardian* have suffered year-on-year decreases in circulation of 8.1% and 7.6% respectively.[53]

3.2 THE EMERGENCE OF CITIZEN JOURNALISM

In light of the plight of the traditional media, commentators such as Oster, Cram, Cohen, Gibbons and Calvert and Torres observe the ascendance of citizen journalism.[54] Although citizen journalism is a relatively new concept, its origins can be found in the civic and public journalism reform movement of the late 1980s.[55] This movement, which aimed to encourage public interest and participation in public affairs,[56] advocated that news media should: 'go beyond the mere reporting of information to act as a catalyst and as a forum for the revitalization of democracy.'[57] The introduction of the Internet and the advent of social media has acted as a stimulus for the movement. Social media, in particular, has facilitated active participation, interaction and engagement of users with public issues,[58] by removing barriers

[53] R. Greenslade, 'Are national newspaper sales heading for a cliff? Not quite yet…' *The Guardian*, 9th October 2015 http://www.theguardian.com/media/greenslade/2015/oct/09/are-national-newspaper-sales-heading-for-a-cliff-not-quite-yet.

[54] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 63; J. Oster, *Media Freedom as a Fundamental Right,* (Cambridge University Press, 2015); C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 344; I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015), 37-72. A. Cohen, 'The media that need citizens: The First Amendment and the fifth estate' (2011) 85 *Southern Californian Law Review* 1; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 486.

[55] T. Flew and J. Wilson, 'Journalism as Social Networking: The Australian Youdecide Project and the 2007 Federal Election', (2010) *Journalism* 11(2) 131-147; F. Kperogi, 'Cooperation with the Corporation? CNN and the Hegemonic Cooperation of Citizen Journalism through IReport.Com', (2011) *New Media & Society* 13(2) 314-329; B. Massey and T. Haas, 'Does Making Journalism More Public Make a Difference? A Critical Review of Evaluative Research on Public Journalism', (2002) *Journalism & Mass Communications Quarterly* 79(3) 559-586.

[56] Ibid. (Massey and Haas).

[57] M. McDevitt, B. Gassaway and F. Perez, 'The Making and Unmaking of Civic Journalists: Influences of Professional Socialization', (2002) *Journalism & Mass Communications Quarterly* 79(1) 87-100.

[58] T. Johnson and D. Perlmutter, 'Introduction: The Facebook Election', *Mass Communication and Society* (2010) 13(5) 554-559; J. Woolley, A. Limperos and M. Oliver, 'The 2008 Presidential Election, 2.0: A Content

to production and enabling journalism-like public messages to be produced and disseminated without professional journalistic norms and training.[59] This has given rise to the audience and producer convergence mentioned above. This new breed of journalist is increasingly playing the role of public watchdog, and aiding democratic participation.[60] As Cram observes, citizen journalism has: '…transformed the average citizen's hitherto largely passive experience of political debate led by elite opinion formers into something much more vibrant and more participative.'[61] Other scholars, who have made this 'democratisation argument',[62] have emphasised the empowerment[63] of what Volokh referred to as 'cheap speech'; 'The new technologies…will, I believe, both democratize the information marketplace – make it more accessible to comparitively poor speakers as well as the rich ones – and diversify it.'[64] This ability of citizen journalism, enabled by social media to create a democratised digital public sphere, has also been acknowledged by the US Supreme Court in *Reno v American Civil Liberties Union*,[65] in which Justice Stevens stated that online chatrooms would enable anyone to become a 'town crier with a voice that resonates further than it would from a soap box.'[66] More recently, the Council of Europe's Committee of Ministers has stated:

> 'Citizens' communication and interaction in online environments and their participation in activities that involve matters of public interest can bring positive, real-life, social change. When freedom of expression and the right to receive and impart information and freedom of assembly are not upheld online, their

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Analysis of User-generated Political Facebook Groups', (2010) *Mass Communication and Society* 13(2) 631-652.

[59] Y. Kim and W. Lowrey, 'Who are Citizen Journalists in the Social Media Environment?' *Digital Journalism*, 3.2, 298-314, 299.

[60] Indeed, this has been recognised by the jurisprudence of the European Court of Human Rights: *Magyar Helsinki Bizottsag v Hungary* [2016] App. no. 18030/11, [43]; See generally: Ibid. (Kim and Lowrey) 301; S. Allan, *Online News: Journalism And The Internet: Journalism and the Internet*, (McGraw-Hill International, 2006); D. Gillmor, 'We the Media: The Rise of Citizen Journalists' *National Civic Review*, 2004 93(3), 58-63; S. Robinson, 'If You had been with us: Mainstream Press and Citizen Journalists Jockey for Authority over the Collective Memory of Hurricane Katrina', *New Media & Society*, (2009) 11(5) 795-814; N. Thurman, 'Forums for Citizen Journalists? Adoption of User Generated Content Initiatives by Online News Media', *New Media & Society*, (2008) 10 (1) 139-157; M. Tremayne, *Blogging, Citizenship and the Future of Media*, (Routledge, 2006).

[61] I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015), 3.

[62] For example, see generally: M. Hindman, *The Myth of Digital Democracy* (Princeton University Press, 2009); Ibid. (Cram).

[63] Ibid. (Cram) 3-4.

[64] E. Volokh, 'Cheap speech and what it will do' (1995) 104 *Yale Law Journal* 1805, 1833. See also: P. Schwartz, 'Privacy and democracy in cyberspace' (1999) 52 *Vanderbilt Law Review* 1609; J. Rowbottom, 'Media freedom and political debate in the digital era' (2006) *Modern Law Review* 489.

[65] (1997) 521 US 844.

[66] Ibid. 862.

> protection offline is likely to be undermined and democracy and the rule of law can also be compromised.'[67]

Thus, citizen journalism's potential to enrich public discourse by virtue of its ability to report matters of public interest and concern,[68] is paradigmatic of the argument from democratic self-governance, which will be discussed in Chapter Three in relation to how it underpins the media-as-a-constitutional-component concept. This 'ability', and the role that it is now playing in facilitating public discourse, is demonstrated by the 'trust'[69] being placed in citizen journalists, not only by the public, but also by media sources,[70] and the traditional media who, as discussed above, increasingly recycle material published by citizen journalists. Indeed, during the Leveson Inquiry, Alastair Campbell, the former Labour Government's chief press secretary, gave evidence that 'people are going elsewhere to find information they can trust,'[71] a comment that clearly corresponds with the statistics from the Pew Research Centre set out in section 3.1, demonstrating that millennials are tending to use citizen journalists as a source of news rather than the traditional media.

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[67] Council of Europe's Committee of Ministers, 'Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings' [3] (Adopted by the Committee of Ministers on 21st September 2011) https://wcd.coe.int/ViewDoc.jsp?id=1835805.

[68] *Magyar Helsinki Bizottsag v Hungary* [2016] App. no. 18030/11, [43]; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 63;
C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 344; I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015).

[69] For a discussion on the concept of trust see: T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219.

[70] For example, Edward Snowden disclosed information regarding American surveillance programmes to blogger Glenn Greenwald, as he did not trust the New York Times to publish the material. For detailed commentary on this case see: P. Coe, 'National security and the fourth estate in a brave new social media world' in L. Scaife (ed), *Social Networks as the New Frontier of Terrorism #Terror* (Routledge, 2017), 165-192, 175-179. See also: M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2265.

[71] www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Alastair-Campbell.pdf, 28. From a US perspective this is supported by the findings of the Knight Foundation which found that, generally, readers are disillusioned with the press and think it is untrustworthy:
https://www.knightfoundation.org/reports/indicators-of-news-media-trust.

4. CONCLUSION

Arguably, citizen journalism, which has clearly disrupted the media ecology,[72] has added to what was already, as Ian Walden describes, a 'messy' media sector. [73] The purpose of this thesis, and the following chapters, is to try to clear up, at least some, of this mess. Ultimately, it will argue that the media-as-a-constitutional-component concept, and the new theory for media freedom that it lays down, is better suited for the modern media landscape sketched by this Chapter than the current normative and philosophical foundations upon which free speech and media freedom is based. To this end, the following chapter provides the foundation for the thesis by unpacking media freedom and distinguishing it as a separate concept to freedom of expression.

[72] For a discussion on how this change to the media ecology has impacted upon societal interaction with politics and the democratic process generally, see: I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015).
[73] I. Walden, 'Press regulation in a converging environment' in D. Mangan and L. Gillies, *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 61-82, 61.

CHAPTER TWO

UNPACKING MEDIA FREEDOM AS A DISTINCT LEGAL CONCEPT

1. INTRODUCTION

Chapter One explained that citizen journalism has altered the media ecology. Consequently, in a world where citizen journalists can fulfil a vital constitutional function by reporting on matters of public interest, being able to identify who is and who is not media is critical to the effective operation of the enhanced right to media freedom. Chapter Three will introduce the key to address this problem: a new workable definition of the media, founded upon a media-as-a-constitutional-component concept that effectively delineates media from non-media actors. However, the purpose of this functional Chapter is to lay the foundations for the chapters that follow. Therefore, section 2 will distinguish media freedom from freedom of expression, and will establish that the former provides enhanced protection, over and above the right to freedom of expression, for actors operating as part of the media. In doing this, it compares the jurisprudence of the ECtHR with US scholarship and jurisprudence from the US Supreme Court. As discussed in section 2, and developed in section 5.1, the dominant view in the US is based upon the press-as-technology-model, which rejects the notion that the media has any constitutional privileges in excess of other speakers. This comparison with the position of the Strasbourg Court forms the foundation for section 5.1, which discredits the model as a method for distinguishing media from non-media actors in the current media environment. Section 3 will 'unpack' media freedom. In doing so it will, firstly, explain its role and why the right is conceptually important to media actors. Secondly, it sets out what the right means in reality to its beneficiaries in respect of the protection it affords media speech and the media institutionally. This is categorised as defensive and positive rights. Section 4 provides the rationale for why there is a need to distinguish media from non-media entities. This leads into section 5, which argues that the growth of citizen journalism means that the ability to reach mass audiences is no longer reserved to the traditional media. This blurring of the lines between our perceptions of the traditional media, citizen journalists and

casual social media users has created doctrinal uncertainty as to how the courts should determine the beneficiaries of media freedom. Thus, it identifies the shortfalls of the traditional methods adopted by the courts and commentators for distinguishing between media and non-media actors (including the press-as-technology model), and therefore who/what is subject to media freedom.

2. MEDIA FREEDOM AS A DISTINCT RIGHT TO FREEDOM OF EXPRESSION

Freedom of the media is mentioned specifically in a variety of international treaties and domestic laws. For example, pursuant to Article 11(2) of the Charter of the Fundamental Rights of the European Union (CFREU),[1] 'freedom and pluralism of the media shall be respected'. In Germany, Article 5(1)2 of the German Basic Law provides a separate provision for the specific protection of media expression, thus creating a clear distinction with free expression guarantees for private individuals: '[f]reedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed.'[2] Similarly, in the US, the First Amendment states that: '[c]ongress shall make no law…abridging the freedom of speech, or of the press…'[3]

Within a European Convention on Human Rights (ECHR) context, freedom of expression is protected by Article 10(1), and qualified by Article 10(2):

> (1) 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.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

[1] The Charter was initially solemnly proclaimed at the Nice European Council on 7th December 2000. At that time, it did not have any binding legal effect. However, on 1st December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the European Union institutions and on national governments: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

[2] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 59; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 417-419. See also: Article 21(2) of the Italian Constitution, Article 25(1) of the Belgian Constitution and the media clauses in Article 17 of the Swiss Constitution, the Swedish Constitution Freedom of the Press Act, Law of July 29th 1881 on the Freedom of Press (French Press Freedom Law).

[3] However, despite a specific free press clause, the US position is very different, and is discussed below.

> 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10(1) does not specifically provide for protection of media freedom[4] in distinction to that of private individuals and non-media institutions. Rather, in interpreting Article 10, the ECtHR has attached great importance to the role of the media[5] and, in doing so, as illustrated by the cases discussed below,[6] has afforded it preferential treatment. Thus, the media's contribution to democracy and democratic self-governance,[7] and its 'role of public watchdog'[8] have been clearly established by the jurisprudence of the Court. Indeed, it recognises a duty on the media to convey information and ideas on political issues and public interest,[9] and the right of the public to receive this information.[10]

The special position of the media in relation to freedom of expression, recognised by commentators such as Stewart J, Bezanson and West,[11] explains why the jurisprudence of, for instance, the ECtHR, interprets Article 10(1) to contain privileged protection of the media, even in the absence of express provisions to that effect. Indeed, according to Barendt, media freedom is 'an institutional right' and a 'constitutional value which should influence the whole of the law' because 'the media foster free speech, in particular by providing fora for

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[4] This also applies to Article 19 of the United Nations International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights, both of which are discussed in more detail in section 3 below.

[5] For example, see: *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Jersild v Denmark* (1995) 19 EHRR 1; *Janowski v Poland (No 1)* (2000) 29 EHRR 705, [32]

[6] *Busuioc v Moldova* [2004] App. no. 61513/00; *Wojtas-Kaleta v Poland* [2009] App. no. 20436/02; *Vejdeland and others v Sweden* [2012] ECHR 242.

[7] For example, see: *Perna v Italy* (2004) 39 EHRR 28.

[8] *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, [59]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Thorgeirson v Iceland* (1992) 14 EHRR 843, [63]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [62].

[9] *Lingens v Austria* (1986) 8 EHRR 103, [26]; *Oberschlick v Austria (No 1)* (1991) 19 EHRR 389, [58]; *Castells v Spain* (1992) 14 EHRR 445, [43]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843; *Jersild v Denmark* (1995) 19 EHRR 1, [31].

[10] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [65]; *Fressoz and Roire v France* (2001) 31 EHRR 2, [51]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [52].

[11] P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631, 633; R.P. Bezanson, 'The New Free Press Guarantee' (1977) 63 *Virginia Law Review* 731, 733; S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1032. The US position is discussed in more detail below.

vigorous and uninhibited debate.'[12] Media freedom is, therefore, 'special' because a journalist or media company is: 'governed by a different set of factors concerning the scope and intensity of protection when preparing, editing or issuing a publication, compared to freedom of expression afforded to private individuals or non-media entities.'[13] Thus, the fact that a statement can be classed as media expression, as opposed to expression by a private individual or non-media institution, adds to the burden of justifying its restrictions.[14] The following three cases serve to illustrate the special treatment of media freedom.[15]

Busuioc v Moldova[16] concerned a civil servant who had been ordered to pay damages by the domestic court for publishing an article that alleged favouritism amongst civil servants. The respondent cited the ECtHR's judgment in *Janowski v Poland (No. 1)*[17] which stated: 'civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.'[18] However, the Strasbourg Court distinguished the present case from *Janowski* on the basis that in that case it was held that the applicant, 'although a journalist by profession, [he had] clearly acted as a private individual on this occasion',[19] and thus did not engage media freedom, whereas, to the contrary, Busuioc's article was written in his capacity as a journalist, bringing it within the ambit of the right. Consequently, the European Court held that the Moldovan authorities were subject to a more restrictive margin of appreciation when deciding whether there was a 'pressing social need' to interfere with Busuioc's right to free speech.[20]

The applicant in *Wojtas-Kaleta v Poland*[21] was a journalist employed by a public television company. She complained that the quality of public television programmes was undermined by competition from private broadcasters and that support for classical music was insufficient. As a result her employer disciplined her. The ECtHR, 'having regard to the

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[12] E. Barendt, 'Press and broadcasting freedom: does anyone have any rights to free speech?' (1991) 44 *Current Legal Problems* 63, 66-67.
[13] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 59.
[14] Ibid.
[15] P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631, 633; R.P. Bezanson, 'The New Free Press Guarantee' (1977) 63 *Virginia Law Review* 731, 733; S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1032.
[16] [2004] App. no. 61513/00.
[17] [1999] App. no. 25716/94.
[18] Ibid. [33].
[19] Ibid. [32].
[20] [2004] App. no. 61513/00 [64] and [65].
[21] [2009] App. no. 20436/02.

role played by journalists in society and to their responsibilities to contribute to and encourage public debate',[22] determined that the obligation of discretion and constraint under general employment law 'cannot be said to apply with equal force to journalists, given that it is in the nature of their functions to impart information and ideas.'[23]

In *Vejdeland and others v Sweden*[24] the applicants, who were not associated with the media, had been convicted for distributing homophobic leaflets in a secondary school. The ECtHR upheld their convictions, whilst observing: '[i]f exactly the same words and phrases were to be used in public newspapers…they would probably not be considered a matter for criminal prosecution and condemnation.'[25] Thus, the special protection afforded to media expression permits the use of wide discretion as to the methods and techniques adopted to report on matters, and how that material is subsequently presented.[26] It allows the media to have recourse to exaggeration and even provocation,[27] including the use of strong terminology or polemic formulations.[28] Additionally, as discussed in more detail below at section 3.2.2, the ECtHR has held that this protection extends beyond the dissemination of the journalist's or media organisation's own opinions, to encapsulate those expressed by third parties in the context of, for example, interviews.[29]

The ambit of media freedom is not just limited to stronger protection for media speech; instead, it extends to rights that are not, in any way, available pursuant to freedom of expression guarantees. Consequently, as stated above,[30] and discussed in greater detail at section 3.3 below, media freedom and freedom of expression differ in relation to the intensity of the protection and in respect of the scope of the protected action. This position equates to institutional protection of the media that, sequentially, guarantees rights that are not

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[22] Ibid. [46].
[23] Ibid.
[24] [2012] ECHR 242.
[25] [2012] ECHR 242 per Judge Zupančič, [12].
[26] *Jersild v Denmark* (1995) 19 EHRR 1, [31]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [63]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [57].
[27] *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38]; *Thoma v Luxembourg* (2003) 36 EHRR 21, [45]-[46]; R. Clayton QC and H. Tomlinson QC, *Privacy and Freedom of Expression* (2nd ed. Oxford University Press, 2010), 271 [15.254].
[28] *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, [67]; *Oberschlick v Austria (No 2)* (1998) 25 EHRR 357, [33]; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 59.
[29] *Jersild v Denmark* (1995) 19 EHRR 1.
[30] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 59.

exclusively concerned with expression, but also relate to the media vis-à-vis its newsgathering or editorial activities, or even to the existence of an independent media.[31]

This institutional protection afforded to media entities by the right to media freedom can be categorised as being both defensive, in that it protects the media against interference by the state, and positive, as it entitles the media to state protection.[32] This categorisation is animated by reference to a non-exhaustive list of ECtHR jurisprudence.[33] For instance, in relation to the defensive category, in *Halis Dogan and others v Turkey*, the Court held that media freedom includes the protection of the newspaper distribution infrastructure.[34] The case of *Gsell v Switzerland*[35] involved restrictions on road access to the World Economic Forum in Davos, consequently the Court recognised the existence of protection against state measures that could impinge upon the exercise of the journalist's profession. It has also been held that journalists cannot be made to give evidence concerning confidential information or sources, even if it has been obtained illegally.[36] They are also exempt from certain data protection and copyright provisions.[37] With regard to the positive category, states are required to: protect the media through the safeguarding of media pluralism;[38] protect journalists from acts of violence in the course of their work,[39] and from undue influence by financially powerful groups[40] or the government.[41]

In contrast to ECtHR jurisprudence, the position in the US is markedly different.[42] Despite leading commentators,[43] and dissenting Supreme Court judgments[44] arguing that the

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[31] Ibid. 60. See section 3.3 below.
[32] Ibid. The institutional protection of the media, and these defensive and positive rights, are discussed in more detail in section 3.3 below.
[33] Ibid. 60-61.
[34] *Halis Dogan and others v Turkey* [2006] App. no. 50693/99 (ECtHR, 10th January 2006), [24].
[35] [2009] App. no. 12675/05 [49].
[36] *Goodwin v United Kingdom* [1996] ECHR 16, [39]; *Radio Twist as v Slovakia* [2006] ECHR 1129, [62]; *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1273, [50].
[37] For example, see: Article 85 of the General Data Protection Regulation and paragraph 26, Part 5 of Schedule 2 of the Data Protection Act 2018. See Chapter Four section 3.1 for a discussion on the 'journalistic exemption'. See also: Article 9 Data Protection Directive 95/46/EC, OJ L281/31; Article 5(3)(c) Copyright Directive 2001/29/EC, OJ L167/19.
[38] *Informationsverein Lentia and others v Austria* [1993] ECHR 57, [32]-[34]; *TV Vest & Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [78].
[39] *Ozgur Gundem v Turkey* [2000] ECHR 104, [38 ff].
[40] Article 21(4)(2) EC Merger Regulation 139/2004, OJ L24/1; Part 5 Chapter 2 Communications Act 2003 ch 21.
[41] *Manole v Moldova* [2009] ECHR 1292, [109]; *Centro Europa 7 Srl and Di Stefano v Italy* App. No. 38433/09 (ECtHR, 7th June 2012), [133].
[42] The US view is worthy of consideration at this juncture, as it provides useful parallels with the ECtHR position that animates the debate on how the media is defined and how the courts can determine who or what should benefit from media freedom. This is discussed in more detail in section 5 below.

specific free press clause 'or of the press' in the First Amendment to the US Constitution creates a similar distinction to that provided by the CFREU, the German Basic Law and the jurisprudence of the ECtHR, this has been opposed by academics such as Volokh,[45] and resisted by the Supreme Court.[46] Consequently, the dominant view in the US is based on the press-as-technology model. This model, which is discussed in greater detail at section 4 below,[47] has roots in English common law,[48] and is founded on the premise that media freedom should not be subject to privileges or duties over and above freedom of expression.[49] According to Volokh, freedom of the press is technological. It is, therefore, available to all forms of communication classed as technologies, which covers everything.[50] In Volokh's assessment, freedom of the press does not just protect the press industry, but secures the right of everyone to use communications technology.[51] Therefore, the ambit of the model extends,

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[43] See generally: M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1975) 26 *Hastings Law Journal* 631; C.E. Baker, *Human Liberty and Freedom of Speech,* (Oxford University Press, 1989), chs. 10-11; R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259; See also: T.B. Dyk, 'Newsgathering, Press Access, and the First Amendment', 44 *Stanford Law Review* 927, 931-932 (1992); P. Horwitz, 'Universities as First Amendment Institutions: Some Easy Answers and Hard Questions', (2007) 54 *UCLA Law Review*, 1497, 1505 (2007); S.R. West, 'Awakening the Press Clause', 58 *UCLA Law Review* 1025, 1027-1029 (2011); For judicial argument see: P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631, 634.

[44] See the dissenting judgments of: Stevens J in *Citizens United v FEC* 130 S Ct 876, 951 n 57 (2010); Powell J in *Saxbe v Wash Post Company* 417 US 843, 863 (1974); Douglas J *Branzburg v Hayes* 408 US 665, 721 (1972).

[45] E. Volokh, 'Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459. See also A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn. Macmillan, 1959), ch. 6. Dicey also held the view that freedom and expression and media freedom are one and the same.

[46] For example, see the majority decision in *Citizens United v FEC* 130 S Ct, 905 (2010); See also: E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459, 506-510 for a summary of other Supreme Court cases that have held the same.

[47] It is argued here that the press-as-technology model is no longer an appropriate method for distinguishing media from non-media entities.

[48] *R v Shipley (Dean of Saint Asaph's Case)* (1784) 21 How. St. Tr. 847 (KB); *R v Rowan* (1794) 22 How. St. Tr. 1033 (KB); *R v Burdett* (1820) 106 Eng. Rep. 873 (KB), 887; 4 B. & Ald. 95, 132; see generally: E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459, 484-489.

[49] For example, see: D.L. Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77; W.W. van Alstyne, 'the Hazards to the Press of Claiming a "Preferred Position" (1977) 28 *Hastings Law Journal* 761, 768-669; A. Lewis, 'A Preferred Position for Journalism' (1978-9) 7 *Hofstra Law Review* 595; C.E. Baker 'Press Performance, Human Rights, and Private Power as a Threat' (2011) 5 *Law & Ethics of Human Rights* 219, 230; E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459, 538-539.

[50] R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259.

[51] E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459, 462-463.

not only to the traditional media, and citizen journalists, but also, for example, to casual users of social media.[52]

This originalist interpretation[53] is prevalent in US jurisprudence and scholarship, both historically[54] and currently. Despite the Supreme Court recognising that the press operates 'as a powerful antidote to any abuses of power by government officials',[55] it continues to reject the argument that the institutional press has any constitutional privilege in excess of other speakers.[56] Thus, the majority in *Citizens United v FEC,*[57] echoing previous judgments of Brennan J,[58] agreed that the First Amendment protects 'speech',[59] as opposed to the source of that expression, whether that emanates from a professional journalist or a casual Twitter user. However, the press-as-technology model is not immune to criticism and opposing views, from both US Supreme Court judges, and legal scholars.[60] This is discussed in more detail in section 5 below, where it is argued that it lacks merit in the modern media environment.[61]

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[52] The press-as-technology model has been given other labels, including: 'the equivalence model', which is based on the premise that courts, in a number of jurisdictions, seem to recognise that free speech claims of the media are indistinguishable from speakers generally (see: H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 20-25; the 'neutrality doctrine', that stems from the notion that the state is under an obligation to be neutral, in relation to the mass media and speakers generally, in granting free speech rights (see: A. Lewis, 'A Preferred Position for Journalism?' 7 *Hofstra Law Review* 595, 599-605; compare with: M.J. Rooney, 'Freedom of the Press: An Emerging Privilege' (1983) 67 *Marquette Law Review* 34, 52-56).

[53] See: D. Anderson, 'The Origins of the Press Clause' (1982-3) 30 *UCLA Law Review* 455; E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459; D.L. Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77, 88-99; A. Lewis, 'A Preferred Position for Journalism' (1978-9) 7 *Hofstra Law Review* 595, 600; R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259.

[54] *Republica v Oswald* 1 Dall. 319, 325 (Pa. 1788); *Commonwealth v Freeman,* HERALD OF FREEDOM (Boston), Mar. 18, 1791, at 5 (Mass. 1791); *In re* Fries. 9 F. Cas. 826, 839 (Justice Iredell, Circuit Judge, C.C.D. Pa. 1799) (no. 5126); *Runkle v Meyer* 3 Yeates 518, 519 (Pa. 1803); see generally: E. Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459, 465-468.

[55] *Mills v Alabama* 384 US 214, 219 (1966); see also: *Estes v Texas* 381 US 532, 539 (1965).

[56] *Citizens United v FEC* 130 S Ct 876, 905 (2010); *Associated Press v United States* 326 US 1, 7 (1945); *Branzburg v Hayes* 408 US 665, 704 (1972); *Pell v Procunier* 417 US 817, 834 (1974); *Saxbe v Washington Post Company* 417 US 843, 848-849; *In re Grand Jury Subpoena, Miller* 397 F 3d 964 (DC Cir 2005), *cert denied* 125 S Ct 2977 (2005).

[57] 130 S Ct 876 (2010).

[58] For example, see: *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* 472 US 749, 781 (1985).

[59] *Citizens United v FEC* 130 S Ct 876, 905 (2010) (Scalia J concurring).

[60] For example, see generally: *Bartnicki v Vopper* 532 US 514 (2001); *Minneapolis Star & Tribune Company v Minneapolis Commissioner of Revenue* 460 US 575, 592-93 (1983); *Gertz v Robert Welch Inc* 418 US 323 (1974); see the dissenting judgments in *Citizens United v FEC* 130 S Ct 876 (2010) (in particular Stevens J at 951 n. 57); Powell J's dissenting judgment in *Saxbe v Washington Post Company* 417 US 843, 863 (1974); Douglas J's dissenting judgment in *Branzburg v Hayes* 408 US 665, 721 (1972); Stewart J, 'Or of the Press' *26 Hastings L.J.* 631, 634 (1975); T. Dyk, 'Newsgathering, Press Access, and the First Amendment' *44 Stanford Law Rev* 927, 931-932 (1992); P. Horwitz, 'Universities as First Amendment Institutions: Some Easy Answers and Hard Questions' 54 *UCLA L. Rev.* 1497, 1505 (2007); S. West, 'Awakening the Press Clause' 58 *UCLA*

This section has established, within a ECHR context at least, the distinction between the freedom of expression right afforded to private individuals compared with that of non-media institutions, pursuant to media freedom: if the expression emanates from a media entity it will be subject to the privileged protection set out above; to the contrary, if the expression comes from a non-media entity, it will, nonetheless, be subject to general freedom of expression protection. Furthermore, only journalists and media organisations can take advantage of the freedom bestowed upon the media as an institution, for example, with regard to newsgathering activities.[62]

3. UNPACKING MEDIA FREEDOM

The previous section has argued that, within the context of ECtHR jurisprudence at least, media freedom is a distinct concept to that of freedom of expression. This means that a media actor, whether that be a person or an institution, is subject not only to the right to freedom of expression, but also to enhanced protection under the right to media freedom when they issue a publication, as compared to non-media actors who benefit exclusively from the right to freedom of expression. The purpose of this section is to 'unpack' the contents of media freedom. It will begin by explaining why it is important. This will be followed by an assessment of the contents of media freedom for media entities. In particular, it will consider how the protection afforded to media actors by the right is bifurcated, in that it firstly protects media speech and secondly provides defensive and positive institutional protection of the media. Thus, pursuant to speech protection, it will consider: (1a) what the freedom to hold opinions and impart information and ideas means and; (1b) the extent of editorial freedom. In respect of the institutional protection of the media, it will discuss: (2a) three defensive rights against state action, namely media independence, protection of media research and investigation and protection of media sources; (2b) the media's positive rights entitling it to state action in various circumstances.

Law Review 1025, 1027-1029 (2011). See also Bezanson's rejoinder to Volokh's article: R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259.

[61] In addition to the press-as-technology model, section 5 also considers the merits of the mass audience approach and the 'professionalised' publisher approach for determining the beneficiaries of media freedom.

[62] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 61-62.

3.1 THE IMPORTANCE AND THE ROLE OF MEDIA FREEDOM

Media freedom is inextricably linked to the notion that the media's primary function is to act as a 'public watchdog',[63] in that it operates as the general public's 'eyes and ears' by investigating and reporting abuses of power.[64] Thus, the importance attached to media freedom is not only justified by the individual liberty of the publisher, but because the media plays a critical role in facilitating public discourse within democratic societies.[65] Accordingly, Oster states that: '[i]deal public discourse means that all relevant questions, issues and contributions are brought up and processed in debates on the basis of the best available information and arguments.' [66] This is not controversial. However, Oster goes on to argue:

> 'The mass media is regularly, and on a grand scale, concerned with contributions to such public debates. The expression of opinion and the dissemination of information by the institutional mass media are, in their sheer quantity and influence, distinct from speech of private individuals.'[67]

This thesis argues that although the institutional mass media can be concerned with 'contributions to such public debates', as established in Chapter One, this is not always the case. Indeed, strong arguments have been made that the traditional media's focus has shifted from its role as the public watchdog to exploiting commercial opportunities.[68] Pursuant to the media-as-a-constitutional-component concept and the new definition of media, both of which are introduced in the following chapter, the training and employment of the actor is irrelevant, rather it is the dissemination of speech of constitutional value, which in turn enables democratic self-governance,[69] and adherence to behavioural standards deriving from

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[63] *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, [59].
[64] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 418; D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577.
[65] P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 199. This view has been articulated by ECtHR's jurisprudence emanating from a number of cases: *Axel Springer AG v Germany (No. 1)* [2012] App. no. 39954/08 [79]; *Von Hannover v Germany (No. 2)* [2012] App. nos. 40660/08 and 60641/08 [102]; *Sunday Times v United Kingdom (No. 1)* [1979] App. no. 6538/74 [65]; *Bladet Tromsø and Stensaas v Norway* [1999] App. no. 21980/93 [62]; *Times Newspapers Ltd v United Kingdom* (*Nos. 1 and 2)* [2009] App. nos. 3002/03 and 23676/03 [40].
[66] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 29.
[67] Ibid.
[68] See Chapter One section 3.1.
[69] This is also discussed in detail in the following chapter along with the other philosophical foundations for free speech.

the social responsibility theory, that are critical to distinguishing media from non-media actors and, therefore, the beneficiaries of media freedom. The concept renders the right to media freedom applicable to any actor fulfilling this role, whether that be a traditional or citizen journalist. Thus, by adopting a functional approach to defining media, the concept dictates that media freedom is no longer reserved to the institutional mass media.

So what role does media freedom play in enabling media actors to facilitate public discourse by fulfilling this constitutional function? As observed by Rooney, in order for the media to achieve this it must be guaranteed 'effective means to gather and disseminate news.'[70] In theory at least, the media requires privileged protection, or minimal restriction, to encourage the publication and dissemination of more information[71] that, in turn, means that as many views and ideas as possible are represented.[72]

In essence, the ability of societies to effectively democratically self-govern is largely dependent on media actors facilitating the process by virtue of their freedom to operate in the ways discussed in sections 3.2 and 3.3 below. This view is articulated by jurisprudence from a number of jurisdictions. For instance, according to the ECtHR the right to media freedom 'affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the [media] to impart information and ideas on political issues and other subjects of public interest.'[73] The Inter-American Court of Human Rights (IACHR), which adjudicates on the American Convention on Human Rights (ACHR), says that the media acts as a catalyst for the 'social dimension' of free speech in a democratic society, which makes the media's ability to gather diverse information and opinions fundamental to the operation of democracy.[74] For this reason, in the IACHR's view,

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[70] M.J. Rooney, 'Freedom of the Press: An Emerging Privilege' (1983) 67 *Marquette Law Review* 34, 58.

[71] J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211; J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 31.

[72] From the US Supreme Court see: *Dennis v United States* (1951) 341 US 494, 584; See also: J.S. Alonzo, 'Restoring the Ideal Marketplace: how Recognizing Bloggers as Journalists Can Save the Press' (2006) 9 *Legislation and Public Policy* 751, 762. Although this statement is, in essence, correct, this thesis argues that media freedom should not come without qualification in respect of both the rationale and values that underpin it, and regulation that enforces its concomitant obligations and responsibilities. Thus, Chapter Three considers in detail the appropriateness of libertarian theory as a normative paradigm for free speech and, in particular, its philosophical foundations, including the argument from truth and marketplace of ideas.

[73] *Centro Europa 7 Srl and Di Stefano v Italy* [2012] App. no. 38433/09 [131]; *Lingens v Austria* [1986] App. no. 9815/82 [41]-[42]; *Sürek v Turkey (No. 1)* [1999] App. no. 26682/95 [59]; *Thoma v Luxembourg* [2001] App. no. 38432/97 [45].

[74] *Fontevecchia and D'Amico v Argentina* [2011] Case 12.524 [44]; *Ivcher-Bronstein v Peru* [2001] Case 11.762 [149]; *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [117].

the media, through its publications and broadcasts, provides 'one of the most important manifestations of freedom of expression and information.'[75] Therefore, it is essential, says the IACHR, that the media 'should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom.'[76] In respect of the International Covenant for Civil and Political Rights (ICCPR) the HRC has also examined the role played by a free media in the democratic process. In *Bodrožić v Serbia and Montenegro*[77] the Committee acknowledged that 'in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.'[78] This is because, through the media, citizens gain wider access to information and have the opportunity to disseminate information and opinions about 'the activities of elected bodies and their members.'[79]

Thus, rather than being an inherent right, pursuant to, for instance, ECtHR jurisprudence, media freedom is, in fact, an instrumental one.[80] Consequently, as Oster explains, media freedom protects the media 'for fulfilling a beneficial function for society in general, that is, informing the public about matters of general concern…media freedom is more than merely freedom of expression for journalists: affording particular protection to the media is based on a consequentialist and functional understanding of media activity.'[81] As stated above, and as will become apparent in the following sections, the protection provided by media freedom is bifurcated. Not only does it protect media speech, as in publications or broadcasts, it also affords the media defensive and positive institutional protection from state interference. Section 3.2 will deal with how media freedom protects media speech. This will be followed at Section 3.3 that considers the scope of the institutional protection afforded by the right to media entities.

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[75] Advisory Opinion OC-5/85 [71].
[76] *Ivcher-Bronstein v Peru* [2001] Case 11.762 [150]; *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [119].
[77] [2005] Communication no. 1180/2003.
[78] Ibid. [7.2].
[79] *Gauthier v Canada* [1999] Communication no. 633/95 [13.4].
[80] E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005), 422; J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 33. However, compare the US position discussed below in section 5.1 in respect of the press-as-technology model.
[81] Ibid. (Oster).

3.2 MEDIA FREEDOM'S PROTECTION OF MEDIA 'SPEECH'

Media freedom includes, and can be sub-categorised[82] into, the freedom to: (i) hold opinions and; (ii) receive and impart information and ideas without interference by public authorities and regardless of frontiers. This right (and its sub-categories) is enshrined within Article 10(1) ECHR, along with other international Conventions and legal instruments, including the ICCPR[83] and the ACHR.[84]

At this juncture it is worthy of note that Articles 19(1) and 13(1) of the ICCPR and ACHR respectively protect all forms of expression, and their means of conveyance. Pursuant to ECtHR jurisprudence Article 10(1) ECHR protects the substance of ideas and information, the form in which they are conveyed and the method of dissemination,[85] which can encompass any medium, such as books, newspapers, television, radio and social media.[86] The enhanced right to media freedom takes this protection a step further, as it also includes the right to decide upon the method and technique of reporting, and the way in which the material is presented.[87] Therefore, the right to media freedom consists of a positive freedom: the right to gather and to publish information in a particular way. However, it also includes a negative freedom: not to have to publish certain information. This would include, for instance, the freedom not to have to publish articles that benefit the owner of the media outlet, or before information provided by sources has been properly verified. Thus, this negative aspect of the right manifests in editorial freedom as to what to publish.[88] The following sections will set out what the sub-categories mean for actors operating as media.

3.2.1 THE FREEDOM TO HOLD OPINIONS

As a constituent of the right to freedom of expression the freedom to hold opinions without interference acts as a pre-condition to the right of individuals to freely express themselves.[89] In respect of media freedom, HRC jurisprudence relating to the ICCPR tells us that this

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[82] Ibid. 69.
[83] See: Article 19(1) and (2).
[84] See: Article 13(1). Rather than 'hold opinion' this Article protects the right to 'freedom of thought'.
[85] For example, see: *Autronic AG v Switzerland* [1990] App. no. 12726/87 [47]; *Jersild v Denmark* [1994] App. no. 15890/89 [31]; *De Haes and Gijsels v Belguim* [1997] App. no. 19983/92 [48]; *Murphy v Ireland* [2003] App. no. 44179/98 [61]; *Radio France and others v France* [2004] App. no. 53984/00 [39].
[86] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 77.
[87] For example, see: *Jersild v Denmark* [1994] App. no. 15890/89 [31]; *De Haes and Gijsels v Belguim* [1997] App. no. 19983/92 [48]; *Bergens Tidende and others v Norway* [2000] App. no. 26132/95 [57]; *Radio France and others v France* [2004] App. no. 53984/00 [39].
[88] This is discussed in more detail below at section 3.2.2.1 below.
[89] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 70.

means that a media actor may freely have an opinion that they may change, or not have an opinion at all. Regardless, this must not be subject to any interference or punishment.[90] The various international Conventions and instruments within which freedom of expression is enshrined, including Article 10(1) ECHR, Article 19(1) ICCPR and Article 13(1) ACHR, protect all types of opinions, including those of a political, scientific, historic, moral or religious nature.[91] However, there are some subtle differences between them. Article 19(1) ICCPR provides an absolute right to hold opinions (as does Article 9(1) ECHR in respect of freedom of thought), whereas Article 10(2) ECHR and Article 13(2) ACHR qualify the right within the respective Conventions. Notwithstanding this, in line with Article 9(1) ECHR and Article 19(1) ICCPR, unlike free speech, which acts as an external manifestation, or forum externum, of one's opinions and thoughts, the freedom to hold an opinion and the freedom of thought are part of an individual's forum internum and, consequently, should be unrestricted. Thus, measures that coercively manipulate opinions should be unjustifiable in all circumstances.[92]

3.2.2 THE FREEDOM TO IMPART INFORMATION AND IDEAS

The importance of the media's role in imparting information and ideas has been consistently reiterated in ECtHR jurisprudence, according to which: 'Freedom of the press…affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and on matters of general interest.'[93] So what does the right to impart information and ideas actually mean and include for the media?

The ECtHR's famous passage from its judgment in *Handyside v United Kingdom*[94] serves as a starting point. It tells us that the right to freedom of expression, and by extension media freedom, is applicable not only to information or ideas 'that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism,

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[90] For example, see: *Mpaka-Nsusu v Zaire* [1986] Communication no. 157/1983 [10]; *Primo Jose Essono Mika Miha v Equatorial Guinea* [1994] Communication no. 414/1990 [6.8]; *Faurisson v France* [1996] Communication no. 550/93; *Kang v Republic of Korea* [2003] Communication no. 878/1999 [7.2]; General Comment no. 34, [9].
[91] Ibid. (General Comment).
[92] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 70-71.
[93] *Lingens v Austria* [1986] App. no. 9815/82 [42]. This has been reiterated in a number of cases, including: *Oberschlick v Austria (No. 1)* [1991] App. no. 11662/85 [58]; *Thoma v Luxembourg* [2001] App. no. 38432/97 [45]; *Scharsach and News Verlagsgesellchaft mbH v Austria* [2003] App. no. 39394/98 [30]; *Cumpănă and Mazăre v Romania* [2004] App. no. 33348/96 [93].
[94] [1976] App. no. 5493/72.

tolerance and broadmindedness without which there is no "democratic society".'[95] Similarly, the US Supreme Court in *Cohen v California* stated that 'one man's vulgarity is another's lyric.'[96] Thus, the critical question for lawyers is whether restriction of particular expression is justified in the specific circumstances, bearing in mind any conflicting rights and interests that are engaged.[97]

The freedom to impart information and ideas is not simply confined to the publishing media actor. It also applies to statements made by, for instance, interviewees and other third parties. According to the ECtHR in *Selistö v Finland*[98] and *Axel Springer AG v Germany (No. 2)*[99] this aspect of the right to media freedom is critical to the media's ability to perform its function as the public watchdog.[100] Therefore, and in line with the Strasbourg Court's dictum in *Handyside*, media actors are not required to distance themselves from statements made by interviewees that may be provocative or offensive to others, or damage their reputation.[101] Consequently, media actors should only be punished for disseminating information emanating from their sources in very limited circumstances, such as when their publication is providing a platform for inciting violence and hatred in situations of conflict and tension.[102] According to both the ECtHR and the IACHR this is because punishing media actors for publishing information from third parties would negatively impact upon the media's ability to facilitate public discourse on matters of public concern.[103] It follows that this is only true when the media are facilitating public discourse. Thus, there is a clear distinction between reporting on violence or hate speech, which falls within the ambit of media freedom, as compared to advocating it, which does not.

Anonymous and pseudonymous speech is dealt with in detail in Chapter Five. This chapter provides detailed analysis of the treatment of such speech by, amongst others, UK

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[95] Ibid. [49]; See also: *Sunday Times v United Kingdom (No. 1)* [1979] App. no. 6538/74 [65]; *Lingens v Austria* [1986] App. no. 9815/82 [41]; *Axel Springer AG v Germany (No. 1)* [2012] App. no. 39954/08 [78]; *Thorgeir Thorgeirson v Iceland* [1992] App. no. 13778/88 [63].
[96] 403 US 15, 25 (1971).
[97] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 73.
[98] [2004] App. no. 56767/00.
[99] [2014] App. no. 48311/10.
[100] *Selistö* [59]; *Axel Springer* [69].
[101] *Radio France and others v France* [2004] App. no. 53984/00 [37]; *July and SARL Liberation v France* [2008] App. no. 20893/03 [71]; *Orban and others v France* [2009] App. no. 20985/05 [52]; *Pedersen and Baadsgaard v Denmark* [2004] App. no. 49017/99 [77].
[102] *Sürek v Turkey (No. 1)* [1999] App. no. 26682/95 [63]; *Sürek v Turkey (No. 2)* [1999] App. no. 24122/94 [36].
[103] ECtHR: *Jersild v Denmark* [1994] App. no. 15890/89 [35]; *July and SARL Liberation v France* [2008] App. no. 20893/03 [69]. IACHR: *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [134].

and US courts and by the ECtHR in the context of conflicting audience and speaker interests. It is predominantly concerned with how the polarised jurisprudence from these jurisdictions impacts upon the anonymous or pseudonymous author and the respective publication's audience.[104] Therefore, for the purposes of unpacking media freedom, the remainder of this section will consider how anonymous and pseudonymous speech has been treated by the ECtHR in respect of information emanating from a third-party. As discussed in Chapter Five, anonymous and pseudonymous publications are prevalent online and among citizen journalists, who often write and publish anonymously, or using a pseudonym. Thus, as citizen journalists often act as a source of news for the traditional media,[105] the Strasbourg Court's recognition in *Albert-Engelmann-Gesellschaft mbH v Austria*[106] that editors have the right to publish information emanating from anonymous and, by extension, pseudonymous sources, is relevant to both citizen journalists and the traditional media.[107] In cases involving the publication of information coming from anonymous and pseudonymous sources assessing the veracity of the publication has been central to the reasoning of the ECtHR, as illustrated by the following cases. *Print Zeitungsverlag v Austria*[108] concerned a newspaper that had published an article quoting a letter that had been sent to members of a tourism association supervisory board. The letter included defamatory imputations, which the newspaper distanced itself from. However, the Court held that by publishing the anonymous letter, the newspaper had communicated it to a far larger audience than the restricted group of board members. As a result, in the Court's view, the dissemination of the letter exceeded the limits of permissible reporting.[109] In *Lavric v Romania*[110] a newspaper published the defamatory content of a complaint made by a defendant against a public prosecutor. The newspaper presented this material as the objective truth, as opposed to the statements of a third party, and did not check the accuracy of its sources, nor give the individual concerned the

[104] For detailed treatment of anonymous and pseudonymous speech generally in a number of contexts see: S. Levmore, 'The Internet's Anonymity Problem' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010); J. Bartlett, *The Dark Net Inside the Digital Underworld* (Random House, 2014), ch. 2; E. Barendt, *Anonymous Speech* (Hart Publishing, 2016); J. Oster, *European and International Media Law* (Cambridge University Press, 2017), 46-50; R. Arnold and M. Rajan, 'Do authors and performers have a legal right to pseudonymity' *Journal of Media Law* (2017), DOI: 10.1080/17577632.2017.1347082; P. Coe, 'Anonymity and Pseudonymity: Free Speech's Problem Children' *Media & Arts Law Review* (2018) 22(2) 173-200.
[105] See Chapter One sections 3.1 and 3.2.
[106] [2006] App. no. 46389/99 [32].
[107] See the detailed discussion in Chapter Five relating to *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22.
[108] [2013] App. no. 46389/99 [32].
[109] Ibid. [40]-[41].
[110] [2014] App. no. 22231/05.

opportunity to respond to the accusations made against her.[111] The Court held that the newspaper lacked the professional care required by journalists[112] and that, as a result, it had 'exceeded the acceptable limits of comment in relation to a debate of general interest.'[113] In the Court's view, the newspaper's right to freedom of expression did not outweigh the applicant's right to reputation. Consequently, it found that there had been a violation of Article 8 ECHR.[114] It is submitted that the judgment in *Lavric* was, on the facts, surely correct. However, the decision in *Print Zeitungsverlag* is troubling. If the media actor, in this case the newspaper, gave the victim an opportunity to comment prior to publication and did not claim that the allegations made in the anonymous material were true, then they are demonstrating responsible reporting pursuant to the right to media freedom: they are fulfilling their concomitant obligations and responsibilities, as set out in Chapter Four.[115] This means that, so long as the content of the anonymous letter relates to an issue of public concern, the newspaper in this case should have been able to publish the letter despite the fact that it may have been defamatory.[116] In these circumstances, a decision to the contrary inhibits the media's role as the public watchdog and conflicts with the right to media freedom.

Both the ECtHR and the European Commission on Human Rights have handed down judgments relating to media actors' treatment of interviewees. Pursuant to the right to media freedom, it has been held by the ECtHR that media actors should not be subject to a general obligation to obtain permission from an interviewee before publishing an interview. According to the Court, this is because requiring members of the media to obtain such authorisation would inhibit their work and negatively impact on the quality of public discourse in the following ways: (i) media actors may be deterred from asking difficult and provocative questions for fear of the interviewees preventing publication by refusing to grant their permission, or; (ii) interviewees would choose which members of the media to talk to based on their reputation as being co-operative.[117] Furthermore, in *Haider v Austria*[118] the Commission held that Article 10 ECHR does not entitle an interviewee to be interviewed in a

[111] Ibid. [47].
[112] Ibid. [48].
[113] Ibid. [49]
[114] Ibid.
[115] Sections 3.2 and 3.3.
[116] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 75.
[117] *Wizerkaniuk v Poland* [2011] App. no. 18990/05 [82].
[118] [1995] App. no. 25060/94.

specific way by the media[119] as it is: 'in the interest of freedom of political debate that the interviewing journalist may also express critical and provocative points of view and not merely give neutral cues for the statements of the interviewed person, since the latter can reply immediately.'[120] Although in *Haider* the case, and the Commission's judgment, related to a politician and political debate, it is consistent with ECtHR jurisprudence that is of general application. For instance, in *Filatenko v Russia*[121] the Court stated: 'The punishment of a journalist for having worded his questions in a specific manner 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.'[122]

3.2.2.1 EDITORIAL FREEDOM

As explained above,[123] media freedom consists of the negative right of not having to impart certain information and ideas; a facet of the right that manifests in editorial freedom. This has been the subject of jurisprudence from a number of jurisdictions, including the ECtHR, [124] the United States and Germany. From a US perspective, in the leading case of *Miami Herald v Tornillo*[125] the Supreme Court unanimously held that a Florida statute that provided a mandatory right of reply to election candidates whose character was attacked by a newspaper was invalid. The court's decision was based on, inter alia, the fact that the statute conflicted with the function of editors to determine the contents of the newspaper and the treatment of public issues as, pursuant to the statute, they would be forced to publish a reply regardless of whether or not they considered it appropriate.[126] The right to editorial freedom has also been extended to both private and public broadcasters, pursuant to which they can determine programme schedules, reject political advertisements[127] and take a distinctive view on controversial public issues.[128] Consequently, Bezanson has described editorial discretion as the essence of media freedom as, in his view, it is the equivalent of free will, or liberty, which

[119] Ibid. 7.
[120] Ibid. 8.
[121] [2007] App. no. 73219/01.
[122] Ibid. [41].
[123] See section 3.2.
[124] From the ECtHR see, for example: *Melnychuk v Ukraine* [2005] App. no. 28743/03, p. 6.
[125] 418 US 241 (1974).
[126] Ibid. 258 per Burger CJ.
[127] *Columbia Broadcasting System v Democratic National Committee* 412 US 94 (1973).
[128] *FCC v League of Women Voters of California* 468 US 384 (1984).

is protected for individuals by the free speech clause of the First Amendment.[129] Similarly, in Germany it has been held that media freedom enables editors to choose letters for publication, allow anonymous[130] contributions by authors[131] and includes the freedom to determine their respective publication's general outlook and views on particular political and social issues.[132]

3.3 BEYOND SPEECH RIGHTS: MEDIA FREEDOM'S INSTITUTIONAL PROTECTION OF MEDIA ACTORS

The previous section has set out how the right to media freedom protects media speech. However, media freedom goes beyond this. It also protects media actors from state interference not directly related to specific publications, in that it protects them as institutions performing their role as the public watchdog and Fourth Estate.[133] Within this institutional context media freedom differs from the right to freedom of expression, not only in respect of the intensity of the protection it provides, as is the case with media speech, but also in terms of the scope of protected action.[134] Thus, pursuant to this institutional protection of the media, rights that are not directly speech-related, but are instead connected to the media's newsgathering, editorial and distribution process, and to the media's independence, are guaranteed.[135]

Oster divides this institutional protection of the media into defensive and positive rights.[136] This thesis will adopt the same method of categorisation in the following paragraphs. Under defensive rights, it will deal with how the right to media freedom protects media: (i) independence; (ii) research and investigation; (iii) sources. In respect of positive rights, it will consider what the media is entitled to in order for it to effectively utilise media freedom.

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[129] R.P. Bezanson, 'Institutional Speech' (1995) 80 *Iowa Law Review* 735, 806-815; 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska Law Review* 754. See also: E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005), 425.
[130] See above at section 3.1.2. Anonymity and pseudonymity is also discussed in more detail in Chapter Five.
[131] 95 BVerfGE 28 (1996).
[132] 52 BVerfGE 283, 301 (1979); 97 BVerfGE 125 (1998).
[133] J. Oster, *European and International Media Law* (Cambridge University Press, 2017), 52-53.
[134] Ibid.
[135] Ibid.
[136] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 84-101.

3.3.1 DEFENSIVE RIGHT 1: MEDIA INDEPENDENCE

In *Manole and others v Moldova*[137] the ECtHR held that if a powerful economic or political group obtained a position of dominance over the media and, as a result, influenced and/or limited their editorial freedom, this would undermine the media's fundamental democratic role.[138] Thus, media freedom protects media actors from undue governmental influence and monopolies. The need for this protection derives from the fact that within a democracy the citizens that the respective government serves mandates state authority. Sequentially, as the media has the power to influence public opinion and ideology, its independence from the state, [139] and commercial influence is critical to the effective functioning of democracy.[140]

3.3.2 DEFENSIVE RIGHT 2: PROTECTION OF MEDIA RESEARCH AND INVESTIGATION

Beneficiaries of the right to media freedom are protected against unjustified interferences with activities related to all forms of newsgathering.[141] This is demonstrated by the fact that the Council of Europe has stated, and the ECtHR has consistently held, that media freedom includes the right of media actors to seek information, pursuant to which they are at liberty to determine whether they need to employ investigative journalism to obtain the information.[142] Thus, in *Társaság a Szabadságjogokért v Hungary*[143] the Court stated that 'the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information[, which] is an essential and preparatory step in journalism and…an inherent, protected part of press freedom.'[144]

The protection against unjustified interferences with media's newsgathering practice has a very wide ambit. For instance, as illustrated by the case of *Gsell v Switzerland*,[145] measures that are equally applicable to the media and general public have been held to

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[137] [2009] App. no. 13936/02.
[138] Ibid. [98]. See also: *Centro Europa 7 Srl and Di Stefano v Italy* [2012] App. no. 38433/09 [133].
[139] See generally: H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 39-41.
[140] See Chapter One section 3.1 for further discussion on media ownership and independence.
[141] This includes undercover work. See: *Nordisk Film & TV A/S v Denmark* [2005] App. no. 40485/02; *Haldimann and others v Switzerland* [2015] App. no. 21830/09.
[142] Council of Europe, Declaration by the Committee of Ministers on the protection and promotion of investigative journalism (26th September 2001). ECtHR: *Cumpănă and Mazăre v Romania* [2004] App. no. 33348/96 [96]; *Dammann v Switzerland* [2006] App. no. 77551/01 [52]; *Társaság a Szabadságjogokért v Hungary* [2009] App. no. 37374/05 [27]; *Bremner v Turkey* [2015] App. no. 37428/06 [76].
[143] Ibid. (*Társaság*).
[144] Ibid. [27]. See also: *Kenedi v Hungary* [2009] App. no. 31475/05 [43].
[145] [2009] App. no. 12675/05. Discussed above at section 2.

contravene the right if the media actor is disproportionately inhibited from exercising their profession.[146] Further, it has been recognised by both the US Supreme Court and the ECtHR that freedom of the media allows media actors to publish information obtained unlawfully, so long as the public interest in receiving it is greater than the state's or an individual's interest in confidentiality.[147] However, media freedom does not extend to illegal activity or violation of public safety rules that apply to everyone.[148]

3.3.3 DEFENSIVE RIGHT 3: PROTECTION OF MEDIA SOURCES

In the seminal case of *Goodwin v United Kingdom*[149] the ECtHR stated that '[p]rotection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest'[150] Undoubtedly an informed media, and effective journalism, is dependent upon the use of sources, who tend to be insiders working in or associated with the subject matter of the publication, to provide the most effective information.[151] As Lord Denning observed in *Attorney-General v Mulholland and Foster*[152] '[the journalist] can expose wrong-doing and neglect of duty which would otherwise go unremedied…the mouths of his informants will be closed to him if it is known that their identity will be disclosed…'[153] which would, in turn undermine the media's role as the public watchdog. Thus, the protection of media sources is a fundamental aspect of media freedom, and is recognised as such by a variety of European legal instruments,[154] jurisprudence[155] and legal scholarship.[156] Within a ECHR context, this is

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[146] Ibid. [49].
[147] US Supreme Court: *New York Times Co. v United States* 403 US 713 (1971); *Bartnicki v Vopper* 532 US 514 (2001); ECtHR: *Radio Twist a.s. v Slovakia* [2006] App. no. 62202/00 [62]; *Nagla v Latvia* [2013] App. no. 73469/10 [97].
[148] J. Oster, *European and International Media Law* (Cambridge University Press, 2017), 53.
[149] [1996] App. no. 17488/90.
[150] Ibid. [39]. See also: *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193.
[151] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 311.
[152] [1963] 2 QB 477.
[153] Ibid. 489.
[154] United Nations Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr Abid Hussain, submitted pursuant to Commission Resolution 1997/27, E/CN.4/1998/40/Add.1, [17] and [22]; Human Rights Resolution 2005/38: The Right to Freedom of Opinion and Expression, E/CN.4/RES/2005/38; Council of Europe, Committee of Ministers, Recommendation No. R(2000) 7 on the Right of Journalists not to Disclose their Sources of Information; Parliamentary Assembly, Recommendation 1950 (2011): The Protection of Journalistic Sources.
[155] For example, see: *Goodwin v United Kingdom* [1996] App. no. 17488/90 [39]; *Roemen and Schmit v Luxembourg* [2003] App. no. 51772/99 [57]; *Cumpănă and Mazăre v Romania* [2004] App. no. 33348/96 [106]; *Radio Twist a.s. v Slovakia* [2006] App. no. 62202/00 [62]; *Voskuil v Netherlands* [2007] App. no. 64752/01 [65]; *Tillack v Belgium* [2007] App. no. 20477/05 [53]; *Financial Times Ltd and others v United Kingdom*

illustrated by the fact that the Strasbourg Court has consistently held that journalistic rights pursuant to media freedom are interfered with by virtue of the very existence of an order to disclose a source's identity, regardless of whether or not the order is actually enforced.[157] However, despite the high level of importance attached to the protection of media sources, it is not absolute.[158] This is illustrated by *Roeman and Schmit v Luxembourg*[159] and *Financial Times Ltd and others v United Kingdom*[160] in which the ECtHR found that the following factors will determine whether or not a legitimate interest in disclosure outweighs the right not to disclose information pertaining to the identity of the source: (i) the nature of the interest in the disclosure; (ii) in particular, the public interest in preventing and punishing criminal offences; (iii) the authenticity of the information; (iv) the conduct and good faith of the source; (v) the availability of alternative, less intrusive means of obtaining the information sought.[161]

Furthermore, if the sole or predominant purpose of the search of media premises, and the seizure of journalistic material, is to identify media sources then the search and seizure are in direct conflict with the right to media freedom, as they have 'an intolerable chilling effect on journalistic work and may also deter informants from providing information that they are only willing to provide confidentially.'[162] Indeed, the Strasbourg Court has held that the mere threat to search media premises causes a 'chilling effect' and is, prima facie,

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[2009] App. no. 821/03 [59]; *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [50]; *Nagla v Latvia* [2013] App. no. 73469/10.

[156] For example, see: D. Carney, 'Theoretical Underpinnings of the Protection of Journalists' Confidential Sources: Why an Absolute Privilege Cannot be Justified' (2009) 1 *Journal of Media Law* 97; E. Barendt, 'Bad News for Bloggers' (2009) 2 *Journal of Media Law* 141, 146; S. Helle, 'The News-Gathering/Publication Dichotomy and Government Expression' (1982) *Duke Law Journal* 1, 27-28; C.C. Monk, 'Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection' (1986) 51 *Missouri Law Review* 14-5; E. Chemerinsky, 'Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering' (2000) 33 *University of Richmond Law Review* 1143; J. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalists' Privilege' (2005) 154 *University of Pennsylvania Law Review* 201; E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118; D. Abramowicz, 'Calculating the Public Interest in Protecting Journalists' Confidential Sources' (2009) 108 *Columbia Law Review* 101.

[157] *Financial Times Ltd and others v United Kingdom* [2009] App. no 821/03 [56]; *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [50]; *Roemen and Schmit v Luxembourg* [2003] App. no. 51772/99 [57]; *Telegraaf Media Nederland Landelijke Media BV and others v Netherlands* [2012] App. no. 39315/06 [127]. See also the House of Lords case of: *British Steel Corporation v Granada Television Ltd* [1981] 1 All ER 417.

[158] *Goodwin v United Kingdom* [1996] App. no. 17488/90 [39]. For example, for the UK see: section 10 Contempt of Court Act 1981.

[159] [2003] App. no. 51772/99.

[160] [2009] App. no. 821/03.

[161] *Roeman and Schmit* [58]; *Financial Times* [67].

[162] J. Oster, *European and International Media Law* (Cambridge University Press, 2017), 54.

irreconcilable with media freedom.[163] Of particular significance to citizen journalists, who may well operate from home, is the fact that, in addition to their right to media freedom being interfered with by searches and seizures of their journalistic material, such activity also constitutes a breach of the right to respect one's home as an aspect of personal privacy pursuant to Article 8 ECHR[164] and the entitlement to the enjoyment of property under Article 1 ECHR.[165]

In contrast, in the US, although the value of source protection is recognised, it is not regarded as an aspect of the media free speech right. In *Branzburg v Hayes*[166] the Supreme Court held that the First Amendment does not confer protection for media sources. However, statutes providing 'shield' laws for journalistic rights were enacted by some states prior to the *Branzburg* decision, and more have been enacted since by a number of states and by Congress.[167] Thus, unlike the UK and the ECtHR, in which the protection of journalistic sources is regarded as synonymous with media speech, the US treats the protection of sources as a 'background' right.[168] Similarly, Australia does not constitutionally protect journalistic sources. However, as with the US, some Australian state legislatures have enacted shield laws to protection the confidentiality of sources.[169] In contrast, Canada takes the same stance as the US and Australia, but does not have shield laws to protect journalists. If a media actor fails to comply with a court order to disclose the identity of a source, they could be faced with legal charges, including the threat of imprisonment.[170] Thus, in respect of these jurisdictions, Fenwick and Phillipson observe that 'in contrast to the ECHR stance, there is significant doubt as to the harmony of interests between free speech and source protection. Source protection in these [jurisdictions] appears to be seen as a journalistic privilege, not viewed as

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[163] *Sanoma Uitgevers BV v Netherlands* [2010] App. no. 38224/03 [71].
[164] This applies even if the search and seizure was conducted on business premises as 'home'. See: *Niemietz v Germany* [1992] App. no. 13710/88 [30]; *Saint-Paul Luxembourg SA v Luxembourg* [2013] App. no. 26419/10 [37].
[165] See also Article 21 ACHR.
[166] 408 US 665 (1972). See also: *Cohen v Cowles Media Co* 510 US 663, 669 (1991); *Judith Miller, Petitioner v US and M Cooper and Time inc, Petitioners v US*, Supreme Court (2005) No. 04-1508.
[167] For a detailed discussion of US shield laws, see generally: E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118.
[168] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 314.
[169] See: W. Bacon and C. Nash, 'Confidential Sources and the Public Right to Know' 1999: *Australian Journalism Review* Vol. 21(2), August, 1-26.
[170] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 314.

worthy of the high levels of protection accorded to speech, despite the link between the two.'[171]

3.3.4 POSITIVE RIGHTS

One of media freedom's distinguishing features to freedom of expression is the fact that, in addition to defensive rights against the state, the right also includes positive entitlements to state action. These entitlements provide the preconditions that enable the media to effectively utilise media freedom to fulfil its role as the public watchdog, and to inform the public on matters of public interest.[172] According to case law, legal instruments and scholarship from a number of jurisdictions, these entitlements include: (i) the right to enable a publisher to distribute their publications by any appropriate means;[173] (ii) privileged access to government information,[174] press conferences[175] and court proceedings;[176] (iii) the obligation of the state to protect media actors in the performance of their work, in particular from violence.[177] In respect of positive entitlements, the protection granted by the ECtHR is more robust than that provided by US Supreme Court jurisprudence. This is demonstrated by the Court's judgment in *Schweizerische Radio-und Fernsehgesellschaft SRG v Switzerland*[178] in which it held that the Swiss authorities' refusal to permit the media to film inside a prison and to conduct an interview with an inmate was disproportionate.[179] In contrast, in *Pell v Procunier*[180] and *Saxbe v Washington Post*[181] the Supreme Court held that the First Amendment does not provide the media with rights to special access or immunities. Consequently, the Court rejected the claims of newspapers to enter prisons and conduct interviews with inmates. This contrasting jurisprudence is indicative of the approach of the ECtHR, which is instrumental and objective and provides privileged protection of the media, compared to the 'press-as-technology' model adopted by the US Supreme Court, which does not afford any

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[171] Ibid.
[172] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 93-94. Consequently, they form part of the non-statutory incentives available under the new regulatory framework advanced in Chapter Seven (see section 4.4.2).
[173] ECtHR: *VgT Verein gegen Tierfabriken v Switzerland (No. 1)* [2001] App. no. 24699/94 [48]; IACHR: *Palamara-Iribarne v Chile* [2005] Case 11.571 [73].
[174] For example, from the US see: section (4)(A)(ii)(II) of the US Freedom of Information Act.
[175] Human Rights Committee: *Gauthier v Canada* [1999] Communication no. 633/95 [13.4]. See also: D. Anderson, 'Freedom of the Press' (2002) 80 *Texas Law Review* 429, 432.
[176] See Chapter Six for analysis of the offence of contempt of court and the open justice principle.
[177] ECtHR: *Özgür Gündem v Turkey* [2000] App. no. 23144/93 [38ff].
[178] [2012] App. no. 34124/06.
[179] Ibid. [65].
[180] 417 US 817 (1974).
[181] 417 US 843 (1974).

constitutional protection of the media. This model is discussed in more detail in section 5 below where it is argued that it is no longer a suitable approach for delineating media from non-media actors.

This section has established not only the importance of media freedom as a concept, but also what it 'contains' and means for members of the media in reality. Section 4 will briefly set out why we need to be able to effectively distinguish media from non-media actors. This will then be followed in section 5 by analysis of the traditional methods for distinguishing media from non-media actors, and therefore the beneficiaries of media freedom.

4. THE NEED TO DISTINGUISH MEDIA FROM NON-MEDIA ACTORS

Chapter One discussed the emergence of citizen journalism. However, although it is now a vital method for imparting and receiving news, its contribution to matters of public interest cannot be overrated, just as traditional journalism should not be underestimated.[182] This is because online expression and social media facilitates the instantaneous, and often spontaneous, expression of opinions and venting and sharing of emotions, thoughts and feelings. Consequently, the Internet is saturated with poorly researched, biased and meaningless material emanating from the traditional media, citizen journalists and non-media actors alike. For instance, in his *Inquiry*, Leveson LJ refers to *Popbitch*[183] that, in his Lordship's opinion, is: 'clear in its ambition to entertain and understands itself to "poke fun" and comment on the "lighter" side of celebrity culture.'[184] Furthermore, despite the fact that social media platforms, such as Twitter and Facebook, create new 'opportunities for deliberation in conditions of approximate political equality among citizens,'[185] scholars such as Sunstein have cautioned that, as social media enables users to personalise, and therefore be selective as to, the information they receive, combined with the human psychological trait that seeks out material that endorses, rather than is critical of, the user's existing beliefs, the range of information to which users are exposed is decreased.[186] Consequently, there is

[182] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 63.
[183] *Popbitch* is a blog that publishes celebrity gossip stories. See: www.popbitch.com.
[184] Lord Justice Leveson, An Inquiry into the Culture, Practices and Ethics of the Press, November 2012, 168 [4.3].
[185] I. Cram, *Citizen Journalists Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015), 5.
[186] This is discussed in detail in Chapter Three section 3.2.

reduced potential for a richer and more balanced dialogue.[187] This issue with social media's facilitation of citizen journalism is discussed in greater depth in the following chapter in respect of the marketplace of ideas theory at section 3.2.

Despite the best intentions of some citizen journalists, they may still lack the education, qualifications and experience to distinguish themselves from professional journalists. Indeed, bloggers post information despite being uncertain as to its provenance and without verifying it for reliability, and instead, rely on readers to judge its accuracy.[188] To the contrary, a blog by a professional journalist may include spontaneous comments and conversation, whilst being supported by professional experience and resources.[189] In conclusion, there exists a symbiosis between citizen journalism and the traditional media that has been articulated by a number of commentators. Essentially, this relationship is mutually beneficial because professional journalists and traditional media entities research and cover the findings of citizen journalism that, sequentially, adds credence to the citizen journalist's work and facilitates the wider dissemination of their research.[190]

In a world where anyone can disseminate information to potentially huge audiences via blogs and other social media platforms, there is a need to distinguish media from non-media actors, not only for the purposes of determining the beneficiaries of the rights and responsibilities attributed to media freedom, but also to identify those who could be subject to a regulatory regime.[191] Thus, the following section will look at the traditional approaches

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[187] C.R. Sunstein, *Republican.com 2.0*, (Princeton University Press, 2009); Ibid. 5-6.

[188] J. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press', (2006) 9 *NYU Journal of Legislation and Public Policy*, 751, 755.

[189] Rowbottom argues for a high and low-level distinction for speech that is based on the context within which the expression is made, as opposed to a value-based distinction deriving from the content of the expression. See: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', *Cambridge Law Journal* 2012, 71(2), 355-383, 371. See also: 108. P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 36. It is argued in the following Chapter that these concerns are paradigms of the rejoinders raised in relation to Holmes J marketplace of ideas and, although John Stuart Mill's argument from truth is not concerned with these issues, the criticisms levelled at the theory. See Chapter Three sections 3.1 and 3.2.

[190] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 64; C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 345; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7th ed. Routledge, 2010), 286.

[191] See Chapter Seven.

used to determine who benefits from media freedom, and why these are not appropriate for the modern media era.

5. THE TRADITIONAL APPROACHES FOR DETERMINING THE BENEFICIARIES OF MEDIA FREEDOM

Traditionally courts and scholars from different jurisdictions have used the following approaches to determine whom and what should benefit from the existence of a distinct right to media freedom: the press-as-technology model; the 'mass audience approach' and; the 'professionalised publisher approach'.[192] As observed in Chapter One, alluded to in the Introduction to this Chapter,[193] and discussed in more detail below in relation to these approaches, the growth of citizen journalism, and the ability of citizen journalists to reach mass audiences, has created doctrinal uncertainty as to how the courts should determine the beneficiaries of media freedom. Arguably, in the context of the modern media, of which citizen journalism is a central component, these factors can no longer be relied upon to distinguish between media and non-media actors. As a result, this section will argue that although these approaches may once have been effective, they now lack merit and are, potentially, redundant.

5.1 PRESS-AS-TECHNOLOGY MODEL

As previously explored,[194] the dominant view in the US, based upon the press-as-technology model, is that the media should not be subject to any privileges or special duties,[195] a position that is juxtaposed with the instrumental and objectivist approach of the ECtHR, which grants privileged protection of the media. Accordingly, pursuant to the model's rationale, there is no need to distinguish the media at all and, as a result, this model does not provide the means to do so. This is because, so the press-as-technology movement argues, the Framers of the Constitution understood the words 'or of the press' to secure the right of every person to use communications technology, as opposed to laying down a right exclusively available to

[192] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 64-68.
[193] See section 1.
[194] See sections 2 and 3.3.4 above.
[195] See generally: E. Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today', (2012) 160 *University of Pennsylvania Law Review* 459.

members of the publishing industry.[196] As a result, in the view of the Supreme Court, the First Amendment protects speech not speakers, regardless of whether the source of the expression is a professional journalist or media organisation, or whether it's a casual social media user.[197] Therefore, in the case of *Branzburg v Hayes,*[198] White J, giving the opinion of the majority, resisted attempting to conceptualise the media, and define what it consists of. In White J's judgment, this is because: 'freedom of the press is a fundamental personal right' which is not confined to the mass media but, instead, attaches to 'every sort of publication which affords a vehicle of information and opinion.'[199] Thus, there appears a concern, echoed, although not necessarily supported, in the work of scholars such as Oster, Baker and Amar that, in attempting to define the media, there is a risk of creating either an over-inclusive or over-exclusive interpretation of journalism.[200] The former could, potentially, be misused,[201] while the latter could give rise to allegations of discrimination.[202] This is because non-journalists, who may contribute to matters of public importance, such as business leaders, scientists and artists, would not fall within the province of the additional protection afforded to the media.[203] However, protecting the media with specific provisions or clauses, that provide extra privileges and duties, does not mean those who are not defined as media would be deprived of their rights. For instance, within the context of ECtHR jurisprudence, artistic[204] and commercial expression[205] are subject to a relatively high level of protection. Similarly, Article 13 CFREU, and Article 5(3) of the German Basic Law protect freedom of science and freedom of the arts. Thus, there is no reason to suggest that, within these legal frameworks at least, privileged protection of the media would operate against business leaders, artists or scientists.[206]

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[196] Ibid. 463.
[197] *Citizens United v FEC* 130 S Ct 876, 905 (2010).
[198] 408 US 665, 704 (1972).
[199] Ibid.
[200] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 65
[201] C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1013-1016.
[202] V.D. Amar, 'From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later' (1999) 50 *Hastings Law Journal* 711, 714-715.
[203] Ibid. J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 65.
[204] *Muller v Switzerland* (1991) 13 EHRR 212; *Otto Preminger v Austria* (1995) 19 EHRR 34; *IA v Turkey* (2007) EHRR 30.
[205] *Markt Intern v Germany* (1989) 12 EHRR 161, [33].
[206] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 65-66.

As set out in the following paragraphs, there are wider-reaching reasons why the press-as-technology model is subject to criticism. In fact, as explained below, there is a strong judicial and academic counter-movement in the US that not only correlates more closely with ECtHR jurisprudence, but also undermines the model within the modern media era.

It is submitted that the specific media protection clauses enshrined within legal instruments, such as Article 11(2) CFREU and the First Amendment, in addition to those provisions safeguarding freedom of expression[207] strongly suggests that, for example, the European Union and the Framers of the US Constitution, intended to distinguish the two, in that they could apply to different entities and mean something different. Taking the First Amendment as an example, commentators such as Stewart J and Bezanson have argued that these provisions must mean something more otherwise they would be redundant.[208] For Stewart J, the First Amendment free press clause operates as a structural guarantee[209] to enable the press to fulfil its constitutional functions of acting as the Fourth Estate; to provide additional checks and balances on the government. Accordingly, the twin speech and press rights are: 'no constitutional accident, but an acknowledgment of the critical role played by the press…'[210] Further, according to West, in addition to the Fourth Estate function, the press fulfils another primary role beyond the values served by the general right to freedom of expression: dissemination of information of public interest.[211]

In the current media era, clearly the institutional press is not the only means to provide a check and balance on government or convey matters of public interest. Other forms of media can, and do, fulfil this role effectively.[212] Consequently, these views of the press

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[207] See section 2 above.
[208] P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631, 633; R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259, 1261-1262. See also: M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1974-5) 26 *Hastings Law Journal* 639, 640; K. Pasich, 'The Right to the Press to Gather Information under the First Amendment' (1978) 12 *Loyola University of Los Angeles Law Review* 357, 385; F. Schauer, 'Towards and Institutional First Amendment' (2005) 89 *Minnesota Law Review* 1256, 1263-1264; E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 136; S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1030-1031.
[209] As opposed to a more 'organic' guarantee that derives from case law.
[210] *Houchins v KQED Inc.* 438 US 1, 17 (1978).
[211] S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1069-1070.
[212] See Chapter One sections 3.1 and 3.2.

clause are not exclusively institutional.[213] The functions of the press identified by Stewart J and West, as being conducive to its constitutional role, are served by the traditional media and citizen journalists.[214] Arguably, therefore, when constitutions, statutes and normative theory require protection of the media in addition to freedom of expression, it is incumbent on the courts to delineate between the two, as demonstrated by ECtHR jurisprudence, despite the fact that such a challenging line-drawing exercise will generate controversial judgments.[215] Accepting the media as a discrete institution is, it is submitted, vitally important within the context of the modern media, in which we can be constantly bombarded by a cacophony of information from different forms of media. It is the fulfilment of the unique functions identified by Stewart J and West that serves to distinguish the media-as-a-constitutional-component[216] from mere media entertainment, as the activities of the latter are not subject to the same legal protection,[217] at least within an ECHR and CFREU context.

5.2 MASS AUDIENCE APPROACH

According to the HRC: 'Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere…'[218] On this analysis, anyone with the ability to disseminate information to a mass audience could be considered to be media, and therefore be subject to the same privileges.[219] Historically this approach could have enabled a distinction to be made between media and non-media actors as professional journalists, and the newspapers, publishers and broadcasters they worked for, tended to be the only entities with the ability to reach mass audiences. However, social media's facilitation of citizen journalism means that this ability is no longer reserved to these organisations and their journalists or broadcasters. Instead, anybody with access to the Internet can, in theory at least,

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[213] R.P. Bezanson, 'Whither Freedom of the Press?' 97 *Iowa Law Review* 1259, 1267.
[214] See Chapter One; According to Oster: Media freedom identifies the rights holder. It is concerned with freedom of the press and of the media, and therefore does not convey a right on to a vehicle of publication. In other words, it is '…not the freedom to publish anything with certain media': J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57-78, 66.
[215] F. Schauer, 'Towards and Institutional First Amendment' (2004-5) 89 *Minnesota Law Review* 1256, 1260. See also: C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1016; S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1048.
[216] This concept is discussed in greater detail in the following chapter.
[217] D.A Anderson, 'Freedom of the Press' 80 *Texas Law Review* 429, 442 (2002).
[218] United Nations Human Rights Committee, General Comment No 34: Freedoms of opinion and expression, (CCPR/C/GC/34), 12th September 2011, [44].
[219] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 66-67.

convey information to millions of people through the creation of a blog, posting a YouTube video or using social media, such as Twitter, Facebook or Instagram. Indeed, if you consider the reach of sporting celebrities such as Cristiano Ronaldo, Andy Murray and Lewis Hamilton through their social media accounts, based on the HRC's formulation, they would be considered 'journalists'.[220]

This situation is paradigmatic of the over-inclusive interpretation of media expression envisaged by Oster and Baker outlined above,[221] as it captures virtually every Internet publication, including, for instance, tweets by celebrity footballers. Furthermore, as discussed above,[222] clearly the appearance and quality of information available on the Internet, whether that be through blogs, websites or social media, varies drastically. Despite these apparent inconsistencies, the mass audience approach would classify a casual tweet from Cristiano Ronaldo as being legally indistinguishable to a citizen journalist using their blog to report from a war zone. Therefore, it would be incorrect to classify all publications capable of reaching mass audiences as media: the Internet, as a vehicle through which information can be conveyed, must not be confused with the media as a legal concept, just as the medium 'paper' does not, necessarily, constitute the press.[223] Consequently, it is imperative to identify diligent journalists operating within the media-as-a-constitutional-component, regardless of the form that takes, and distinguish these from media entertainment and other information.

5.3 'PROFESSIONALISED' PUBLISHER APPROACH

The Committee of Ministers of the Council of Europe and the jurisprudence of the ECtHR regularly refer to 'media professionals'.[224] Thus, in cases such as *Perrin v United Kingdom*[225]

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[220] By way of example, as of May 2019, Cristiano Ronaldo has 78 million followers on Twitter alone. Also, on Twitter, Roger Federer has 12.4 million, Lewis Hamilton has 5.5 million, Andy Murray has 3.5 million and Rory McIlroy has 3.2 million followers.

[221] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 65; C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1013-1016.

[222] See section 4.

[223] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 67.

[224] For example, see Appendix to Recommendation No R (2000) of the Committee of Minsters of the Council of Europe to Member States on the right of journalists not to disclose their sources of information: 'For the purposes of this Recommendation…the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication'*; Surek and Ozdemir v Turkey* App nos. 23927/94 and 24277/94 (ECtHR, 8 July 1999) para. 63;

and *Willem v France*[226] the ECtHR did not grant protection to private and non-professional Internet publications. This view is mirrored in the US in that, for example, under New York shield law, only 'professional journalists' working for 'gain or livelihood'[227] are entitled to benefit from special journalistic dispensations.[228] These positions lend support to an approach whereby a publisher must be connected with, and remunerated by, a traditional media company, and/or have undertaken formal journalistic education and training to benefit from privileges attributed to media freedom.

In contrast to the mass audience approach, it is submitted that this approach animates concerns of over-exclusivity,[229] for reasons that are relevant within the context of citizen journalism. Firstly, who amounts to a professional journalist cannot be defined by membership of a professional body, as unlike lawyers and doctors, journalists are not required to be members of such organisations.[230] Secondly, just because a person has not undergone formal journalistic education or training does not mean they cannot be diligent and professional reporters. Equally, requiring that a person be employed by a professional media organisation eliminates anyone not subject to regular remuneration. This would include many citizen journalists despite the fact their work may contribute to matters of public interest.[231]

The 'professionalised' publisher approach is unconvincing when considering that blogs, published by citizen journalists can be the only source of news coverage from, for example, war zones, as was the case during the Arab Spring uprising.[232] In contrast, educated and professionally trained journalists, employed by media organisations, do not always write

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Wizerkaniuk v Poland App no. 18990/05 (ECtHR, 5 July 2011), [68]; *Kaperzynski v Poland* App no. 43206/07 (ECtHR, 3 April 2012), [70].

[225] App no. 5446/03 (ECtHR, 18 October 2005).

[226] App no. 10883/05 (ECtHR, 16 July 2009).

[227] N.Y. CIV. RIGHTS LAW 79-h (a)(6) (2007).

[228] For detailed discussion of US shield laws, see generally: E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118.

[229] See section 5.2 above.

[230] In respect of voluntarily joining regulatory bodies see Chapter Three section 5.1.4.

[231] E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 136-137; P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 40.

[232] See generally: D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' *Human Rights Law Review* 13 (2013) 125-151; N. Miladi, 'Social Media and Social Change' (2016) *Digest of the Middle East* 25(1), 36-51. This issue is also discussed in Chapter Three section 5.1.1.

or broadcast material that is in the public interest.[233] Instead, this work may be subject to conflicting interests, such as commercialism or political bias.[234] Thus, establishing a presumption that a tabloid journalist reporting on a 'kiss-and-tell' story should be subject to greater legal protection, under the auspices of media freedom, than a private citizen journalist diligently blogging from an area embroiled in conflict, merely because the former is remunerated by a media organisation, and is professionally trained and educated is, it is submitted, unmeritorious and illogical.[235] The former could be classed as mere media entertainment, whilst the latter is paradigmatic of the media-as-a-constitutional-component.[236]

6. CONCLUSION

This Chapter has distinguished media freedom from freedom of expression, and has established that the former provides enhanced protection, over and above the right to freedom of expression, for actors operating as part of the media. It has also set out why media freedom is conceptually important for media actors, and what it means in reality for its beneficiaries, in respect of both speech and institutional protection. Finally, it has identified the shortfalls of the traditional methods adopted by courts and scholars for distinguishing between media and non-media actors, and therefore who/what is subject to media freedom: they simply do not fit in the modern media arena, of which citizen journalism is now very much a part. Thus, this Chapter has provided the foundations for the following chapters. Chapter Three introduces a new workable definition of the media, founded upon the media-as-a-constitutional-component concept that effectively delineates media from non-media actors. This reconceptualisation is based on the premise that the performance of a constitutional function, such as reporting on a matter of public concern, rather than the education, training or employment of the actor, should define the beneficiaries of media freedom. Prior to discussing the concept, and how it can be applied to deal with a variety of legal challenges, it will address the normative problem identified in Chapter One: The dominant theories in political philosophy are based on nineteenth and early twentieth century means of

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[233] See generally: R. Barnes, *Outrageous Invasions Celebrities' Private Lives, Media and the Law*, (Oxford University Press, 2010). The notion of public interest is considered in detail in Chapter Four section 3.
[234] See Chapter One section 3.1.
[235] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 68; P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 41.
[236] This issue is discussed in more detail in Chapter Three in the context of embracing social responsibility theory over libertarianism as a normative paradigm for social media speech.

communicating. They are not suitable for twenty-first century free speech, and the modern media, of which citizen journalism is no longer an outlier, but a central component. Thus, although libertarianism has historically underpinned the notion of the Fourth Estate, has a 'hold' on First Amendment jurisprudence, and is the dominant normative paradigm for Internet and social media speech, based on analysis of the argument from truth and the marketplace of ideas, it will be argued in Chapter Three that it is not the appropriate normative framework for such speech, or the media-as-a-constitutional-component concept. Instead, the Chapter advances the proposition that the social responsibility theory of the media should be re-embraced as the dominant normative paradigm. Chapter Four considers what this new normative framework will mean for media freedom. Specifically, it sets out the standards of behaviour and norms of discourse imposed by the concept, which are applied in Chapters Five, Six and Seven to anonymous and pseudonymous speech, contempt of court, the open justice principle and defamation and media regulation respectively.

CHAPTER THREE

REJECTING LIBERTARIANISM AND EMBRACING SOCIAL RESPONSIBILITY: THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT – A NEW THEORETICAL FOUNDATION FOR MEDIA FREEDOM

1. INTRODUCTION

In a world where citizen journalists can fulfil a vital constitutional function by reporting on matters of public interest, being able to identify who is and who is not media is critical to the effective operation of the enhanced right to media freedom. Chapter Two distinguished media freedom from freedom of expression. It set out why it is conceptually important to media actors, and what it means in reality to its beneficiaries. It argued that the current methods for distinguishing those entities operating as media from those that are not for the purposes of media freedom at best lack merit and are, at worst, redundant.

This Chapter, at section 5, will introduce the key to address this problem: a new workable definition of the media, founded upon a media-as-a-constitutional-component concept that effectively delineates media from non-media actors. This conceptualisation is based on the premise that the performance of a constitutional function, such as reporting on a matter of public concern, rather than the education, training or employment of the actor, should define the beneficiaries of media freedom. However, before discussing the concept, and how it can be applied to deal with a variety of legal challenges, the normative problem identified in the Introduction[1] must be addressed. The dominant philosophical theories that underpin free speech and media freedom are John Stuart Mill's argument from truth and, particularly in the context of online expression, the marketplace of ideas. However, these libertarian arguments are based on nineteenth and early twentieth century means of

[1] See section 1.

communication. They are not suitable for twenty-first century free speech, and the modern media, of which social media is no longer an outlier, but a central component. Therefore, although, as will be established below, libertarianism has historically underpinned the notion of the Fourth Estate, has a 'hold' on First Amendment jurisprudence, and is the dominant normative paradigm for online speech, in conflict with the scholarly observations referred in the following section, it is not, in fact, the appropriate normative framework for such speech, or the media-as-a-constitutional-component concept.

Section 2 begins by introducing libertarianism's position as the de facto normative paradigm. It then sets out the meaning and origins of the theory. Based on analysis of the argument from truth and the marketplace of ideas section 3 explains why libertarianism should be rejected as a normative framework for online speech and the media-as-a-constitutional-component concept. It considers, in detail, the medium through which citizen journalists tend to communicate, namely the Internet, including social media. In doing so, it explains the problems and challenges associated with citizen journalists operating through this medium in a libertarian framework. This leads on to section 4 that advances the proposition that the social responsibility theory of the media should be re-embraced as the dominant normative paradigm. It argues that it is better suited to underpin the modern media because it: (i) provides an effective compromise between libertarianism and paternalism; (ii) is a sound doctrinal basis for the argument from democratic self-governance which, it is argued, is an ideal philosophical foundation for the media-as-a-constitutional-component concept, and; (iii) enables a new workable definition of the media, which is introduced in section 5. The chapter concludes at section 6, which considers how the new normative framework advanced throughout this chapter could better deal with some of the legal challenges that arise from the media operating within the current libertarian paradigm. In doing so, it sets out the challenges that will be unpacked in the following chapters, namely: what this conceptualisation of the media means for media freedom; balancing speaker and audience interests in respect of anonymous and pseudonymous social media speech; ensuring the integrity of trials and the open justice principle and achieving a balance between reputational rights and free speech; and, regulating citizen journalists. Thus, it offers an alternative means of interpreting free speech that recognises twenty-first century methods of communication and the legal challenges this presents.

2. LIBERTARIANISM

2.1 INTRODUCING LIBERTARIANISM: THE DE FACTO NORMATIVE PARADIGM FOR FREE SPEECH?

From an Anglo-American perspective, this theory,[2] and the arguments advanced by proponents such as John Milton, John Erskine, John Stuart Mill, Thomas Jefferson and Justice Holmes[3] have served to support the traditional notion of the Fourth Estate.[4] In the US, the theory was made an explicit and foundational tenet of democracy, as it is enshrined within the First Amendment,[5] pursuant to which 'Congress shall make no law…abridging the freedom of speech, or of the press.'[6] Central to the influence of libertarianism on free speech has been Milton's self-righting process,[7] Mill's argument from truth and, in particular, Justice Holmes' marketplace of ideas theory[8] that was laid down in *Abrams v United States.*[9] As explained below,[10] this theory encapsulates Milton's self-righting process as it is based on the premise that 'truth', or the 'best' ideas, will win out, as they will naturally emerge from the competition of ideas in the marketplace.[11] Thus, as Barendt observes:

> 'It is almost impossible to exaggerate the central hold of the "market-place of ideas" metaphor on US jurisprudence and general thinking about the First Amendment freedom of speech. From it stems the belief that the best corrective for the expression of pernicious opinion is not regulation, let alone suppression, but more speech. Truth, it is said, will emerge from the competition of ideas in

[2] See section 2.2 for an explanation as to what the theory means.
[3] All of which are discussed below at section 2.
[4] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 576.
[5] Ibid; P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 295.
[6] Consequently, US Supreme Court decisions have consistently defended media freedom from government intervention and regulation based on libertarian ideology. For example, see: *New York Times v Sullivan* 376 US 254 (1964); *New York Times v United States* 403 US 713 (1971). See generally: P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631; Chapter Two section 2.
[7] This is discussed below at section 2.2.
[8] See: S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 68; D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 44-45.
[9] 250 US 616 (1919).
[10] At section 3.
[11] *Abrams v United States* 250 US 616 (1919), 630-631; See also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes.

> the market-place…This is the central tradition of US free speech jurisprudence…it is now taken quite literally as the appropriate framework for First Amendment jurisprudence.'[12]

In the context of online speech, Dahlberg states that the Internet and, it is submitted, by extension, citizen journalism, has provided the perfect environment for libertarianism and, specifically, the marketplace of ideas theory, to flourish as it: 'provides a space for information exchange and individual decision-making free of bureaucracy, administrative power and other restrictions of 'real' space.'[13] Thus, it has been recognised by a number of commentators that libertarianism has become the de facto communication theory for online speech within Western democracies.[14] This is because 'cyberspace is founded on the primacy of individual liberty'[15] and, as a result, there now exists a 'normative assumption that all nation-states should adopt a libertarian orientation toward their oversight of new media.'[16]

2.2 THE MEANING AND ORIGINS OF LIBERTARIANISM

The distinction between liberalism and libertarianism is a fine one, with the latter having been described as a 'tendency' of the former. [17] However, the difference between liberalism and its libertarian strand can be articulated as follows: liberalism posits that governments are responsible for guaranteeing individual freedom, and therefore rests on the twin claims that governmental intrusion must be based on reason and rational justifications that serve to protect or further those rights.[18]

Libertarianism, on the other hand, determines that individual freedom should be attained with as little government involvement as possible in the regulation of the market. It

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[12] E. Barendt, 'The First Amendment and the Media' in I. Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA*, (Hart Publishing, 1998), 29-50, 43. See also, F. Schauer, 'The Political Incidence of the Free Speech Principle' (1993) 64 *University of Colorado Law Review* 935, 949-952.

[13] L. Dahlberg, 'Cyber-libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination' *Cultural Politics* (2010) 6(3), 331-356, 332-333.

[14] Ibid. D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 579.

[15] M. Kapor, 'Where is the Digital Highway Really Going?' (1993) *Wired* 1(3) 53-59.

[16] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 579.

[17] M. Freeden, *Liberalism A Very Short Introduction*, (Oxford University Press, 2015), 35-36.

[18] P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 294.

was born out of opposition to authoritarianism – a theory that placed all forms of communication under the control of the governing elite or authorities.[19] The origins of libertarian theory can be traced back to sixteenth century Europe,[20] and, in particular, John Milton's *Areopagitica*, which was published in 1644.[21] Although not a comprehensive statement of the principles of freedom of expression and of the press, it provided strong libertarian arguments against authoritarian controls of free speech and the press and for intellectual freedom. Milton's tract laid down the self-righting process, which underpins libertarianism and, as stated above, is enshrined within the marketplace of ideas theory. The process dictates that everyone should be free to express themselves and, ultimately:

> 'The true and sound will survive; the false and unsound will be vanquished. Government should keep out of the battle and not weigh the odds in [favour] of one side or the other. And even though the false may gain a temporary victory, that which is true, by drawing to its [defence] additional forces, will through the self-righting process ultimately survive.'[22]

Early libertarians such as Milton and John Erskine[23] argued that if individuals could be freed from restrictions on communication, people would 'naturally' follow the dictates of their conscience, seek truth, engage in public debate and, consequently, create a better life for themselves and others.[24] In applying the theory to the modern media, from a 'pure' libertarian perspective, it should be characterised by 'uncontrolled, full, unregulated laissez-faire journalism – with a clear separation of State and [media].'[25] In Merrill's view, freedom should be the underlying moral principle of any press theory: '[t]here is a basic faith, shown by libertarian advocates, that a free press – working in a laissez-faire, unfettered situation –

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[19] Authoritarians justified this control, and the theory's requirement to acquiesce to those in power, on the basis that it was necessary to protect and preserve a divinely ordained social order. In most countries this control rested in the hands of the monarch, who would grant royal charters or licenses to media practitioners. If the charters or licenses were violated, then they could be revoked, and those responsible could be jailed. Consequently, censorship was indicative of authoritarianism, as was the arbitrary and erratic ways in which control was exercised. See: S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 63.

[20] See generally: J.H. Altschull, *From Milton to McLuhan The Ideas Behind American Journalism*, (Pearson, 1990).

[21] J. Milton, *Areopagitica,* (Clarendon Press Series, Leopold Classic Library, 2016).

[22] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 44.

[23] Some fifty years after Milton published *Areopagitica*, John Erskine advanced the libertarian principles of freedom of speech and of the press in defence of publishers accused of violating the law. See: T. Howell, *A Complete Collection of State Trials London: 1704, Volume 22* (T.C. Howard, 1817), 414.

[24] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 63.

[25] J. Merrill, *The imperative of freedom: A philosophy of journalistic autonomy* (Freedom House, 1990), 11.

will naturally result in a pluralism of information and viewpoints necessary in a democratic society.'[26]

In the context of online speech and citizen journalism, this correlates closely with the view of cyber-libertarians who, according to Nemes, '…argue that the harm in regulating online speech is greater than the harm caused by the online speech'[27] and '…favour an archaic, unregulated Internet free from state control, fearing that regulation will stifle Internet development and associated freedoms.'[28] Thus, the theory dictates that free speech is an intrinsic natural right that individuals are born with and, therefore, it is absolute, as it does not propagate duties and responsibilities that attach to the right to freedom of expression and, by extension, media freedom. Libertarianism rests on the moral principle of autonomous agency,[29] and as a result assumes that free individuals will express their ideas and opinions, and that other free individuals will listen.[30] In contrast to the social responsibility model of the media that, as is discussed below at section 4, identifies with a collectivist theory of society, libertarianism sprang from individualistic theory.[31] As Freeden explains, libertarianism stresses individualism, and assumes the superior rationality of the individual. Consequently, 'liberty alone, in its purest form, is the message that should be extracted from the liberal tradition and employed to guide social and political…life',[32] hence the libertarian notion of the 'self-righting process'.

Despite the efforts of the likes of Milton and Erskine, it was not until the eighteenth century that authoritarian press control by the Crown and church began to decline, and state monopolies in publishing were eventually abolished. Consequently, by the end of the century the authoritarian regime had been entirely replaced by libertarian principles protecting

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[26] Ibid. 35.
[27] I. Nemes, 'Regulating Hate Speech in Cyberpsace: issues of Desirability and Efficacy', *Information & Communication Technology Law* (2002) 11(3) *Information & Communication Technology Law* 193-220
[28] Ibid. 199. See also: B. Leiter, 'Clearing Cyber-Cesspools: Google and Free Speech' in S. Levmore and M. Nussbaum, *The Offensive Internet* (Harvard University Press, 2010), 156; J. Bartlett, *The Dark Net* (Random House, 2014), 8-9.
[29] This is in contrast to the social responsibility theory, discussed at section 4, which has a communitarian focus. P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 298, 300-301.
[30] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 96-97.
[31] Ibid. 82; P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 300.
[32] M. Freeden, *Liberalism A Very Short Introduction*, (Oxford University Press, 2015), 35-36.

freedom of speech and of the press from state and church intervention.[33] Later proponents of libertarian theory, such as Jefferson[34] and, in particular, Mill and Justice Holmes, were equally as influential in this shift away from authoritarianism as Milton had been in the theory's emergence. Indeed, it is because of Mill's argument from truth, and the introduction by Justice Holmes of the marketplace of ideas theory, that libertarian free speech ideology continued to flourish in the nineteenth and into the twentieth centuries.[35] Although the twentieth century saw the Royal Commission on the Press[36] in the UK and the Hutchins Commission report[37] in the US, that were catalysts for the emergence of the social responsibility theory,[38] the '…doctrine has always been relegated to the fringes of journalism education and the newsroom.'[39] For the reasons discussed above, this marginalisation of the social responsibility doctrine is certainly the case in respect of online speech.[40] Thus, largely due to the influence of the argument from truth and, in particular, the marketplace of ideas, which are analysed in the following section, libertarianism remains a dominant communication theory, not just in respect of US free speech jurisprudence,[41] but also in

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[33] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 44.

[34] Jefferson, during his Presidency, consistently emphasised the theory in his defence of freedom of the press. For example, see: A. Lipscomb (ed), T. Jefferson, *The Writings of Thomas Jefferson*, (Memorial Edition, Thomas Jefferson Memorial Association, 1904, Vol. 11), 32-34.

[35] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 44-45.

[36] The Royal Commission on the Press 1947-1949 was formed at the instigation of the National Union of Journalists. It was established 'with the object of furthering the free expression of opinion through the Press and the greatest possible accuracy in the presentation of news, to inquire into the control, management and censorship of the newspaper and periodical Press and the news agencies, including the financial structure and the monopolistic tendencies in control, and to make recommendations thereon.'

[37] R. Hutchins, Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, 1947). The Commission was set up in 1942 and reported in 1947. Its aim was 'to examine areas and circumstances under which the press of the United States is succeeding or failing; to discover where freedom of expression is or is not limited, whether by government censorship pressure from readers or advertisers or the unwisdom of its proprietors or the timidity of its management.' According to McQuail, it was created in 'response to widespread criticism of the American newspaper press, especially because of its sensationalism and commercialism, but also its political imbalance and monopoly tendencies.' See: D. McQuail, *McQuail's Mass Communication Theory*, (5th ed, Sage, 2005), 170-171.

[38] Ibid. (McQuail); D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 72-74; D. Davis, 'News and Politics' in D. Swanson and D. Nimmo (eds), *New Directions in Political Communication* (Sage, 1990); J. McIntyre, 'Repositioning a Landmark: The Hutchins Commission and Freedom of the Press', *Critical Studies in Mass Communication* (1987) 4, 95-135; F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), ch. 3.

[39] C. Christians, J. Ferré and P. Fackler, *Good News: Social Ethics and the Press* (Oxford University Press, 1993), 38.

[40] P. Coe, '(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media' *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431, 406-407.

[41] E. Barendt, 'The First Amendment and the Media' in I. Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA*, (Hart Publishing, 1998), 29-50, 43.

relation to the underlying principles of the Fourth Estate and, significantly, in the context of online speech and citizen journalism.[42]

3. REJECTING LIBERTARIANISM AS A FLAWED NORMATIVE FRAMEWORK: PROBLEMS WITH THE ARGUMENT FROM TRUTH AND THE MARKETPLACE OF IDEAS

Justification for the protection of freedom of expression[43] and media freedom is underpinned by four philosophical theories. These are the: (i) argument from truth; (ii) marketplace of ideas;[44] (iii) argument from self-fulfilment; (iv) argument from democratic self-governance. This philosophical foundation is apparent, to varying degrees, within contemporary domestic jurisprudence and that of the ECtHR.[45] For instance, the House of Lords recognised the existence of all of these rationales in *R v Secretary of State for the Home Department, ex parte Simms,*[46] where Lord Steyn stated the often repeated passage[47] that freedom of expression 'serves a number of broad objectives,' and is intrinsically valuable because:

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[42] L. Dahlberg, 'Cyber-libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination' *Cultural Politics* (2010) 6(3), 331-356, 332-333.

[43] As stated by Fenwick and Phillipson, freedom of expression is regarded as being one of the most fundamental rights. See: H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 12.

[44] This theory was formulated by Justice Oliver Wendell Holmes in *Abrams v United States* (1919) 616, 630-631. As can be seen below, in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 126 Lord Steyn treated Mill's argument from truth and Justice Holmes' marketplace of ideas as interchangeable. This view is supported by a number of commentators, including Nicol, Millar and Sharland (see A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 2-3 [1.05]) and Schauer (see F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 15-16), who treat the marketplace of ideas as simply a development of the argument from truth. However, in line with commentators such as Wragg (P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', (2013) *Public Law*, Apr 363-385, 368-369) Blasi (V. Blasi, 'Reading Holmes through the lens of Schauer', (1997) 72(5) *Notre Dame Law Review* 1343, 1355) and Barendt (E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 13), this thesis treats the theories as distinct.

[45] According to Fenwick and Phillipson, in *Handyside v United Kingdom* (1976) 1 EHRR 737 the ECtHR referred, at least implicitly, to these theories, when it stated, at [49]: 'Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.' However, Fenwick and Phillipson go on to observe that although freedom of expression can be defended on all of these rationales, only the argument from democratic self-governance has been prominently employed by the ECtHR: See H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 39. 707-710; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 318.

[46] [2000] 2 AC 115.

[47] Lord Steyn's judgment has been referred to numerous times within domestic jurisprudence. For a recent example see: *R (on the application of Lord Carlisle of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 per Lord Kerr at [164].

> 'First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Mr Justice Holmes (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'… Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate…'[48]

Leading commentators, including Dworkin,[49] Schauer,[50] Greenawalt,[51] Raz,[52] Barendt,[53] Wragg,[54] Scanlon[55] and Fenwick and Phillipson,[56] have already provided rich and extensive coverage of these arguments in a variety of contexts, exploration of which is beyond the scope of this thesis.[57] Instead, this section seeks to do the following: it will analyse how the argument from truth and the marketplace of ideas operate in the context of online speech and citizen journalism, and, in doing so, will demonstrate why these philosophical arguments are ill-suited to support the modern media. This analysis will defend the proposition set out in section 1 that, despite its dominance over free speech jurisprudence, libertarianism does not provide an appropriate normative framework for media speech and the media-as-a-constitutional-component concept. This leads in to the discussion at section 4, which sets out why the social responsibility model of the media is better suited to this task. Ultimately, it will be argued that it provides a suitable basis for the argument from democratic self-governance that is an ideal philosophical foundation for media speech and the media-as-a-constitutional-component concept.

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[48] [2000] 2 AC 115, 126.
[49] R. Dworkin, *Do we have a right to pornography?* In *A Matter of Principle* (Harvard University Press, 1985); R. Dworkin, *Freedom's Law*, (Oxford University Press, 1996).
[50] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982).
[51] K. Greenawalt, 'Free Speech Justifications', (1989) 89 *Columbia Law Review* 119.
[52] J. Raz, 'Free Expression and Personal Identification', (1991) 11 *Oxford Journal of Legal Studies* 303.
[53] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005).
[54] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', (2013) *Public Law*, Apr 363-385.
[55] T. Scanlon, 'A Theory of Freedom of Expression', *Philosophy & Public Affairs*, Vol. 1 No. 2 (Winter, 1972), 204-226.
[56] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006).
[57] See also: L. Alexander, *Is there a Right to Freedom of Expression*, (Cambridge University Press, 2005); T. Campbell and W. Sadurski, *Freedom of Communication*, (Dartmouth, 1994); J.M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1.

3.1 THE ARGUMENT FROM TRUTH

The argument from truth is located in Mill's 19th Century text *On Liberty* and, predominantly, his essay, *Of the Liberty of Thought and Discussion.*[58] According to commentators such as Fenwick and Phillipson, the overall thrust of Mill's argument is that truth is most likely to emerge from totally uninhibited freedom of thought, and almost absolute freedom of expression.[59] Consequently, thought and discussion protects individual liberty from its predominant threat,[60] which is not 'political oppression',[61] but 'social tyranny':[62] a 'tyrannical majority'[63] that does not allow for autonomous thought, expression or opposition, but instead requires absolute accord with its own ideas and opinions.[64]

As will be seen below, in relation to the four facets of Mill's argument, it is subject to a conflict between the discoverability of truth, and the constant need for disagreement about that truth.[65] Mill argues that truth does not, always and immediately triumph, but rather, that it will continually be subject to rediscovery, and will eventually emerge victorious, despite suppression.[66]

According to Schauer, for Mill, the issue is not certain truth; instead, his primary concern is 'epistemic advance'.[67] Indeed, Mill regards truth, at times, as merely a by-product of open discussion.[68] Thus, of paramount importance to Mill is not the discovery of truth, but the process of discussion and debate.[69] Mill argues that the foundations and reasoning upon which opinions are based must be continually tested and, as result, the acceptance of

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[58] J.S. Mill, *On Liberty and Other Essays*, (Oxford University Press, 1991); J.S. Mill, *On Liberty, Essays on Politics and Society,* in J.M. Robson (ed), *Collected Works of John Stuart Mill,* (University of Toronto Press, 1977).
[59] J.S. Mill, *On Liberty, Essays on Politics and Society,* in J.M. Robson (ed), *Collected Works of John Stuart Mill,* (University of Toronto Press, 1977), 225-226; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 14.
[60] Ibid. (Mill), 229.
[61] Ibid. 220
[62] Ibid.
[63] Ibid. 219
[64] Ibid. 219-220; P. Wragg, *Mill's dead dogma: the value of truth to free speech jurisprudence*, *Public Law* (2013), Apr, 363-385, 365.
[65] Ibid. (Wragg) 365; The importance of truth is discussed in more detail below.
[66] Ibid. 365
[67] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 25
[68] J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 110
[69] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 20; This is discussed in relation to problems with the justifications below.

alternative views by others, and ultimately the reliable discovery of truth, must derive from effective persuasion, rather than coercion.[70]

Additionally, Mill says that why we should not use truth to determine what is acceptable and unacceptable speech, and therefore, by extension, why we should not regulate based on truth, has four facets. Firstly, the state would expose its own fallibility if it suppresses opinion on account of that opinion's perceived falsity as, in fact, it may be true.[71] Secondly, even if the suppressed opinion is objectively false, it has some value, as it may (and in Mill's opinion very commonly does) contain an element of truth.[72] Thirdly, since the dominant opinion on any given subject is rarely, or never, the whole truth, what remains will only appear as a result of the collision of adverse opinions.[73] Finally, notwithstanding the third facet, even if the received opinion is not only true, but the entire truth, unless it is rigorously discussed and debated, it will not carry the same weight, as the rationale behind it may not be fully and accurately comprehended.[74] Consequently, unless opinions can be frequently and freely challenged, by forcing those holding them to defend their views, the very meaning and essence of that true belief may, itself, be weakened, become ineffective, or even lost:[75] In Mill's words, the true belief: 'will be held as a dead dogma, not a living truth.'[76]

As Wragg says, Mill values open discussion and debate instrumentally and intrinsically:[77] 'as a condition of that rationality and belief which he conceives of as a characteristic feature of a free man.'[78] Mill argues that there should be: 'freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.'[79] Accordingly, the very existence of disagreement is critical to the health of society[80] and the

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[70] J. Mill, *On Liberty*, in J.M. Robson (ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 217-223.
[71] See generally: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 8; J. Mill, *On Liberty*, in J.M. Robson (ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 229-243, 258.
[72] Ibid. (Mill) 229.
[73] Ibid. 252, 258.
[74] Ibid. 258.
[75] Ibid. 258; See also: P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365.
[76] Ibid. 243, 258.
[77] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365; See also: H. Fenwick, *Civil Liberties and Human Rights* (4th ed. Routledge Cavendish, 2007), 302.
[78] J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 107.
[79] J. Mill, *On Liberty*, in J.M. Robson (ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 226.
[80] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365.

type or quality of expression is irrelevant, as the 'usefulness of an opinion is itself a matter of opinion' and to make an assessment of quality is an 'assumption of infallibility'.[81] Thus, as advanced by Fenwick and Phillipson, it appears that Mill envisaged the argument to apply to the expression of opinion and debate. However, it can also be used in support of freedom of information claims as: 'the possession of pertinent information about a subject will nearly always be a prerequisite to the formation of a well-worked-out opinion on the matter.'[82]

Despite Schauer's argument that the desirability of truth within society is almost universally accepted,[83] and the fact that this view seems to correlate with Jacob LJ's obiter dicta in *L'Oreal SA v Bellure NV*[84] that, pursuant to various international laws,[85] 'the right to tell – and to hear – the truth has high international recognition',[86] the assumption derived from the argument, that freedom of expression leads to truth, can be attacked on a number of fronts. Firstly, there is not necessarily a causal link between freedom of expression and the discovery of truth.[87] This is particularly pertinent with regard to online speech and citizen journalism, where anybody can express opinions or views, or disseminate information. Consequently, the Internet is saturated with information that is inaccurate, misleading or untrue, emanating from the traditional media, citizen journalists and non-media actors. This issue is animated by the recent 'fake news' phenomenon, which has led to social media platforms being asked to deal with the proliferation of fake news on their sites,[88] and the Cambridge Analytica scandal. In respect of the former, Facebook, in particular, was the subject of strong criticism in the wake of the US election.[89] This resulted in the platform announcing that it will be partnering with a third-party fact-checking organisation to deal

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[81] J. Mill, *On Liberty*, in J.M. Robson (ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 233-234; See also: K.C. O'Rourke, *John Stuart Mill and Freedom of Expression The genesis of a theory*, (Routledge, 2001), 108.

[82] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 15.

[83] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 17; See also J. Feinberg, *Social Philosophy*, (Prentice-Hall, 1973), 26.

[84] [2010] EWCA Civ 535.

[85] Article 19 Universal Declaration of Human Rights; Article 19(2) ICCPR; Article 10(1) ECHR; Article 11(1) Charter of the Fundamental Rights of the European Union: [2010] EWCA Civ 535, [10].

[86] [2010] EWCA Civ 535, [10].

[87] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 15.

[88] E. Klaris and A. Bedat, 'With the Threat of Fake News, Will Social Media Platforms Become [like] Media Companies and Forsake Legal Protections?' https://inforrm.wordpress.com/2016/12/21/with-the-threat-of-fake-news-will-social-media-platforms-become-more-media-companies-and-forsake-legal-protections-ed-klaris-and-alexia-bedat/ 21st December 2016.

[89] See generally: See generally: H. Allcott and M. Gertzkow, 'Social Media and Fake News in the 2016 Election' *The Journal of Economic Perspectives* (2017) 31(2), 211-236; O. Solon, '2016: the year Facebook became the bad guy' https://www.theguardian.com/technology/2016/dec/12/facebook-2016-problems-fake-news-censorship 12th December 2016.

with the challenge of fake news.[90] It is submitted that the issue with fake news, and Facebook's response, betrays a deeper problem for social networking platforms: These measures (partnering with a fact-checking organisation) clearly run counter to libertarian ideology yet, at the same time, Facebook is trying to maintain a grip on liberal values, demonstrated by its reiteration of its commitment to 'giving people a voice' and that it 'cannot become an arbiter of truth.'[91] Thus, social media platforms, such as Facebook, are struggling to come to terms with a conflict between the reality of online speech and the libertarian values upon which they, as organisations, were originally founded. In other words, libertarianism is not compatible with what they have become. In the same vein, the fact that Cambridge Analytica harvested over 50 million user profiles without Facebook's permission, and manufactured sex scandals and fake news to influence voters in elections around the world,[92] is even more damning of libertarian ideology. The relative ease with which the firm breached Facebook's data security enabled it to essentially hijack democracy, demonstrating that the philosophical rationales underpinning libertarianism, in the form of the argument from truth and marketplace of ideas, are fundamentally flawed and unrealistic, particularly in the context of online speech.

Secondly, despite Jacob LJ's dicta, there is no right to truth per se.[93] Further, contrary to Schauer's statement, arguably the dissemination of truth is not always a good thing. In some situations, the protection of other, countervailing values, should take precedent. Ironically, this is illustrated by the international instruments referred to by Jacob LJ in *L'Oreal*. Taking the ECHR as an example, Article 10(1) is qualified by Article 10(2), which enables expression, and therefore both truths and untruths, to be legitimately withheld on grounds of, inter alia, health or morals, national security, public safety, protecting the reputation and honour of private individuals, the prevention of disorder or crime and breach of confidence. Equally, this can be applied to trade secrets, medical information, data protection, confidentiality agreements, or official secrecy. Within the context of social media, the revenge porn phenomenon illustrates this dichotomy. In the UK, this offence, which

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[90] https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/ 15th December 2016.

[91] https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/ 15th December 2016.

[92] P. Greenfield, 'The Cambridge Analytica files: the story so far' *The Guardian*, 26th March 2018 https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far.

[93] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 372.

exists by virtue of section 33 of the Criminal Justice and Courts Act 2015, was essentially created to combat individuals sharing, via text messages and social media, sexually explicit content of ex-partners without that person's permission.[94] Although the explicit pictures, videos and accompanying text may well be 'true', the dissemination of this content could, clearly, harm the victim's health and morals, their reputation and honour and be a misuse of private information.[95] Thus, as Barendt argues: '[i]t is not inconsistent to defend a ban on the publication of propositions on the ground that their propagation would seriously damage society, while conceding that they might be true.'[96]

Finally, a further argument that undermines the argument from truth as a rationale to defend free speech claims relates to its lack of application in ECtHR case law. Strasbourg jurisprudence is most closely aligned with the argument from democratic self-governance, which the European Court has made clear is at the core of Article 10 ECHR.[97] Of course, the UK's courts are able to develop the concept of free speech domestically, so as to provide for a right that encapsulates the broader arguments for freedom of expression found in the argument from truth, the marketplace of ideas and the argument from self-fulfilment.[98] Indeed, as illustrated by the judgments of Lord Steyn and Jacob LJ in *R v Secretary of State for the Home Department, ex parte Simms*[99] and *L'Oreal*[100] respectively, the argument from truth has been employed domestically.[101] However, in conflict with these judgments, as Wragg observes, the House of Lords consistently interpreted the obligation imposed on judges to take Strasbourg jurisprudence into account in domestic proceedings, pursuant to section 2 Human Rights Act 1998, strictly, meaning that the domestic development of the

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[94] For further analysis see: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 13-14.
[95] Prior to the Criminal Justice and Courts Act 2015 coming into force, a number of criminal offences and civil causes of action were applied to revenge porn. See: Ibid. 13-14.
[96] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 8; 133. P. Coe, '(Re)embracing social responsibility theory as a basis for free speech: shifting the normative paradigm for a modern media', *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431, 410.
[97] *Lingens v Austria* (1986) 8 EHRR 407; *Jersild v Denmark* (1995) 19 EHRR 1; L. Wildhaber, 'The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression under the European Convention on Human Rights' (2001) 36 *Irish Jurist* 17; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.
[98] Ibid. (Wragg).
[99] [2000] 2 AC 115, 126.
[100] [2010] EWCA Civ 535, [10].
[101] See also: *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. However, as stated by Wragg, arguably the argument from democratic self-governance could also have been applied to protect free speech in each of these cases: P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 318.

concept of free speech in this way is hard to justify.[102] For instance, in *R (on the application of Ullah) v Special Adjudicator*[103] Lord Bingham stated that the 'duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[104] Consequently, domestic jurisprudence should 'mirror' the jurisprudence of the ECtHR.[105] According to Lord Bingham in *Ullah* failure to follow 'clear and constant' Strasbourg jurisprudence would be unlawful under section 6(1) HRA 1998,[106] unless there are 'special circumstances'[107] that justify departure from that approach.[108] Despite Lord Bingham's judgment in *Ullah* being the subject of both judicial[109] and academic[110] criticism, the mirror principle remains in place. Thus, unless it can be persuasively argued that such 'special circumstances' exist, then it is submitted the philosophical argument that must be applied to domestic case law, in line with Strasbourg jurisprudence, is the argument from democratic self-governance, as opposed to the inherently libertarian argument from truth and marketplace of ideas.

3.2 THE MARKETPLACE OF IDEAS

This theory originates from the jurisprudence of US judges. Although it is a distinct theory, it is generally regarded as deriving from Mill's argument from truth.[111] The theory emanates from Justice Holmes' judgment in *Abrams v United States,*[112] in which it was asserted that: 'the best test of truth is the power of the thought to get itself accepted in the competition of

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[102] Ibid. (Wragg) 314.
[103] [2004] 2 AC 323.
[104] Ibid. 350.
[105] *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, [34] per Lord Nicholls. See also: J. Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law* 720; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.
[106] Section 6(1) states: '[I]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'; Pursuant to section 6(3) the definition of 'public authority' includes the courts.
[107] It is unclear what amounts to 'special circumstances'. See: P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.
[108] P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.
[109] In *R (on the application of Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 at [62]-[64] Law LJ stated that: '…I hope the *Ullah* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention Rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases.'
[110] R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal" Law of Human Rights under the Human Rights Act (2005) 54 *International and Comparative Law Quarterly* 907; J. Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law* 720.
[111] See above, n 43.
[112] 250 US 616 (1919).

the market.'[113] Subsequently, Holmes J's judgment garnered support from other influential judges, including: Justice Brandeis in *Whitney v California;*[114] Justice Hand in *United States v Dennis*[115] and *International Brotherhood of Electrical Workers v NLRB;*[116] and, Justice Frankfurter in *Dennis v United States*[117] who observed that: 'the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded other truths. Therefore, of man to search for truth ought not be fettered, no matter what orthodoxies he may challenge.'[118] According to the theory, an open and unregulated market, which allows for ideas to be traded through the free expression of all opinions, is most likely to lead to the truth and, consequently, increased knowledge.[119] Hence, the examination of an opinion within the 'marketplace' subjects it to a test that is more reliable than individual or governmental appraisal.[120]

Herein lies an initial problem with the theory: it is, essentially, a variation of a fundamental principle of capitalism – namely the notion of a self-regulating consumer marketplace. Consequently, it is open to both economic and democratic interpretations.[121] Although this section, and the thesis overall, is predominantly concerned with the democratic interpretation, as this has generated more scholarship and jurisprudence relating to the operation of the theory in respect of free speech, the economic interpretation is worthy of brief consideration at this juncture, as it does present problems applicable to citizen journalism, and media speech more widely.

The eighteenth century economist Adam Smith formulated the principle of the 'invisible hand', or laissez-faire doctrine, guiding free consumer markets. Pursuant to this principle, there is no need for government regulation of markets, as an open and unregulated marketplace should regulate itself. Echoing Milton's self-righting process, if one manufacturer charges too much for a product, or produces an inferior product, competitors

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[113] 250 US 616 (1919), 630-631; See also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes.
[114] 274 US 357 (1927), 375-378.
[115] 181 F2d 201 (2d Cir 1950); *Dennis v United States* 341 US 494, 584 (1951).
[116] 181 F2d 34 (2d Cir 1950).
[117] 341 US 494 (1951), 546-553.
[118] See also Frankfurter J's judgment in *Kovacs v Cooper* 336 US 77, 95-7 (1949).
[119] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 70; J. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press', (2006) 9 *NYU Journal of Legislation and Public Policy*, 751, 762.
[120] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 16; see also: Ibid (Alonzo) 762.
[121] P. Napoli, 'The Marketplace of Ideas Metaphor in Communications Regulation', *Journal of Communication* (1999) 49, 151-169, 151-152.

will either charge less, or produce a higher quality product, to attract buyers. Thus, government interference is not required to protect consumers or to force manufacturers to meet consumer needs.[122] According to the marketplace of ideas theory, Smith's principle should be applied to the media; that is, if ideas are 'traded' freely within society, the correct or best ideas will eventually prevail.[123]

However, there are considerable difficulties in applying this logic to the modern media[124] and, in particular, citizen journalists operating online and through social media. Media content is far less tangible than other consumer products.[125] As a result, and in contrast to the consumer marketplace, the perceived meaning of individual media messages can vary depending on the respective recipient. Taking this a step further, the medium through which the information is communicated can also influence, not only the communication's perceived meaning, but also the impact that it has on its intended and, potentially, non-intended audience. This point is illustrated by jurisprudence emanating from both the ECtHR and the US Supreme Court relating to the regulation of different forms of media.[126] In *Jersild v Denmark*[127] the European Court stated:

> '…the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media…conveying through images meanings which the print media are not able to impart.'[128]

The US Supreme Court has also acknowledged the significance of a medium in respect of the influence it can have on recipients of information. In *Burstyn v Wilson*,[129] which concerned cinema regulation, the Court noted how a medium 'present(s) its own particular problems.'[130] Similarly, in *Metromedia v City of San Diego*,[131] a case relating to billboard

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[122] A. Skinner (ed), *Adam Smith, The Wealth of Nations*, (Penguin, 1982). See also: D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 67.
[123] Ibid. (Baran and Davis).
[124] Ibid.
[125] Ibid.
[126] See generally: D. Mac Síthigh, *Medium Law* (Routledge, 2018), 24-28; M. Feintuck and M. Varney, *Media Regulation, Public Interest and the Law* (2nd ed. Edinburgh University Press, 2006), 81.
[127] (1995) 19 EHRR 1.
[128] Ibid. [31].
[129] (1952) 343 US 495.
[130] Ibid. 503.
[131] (1981) 453 US 490.

regulation, the Court stated that each method of communication is a 'law unto itself' and, consequently, the law must respond to differences between media, in terms of their 'natures, values, abuses and dangers.'[132] Finally, in *FCC v Pacifica Foundation,*[133] which related to television broadcasting regulation, the Court recognised television's immediacy, accessibility and its peculiarly pervasive and intrusive potential.[134] Similarly, in *Reno v American Civil Liberties Union*[135] the Court was of the opinion that 'the Internet is not as invasive as radio or television'.[136] In coming to this decision, the Court relied upon the finding of the District Court that:

> 'Communications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident … [a]lmost all sexually explicit images are preceded by warnings as to the content … odds are slim that a user would come across a sexually explicit sight by accident.'[137]

This decision is indicative of the pace at which online and social media communication has developed, as the findings upon which the decision is based are arguably at odds with current online expression. Internet communications, in particular those transmitted via social media, can be invasive. To an extent this may be 'allowed' by the user of the social media platform, by virtue of registering with the platform and joining particular communities. However, users are still subject to 'unbidden' messages regularly appearing on their mobile telephone, tablet and laptop screens.[138] Further, the availability of sexually explicit content has been proliferated by social media and is synonymous with platforms such as WhatsApp and Snapchat, as demonstrated by the 'revenge porn' phenomenon.[139]

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[132] Ibid. 501.
[133] (1978) 438 US 726.
[134] Ibid. 727.
[135] 521 US 844 (1997).
[136] Ibid 869.
[137] *American Civil Liberties Union v Reno* 929 F Supp 824 (ED Pa, 1996) (finding 88).
[138] For detailed analysis of how the economic constructs of social media has influenced this issue see J. Dijck, *The Culture of Connectivity* (Oxford University Press, 2013) 163–76; See also: P. Coe, '(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media' *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431, 413.
[139] P. Coe, 'The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law' (2015) 24(1) *Information & Communications Technology Law* 16, 28–9. See generally B. Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in S. Levmore and M.C. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010) 155.

Although these cases pre-date the advent of citizen journalism and ubiquitous online speech, the concerns espoused by the ECtHR and the Supreme Court are almost prophetic, as they are equally as applicable, if not more pertinent, to online communication. As discussed in Chapter One, social media's facilitation of an audience-producer convergence, and its circumvention of normal editorial and production processes,[140] can enable excellent citizen journalism,[141] but it can also breed, through the speech it conveys, its own 'abuses and dangers'.[142] Because social media is arguably more 'immediate, pervasive and accessible' to individuals than even television broadcasting, its messages have a potentially greater impact than any other medium.

Turning now to the democratic interpretation of the theory, it has been suggested that discovering truth is dependent upon unregulated competition in the actual, as opposed to the ideal, marketplace.[143] To the contrary, it is arguable that the marketplace of ideas is, in fact, grounded in relativism, in that the ideas that emanate from the competitive market are the truth, leaving nothing more to be said.[144] Oster relies heavily upon this rationale to distinguish media from non-media actors.[145] In his view, because of the media's power and ability to communicate via multiple channels, the theory requires that the media should be subject to protection and only minimal restriction. This is because this 'privilege' for journalists encourages the dissemination of more information that, sequentially, generates more valuable, truthful information.[146] However, it is submitted that this reasoning is flawed, as it is the very reasons used by Oster to support his approach that renders the theory unsuitable to that which it has been applied. Indeed, according to Barendt, whatever interpretation is adopted, the theory 'rests on shaky grounds,'[147] which 'appear particularly

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[140] See section 3.

[141] P. Coe, '(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media' *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431, 413-414.

[142] Ibid.

[143] B. Williams, *Truth and Truthfulness,* (Princeton University Press, 2002), 214-215; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12.

[144] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12.

[145] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 70-71; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211. Contrary to Oster's reliance on the marketplace of ideas theory to distinguish media from non-media actors, it is advanced in section four that, in fact, the argument from democratic self-governance is a more suitable philosophical foundation for this task.

[146] Ibid. (Oster and Nestler).

[147] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12; See also: E. Barendt, *The First Amendment and the Media*, 43-46 in I. Loveland (ed), *Importing The First Amendment Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing, 1998).

infirm in the context of mass media communications'[148] for reasons that can be applied to both the traditional media and citizen journalists.[149]

Firstly, if the assertion that one statement is stronger than another (whether these statements are communicated via a tweet, or a post on Facebook or YouTube, or whether they are printed in a traditional newspaper) cannot be intellectually supported and defended, the notion of truth loses its integrity,[150] as history demonstrates: falsehood frequently triumphs over truth, to the detriment of society.[151] Secondly, in line with Habermas' concept of 'discourse', which aims at reaching a rationally motivated consensus and is based on the assumption of the prevalence of reason,[152] the theory assumes that recipients of the communication consider what they read or view within the context of the marketplace rationally; deciding whether to accept or reject it, based on whether it will improve their lifestyle, and society generally.[153] This accords with Lord Kerr's view in the recent case of *Stocker v Stocker*[154] in which his Lordship referred to a 'new class of reader: the social media user' who understands that an online platform 'is a casual medium in the nature of conversation rather than carefully chosen expression.'[155] However, as both Schauer and Barendt suggest, this assumption is unrealistic.[156] Both criticisms are pertinent to online speech and citizen journalism, but also apply equally to the traditional media using social media and citizen journalists as a source of news. For the reasons discussed in the following paragraphs, it is submitted that this basis of rationality makes a fallacy of the marketplace of ideas theory.

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[148] Ibid. (*The First Amendment and the Media*).
[149] For a comprehensive critique of the theory see: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12.
[150] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12.
[151] R. Abel, *Speech and Respect*, (Stevens & Sons Limited, 1994), 48; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 57.
[152] J. Habermas, *The Structural Transformation of the Public Sphere* (Polity Press, 1962); *The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society* (Beacon Press, 1984), 25, 39, 99; *The Theory of Communicative Action, vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (Beacon Press, 1987), 120, 319; J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 29-31.
[153] J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1103; S. Ingber, 'The Marketplace of Ideas: a Legitimizing Myth', [1984] *Duke Law Journal* 1; J. Skorupski, *John Stuart Mill*, (Routledge, 1991), 371-372.
[154] [2019] UKSC 17.
[155] Ibid. [41] and [43].
[156] F. Schauer, 'Free Speech in a World of Private Power' in T. Campbell and W. Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994), 6; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12. See also: A. Kenyon, 'Assuming Free Speech' (2014) 77(3) *Modern Law Review* 379-408, 382.

The first observation to be made about rationality is that citizen journalism, and social media generally, proliferates a huge amount of information that is poorly researched or simply untrue, yet has the potential to, and very often does emerge as the dominant 'view'[157] regardless of the detrimental impact this may have on society (see, for example, the point made about fake news in section 3.1 above).[158] In turn, the traditional media using citizen journalists and social media as a source of news may regurgitate the same information. Arguably, this issue is amplified by the ubiquity of anonymity and pseudonymity on the Internet and social media, making it hard, if not impossible, for readers to accurately and rationally assess the veracity of the speaker. [159] Thus, in reality, in a marketplace that contains true and untrue or misleading information in at least equal proportions, some of which may be published anonymously or under a pseudonym, it may be impossible for recipients of the communication to make a rational assessment of what they have read, viewed or listened to.

This point leads on to a second observation, based on cognitive psychology research that, although it pre-dates the advent of social media, is particularly relevant to online speech, and is therefore worthy of consideration. In order to deal with the endless flow of information we are subjected to on a daily basis we try to fit each new piece of information in to a set of pre-existing cognitive structures, or schemas, that provide 'simplified mental models' of the world.[160] Processing new ideas and information this way creates problems when people encounter information that cannot be processed in this manner, as they reject information that conflicts with their schemas.[161] According to commentators such as Graber, McGuire and Peffley et al, in these circumstances, people are pre-disposed to deny the validity of the new information and, instead, reinterpret it so that it conforms to the schema within which they want the information to fit or, alternatively, they process it as an isolated exception.[162]

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[157] This criticism reflects those levelled at Mill's theory above. In particular, Schauer's argument that there is not necessarily a causal link between freedom of expression and the discovery of truth. See section 2.1 above.

[158] P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 45.

[159] Anonymous and pseudonymous speech is dealt with in detail in Chapter Five.

[160] D. Graber, *Processing The News: How People Tame The Information Tide,* (2nd ed. Guildford Publications, 1988), 31.

[161] J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California LR* 1103, 1159.

[162] D. Graber, *Processing The News: How People Tame The Information Tide,* (2nd ed. Guildford Publications, 1988), 174-177; W. McGuire, 'Attitudes and Attitude Change' in G. Lindzey and E. Aronson (eds), *Handbook of Social Psychology* (3rd ed. Lawrence Elbaum Association, 1986) 233, 275-276; M. Peffley, S. Feldman and L. Sigelman 'Economic Conditions and Party Competence: Processes of Belief Revision' (1987) 49 *Journal of Politics* 100, 101.

Therefore, as Fajer suggests, because people interpret ambiguous reality to accord with their schemas, they become self-reinforcing and, in turn, more powerful as they are repeatedly 'tested' but never disconfirmed.[163] This is indicative of arguments suggesting that the mass media are better at reinforcing existing attitudes and beliefs than changing them,[164] as we largely ignore information that we deem to be irrelevant to our existing schemas.[165] As Weinberg states, once people 'make up their mind' and 'reach closure' on an issue, they tend to reject new information, regardless of whether it supports or conflicts with their views.[166] Conversely, people seek out and resonate to information that is compatible with their schemas and will, sequentially, 'support' this information.[167] In Ingber's view, it is impossible to create a collective marketplace of unfettered discourse and discovery if we are constrained by our adherence to long-established mental patterns.[168] This results in the 'packaging' of an argument determining how well it is received, as opposed to it being assessed on the merits of its 'contents'.[169] Consequently, because our schemas influence what ideas and information we are willing to accept 'people's social location…control[s] the manner in which they perceive and understand the world.'[170] This research has been described as having 'distressing implications for marketplace theory';[171] it is submitted that it clearly reinforces the point that the marketplace of ideas' basis of rationality makes a fallacy of the theory; as to the extent that our schemas constrain how we react to new ideas and information, the way we think is not 'characterised by reason.'[172] This observation is significant to social media which, due to the sheer amount of information it generates, and the invasive way in which it can potentially disseminate it, arguably only serves to amplify how we process information using pre-exiting schemas and, in doing so, makes the issue with rationality more acute. The fake news phenomenon and its association with social media

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[163] M. Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511, 525.
[164] L. Jaffe, 'The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access' (1972) 85 *Harvard Law Review* 768, 769-770; J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1103, 1160.
[165] D. Graber, *Processing The News: How People Tame The Information Tide,* (2nd ed. Guildford Publications, 1988), 186.
[166] J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1103, 1160.
[167] S. Fiske and S. Taylor, *Social Cognition* (2nd ed. Sage, 1991), 218-220.
[168] S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke Law Journal* 1, 25-27, 34-36.
[169] C.E. Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964, 976-977; D. Graber, *Processing The News: How People Tame The Information Tide,* (2nd ed. Guildford Publications, 1988), 158-160, 261.
[170] Ibid. (Baker) 967.
[171] J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1103, 1162.
[172] Ibid.

'filter bubbles' animate this. Filter bubbles are created by algorithms that filter our online experiences, effectively placing us in echo chambers of our own beliefs,[173] which means we are more likely to interact with content which conforms with our pre-existing views[174] and which, in turn, creates greater polarisation. Therefore, the more we interact with particular 'types' of information on social media, whether that be generated by the traditional media, citizen journalists or casual social media users, or whether that be true or fake, the more of that particular 'type' of information we will be exposed to by virtue of the filter bubble. Thus, within the context of online speech at least, as Weinberg declares: '[t]o the extent that our most basic views and values are relatively immune to rational argument, the marketplace metaphor seems pointless.'[175]

The third and final reason why the theory is flawed relates to truth discovery. Although this issue is particularly pertinent to the traditional media, it is also relevant to citizen journalism and social media. The theory assumes that the marketplace contains expression that solely represents the views of the proponents of, for instance, publications or broadcasts, as opposed to being conveyed on the basis of restrictions such as editorial control, ownership, political bias or increased commercial revenue through advertising and/or sales.[176] This may be true within the context of online speech, where there are, in theory at least, less restrictions. Although, this is not always the case, as many citizen journalists may simply regurgitate false, bias or misleading information. In relation to the traditional media, this assumption is equally as unrealistic, for two reasons. Firstly, many media outlets are driven by the restrictions set out above, to the detriment of investigative journalism;[177] Indeed, as observed by Gibbons:

> 'The liberal theory of the media appears to be influential, yet there is a countervailing view, supported by much evidence, that the media have a tendency to distort our understanding of the world…The media devote a relatively small part of their content to public affairs, including official wrong-doing, preferring to emphasise entertainment more generally. They also devote little time to wider

[173] See generally: D. Spohr, 'Fake news and ideological polarization: Filter bubbles and selective exposure on social media', *Business Information Review* (2017) 34(3) 150-160; E. Pariser, *The Filter Bubble; What the Internet is Hiding from You* (Penguin, 2011).
[174] N. Stroud, 'Media use and political predispositions: revisiting the concept of selective exposure' (2008) *Political Behaviour* 30, 341-365.
[175] J. Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1103, 1162.
[176] See Chapter One sections 3.1 and 3.2.
[177] Ibid.

> sources of power including economic power. Furthermore, news may be managed to serve the media's interests, whether they be the proprietor's or the company's more broadly.'[178]

Thus, as Kenyon states, there is a 'disjunction between ideas of political equality and economic communication markets'.[179] These markets are inconsistent with democratic requirements as, unlike citizen journalism, the orientations of commercial media have primarily been to advertisers and to audiences as consumers.[180] Consequently, research points towards there being a 'narrowness of political views within major media.'[181] As Baker acknowledges, the market-based media cannot be expected to serve audiences as well as citizens.[182] Secondly, as has been previously discussed, traditional media outlets use citizen journalists, and social media generally, as a source of news. Thus, in the same way that citizen journalists may recycle false or misleading information obtained, for instance, from the traditional media or other bloggers, the traditional media may do the same in respect of information obtained from citizen journalists and social media.

Ultimately, libertarianism is flawed as a normative paradigm as it is based on the unproven assertion that the product of the media marketplace, which is only one out of an infinite number of potential outcomes, gains a de facto privileged status as the 'truth'.[183] As Schwarzlose states, this creates the 'dilemma of libertarianism': in the marketplace of ideas 'is it truth that survives, or is whatever survives the truth?'[184] Based on the arguments advanced in this section, it is submitted that libertarianism, as a normative paradigm founded

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[178] T. Gibbons, 'Fair Play to All Sides of the Truth': Controlling Media Distortions (2009) *Current Legal Problems* 62(1), 286-315, 289. See also: J. Curran, 'Mediations of Democracy' in J. Curran and M. Gurevitch (eds) *Mass Media and Society* (Hodder Arnold, 4th ed. 2005), 129.

[179] A. Kenyon, 'Assuming Free Speech' (2014) 77(3) *Modern Law Review* 379-408, 386.

[180] Ibid; T. Gibbons, 'Fair Play to All Sides of the Truth': Controlling Media Distortions (2009) *Current Legal Problems* 62(1), 286-315, 290.

[181] Ibid. 387; T. Gibbons, 'Freedom of the Press: ownership and editorial values' (1992) *Public Law* 279, 286-287. See also the study by Toril Aalberg and James Curran et al which investigated the content of print and broadcast news and ordinary people's knowledge and understanding of matters of political and more general public interest: T. Aalberg and J. Curran (eds), *How Media Inform Democracy: A Comparative Approach* (Routledge, 2012); B.H. Bagdakian, *The Media Monopoly* (6th ed. Beacon Press, 2000), xxvii-xxxi; R.W. Chesney, *Rich Media, Poor Democracy* (University of Illinois Press, 1999); N. Chomsky, *Media Control* (2nd ed. Seven Stories Press, 2002); See Chapter One section 3.1.

[182] See generally: C.E. Baker, *Media, Markets and Democracy* (Cambridge University Press, 2002).

[183] G. Wuliger 'The moral universe of libertarian press theory' (1991) *Critical Studies in Media Communication* 8, 152-167, 156; P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 297.

[184] R. Schwarzlose, 'The Marketplace of ideas: A measure of free expression' (1989) *Journalism Monographs* No. 118, 1-41, 8.

upon philosophical doctrine such as the argument from truth and the marketplace of ideas, is unable to provide a suitably robust rejoinder to this 'dilemma', which clearly demonstrates that libertarian ideology is an inadequate normative framework for the modern media and the media-as-a-constitutional-component concept. The following sections will consider the social responsibility model as a more suitable basis for such a framework.

4. SOCIAL RESPONSIBILITY THEORY

This section will argue that the social responsibility theory, as underpinned by the argument from democratic self-governance, creates a more appropriate normative and philosophical framework for the modern media than libertarianism that endorses an approach to media expression based on behavioural standards and norms of discourse. The theory dictates that media freedom is distinct from personal freedom of expression, a view that correlates with the jurisprudence of the ECtHR.[185] This distinction means that certain demands can be placed on media actors in performance of their duties over and above what would apply to individuals. Thus, as Leveson LJ acknowledges in his *Inquiry*[186] unlike individual expression, freedom of the press (and it is submitted, by extension, the wider media) is valued only instrumentally, as opposed to intrinsically, when it performs democratic functions with a view to developing commercially as a sector, such as informing the democratic process, and acting as a check and balance on political, corporate or individual power.[187]

Thus, based on a combination of jurisprudence and scholarship, and by recourse to the argument from democratic self-governance, this section will attempt to formulate a functional media-as-a-constitutional-component approach to distinguishing media from non-media actors. In line with the values underpinning the social responsibility theory, it will argue that the performance of a constitutional function should define the beneficiaries of media freedom, as opposed to the individual being defined as media, simply based upon their employment or training. Ultimately, it seeks to establish the principle that media freedom, and its privileges, attach to the constitutional component, and could therefore apply to anyone

[185] See Chapter Two section 2. As is discussed in more detail below at section 5.1.3 this also correlates with the influential evidence given by Baroness O'Neill to the Leveson Inquiry. O'Neill has long held the view that media freedom is normatively distinct to personal freedom of expression (Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012), 55, [3.7]). See: http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-Of-Baroness-ONeil.pdf.
[186] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012).
[187] Ibid. 55, [4.1]-[4.5].

serving a constitutional function: that is, operating within the parameters of the social responsibility paradigm by adhering to the behavioural standards, and the norms of discourse set out below. Therefore, the enjoyment of media freedom is contingent upon the fulfilment of the standards of behaviour and norms of public discourse, or concomitant duties and responsibilities, referred to in sections 4.1 and 4.2. Specifically, section 4.1 considers the behavioural standards associated with the social responsibility theory. Section 4.2 sets out how these standards are complemented by the argument from democratic self-governance in respect of the type of speech the media conveys. This will lead in to a discussion at section 5 on how the theory and the argument provide a more suitable framework for dealing with some of the issues identified in section 3 that are created by libertarianism and provide an appropriate normative foundation for a regulatory regime that effectively captures citizen journalists.

4.1 THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT, SOCIAL RESPONSIBILITY THEORY AND BEHAVIOURAL STANDARDS

Like libertarianism, the social responsibility theory is an Anglo-American concept. As stated in section 2.2, the catalyst for the emergence of the theory was two reports commissioned on either side of the Atlantic in the 1940s: The Royal Commission on the Press[188] in the UK and the Hutchins Commission report[189] in the US. The Commission's report was particularly influential in establishing this new communication paradigm, and in finding a balance between libertarianism and paternalism. Accordingly, in Baker's view, it 'provides the most influential modern account of the goals of journalistic performance' and is virtually treated as the 'official Western view.'[190] In simple terms the report laid down five requirements of media performance: firstly, to provide a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning, and to clearly distinguish fact from opinion; secondly, to be a forum for the exchange of comment and criticism by operating as common carriers of public discussion, even if this means disseminating views contrary to their own; thirdly, to project a representative picture of the constituent groups in society;

[188] The Royal Commission on the Press 1947-1949.
[189] R. Hutchins, Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, 1947). The Commission was set up in 1942 and reported in 1947.
[190] C.E. Baker, *Media, markets and democracy* (Cambridge University Press, 2002), 154. Baker has also described it as 'the most important, semi-official, policy orientated study of the mass media in US history: C.E. Baker, *Media concentration and democracy: Why ownership matters* (Cambridge University Press, 2007), 2.

fourthly, to be responsible for the presentation and clarification of the goals and values of society; fifthly, to provide full access to the day's intelligence.[191]

The Royal Commission and Hutchins Commission reports, and the eventual establishment of the theory, were born out of diminishing faith in libertarianism's 'optimistic' notion that virtually absolute freedom and the self-righting process carried 'built-in correctives' for the media.[192] Siebert et al distil the themes of criticism of the media at the time as follows: (i) it used its power for its own ends, with owners propagating their own opinions to their political and economic advantage at the expense of opposing views; (ii) it had been subservient to big business, with advertisers controlling editorial policies and content; (iii) it resisted social change; (iv) it was more willing to publish superficial and sensational stories than to publish 'significant' stories; (v) it had endangered public morals; (vi) it invaded the privacy of individuals without just cause; (vii) it was controlled by an elite socioeconomic class, meaning that access to the industry was difficult, which consequently endangered the free and open marketplace of ideas.[193] This disillusionment gave rise to an extreme anti-libertarian movement, grounded in paternalism that resulted in increased pressure on the UK and US governments to regulate the media. As Siebert et al state (from a US perspective): '[a] rather considerable fraction of articulate Americans began to demand certain standards of performance from the press. They threatened to enact legislation…if the press did not meet…those standards.'[194] Within the Hutchins Commission itself there was a clear divide between those who held strong libertarian views and those who favoured some form of media regulation, due to, in their view, the fragility of the marketplace of ideas theory making the media vulnerable to subversion by anti-democratic forces.[195] These proponents of regulation were guided by a philosophy of public communication developed by social researchers at the University of Chicago during the 1940s.[196] In opposing the notion of the marketplace of ideas the Chicago School argued that unregulated mass media served the interests of large or socially dominant groups. To their mind, the protection of free speech

[191] Ibid. 20-30.
[192] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 77.
[193] Ibid. 78-79.
[194] Ibid. 77.
[195] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 73.
[196] Ibid. See also: V. Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (Cambridge University Press, 2015), 154.

was not the same as the provision of free speech.[197] Therefore, they wanted government regulation to play an 'interventionary role' in order 'to provide enabling structures for a healthy public sphere.'[198] Despite the majority of the Commission having some sympathy with the ideas advanced by the Chicago School, they opposed any direct form of regulation, because they feared that this could act as a catalyst for official control of the media.[199] Consequently, an acceptable compromise had to be found between libertarian ideology and paternalism: this came in the form of the social responsibility theory, which was founded on faith placed in the media by the members of the Commission, who emphasised that the media needed to refocus its efforts on serving the public.[200] As Curran states:

> '[The Commission] endorsed professional responsibility…[as] a way of reconciling market flaws with the traditional conception of the democratic role of the media. [The Commission's report] asserted journalists' commitment to higher goals – neutrality, detachment, a commitment to truth. It involved the adoption of certain procedures for verifying facts, drawing on different sources, presenting rival interpretations. In this way, the pluralism of opinion and information, once secured through the clash of adversaries in the free market, could be recreated through the "internal pluralism" of monopolistic media. Market pressures to sensationalize and trivialize the presentation of news could be offset by a commitment to inform.'[201]

Thus, the theory is based on the following rationale: unlike libertarianism, which dictates that free speech is absolute and, as a result, does not propagate duties and responsibilities that attach to the right to freedom of expression and media freedom, under social responsibility doctrine, freedom carries concomitant responsibilities and obligations to society, employers and the market.[202] If the media does not at least attempt to meet these responsibilities and obligations then, as a consequence, it cannot benefit from the right to

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[197] Ibid. (Baran and Davis).
[198] V. Pickard, 'Whether the Giants Should be Slain or Persuaded to Be Good: Revisiting the Hutchins Commission and the Role of Media in a Democratic Society' (2010) *Critical Studies in Media Communication* 27, 391-411, 394.
[199] See generally: D. Davis, 'News and Politics' in D. Swanson and D. Nimmo (eds) *New Directions in Political Communication* (Sage, 1990); J. McIntyre, 'Repositioning a Landmark: The Hutchins Commission and Freedom of the Press' (1987) *Critical Studies in Mass Communication* 4, 95-135.
[200] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 72.
[201] J. Curran, 'Mass Media and Democracy: A Reappraisal' in J. Curran and M. Gurevitch (eds) *Mass Media and Society* (Edward Arnold, 1991), 98.
[202] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 74.

media freedom.[203] The theory rests on the moral principle of justice,[204] hence the right to free speech and media freedom must be balanced against the private rights of others and vital social interests: as beneficiaries of the right to media freedom, the media are obligated to continually strive to preserve democracy[205] by fulfilling essential constitutional normative functions of mass communication that extend beyond the mere provision of a robust marketplace of ideas,[206] including: (i) 'servicing the political system' by providing information, discussion and debate on public affairs; (ii) 'enlightening the public' so as to make it capable of democratic self-governance by disseminating information of public interest; (iii) 'protecting the rights of the individual' by acting as the public watchdog.[207] In fulfilling these functions the media must ensure that it: sets and maintains high professional standards of truth and balance and conduct;[208] avoids the communication of material that may lead to or incite criminal activity; refrain from offending minority or marginalised groups.[209] Finally, at the heart of the theory, is the requirement of the media to foster productive and creative 'Great Communities' by prioritising cultural pluralism by being a voice for all people, not just elite or dominant groups.[210]

The following section will set out how the values underpinning the social responsibility theory facilitate its support of the argument from democratic self-governance and why, in turn, this provides the ideal philosophical and normative foundation for the media-as-a-constitutional-component concept.

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[203] Ibid. 98. See Chapter Four sections 3.2 and 3.3 for a detailed discussion on the media's obligations in respect of its conduct and acting in good faith.
[204] P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 300.
[205] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 73.
[206] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 74; P. Plaisance, 'The Mass Media as Discursive Network: Building on the Implications of Libertarian and Communitarian Claims for New Media Ethics Theory' *Communication Theory* 15(3) 2005, 292-313, 300.
[207] Ibid. (Siebert, Peterson and Schramm).
[208] The media's obligations to conduct itself correctly and act in good faith are discussed in greater detail in the following chapter at sections 3.2 and 3.3 respectively.
[209] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577.
[210] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 73.

4.2 SOCIAL RESPONSIBILITY THEORY, THE ARGUMENT FROM DEMOCRATIC SELF-GOVERNANCE AND NORMS OF PUBLIC DISCOURSE

Although the argument from democratic self-governance has been applied by the US Supreme Court and the House of Lords to defend free speech claims,[211] it is most commonly associated with the jurisprudence of the ECtHR.[212] As explained above in relation to the argument from truth,[213] the ECtHR has consistently placed it at the core of its jurisprudence on Article 10[214] and, as a result, pursuant to the 'mirror principle, it should, in theory at least, be the dominant philosophical foundation for free speech domestically.[215] Regardless of how the argument has been treated jurisprudentially in the US, by the ECtHR and by domestic courts, it is submitted, that it is best suited to underpin modern media speech and support the notion of the media-as-a-constitutional-component. Consequently, the concept and its philosophical and normative foundations are consistent with Strasbourg jurisprudence. In line with the values underpinning social responsibility theory, the argument is based on the premise that the predominant purpose of freedom of expression is to protect the right of citizens to understand political matters in order to facilitate and enable societal engagement with the political and democratic process.[216] Ultimately, an informed electorate is a prerequisite of democracy.[217] Thus, the argument complements the social responsibility paradigm by setting norms, or parameters, for the type of speech the media can convey within the confines of media freedom.

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[211] For example, from the US Supreme Court see: *Whitney v California* 274 US 357 (1927) per Brandeis J at 375-378 (1927); *Garrison v Louisiana* 379 US 64, 74-75 (1964); C. Estlund, 'Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category' (1990) 59(1) *George Washington Law Review* 1-54, 1; From the House of Lords, see: *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 per Lord Steyn at 126. See generally: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 18.

[212] For example, see: *Lingens v Austria* (1986) A 103, [42]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48].

[213] See section 3.1.

[214] *Lingens v Austria* (1986) 8 EHRR 407; *Jersild v Denmark* (1995) 19 EHRR 1. See also: L. Wildhaber, 'The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression under the European Convention on Human Rights' (2001) 36 *Irish Jurist* 17; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.

[215] See section 3.1 for detailed discussion of the 'mirror principle'.

[216] See generally: Sir J. Laws, *Meiklejohn, the First Amendment and Free Speech in English Law*, in I. Loveland (ed), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA,* (Hart Publishing, 1998), 123-137; A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 3 [1.06]; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 18.

[217] Therefore, 'there must be no constraints on the free flow of information and ideas': J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 69.

According to Bork, speech regarding 'government behaviour, policy or personnel, whether…executive, legislative, judicial or administrative'[218] was the original subject that was perceived as being protected by the right to freedom of expression.[219] However, the scope of this approach was seen as being overly restrictive,[220] as focusing purely on political expression to the exclusion of other matters of public interest gave rise to an 'old-fashioned distinction between public and private power'.[221] Consequently, Alexander Meiklejohn, with whom this argument is now primarily associated,[222] argued for the substitution of political expression with the wider, and less restrictive notion of 'public discussion', relating to any matter of public interest, as opposed to expression linked purely to the casting of votes.[223] Meiklejohn stated that public discussion is speech which impacts 'directly or indirectly, upon the issues with which voters have to deal [i.e.] to matters of public interest'.[224] A result of this bifurcated interpretation of free speech is a two-tiered approach to freedom of expression:[225] expression that is not in the interest of the public, is not protected, and is therefore open to restriction to protect the general welfare of society.[226] In later writings, Meiklejohn clarified this wider view of 'public discussion', by stating that voting is merely the 'external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments.'[227] Accordingly, education, philosophy and science, literature and the arts, and public discussions on public issues, are activities that will

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[218] R.H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 27-28.
[219] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 69.
[220] Ibid; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 63-64; M.R. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, (Ashgate Publishing, 2000), 48; See also: A. Kenyon, 'Defamation and Critique: Political Speech and *New York Times v Sullivan* in Australia and England', (2001) 25 *Melbourne University Law Review* 522, 539; R. Gilson and M. Leopold, 'Restoring the "Central Meaning of the First Amendment": Absolute Immunity for Political Libel', (1986) 90 *Dickinson Law Review* 559, 574.
[221] Ibid. (Chesterman, Kenyon and Gilson and Leopold).
[222] A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 3 [1.06].
[223] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, 1960), 42; A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255-257; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 63-64; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 69.
[224] Ibid. (Meiklejohn, *Political Freedom*) 79.
[225] An advocate of this approach is C.R. Sunstein. See generally: C.R. Sunstein, *Democracy and the Problem of Free Speech*, (The Free Press, 1993); C.R. Sunstein, *The Partial Constitution*, (Harvard University Press, 1994).
[226] D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 62-63.
[227] A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255.

educate citizens for self-government.[228] This wider view of public discussion advanced by Meiklejohn reflects the fact that the ECtHR has resisted defining the democratic process value in free speech narrowly.[229] The wide ambit afforded to the argument from democratic self-governance by the Strasbourg Court is demonstrated by jurisprudence consistently finding the democratic process value to be at stake in commercial expression cases.[230]

Historically, due to its reach, it was incumbent upon the traditional media to disseminate matters of public interest, and to act as the public watchdog and Fourth Estate; to provide a check and balance on government. Consequently, the ECtHR has consistently stated that media freedom provides one of the best means for the public to discover and form opinions about the ideas and attitudes of political leaders, and on other matters of general interest, and that the public has a right to receive this information.[231] However, as explored in Chapter One, this role can be fulfilled by both the traditional media and citizen journalists. Therefore, it is submitted that this argument helps to define the media by providing a clear delineation between media and non-media actors. Pursuant to its 'public discussion' scope, this rationale underpins the media-as-a-constitutional-component concept, as it supports media freedom protection, beyond that afforded to private individuals pursuant to the right to freedom of expression, for any actor that adheres to the behavioural standards set out in the previous section and contributes regularly and widely to the dissemination of matters of public interest and/or operates as a public watchdog. The concept of public interest in the context of the component, as underpinned by social responsibility theory and the argument from democratic self-governance, is discussed in more detail the following chapter.[232]

In Chapter Two it was suggested that media freedom grants protection to those operating as media beyond that afforded to non-media actors by freedom of expression. However, as discussed in more detail in the following chapter, pursuant to this concept, media actors that are subject to these privileges, beyond private individuals, are also subject to duties and responsibilities in excess of those expected of non-media entities. The reach of

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[228] Ibid. 257, 263; For judicial application of this wider interpretation of the theory see: *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, (HL) per Lord Cooke at 220; *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, (HL) per Baroness Hale at [158].

[229] P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 318.

[230] For example, see: *Krone Verlag GmbH & Co KG v Austria* (2006) 42 EHRR 28; see also, Ibid.

[231] *Lingens v Austria* App. no. 9815/82 (ECtHR, 8 July 1986), [42]; *Oberschlick v Austria* (No 1) App. no. 1162/85 (ECtHR 23 May 1991), [58]; *Scharsach and News Verlagsgesellschaft v Austria* App. no. 39394/98 (ECtHR, 13 November 2003), [30].

[232] See Chapter Four section 3.1.

both the traditional media and citizen journalists, does not just enable it to fulfil its constitutional functions. This power can be abused in equal measure. Due to the reach of the media, the potential impact of abuse of power is far greater than those emanating from private individuals. The media is not just capable of invading private lives of individuals, or damaging reputations, but it can also shape and mislead public opinion.[233] As established in section 3 above, 'abuse' of this kind by the media is more likely if it is operating within a libertarian paradigm. To the contrary, section 6 below sets out how the concept, founded upon social responsibility theory and the argument from democratic self-governance, is better able to combat some of these potential abuses.

Therefore, social responsibility ideology, together with the argument from democratic self-governance, endorses an approach to media expression based on behavioural standards and norms of discourse.[234] Firstly, public discussion should be protected. However, if the expression is not of public interest, it should not be afforded the same level of protection compared to that which is of public concern. This includes speech primarily concerned with commercial or financial matters,[235] speech relating to private or intimate matters,[236] and hate speech.[237] Further, as argued in the following chapter, it is submitted that the theory and the argument from democratic self-governance rationale, and its public discussion ambit, dictates that the media's privileged protection, pursuant to it being a constitutional component, is subject to it acting ethically and in good faith, and publishing or broadcasting material that is based on reasonable research to verify the provenance of it and its sources.[238] Incidentally,

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[233] As demonstrated by the fake news phenomenon and Cambridge Analytica scandal referred to in section 3.1 above.

[234] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 71-72. See Chapter Three sections 4.1 and 4.2.

[235] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 392-416; From a US Supreme Court perspective see: *Central Hudson Gas & Electric Corp v Public Service Commission* 447 US 557 (1980); *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749, 762 (1985). For ECtHR jurisprudence see: *Markt Intern Verlag and Klaus Beerman v Germany* App. no. 10572/83 (ECtHR 20 November 1989), [33].

[236] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 230; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 661; P. Keller, *European and International Media Law: Liberal Democracy, Trade and the New Media* (Oxford University Press, 2011), 307; *Von Hannover v Germany (No. 1)* App. no. 59320/00 (ECtHR 24 June 2004) [65]; *MGN Ltd v United Kingdom* App. no. 39401/04 (ECtHR 18 January 2011) [143]; *Mosley v United Kingdom* App. no. 48009/08 (ECtHR 10 May 2011) [14].

[237] Article 20(2) ICCPR states 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. For example, see: *Ross v Canada* App. No. 736/97 (UN Human Rights Committee, 18 October 2000) [11.5]. For ECtHR jurisprudence, see: *Lehideux and Isorni v France* App. no. 55/1997/839/1045 (ECtHR, 23 September 1998), [47]; *Norwood v United Kingdom* App. no. 23131/03 (ECtHR, 16 November 2004).

[238] The media's conduct and the media acting in good faith in respect of the media-as-a-constitutional-component concept are discussed in more detail in the following chapter at sections 3.2 and 3.3 respectively.

the only legal instruments that qualify the right to free speech or expression with express reference to these extra duties and responsibilities are Article 10(2) ECHR and Article 19(3) of the ICCPR. These qualification clauses apply to both media and non-media entities however, according to Oster, their main purpose is to provide member states with a tool to combat abuses of power by the media.[239]

Consequently, and in conclusion, the privilege afforded to the media, deriving from the ambit of the social responsibility theory and the argument from democratic self-governance, is based upon a utilitarian, consequentialist and functional understanding of media freedom. The media-as-a-constitutional-component concept means that media actors are protected when they adhere to the behavioural standards and norms of discourse set out above. However, this protection carries with it the obligation to fulfil these functions. If it fails to do this, it relinquishes its protection and may be subject to regulatory sanctions and/or criminal or civil liability.

5. A WORKABLE DEFINITION OF 'THE MEDIA' BASED ON SOCIAL RESPONSIBILITY THEORY VALUES

The High Court of New Zealand's decision in *Slater v Blomfield*[240] determined that a blogger could be considered a journalist for the purposes of section 68 of the New Zealand Evidence Act 2006 provided, inter alia: '(i) the medium used by the journalist disseminates the information to the public or a section of the public; (ii) what is disseminated is news and observations on news; and (iii) the person claiming to be a journalist is a person who, in the normal course of that person's work, might be given information by informants in the expectation that it will be published in a news medium.'[241] Consequently, in dealing with these points, Asher J's judgment provides a number of guiding principles that can be applied to a new workable definition of media. Firstly, an actor can begin publishing as non-media, and later become media once a certain level of work and content is achieved.[242] Secondly, an actor that regularly disseminates news to a significant body of the public can be a

[239] J. Oster, *Theory and Doctrine of 'Media Freedom' as a Legal Concept*, (2013) 5(1) *Journal of Media Law* 57-78, 72-73; These duties and responsibilities are particularly significant when applied as factors of the qualified privilege defence, as defined by Lord Nicholls in *Reynolds v Times Newspapers* [2001] 2 AC 127, 205 (see also: *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 383 per Lord Hoffmann; *Flood v Times Newspapers Ltd* [2012] UKSC 11, [30] per Lord Phillips), and now enshrined within section 4 of Defamation Act 2013.
[240] [2014] NZHC 2221.
[241] Ibid. [34].
[242] Ibid. [36].

journalist.[243] Thirdly, just because an actor is a blogger does not mean they cannot be considered media.[244] Indeed, 'a blogger who regularly disseminates news to a significant body of the public can be a journalist.'[245] Fourthly, an actor that publishes a single news item would not qualify as media. Regular commitment to publishing new or recent information of public interest is required for, a blog for instance, to be considered news media. However, the quantity of stories does not have to be equivalent to a corporate news organisation.[246] Finally, to determine whether an actor's work within the context of the medium makes them media, the following factors are relevant: (i) whether the receiving and disseminating of news through a news medium is regular; (ii) whether it involved significant time on a frequent basis; (iii) whether there was revenue derived from the medium; and (iv) whether it involved the application of journalistic skill.[247]

Based on the media-as-a-constitutional-component concept of media freedom advanced above, it is suggested that a functional and egalitarian, as opposed to institutional, approach should be adopted to define the media. In line with the social responsibility theory, and the argument from democratic self-governance, this principle and its definition will focus on the functions that are performed by the media actors, as opposed to their inherent characteristics.[248] Therefore, media freedom does not have to be a purely institutional privilege; it can apply to any actor that conforms to the definition. As a consequence of the requirement that these functions are fulfilled in order to satisfy the constitutional component concept, it will also give consideration to the obligations of the media. By applying the guidelines laid down in *Slater*, and scholarship and jurisprudence from both the US and Europe,[249] examined in prevailing sections, the following definition of media is proposed: (1) a natural and legal person (2) engaged in the process of gathering information of public

[243] Ibid. [54].
[244] This accords with the treatment of citizen journalists by the Court of Justice of the European Union in the context of data protection jurisprudence which, as explained in more detail in section 2.2 of Chapter 6, has afforded citizen journalists the same status, and the ability to take advantage of the same exemptions, as the traditional media: See *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy* (*Satamedia)* Case C-73/07; *Sergejs Buivids v Datu valsts inspekcija* Case C-345/17.
[245] *Slater v Blomfield* [2014] NZHC 2221.
[246] Ibid. [54], [65].
[247] Ibid. [74].
[248] As discussed in Chapter Two, this is the case with the traditional methods of distinguishing media from non-media actors. See: T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 487.
[249] For instance, compare Oster and Ugland for definitions from a European and US perspective respectively: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 74; E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 138.

concern, interest and significance (3) with the intention, and for the purpose of, disseminating this information to a section of the public (4) whilst complying with objective standards governing the research, newsgathering and editorial process. These standards would include, for instance, the time spent researching stories and ensuring the provenance and reliability of information.

As the media's privileged protection is based upon the constitutional-component concept, deriving from social responsibility theory and the argument from democratic self-governance, one of the fundamental requirements for determining that an actor is media is its contribution to matters of public interest.[250] Oster's argument that for this requirement to be fulfilled it must occur periodically[251] is, it is submitted, over-exclusive. Actors can fulfil the definition above, and operate as a constitutional component, on one-off occasions or on an ad-hoc basis.[252] This is particularly the case within a citizen journalism context, in which contributions to the public interest may be made sporadically via many different platforms.

6. CONCLUSION

As identified in section 2, despite the emergence of social responsibility theory, its historical and on-going marginalisation[253] has become more acute as a result of libertarianism's position as the de facto normative paradigm for online expression. Consequently, some of the problems distilled by Siebert et al (as set out above)[254] that the Royal Commission and the Hutchins Commission were set up to consider, and attempted to resolve, in respect of the traditional media through the creation of the theory, are being repeated, albeit within a modified media context. Through recourse to the criticisms of libertarianism and, specifically, the argument from truth and marketplace of ideas set out in section 3, this section will set out how embracing social responsibility theory could go some way at least to solving these problems and, in doing so, providing a more robust and realistic normative

[250] Section 3.1 of the following chapter explores the concept of public interest in detail and, in doing so, explains the parameters imposed upon it by the media-as-a-constitutional-component concept.
[251] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 74.
[252] *Editions Plon v France* App. No. 58148/00 (ECtHR 18 May 2004) [43]; *Lindon, Otchakovsky-Laurens and July v France* App. No. 21279/02 and 36448/02 (ECtHR 22 October 2007) [47].
[253] C. Christians, J. Ferré and P. Fackler, *Good News: Social Ethics and the Press* (Oxford University Press, 1993), 38.
[254] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 78-79. See section 4.1.

framework for the media-as-a-constitutional-component concept. Many of these issues will be unpacked in more detail in the chapters that follow.

6.1 RESISTANCE TO SOCIAL CHANGE AND THE POLARISATION OF COMMUNITIES

Prima facie there is no doubt that online speech and the advent of citizen journalism has, in many instances facilitated, social change through its enablement of cultural pluralism and it's fostering of the 'Great Communities' envisaged by the Hutchins Commission. This is particularly evident in the Arab World and the Middle East[255] where citizen journalism and social media 'have been hailed as tools for the empowerment of marginalized communities such as women and the youth, [and have] also brought new opportunities that have resulted in the breaking of the communication monopoly by those in power.'[256] For example, the Arab Spring that began in Tunisia in December 2010 and ended in the revolution of 14th January 2011, and has since been followed in Egypt, Libya and Syria, illustrates citizen journalism's role in galvanising activists and facilitating social change.[257] However, online speech, including that emanating from the traditional media, citizen journalism and non-media actors, does not always stimulate social change; to the contrary, it can encourage social inertia. As identified above at section 3.2, filter bubbles can actively undermine the marketplace of ideas by entrenching people's views. Rather than exposing us to new and opposing ideas and perspectives, these filter bubbles can create echo chambers, giving rise to what has been referred to as 'my news, my world.'[258] Thus, instead of being a catalyst for social change by encouraging cultural plurality and the galvanisation of 'Great Communities' filter bubbles and echo chambers can polarise communities, in particular already marginalised groups.

It is recognised that embracing the social responsibility theory will not necessarily prevent echo chambers, as arguably they are an inherent characteristic of online speech, regardless of the underpinning normative paradigm. However, as the likes of Baran and Davis have observed, social responsibility theory will continue to be revitalised by new and

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[255] See generally: D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) *Human Rights Law Review* 125-151, 130; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law' (2015) *Information & Communication Technology Law* 24(1) 16-40, 30.
[256] N. Miladi, 'Social Media and Social Change' (2016) *Digest of the Middle East* 25(1), 36-51, 36.
[257] Ibid. 37.
[258] S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (7th ed, Wadsworth Publishing, 2014), 81.

emerging technologies, such as social media and its facilitation of citizen journalism.[259] It is submitted that the effect of this could be three-fold: Firstly, promotion of the underlying values of social responsibility theory, particularly its focus on cultural pluralism and media responsibility, may discourage the continued widespread implementation of filter bubbles which would actively reduce the amount of echo chambers we are inadvertently captured by. Secondly, as social media and citizen journalism has the potential to give new strength to the social responsibility model, by virtue of its rationale, this rejuvenation of the theory may encourage more speech adhering to the theory's values. Thus, although not solving the echo chamber issue, it will encourage the dissemination of, and make available, more speech that complies with the standards of behaviour and norms of discourse set out in Chapter Four.[260] Thirdly, as set out in section 2 of Chapter Seven, the social responsibility theory dictates that the government must actively promote the freedom of its citizens,[261] which can be achieved, in part, by guaranteeing adequate media performance.[262] Arguably, this includes the obligation to support diverse speech environments (in other words, 'Great Communities' that encourage cultural pluralism). More broadly, unlike libertarianism, it is submitted that the theory supports the notion of 'positive' free speech; as observed by a number of scholars,[263] and the Grand Chamber of the ECtHR in *Centro Europa 7 Srl v Italy*, the concept places positive obligations on the state to ensure media plurality (in addition to its negative duty of non-interference).[264] This is equally important in respect of emerging technologies as it is with the traditional media as, according to Curran, Fenton and Freedman, the Internet and, it is submitted, by extension, citizen journalism, is not exempt from 'corporate dominance, market concentration, controlling gatekeepers, employee exploitation, manipulative rights management, economic exclusion through "tethered appliances" and encroachment upon the information commons.'[265]

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[259] Ibid. 79.
[260] Section 3.
[261] E. Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed. 2007), 36,105-107.
[262] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 95; W. Hocking, *Freedom of the Press: A Framework of Principle* (University of Chicago Press, 1947), 182-193; See also: *Özgür Gündem v Turkey* (2001) 31 EHRR 1082, [43].
[263] A. Kenyon, 'Assuming Free Speech' (2014) 77(3) *Modern Law Review* 379-408, 391-402; T. Emerson, *The System of Freedom of Expression* (Vintage, 1970), 4; J.M. Balkin, 'Some Realism About Pluralism: Legal Realist Approaches to the First Amendment' [1990] *Duke Law Journal* 375, 401; A. Hutchinson, 'Talking the Good Life: From Free Speech to Democratic Dialogue' (1989) 1 *Yale Journal of Law and Liberation* 17, 25; T. Gibbons, 'Free Speech, Communication and the State' in M. Amos, J. Harrison and L. Woods (eds), *Freedom of Expression and the Media* (Martinus Nijhoff, 2012), 42.
[264] [2012] ECHR 974, [134]; See also: *Manole v Moldova* [2010] ECHR 1112, [107].
[265] J. Curran, N. Fenton and D. Freedman, *Misunderstanding the Internet* (Routledge, 2012), 180.

6.2 THE PROBLEM WITH RATIONALITY: DEALING WITH MEDIA DISTORTION, SENSATIONALISED STORIES, FAKE NEWS, ENTRENCHED VIEWS AND ANONYMOUS AND PSEUDONYMOUS SPEECH

In contrast to libertarianism, social responsibility theory does not accept the proposition that we are innately driven to search for truth and use it as a guide, and it is, at best, sceptical of people's ability to think rationally, particularly in the context of the marketplace. It views us as being lethargic, prone to passively accepting what we see, hear and read and reluctant to apply reason when it does not satisfy our immediate needs and desires. Consequently, as Siebert et al state, the theory perceives us as being 'easy prey for demagogues, advertising pitchmen, and others who would manipulate [us] for their selfish ends.'[266] Thus, unlike libertarian ideology, the social responsibility theory acknowledges the inherent flaws in our nature. In applying this to a modern context, and the discussions in section 3, it recognises that we are vulnerable to sensationalised stories, fake news and the regurgitation of false or misleading information, entrenchment of views by virtue of pre-conceived schemas, the fact that we are largely unable to assess the veracity of anonymous and pseudonymous speakers and, as a result of all of this, our inability to rationally assess the marketplace. Consequently, it is realistic, as opposed to being idealistic.

Significantly, it is this pragmatism that makes it a suitable normative framework for the modern media and the media-as-a-constitutional-component concept. Because the concept is founded on the values that underpin social responsibility theory, in particular the doctrine's requirement that the media fulfil constitutional functions to facilitate effective democratic self-governance as, this conceptualisation of the media enables the delineation between media and non-media actors. In turn, this helps to protect us against some of the flaws and vulnerabilities in human nature outlined above. As the normative framework for a concept that distinguishes who or what is media from who or what is not media it provides us with a mechanism to identify those actors that should benefit from media freedom and its concomitant obligations and responsibilities. Thus, it makes it clearer who or what should be operating in ways which conform to the underlying values of the paradigm and, for instance, be subject to regulation,[267] regardless of whether that actor is a member of the traditional

[266] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 100.
[267] Discussed further below and in Chapter Seven.

media, is a citizen journalist and/or is disseminating information anonymously or pseudonymously.

Although not a panacea, it is submitted that the concept's requirement that to be classed as media and benefit from the enhanced right to media freedom, the actor must fulfil a constitutional function and, in doing so, conform to the underlying principles of the social responsibility theory, lends itself to certain behaviours. In turn, exercising these behaviours help to protect us against some of the flaws and vulnerabilities in human nature outlined above. For instance it may: mean that more care is taken over source checking to reduce the regurgitation of false or misleading information; discourage the publication of sensationalised stories and encourage the dissemination of constitutionally valuable information; as a result it means that the audience can have more faith in material published anonymously and pseudonymously without having to compromise the identity of the speaker, and ultimately discourage such speech to the detriment of freedom of expression.[268] Essentially, the social responsibility theory and the media-as-a-constitutional-component concept provide us with a more suitable platform from which to assess the marketplace rationally.

6.3 BALANCING THE INTERESTS OF THE STATE AND INDIVIDUALS WITH THE MEDIA AND A BASIS FOR REGULATION

Chapter Six argues that the offence of contempt of court and the law of defamation, and the principles upon which they are founded, can be at odds with media freedom, which can create an imbalance between the state or claimants and the media. However, as set out in that chapter, the adoption of the media-as-a-constitutional-component concept, as underpinned by social responsibility theory, and the standards of behaviour and norms of discourse that it imposes on media actors, provides a mechanism to at least alleviate this imbalance.

Notwithstanding this, both the traditional media and citizen journalists can unjustifiably damage reputations.[269] invade personal privacy[270] and can detrimentally affect

[268] Anonymous and pseudonymous speech is discussed further in Chapter Five.
[269] *Smith v ADVFN plc* [2008] EWHC 1797; *McAlpine v Bercow* [2013] EWHC 1342 (QB); *Monroe v Hopkins* [2017] EWHC 433 (QB).
[270] E. Barendt, 'Privacy and Freedom of Speech' in A. Kenyon and M. Richardson (eds) *New Dimensions in Privacy Law International and Comparative Perspectives* (Cambridge University Press, 2006), 11-31; R. Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013); B. Markesinis, *Protecting Privacy* (Oxford University Press, 1999); R. Barnes, *Outrageous Invasions Celebrities' Private Lives, Media and the Law* (Oxford University Press, 2010); Sir M. Warby and N. Moreham (eds), *The Law of Privacy and the Media* (Oxford University Press, 2016) ch. 3. P. Wragg, 'Protecting Private Information of Public Interest: *Campbell's* Great Promise Unfulfilled' (2015) 7 *Journal of Media Law* 225; R. Barnes and P. Wragg, 'Social media,

the integrity of the trial process. However, as discussed in Chapter Seven, social responsibility theory and the media-as-a-constitutional-component concept offer two layers of protection against this. Firstly, publications that damage reputation and/or invade privacy without justification will fall short of the constitutional requirement as they would not be in the public interest[271] and, as a result, would not, in that instance, be classed as media under the new definition and would not be subject to media freedom. Secondly, unlike libertarianism, the social responsibility paradigm champions media self-regulation where possible but acknowledges that a more coercive regulatory system may be necessary. [272] Chapter Seven sets out a blueprint for a new voluntary, yet highly incentivised, regulatory regime, based on the concept, as underpinned by the social responsibility theory and argument from democratic self-governance that could, if implemented, effectively regulate citizen journalists and the wider media. Furthermore, as set out above, the concept enables the effective delineation of media from non-media actors and, therefore, the identification of those entities that can benefit from the right to media freedom and its concomitant obligations and responsibilities. In doing this it helps regulators to identify who or what is eligible to join a regulatory system. Taking this a step further, as discussed in Chapter Seven, it is submitted that the concept's ability to clarify who and what is media may encourage more citizen journalists to voluntarily join regulatory schemes. This is because: (i) they will be able to identify themselves as 'media' when perhaps previously they did not realise they were in fact operating as media and; (ii) the concept would classify citizen journalists fulfilling a constitutional function as media which would, in turn, confer upon them the right to media freedom and enable them to take advantage of the incentives available to members of the regulatory scheme.

In summary, it is submitted that the theory's underlying values provides a normative framework from which to 'hang' a regulatory regime for those acting as media pursuant to the concept who would not normally be classed as 'traditional' media. Chapter Seven will argue that, as a result of the concept and its normative and philosophical foundation providing a mechanism for citizen journalists to be classed as 'media', and therefore benefit

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sporting figures and the regulation of morality' in D. Mangan and L. Gillies (eds) *The Legal Challenges of Social Media* (Edward Elgar, 2017), 155-176.

[271] The notion of public interest, and the parameters imposed upon it by the media-as-a-constitutional-component concept, is discussed in greater detail in the following chapter at section 3.1.

[272] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 76.

from media freedom, as media actors they should be subject to the same regulatory regimes as the traditional media. Thus, it advances a new regulatory scheme that effectively captures citizen journalists.

CHAPTER FOUR

WHAT THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT MEANS FOR MEDIA FREEDOM

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1. INTRODUCTION

Chapter Three introduced a new workable definition of the media, founded upon a media-as-a-constitutional-component concept that effectively delineates media from non-media actors. This conceptualisation is based on the premise that the performance of a constitutional function, such as reporting on a matter of public concern, rather than the education, training or employment of the actor, should define the beneficiaries of media freedom. It essentially offers an alternative means of interpreting free speech that recognises twenty-first century methods of communication, and the legal challenges this presents, which were sketched in the final section of Chapter Three. These legal challenges will form the subjects of the following chapters. Thus, Chapter Five deals with anonymous and pseudonymous speech, Chapter Six considers contempt of court and defamation and Chapter Seven sets out a new regulatory framework that effectively captures citizen journalists. The purpose of this chapter is to, firstly, at section 2, set out the parameters that are imposed by the concept on media freedom. This leads into a discussion at section 3 as to the standards and norms attached to media conduct and discourse by the concept. Specifically, it explores the notion of public interest, within a broad media context, media conduct and the media's requirement to act in good faith pursuant to the concept. In respect of public interest, it argues that the concept, and the social responsibility and argument from democratic self-governance rationales underpinning it, align it clearly with the jurisprudence of the ECtHR: a position that is diametrically opposed to a divergent line of UK case law supporting a 'role model' principle. As a result, it advances three factors to be taken into account to provide guidance on what is in the public interest in line with the constitutional norms and values inherent within the concept.

2. THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT'S PARAMETERS FOR MEDIA FREEDOM

The media's reach is what enables it to fulfil its constitutional functions. However, the power associated with this privileged position can, equally, be abused; the impact of which is greater than if it came from a private individual, as it can affect the private lives of individuals, damage reputations,[1] and detrimentally affect the fairness of trials and undermine the principle of open justice.[2] Furthermore, it has the ability to shape, distort and mislead public opinion.[3] Online speech and, in particular, the symbiotic relationship that now exists between citizen journalists and the traditional media identified in Chapter One, adds a further dynamic to this ability: citizen journalists increasingly act as a source of news for traditional media outlets. In turn, this adds credence to the respective citizen journalist's work as well as raising their profile further.[4] Commentators such as Curran and Seaton and Calvert and Torres have acknowledged that the traditional media, operating in the context of the Internet, remains a gatekeeper to the awareness of the broader public and the 'public agenda.'[5] In their view, by conducting research and editing and publishing using online resources the traditional media can influence the level of attention paid by the public to certain publications, even amongst the proliferation of other available information on the Internet.[6] Taking this a step further, as alluded to in the concluding sections of the previous chapter, arguably the symbiosis that now exists between citizen journalists and the traditional media only serves to amplify the collective media's ability to exert even greater influence over the weight attached to certain publications and pieces of information and, ultimately, wider public opinion. Thus, according to the ECtHR in *Novaya Gazeta and Borodyanskiy v Russia*:[7] 'In a world in which the

[1] This issue was dealt with briefly in Chapter Three section 6.3. It will be considered in greater depth in Chapter Six.
[2] Ibid.
[3] P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: An evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape', *Legal Studies* (2017) Vol. 37, No. 1, 25-53, 49; T. Gibbons, 'Fair Play to All Sides of the Truth': Controlling Media Distortions (2009) *Current Legal Problems* 62(1), 286-315, 289; T. Gibbons, 'Freedom of the Press: ownership and editorial values' (1992) *Public Law* 279, 286-287; See also: J. Curran, 'Mediations of Democracy' in J. Curran and M. Gurevitch (eds) *Mass Media and Society* (Hodder Arnold, 4th ed. 2005), 129.
[4] See Chapter One section 1.
[5] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 34.
[6] J. Curran and J. Seaton, *Power without Responsibility – Press, Broadcasting and the Internet in Britain* (7th edn. Routledge), 286; C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) 23 *Vanderbilt Journal of Entertainment and Technology Law* 323, 345.
[7] [2013] App. no. 14087/08.

individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.'[8]

It has been argued that journalistic ethics, in the form of boundaries to media freedom, should be defined by Post's 'norms of civility',[9] categorised as individual rights of others (such as privacy and reputation)[10] and social norms required for public discourse.[11] However, as Post himself states, such norms cannot be subject to 'pure fidelity' as, inter alia, 'the norms that define public speech, like all social norms, are the product of a specific community, and because different communities may have different norms, a pure fidelity to a "moral tact" would hegemonically establish the dominance of the perspectives of a particular community.'[12] The media-as-a-constitutional-component concept does not just subsume Post's individual and social norms of civility, but also offers a normative mechanism for dealing with this fidelity issue. Pursuant to the concept, media freedom's parameters must be determined, and are justified by, the norms set out at section 4.1 of Chapter Three that define, and make possible, speech that fulfils a constitutional function. At the concept's very core is the normative requirement of the media to prioritise cultural pluralism, by being a voice for all people, not just elite or dominant groups. Thus, by virtue of it being underpinned by social responsibility theory and the argument from democratic self-governance, it is submitted that the concept, which determines that media freedom is applicable to any actor who is disseminating speech of constitutional value, provides a more appropriate mechanism for setting the limits to media freedom than the 'rules of civility.'

The limits placed on media freedom by the concept and, indeed, by the rules of civility, create what Post has described as the 'paradox of public discourse'.[13] On the one hand is the libertarian argument, discredited in the previous chapter, that conceptually media freedom necessitates being free of regulatory requirements. On the other hand, in line with

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[8] Ibid. [42].
[9] R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell'* (1990) 103 *Harvard Law Review* 601; R. Post, *Racist Speech, Democracy, and the First Amendment'* (1991) 32 *William and Mary Law Review* 267, 286; R. Post, 'Reconciling Theory and Doctrine in First Amendment Jurisprudence' (2000) 88 *California Law Review* 2353, 2365.
[10] Ibid.
[11] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 34.
[12] R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell'* (1990) 103 *Harvard Law Review* 601, 681.
[13] Ibid.

the media-as-a-constitutional-component concept and its normative foundations, is the social responsibility argument that the enjoyment of media freedom, from both a publisher and audience perspective, is contingent upon the fulfilment of certain standards of behaviour and norms of discourse, or concomitant duties and responsibilities.[14] However, as Oster states, so long as the media is properly conceptualised, the apparent conflict between these principles is largely superficial, as the media's privileges in, and its duties and responsibilities for, the public discourse complement one and other.[15] This is because, if the media and individuals were subject to the same freedoms and enjoyed identical duties and responsibilities the privileges attached to media freedom would be rendered obsolete. As a result, these privileges bestowed upon the media pursuant to the right to media freedom justify the greater demands placed on the media by virtue of the right's concomitant duties and responsibilities.

The concept and its social responsibility rationale provide a foundation upon which free speech and media freedom can be based. As established in the previous chapter, this foundation sets the parameters and limitations for media freedom operating within this new conceptual normative framework that can be placed into two categories, namely protecting: (i) vital social interests, and; (ii) the private rights of other individuals. In respect of the former, it is important to note that not all contraventions of vital social interests render media publications illegal. In *Handyside v United Kingdom*[16] the ECtHR laid down the often cited principle that free speech and media freedom are not only applicable to information and ideas 'that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'[17] However, as opposed to contributing to free and rational public debate, media publications undermine it, and therefore do not conform to the norms previously referred to, if their publication or broadcast, inter alia, unjustifiably invades personal privacy or damages an individual's reputation, causes violence or incites hatred, leads to unwarranted panic, damages national security interests, prejudices a fair trial or offends religious beliefs or moral

[14] See Chapter Three section 4.1, and section 3 of this chapter.
[15] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 34.
[16] [1976] App. no. 5493/72.
[17] Ibid. [49]; See also: *Sunday Times v United Kingdom (No. 1)* [1979] App. no. 6538/74 [65]; *Lingens v Austria* [1986] App. no. 9815/82 [41]; *Axel Springer AG v Germany (No. 1)* [2012] App. no. 39954/08 [78]; *Thorgeir Thorgeirson v Iceland* [1992] App. no. 13778/88 [63]. This principle has also been accepted by the IACHR since *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [113]. From the US Supreme Court see: *Cohen v California* 403 US 15, 25 (1971). See also: T. Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 *University of Pittsburgh Law Review* 519.

standards of a particular community.[18] The rights of others as a limitation on free speech and media freedom is underpinned by philosophical arguments advanced by Immanuel Kant and John Rawls. For instance, Kant articulated his understanding of law as the 'sum of the conditions under which the choice of one [person] can be united with the choice of another [person] in accordance with a universal law of freedom.'[19] Consequently, Kant justifies limiting individuals' right to freedom of action on the basis that it is required to reconcile it with everyone else's freedom. Similarly, according to Rawl's first principle of justice 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.'[20] Indeed, inherent within international human rights law is a general duty placed on individuals not to violate the rights of others whilst exercising their own liberties. The limitations placed on free speech and media freedom pursuant to individuals' rights are now widely recognised as qualifications to free speech in international Conventions (and their jurisprudence), such as Article 10(2) ECHR and Article 19(3) ICCPR.

3. THE STANDARDS ATTACHED TO MEDIA DISCOURSE AND CONDUCT BY THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT

It has been established above that the right to media freedom has to be balanced against conflicting rights and interests. The media-as-a-constitutional-component concept dictates that the protection afforded to the media by media freedom does not exist for a purpose that is exclusively and intrinsically beneficial to the media. Rather, pursuant to the concept, and the norms underpinning its social responsibility rationale, the intensity of the protection afforded to the media by virtue of media freedom is dependent upon the publication's constitutional value to society. Thus, factors to be taken into account when determining this includes: (i) the extent to which the media actor, through the publication, is fulfilling the role of public watchdog by reporting on a matter of public interest; (ii) the actor's conduct pre-publication and; (iii) whether the actor acted in good faith. Although the concept provides the theoretical justification for the application of these standards on media discourse and conduct, legal support for their imposition derives from the concomitant 'duties and responsibilities' clauses found in Articles 10(2) ECHR and 19(3) ICCPR. Unlike any other Convention or Covenant

[18] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 36.
[19] I. Kant, *The Metaphysics of Morals* (edited by L. Denis and translated by M. Gregor, Revised edn. Cambridge University Press, 2017), 24, 27-28.
[20] J. Rawls, *A Theory of Justice* (Harvard University Press, 1971), 60.

rights, these Articles expressly provide that the exercise of freedom of expression 'carries with it duties and responsibilities'.[21] Although this qualification applies equally to media and non-media actors, the chief purpose of the qualification is to provide Member States with a mechanism for preventing the modern mass media from abusing its power.[22] Thus, the operation of media freedom in any given situation, and the extent to which the protection it affords is applied, is dependent upon whether the media actor has carried out its concomitant 'duties and responsibilities' in the particular circumstances. In situations where the media actor has not carried out these obligations, the extent of the protection afforded by media freedom is significantly lowered and, as a result, interference with media freedom is, usually, justified.[23] Therefore, according to Grote and Wenzel, the 'duties and responsibilities' clause is, doctrinally, an aspect of the balancing exercise conducted by judges when they apply the principle of proportionality.[24] The following sections will consider how the 'standards' set out above operate for the purposes of the concept.

3.1 A MATTER OF PUBLIC INTEREST?

This thesis has advanced the proposition that the media's privileged protection afforded by media freedom should be based upon the media-as-a-constitutional-component concept. As this concept is underpinned by the social responsibility rationale and the argument from democratic self-governance, which subsumes within its ambit the notion of public discussion,[25] one of the fundamental requirements for determining that an actor is operating as part of the media is its contribution to matters of public interest. In such a case, the constitutional value attached to the dissemination of information that fulfils this requirement supports the media actor's claim for enhanced protection. However, to the contrary,

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[21] To the contrary, Article 14 ACHR provides limitations to free speech. Although the IACHR does not expressly qualify free speech, its jurisprudence has consistently emphasised the responsibilities that attach to media actors in the exercise of their function. For example, see: *Herrera-Ulloa v Costa Rica* [2004] Case 12.367 [117]; *Fontevecchia and D'Amico v Argentina* [2011] Case 12.524 [44].

[22] M. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987), 386.

[23] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 141.

[24] Ibid.

[25] See Chapter Three section 4.2; A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People,* (Oxford University Press, 1960), 42; A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255-257; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 63-64. The inextricable link between public interest and the argument from democratic self-governance is borne out by jurisprudence from, for instance, the US Supreme Court, the ECtHR and the UK courts, all of which is discussed in detail below.

publications that are not of public interest enjoy less protection, and may even constitute an abuse of media freedom if they relate exclusively to private or intimate matters.[26] As is discussed below, this position reflects ECtHR jurisprudence and certain UK case law.[27] It is also evident in US jurisprudence, albeit this is subject to opposing views.[28] As argued in the previous chapter,[29] Oster's argument that for this requirement to be fulfilled it must occur periodically[30] is over-exclusive. Actors can fulfil the workable definition of media and operate as a constitutional component on one-off occasions or on an ad-hoc basis.[31]

Scholarship and jurisprudence from the US, UK and the ECtHR suggests that this requirement could be met with differences of opinion.[32] From a US scholarship perspective, it may be opposed on a doctrinal basis, as content discrimination is not permitted under the First Amendment.[33] As Volokh suggests, it is a fundamental First Amendment principle that it is 'generally not the government's job to decide what subjects speakers and listeners should concern themselves with'.[34] This 'negative' freedom of expression rationale, which is arguably the antithesis to the 'positive' philosophical arguments that have historically underpinned free speech,[35] has also been referred to by, in particular, Schauer, as the 'suspicion' or 'distrust' of government theory.[36] To the contrary however, according to

[26] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 37.
[27] See the discussion later in this section relating to 'celebrity gossip'.
[28] See the discussion in the paragraph below.
[29] See section 5.
[30] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 74.
[31] *Editions Plon v France* App no 58148/00 (ECtHR 18 May 2004) [43]; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR 22 October 2007) [47]; P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53, 51.
[32] Ibid.
[33] L.L. Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371, 1411; C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1013-1016, 1015; J. Rubenfeld, 'The First Amendment's Purpose' (2001) 53 *Stanford Law Review* 767, 787-788; E. Volokh. 'The Trouble with "Public Discourse" as a Limitation on Free Speech Rights' (2011) 97 *Virginia Law Review* 567, 594.
[34] E. Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You' (2000) 52 *Stanford Law Review* 1049, 1089.
[35] The arguments from democratic self-governance, truth and self-fulfilment.
[36] F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 81, 148, 162-163. See also: E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005) 21-23. In his 'Two Concepts of Liberty' Isaiah Berlin referred to the notions of negative and positive freedom. According to Berlin, negative liberty relates to the absence of, for example, barriers, constraints and interference, whereas as positive liberty requires the presence of something, such as control, self-mastery, self-determination or self-realisation: I. Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford University Press, 1969), 118-172.

Sunstein: '…it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee.'[37] This view correlates with Estlund's contention that '[t]he central importance of speech on public issues, or "matters of public concern" is long-established First Amendment dogma.'[38] The 'dogma' referred by Estlund is illustrated by *Garrison v Louisana*[39]in which the Supreme Court highlighted the inextricable link between the argument from democratic self-governance and public interest: 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'[40] Similarly, in *First National Bank v Bellotti*[41] the Court placed public interest speech 'at the heart of the First Amendment's protection'[42] and in *Carey v Brown*[43] matters of public interest were recognised as sitting on the 'highest rung of the hierarchy of First Amendment values.'[44] Indeed, the US Supreme Court, the Supreme Court of Canada and the Court of Appeal, House of Lords and Supreme Court in the UK have made consistent reference to the public interest requirement. The courts have expressed this in a number of ways, including: 'public interest' or 'public concern;'[45] 'of political, social or other concern to the community;'[46] 'influences social relations and politics on a grand scale;' or is part of a 'debate about public affairs'; makes a 'contribution to the public debate;' stimulating 'political and social changes;'[47] more than 'mere curiosity or prurient interest' with the public having a 'genuine stake in knowing about the matter published.'[48]

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[37] C.R. Sunstein, 'Pornography and the First Amendment' (1986) 35 *Duke Law Journal* 589, 605.
[38] C. Estlund, 'Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category' (1990) 59(1) *George Washington Law Review* 1-54, 1.
[39] 379 US 64, (1964).
[40] Ibid. 74-75.
[41] 435 US 765 (1978).
[42] Ibid. 776.
[43] 447 US 455 (1980).
[44] Ibid. 467.
[45] For example, from the US Supreme Court see: *Gertz v Robert Welch Inc* 418 US 323, 246 (1974); *Dun & Bradstreet Inc v Greenmoss Builders* 472 US 749, 761 (1985); *Hustler Magazine v Falwell* 485 US 46, 50 (1988); *Bartnicki v Vopper* 532 US 514, 528, 533-534 (2001). From the House of Lords/Supreme Court, see: *London Artists v Littler* [1969] 2 QB 375, 391 (CA) (per Lord Denning); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls); *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 376 (per Lord Bingham); *Flood v Times Newspapers Ltd* [2012] UKSC 11, [24] (per Lord Phillips).
[46] *Connick v Myers* 461 US 138, 146 (1983).
[47] From the US see: *Roth v United States* 354 US 476, 484 (1957); *New York Times v Sullivan* 376 US 254, 269 (1964); *Hustler Magazine v Falwell* 485 US 46, 53 (1988). From the UK see: *Lion Laboratories Ltd v Evans* [1984] 1 WLR 526, 530; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 897; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls).
[48] For example, see the Canadian Supreme Court case of *Grant v Torstar Corporation* 2009 SCC 61, [105].

The myriad of ways in which 'public interest' has been explained by the courts demonstrates the concept's inherently vague nature. Indeed, it has been suggested that efforts to define it are 'doomed to fail.'[49] This view certainly correlates with, for instance, the position of the Information Commissioner's Office (ICO) that states in its *Data protection and journalism: a guide for the media* that what is in the public interest will differ on a case-by-case basis. Consequently, the guide refers to industry codes of practice, such as the BBC's Editorial Guidelines,[50] to 'help organisations think about what is in the public interest;'[51] a position that, it is submitted, echoes Justice Stewart's often-cited phrase from *Jacobellis v Ohio*[52] of 'I know it when I see it' in respect of his refusal to define hard core pornography. A way of not determining what is in the public interest is to leave this decision to the public or media. If either were responsible for deciding what private information is relevant or irrelevant then, arguably, public interest would be conceptually confused with what is of 'interest to the public.' As Oster is surely correct in stating, public desire for information, such as private or intimate details of people in the public sphere, does not, per se, justify its supply. The damage that would be inflicted by the media intruding into, and reporting on, such matters outweighs the 'interest in the satiation of public appetite for such entertainment.'[53]

This free speech and public interest/privacy dichotomy is acutely apparent within the context of celebrity gossip. The jurisprudence generated from this type of speech from the UK courts and ECtHR illuminates conflicting interpretations of public interest that are of significance to the argument from democratic self-governance and, by extension, the media-as-a-constitutional-component concept and its social responsibility foundations. The discussions relating to the philosophical foundations of freedom of expression in the previous

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[49] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 39.
[50] See section 7: http://www.bbc.co.uk/editorialguidelines/guidelines.
[51] Information Commissioner's Office, *Data protection and journalism: a guide for the media*, 32-34: https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf. The ICO's guidance is consistent with section 32(3) of the now repealed Data Protection Act 1998 which, for the purposes of determining whether the belief of a data controller that the publication would be in the public interest was or is a reasonable belief pursuant to section 32(1)(b), refers to any code of practice designated by the Secretary of State. In the Data Protection (Designated Codes of Practice) (No 2) Order 2000 the Secretary of State has designated a number of codes, including the BBC's Editorial Guidelines. Section 32 of the Data Protection Act 1998 provides a journalistic, literary and artistic exemption for most statutory provisions relating to the processing of personal data if the data is being processed only for one of these special purposes. Section 32 has been imported into the General Data Protection Regulation and the Data Protection Act 2018 by virtue of Article 85 and paragraph 26, Part 5 of Schedule 2 respectively. This provision is discussed in more detail below.
[52] 378 US 184 (1964).
[53] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 38.

chapter[54] established that at the heart of Strasbourg jurisprudence relating to free speech claims is the argument from democratic self-governance[55] that subsumes within its ambit the notion of 'public discussion' relating to matters of public interest.[56] As a result, the argument's rationale has moulded the Court's interpretation of the notion of public interest. This is evident in the public interest test laid down in *Von Hannover v Germany (No 1)*[57] that where the sole purpose of the expression is 'to satisfy the curiosity of a particular readership regarding the details of the applicant's private life', the publication 'cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public' and 'in these conditions freedom of expression calls for a narrower interpretation.'[58] Thus, as Wragg states: 'It is abundantly clear from the Strasbourg case law that the democratic process value is at the core of Article 10, and it is this value that articulates the meaning of 'general interest' in the *Von Hannover* test.'[59] As discussed in the previous chapter, the 'mirror principle' dictates that domestic case law must 'mirror' Strasbourg jurisprudence. Failure to do this would be unlawful under section 2(1) HRA 1998.[60]

Three high profile decisions from the UK courts clearly mirror the *Von Hannover* test. In *Campbell v Mirror Group Newspapers Ltd*[61] Lord Hope was of the view that revelations about Naomi Campbell's private life did not engage political or democratic values.[62] Similarly, Baroness Hale found that many forms of expression are vital to democracy and

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[54] See the discussions relating to the argument from truth and the argument from democratic self-governance at sections 3.1 and 4.2 respectively.
[55] *Lingens v Austria* (1986) 8 EHRR 407; *Jersild v Denmark* (1995) 19 EHRR 1; L. Wildhaber, 'The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression under the European Convention on Human Rights' (2001) 36 *Irish Jurist* 17; P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry* (2010) 2(2) *Journal of Media Law* 295-320, 314.
[56] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People,* (Oxford University Press, 1960), 42; A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255-257; D. Milo, *Defamation and Freedom of Speech,* (Oxford University Press, 2008), 63-64.
[57] [2004] App. no. 59320/00.
[58] Ibid. [65]-[66]. For subsequent application of the test see, for example: *Mosley v UK* App no 48009/08 (ECtHR 10 May 2011), [114]; *Hachette Filipacchi Associes v France* App. no. 12268/03 (ECtHR 23 July 2009) [40]; *Eerikainen and others v Finland* App. no. 3514/02 (ECtHR 10 February 2009) [62]; *Standard Verlags GmbH v Austria (No 2)* App. no. 21277/05 (ECtHR 4 June 2009) [52]; *MGN Ltd v UK* [2011] App. no. 39401/04 [143]; *Von Hannover (No 2) v Germany* [2012] App. nos. 40660/08 and 60641/08; *Axel Springer AG v Germany* [2012] App. no. 39954/08.
[59] P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*' (2010) 2(2) *Journal of Media Law* 295-320, 314.
[60] See Chapter Three section 3.1.
[61] [2004] 2 All ER 995.
[62] Ibid. [117].

democratic societies and are, therefore, deserving of protection. However, in this case, it was difficult to justify the expression involved on these grounds. Accordingly, Her Ladyship stated: '[T]he political and social life of the community and the intellectual, artistic or personal development of individuals are not obviously assisted by poring over the intimate details of a fashion model's private life.'[63] Two years later, in *Jameel v Wall Street Journal Europe Sprl (No. 3)*,[64] Baroness Hale defined 'public interest' as something 'very different from…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 about it.'[65] As Wragg says, Eady J's judgment in *Mosley v News Group Newspapers*[66] corresponds with this line of jurisprudence.[67] In finding that the only permissible interference with Article 8 ECHR raising 'a countervailing public interest…strong enough to outweigh it',[68] would be a necessary and proportionate intrusion for the purpose of exposing illegal activity or to prevent the public from being misled or because the information would make a contribution to a debate of general interest,[69] Eady J effectively applied the *Von Hannover* test. Consequently, in employing the test, in his view, the stories or accompanying images did not make any recognisable contribution to the public interest, and certainly not enough to defeat a privacy claim.[70]

To the contrary however, in recent years, a divergent line of domestic case law based on a 'role model' principle has emerged which, in contravention of section 2(1) HRA, does not mirror the Strasbourg Court's jurisprudence. Furthermore, this more generous approach to the contribution of celebrity gossip to the public interest[71] not only endorses the publication of speech by the media that is not of constitutional value but may also conflict with individual privacy rights. The role model principle was laid down by Lord Woolf LCJ in

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[63] Ibid. [148]-[149].
[64] [2006] UKHL 44.
[65] Ibid. 147.
[66] [2008] EWHC 1777 (QB).
[67] See generally: P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*' (2010) 2(2) *Journal of Media Law* 295-320. Wragg provides comprehensive and persuasive coverage of the privacy/public interest dichotomy in the context of celebrity gossip. The article offers up analysis of the treatment of the link between morality and public interest by Eady J and Tugendhat J in this context in *Mosley* and *Terry (previously LNS) v Persons Unknown* [2010] EWHC 119 (QB) respectively.
[68] Ibid. (*Mosley*) [131].
[69] Ibid.
[70] Ibid. [134].
[71] P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*' (2010) 2(2) *Journal of Media Law* 295-320, 299.

A v B plc[72] where it was held that revelations of adultery by Premiership footballer Gary Flitcroft were in the public interest on the basis that professional footballers 'are role models to young people and undesirable behaviour on their part can set an unfortunate example'.[73] In what would turn out to be in direct conflict with Baroness Hale's judgment in *Jameel*,[74] Lord Woolf LCJ went on to state that 'the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.'[75] Despite academic and judicial criticism, such as Fenwick and Phillipson observing that 'a cruder definition of public interest is hardly imaginable',[76] and Buxton LJ stating in *McKennit v Ash*[77] that '[t]he width of the rights given to the media by *A v B* cannot be reconciled with Von Hannover',[78] the principle has gained traction, particularly in cases involving footballers. For instance, in *Ferdinand v Mirror Group Newspapers Limited*[79] Rio Ferdinand failed to prevent details of his affair with a long-time 'friend' from being published. Nicol J determined there was a public interest in publication as Ferdinand had portrayed himself as a mature, stable 'family-man'. On Nicol J's assessment, Ferdinand, as a former England captain, was a role model, a ubiquitous position not simply confined to the football pitch.[80] More recently *McClaren v News Group Newspapers*[81] involved an application by Steve McClaren for an interim non-disclosure order to prevent News Group Newspapers from publishing information regarding an extra-marital 'sexual encounter' which had taken place a few days previously. Lindblom J held in favour of the defendant and, as a consequence, the story was published.[82] Lindblom J determined that there was a public interest in publishing the story as McClaren, as a former England manager, is a 'prominent public figure' from whom the 'public could reasonably expect a higher

[72] [2002] 3 WLR 542.
[73] Ibid. [45].
[74] *Jameel v Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44.
[75] [2002] 3 WLR 542, 552. In giving a talk on the privacy/free speech dichotomy, Lord Neuberger MR seemed to support Lord Woolf's judgment: 'We, or most of us, like to think that we live in an open society. Which is a society committed to liberal, democratic principles and the rule of law. An open society has a number of essential features: political institutions accountable through free and fair elections, an independent and impartial judiciary upholding the law, and a free press…[A] free press is often not merely truth-seeking and challenging, but strident, biased and shallow; again, however, without a free press we are damned to servitude.' *Privacy & Freedom of Expression: A Delicate Balance*, 28th April 2010.
[76] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press), 799.
[77] [2008] QB 73.
[78] Ibid. [62].
[79] [2011] EWHC 2454.
[80] Ibid. [84]-[87].
[81] [2012] EWHC 2466 (QB).
[82] R. Dale, 'McClaren's affair with Sven's ex' *The Sun*, 19th August 2012 https://www.thesun.co.uk/archives/news/847999/mcclaren-affair-with-svens-ex-2/.

standard of conduct.'[83] In coming to their decisions, both Nicol J and Lindblom J, in *Ferdinand* and *McClaren* respectively, placed emphasis on Lord Woolf LCJ's role model principle laid down in *A v B plc*.[84]

It is submitted that these cases relate to mere entertainment, as opposed to the fulfilment of a constitutional function pursuant to the media-as-a-constitutional-component concept and the proposed definition. In accordance with jurisprudence such as *Von Hannover*, *Campbell* and *Jameel*, in such situations, a publisher is not fulfilling their constitutional function, or role as public watchdog within a democracy. Indeed, as Wragg suggests, 'it is arguable that by reporting celebrity gossip the media are strikingly distracted from performing…vital [democratic] functions.'[85] Consequently, they should not be subject to the privileges attached to media freedom explored in section 3 of Chapter Two. Thus, the definition of the media proposed in the previous chapter[86] has the potential to exclude from media privileges actors that, despite their purpose being to primarily treat 'the private lives of those in the public eye' as 'a highly lucrative commodity' by exposing aspects of people's private lives or engaging in entertainment and sensationalism, have traditionally been considered part of the media, and subject to the protection offered by media freedom. These actors and entities do not conform to the requirements of the definition by publishing material that contributes to the dissemination of matters of public interest.[87]

Moreover, leaving the decision as to what is or is not in the public interest to the public or the media is likely to lead to the 'tyranny of the majority' and the 'tyranny of the prevailing opinion and feeling' that John Adams and Mill warned of.[88] Indeed, this raises a question relating to the relationship between cause and effect. Arguably, the media has, at

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[83] [2012] EWHC 2466 (QB), [34].

[84] *Ferdinand*, [87]; *McLaren*, [18]. The principle has also been applied by Ouseley J in *Theakston v Mirror Group Newspapers Ltd* [2002] EWHC 137 and Tugendhat J *Terry (previously LNS) v Persons Unknown* [2010] EWHC 119 (QB). For detailed discussion of *Terry* see P. Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*' (2010) 2(2) *Journal of Media Law* 295-320.

[85] Ibid. (Wragg) 316.

[86] See section 5.

[87] P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: An evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape', *Legal Studies* (2017) Vol. 37, No. 1, 25-53, 52-53.

[88] J. Mill, *On Liberty*, in J.M. Robson (ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 220; J. Adams, 'A Defence of the Constitutions of the Government of the United States of America', in C. Adams (ed), *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations, by his Grandson Charles Francis Adams*, vol.6 (Little, Brown and Co.), 63.

times, purposefully and pro-actively encouraged the public's desire for information relating to the private lives of certain people in order to create demand, as opposed to the public creating the demand initially and the media reacting to satisfy it.[89] Accordingly, in Post's view, any attempt to establish public interest by simply applying quantitative criteria would risk being either over-inclusive, in that it considers trivial matters that interest factions of the public, or under-inclusive if it excludes matters that most people have not heard of, even it affects them, such as state secrets.[90] The number of people interested in a particular subject should not be the determinative factor for deciding what is in the public interest. Rather, it should serve as just one of many indicators. Evidently, due to its vagueness, creating an exhaustive definition of public interest is probably impossible, particularly because it is a dynamic and ever-changing concept: what is in the public interest today, may not be tomorrow, and vice versa. Thus, to the contrary, because of the independence of the judiciary, and its greater accountability, leaving judges to determine what is or is not in the public interest is preferable as it is less likely to lead to the tyranny described by Adams and Mill.

Rather than attempting to deliver an inevitably abstract definition, echoing the position of the ICO, it is preferable to provide guidance for both lawyers and media actors as to what public interest is which, in turn, creates greater legal certainty. A proposal for such guidance is set out below. However, at this juncture, it is worthy of note that the need for robust guidance on what is in the public interest has become particularly significant in respect of the operation of the section 32 Data Protection Act 1998 exemption for 'journalistic, literary or artistic' purposes. Although it has now been repealed, the provision was imported into the General Data Protection Regulation (GDPR) by virtue of Article 85 and the Data Protection Act 2018 (DPA) by paragraph 26, Part 5 of Schedule 2.[91] Pursuant to the exemption, if the data controller can demonstrate that: (i) the data is processed only for one of the special purposes; (ii) with a view to publication of some material; [92] (iii) it reasonably believes that the publication is in the public interest and; [93] (iv) it reasonably believes that compliance with the respective DPA/GDPR provision(s) would be incompatible with the

[89] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 38-39.
[90] R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 601, 673. See also Ibid. 39.
[91] The GDPR and DPA 2018 have added 'academic purposes' to the list.
[92] Section 32(1)(a)/para. 26(2)(a).
[93] Section 32(1)(b)/para. 26(2)(b).

special purpose,[94] then it provides an exemption from most statutory provisions under the DPA/GDPR which apply to the processing of personal data. According to the ICO the purpose of the exemption is to 'safeguard freedom of expression.'[95] Traditional media organisations have consistently engaged it[96] to protect their freedom of expression; a trend that has extended to citizen journalists, as illustrated by *The Law Society and others v Kordowski.*[97] In recognising that private individuals could engage in journalism Tugendhat J stated:

> 'Journalism that is protected by section 32 involves communication of information or ideas to the public at large in the public interest. Today anyone with access to the internet can engage in journalism at no cost. If what the Defendant communicated to the public at large had the necessary public interest, he could invoke the [section 32] protection for journalism and Article 10.'[98]

Thus, citizen journalists can not only be subject to causes of action founded by DPA/GDPR provisions, like the traditional media, they can also avail themselves of its protection, so long as they demonstrate they have met the conditions set out above. The protection afforded by the exemption has become more important for media actors in light of the Defamation Act 2013. Arguably the introduction of the test under section 1(1) that claimants must demonstrate 'serious harm', which for claimants trading for profit means 'serious financial loss', has made defamation a less attractive cause of action for claimants wanting to vindicate their reputation.[99] Consequently, there has been an increase in claimants using the DPA 1998 and 2018 to defend their reputation.[100] In turn, as illustrated by *Stunt v Associated Newspapers Ltd*[101] and *ZXC v Bloomberg LP*,[102] media organisations have relied on the

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[94] Section 32(1)(c)/para. 26(3).
[95] Information Commissioner's Office, *Data protection and journalism: a guide for the media,* 28: https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf.
[96] For recent examples see: *ZXC v Bloomberg LP* [2017] EWHC 328 (QB); *Stunt v Associated Newspapers Ltd* [2017] EWHC 695 (QB) (at the time of writing an appeal is outstanding).
[97] [2014] EMLR 2. *Kordowski* relates to the application of section 32 of the 1998 Act.
[98] Ibid. [99].
[99] See generally: P. Coe, 'The Defamation Act 2013: We need to talk about Corporate Reputation', *Journal of Business Law*, (2015), Issue 4, 313-334.
[100] M. Patrick and A. Mendonca, 'Using data protection law to defend your reputation: what about the new Data Protection Bill?' *Inforrm* 5th September 2017 https://inforrm.org/2017/09/05/using-data-protection-law-to-defend-your-reputation-what-about-the-new-data-protection-bill-michael-patrick-and-alicia-mendonca/.
[101] [2017] EWHC 695 (QB).

exemption to defend these claims. Like the privacy/free speech dichotomy previously discussed, what is and is not in the public interest is critically important within the context of the data protection/free speech debate, and to the operation of the exemption. In line with the arguments set out above in respect of celebrity gossip, Hugh Tomlinson QC has stated that, 'entertainment journalism' would not be protected by section 32 and, by extension, its DPA 2018 successor as it would fail the public interest condition.[103]

In order to achieve pragmatic and robust guidance three factors need to be considered,[104] pursuant to the norms and values underpinning the media-as-constitutional-component concept. The first factor relates to the form of the question that is asked when considering public interest. As opposed to asking the binary question of whether something is or is not in the public interest, the extent to which the subject matter is in the public interest should, instead, be established. This is because the subject matter, and the speech that pertains to it, can be, at the same time both inherently of public and private concern. For example, the alleged marital difficulties of a member of the UK government's Cabinet, on the one hand, clearly relate to the individual's private life, and is therefore a matter of private concern. However, on the other hand, there may exist a legitimate public interest in the story if the difficulties detrimentally impact upon the individual's ability to fulfil the responsibilities of their role.[105] Accordingly, the question to be asked is: to what extent is the subject matter of public interest and, therefore, to what extent can the media report upon its details? This is because the more a publication relates to a matter of public interest, the greater protection it will be afforded during the balancing exercise that will be undertaken by lawyers and judges when weighing up the conflicting private and public interests. The 'status' or role of the individual concerned would also impact upon this decision. For instance, if a celebrity was being treated for alcohol addiction, this is, quite clearly, a private matter relating to their health and wellbeing. However, there may, in such a case, also exist a

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[102] [2017] EWHC 328 (QB). Two years after this initial failed application by the claimant for an interim injunction Nicklin J granted a permanent injunction after a full trial ([2019] EWHC 970 (QB)). However, at this stage the section 32 argument was not raised by *Bloomberg*.

[103] H. Tomlinson QC, The "Journalism Exemption" in the Data Protection Act: Part 2, Some Practicalities' *Inforrm* 29th March 2017 https://inforrm.org/2017/03/29/the-journalism-exemption-in-the-data-protection-act-part-2-some-practicalities-hugh-tomlinson-qc/.

[104] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 39-44.

[105] This is analogous to the case of *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB) in which Tugendhat J held that the publications complained of were in the public interest as they exposed Christopher Huhne MP's 'improper conduct in deceiving his wife and the electorate in circumstances which would affect his public responsibilities as a Minister' [109].

degree of public interest, as the celebrity's addiction, and the way in which they are dealing with it, may negatively or positively affect the public's attitude towards alcohol. If however, as above, the story related to a Cabinet Minister, it would attract a greater degree of public interest, not only because it would raise the same issues as those relating to the celebrity, but it may also impact upon the Minister's ability to exercise their office, which could affect democracy itself.

The second factor is case law. In particular, the ECtHR's jurisprudence has regularly referred to 'matters of general public interest' and 'matters of public concern' within a variety of different circumstances, and thus offers a rich abundance of examples that may serve as indicators for future cases. The concept has been applied to, amongst many other things:[106] national and local level political speech and reporting;[107] criticism of public administration and justice;[108] abuse of police power;[109] criticisms of businesses and those operating businesses;[110] the search for historical truth, including scholarly historical debates regarding particular events and their interpretation;[111] violations of law, especially criminal and terrorist activity[112] and their prevention, investigation and prosecution;[113] publications on various matters of public interest, such as animal protection,[114] issues relating to tobacco advertising in sport,[115] the programming policy of public media[116] and failed cosmetic surgery provided at a private clinic by a particular surgeon.[117]

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[106] For a more comprehensive list, see: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 75; J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 41-42.

[107] *Bowman v United Kingdom* App. no. 141/1996/760/961 (ECtHR 19 February 1998), [42]; *Jerusalem v Austria* App. no. 26958/95 (ECtHR 27 February 2001), [41]; *Filatenko v Russia* App. no. 73219/01 (ECtHR 6 December 2007), [40].

[108] *De Haes and Gijsels v Belguim* App. no. 19983/92 (ECtHR 24 February 1997), [37]; *Pedersen and Baadsgaard v Denmark* App. no. 49017/99 (ECtHR 17 December 2004), [71]; *Perna v Italy* App. no. 48898/99 (ECtHR 6 May 2003), [39].

[109] *Thorgeir Thorgeirson v Iceland* App. no. 13778/88 (ECtHR 25 June 1992).

[110] *Fressoz and Roire v France* App. no. 29183/95 (ECtHR 21 January 1999), [50]; *Steel and Morris v United Kingdom* App. no. 68416/01 (ECtHR 15 February 2005) [89]; J. Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2 *Journal of European Tort Law* 255.

[111] *Monnat v Switzerland* [2006] App. no. 73604/01 [59]; *Radio France and others v France* [2004] App. no. 64915/01 [69]; *Perinçek v Switzerland* [2013] App. no. 27510/08 [103].

[112] *Leroy v France* [2009] App. no. 36109/03 [41]; *Brunet Lecomte et Lyon Mag v France* [2010] App. no. 17265/05 [41].

[113] *White v Sweden* [2006] App. no. 42435/02 [29]; *Egeland and Hanseid v Norway* [2009] App. no. 34438/04 [58]; *Salumäki v Finland* [2014] App. no. 23605/09 [54].

[114] *VgT Verein gegen Tierfabriken v Switzerland (No. 1)* [2001] App. no. 24699/94 [70]; PETA Deutschland v Germany [2012] App. no. 43481/09 [47]; *Animal Defenders International v United Kingdom* [2013] App. no. 48876/08 [102].

[115] *Société de Conception de Press et d'Edition et Ponson v France* [2009] App. no. 26935/05 [55].

The final factor to consider when attempting to establish the degree to which a publication is of public interest is the extent to which it is a purely private matter. As stated above, the two concepts can overlap. Therefore, the critical questions are, firstly, to what degree is the subject of public interest and, secondly, to what extent is it of private interest. Like public interest, private interest does not attract a definitive definition. Rather, Convention provisions and jurisprudence relating to the concept of privacy provide indications as to what private interest may mean. Pursuant to Article 8 ECHR and Article 17 ICCPR privacy incorporates the following: family, home and correspondence; an individual's name[118] or picture,[119] physical intimacy (such as nakedness, illness or injury[120]), sexuality and sexual life and orientation,[121] the personality of each individual in their relations with other individuals[122] and personal data.[123]

Conceptually, privacy rights run counter to the notion of a general right to know all information about everybody.[124] However, privacy is a relative term, which is, first and foremost, defined by the individual to whom the 'privacy attaches'. For instance, some people voluntarily give up their privacy rights (in specific circumstances) by publishing aspects (or all) of their private life on social media, whereas others protect their private 'sphere' and, as a result, have a right to have it respected.[125] However, as Oster states, this private 'sphere' is not a purely spatial notion.[126] Clearly legitimate privacy interests exist in public spaces, however, as stated above, subject matter relating to an individual's private domain may also be of public interest depending on the circumstances. For instance, the use

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[116] *Wojtas-Kaleta v Poland* [2009] App. no. 20436/02 [46].
[117] *Bergens Tidende and others v Norway* [2000] App. no. 26132/95 [51].
[118] ECtHR: *Burghartz v Switzerland* [1994] App. no. 16213/90 [24]; *Standard Verlags GmbH v Austria (No. 3)* [2012] App. no. 34702/07 [36]. See also: Article 24(2) ICCPR and Article 18 ACHR.
[119] ECtHR: *Schüssel v Austria* [2002] App. no. 42409/98; *Von Hannover v Germany (No. 1)* [2004] App. no. 59320/00 [50ff]; *Eerikäinen and others v Finland* [2009] App. no. 3514/02 [61].
[120] ECtHR: *X and Y v Netherlands* [1985] App. no. 8978/80 [22]; *Raninen v Finland* [1997] App. no. 152/1996/771/972 [63]; *Biriuk v Lithuania* [2008] App. no. 23373/03 [43].
[121] ECtHR: *Peck v United Kingdom* [2003] App. no. 44647/98 [57]; *Biriuk v Lithuania* [2008] App. no. 23373/03 [34]; *Ruusunen v Finland* [2014] App. no. 73579/10 [50].
[122] ECtHR: *Botta v Italy* [1998] App. no. 153/1996/772/973 [32]; *Von Hannover v Germany (No. 1)* [2004] App. no. 59320/00 [50].
[123] ECtHR: *S and Marper v United Kingdom* [2008] App. nos. 30562/04 and 30566/04 [41].
[124] For a fictional interpretation of this 'argument' see: D. Eggers, *The Circle* (Penguin 2013).
[125] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 43.
[126] Ibid.

of violence, and the commission of crimes, is at all times a matter of public interest per se, regardless of the view of the individual concerned.[127]

As discussed above, the actions of the media have raised questions relating to the relationship between cause and effect that apply to the contrast between public and private interest and are, therefore, worthy of brief reconsideration at this juncture. The media, as an institution, is a fundamental part of the public sphere. However, although it has, in the past, conferred a public status on private information by kindling the public's desire for 'sensational and…lurid news, intended to titillate and entertain, aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life,' [128] it is not part of its remit to create a 'pseudo-public sphere'[129] by making public what is private. As Lazarsfeld and Merton have observed, this 'status conferral function' of the media as a communication theory concept is not identical with public interest as a normative concept.[130]

3.2 MEDIA CONDUCT

In order for a publication to be of constitutional value the media-as-a-constitutional-component concept, and its social responsibility foundations, presupposes that it derives from not only accurate, but also the best available information. As Post has stated, the integrity of public discourse and, it is submitted, by extension, constitutionally valuable discourse, is contingent upon factual accuracy.[131] Historically, the traditional media's ability to reach large audiences meant that any false information it disseminated was likely to have a greater negative impact than incorrect or misleading information communicated by private individuals. The fake news phenomenon and its association with filter bubbles discussed in

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[127] Ibid.
[128] *Mosley v United Kingdom* App. no. 48009/08 (ECtHR 10 May 2011), [114]; *Von Hannover v Germany (No 1)* App. no. 59320/00 (ECtHR 24 June 2004) [65]; *Hachette Filipacchi Associes v France* App. no. 12268/03 (ECtHR 23 July 2009) [40]; *Eerikainen and others v Finland* App. no. 3514/02 (ECtHR 10 February 2009) [62]; *Standard Verlags GmbH v Austria (No 2)* App. no. 21277/05 (ECtHR 4 June 2009) [52]; *MGN Ltd v United Kingdom* App. no. 39401/04 (ECtHR 18 January 2011) [143].
[129] J. Habermas, *The Structural Transformation of the Public Sphere* (1962) (translation by T. Burger; Polity Press, 1992), 162.
[130] P. Lazarsfeld and R. Merton, 'Mass Communication, Popular Taste, and Organized Social Action' (1948), in *The Communication of Ideas* (republished in P. Marris and S. Thornham (eds), *Media Studies* (New York University Press, 2002), 20.
[131] R. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 601, 659.

the previous chapter[132] demonstrates that although it is still the case that false information communicated by the traditional media can have a huge negative impact, this is no longer reserved to the printed press or broadcast media. Rather, the symbiotic relationship discussed in Chapter One that now exists between the traditional media and citizen journalists means that false information disseminated by citizen journalists or non-media actors, can have an even greater impact, as false information can be, and very often is, recycled by the traditional media.[133] In turn, the fact that the traditional media has published it serves to justify, and add credence to, the false information.

Consequently, the operation of media freedom pursuant to the media-as-a-constitutional-component concept, based on the social responsibility theory, justifies requiring media actors to abide by certain standards of conduct when gathering, editing and imparting information and ideas. This requirement is particularly significant where the media discloses information that may negatively impact on an individual. Consequently, the ECtHR has consistently held, in defamation claims for example, that the privileged protection afforded by media freedom is subject to the media acting with transparency[134] and on an accurate factual basis.[135] Of course, requiring a media actor to ensure that each factual statement they publish is correct would have a chilling effect on the media that would, in turn, negatively impact on public discourse and the dissemination of information of constitutional value. As a result, in certain situations, media actors may deviate from the requirement to verify the factual information they disseminate. Arguably, this issue is amplified in the fast-paced modern media landscape, where news is not only constantly accessible, but is expected to be disseminated immediately, thereby creating a 'race' amongst media actors to publish information as soon as possible.[136] However, its ability to do this is contingent upon the subject matter. If individuals' rights are engaged, then regardless of the

[132] See Chapter Three sections 3.1 and 3.2.
[133] See generally: N. Davies, *Flat Earth News* (Vintage, 2009).
[134] In that at least the editor of the publication be immediately identifiable in order to facilitate effective protection against defamation and privacy violation. For example, see: *Fatullayev v Azerbaijan* [2010] App. no. 40984/07. As discussed in the Chapter Five section 3.1, this transparency requirement can cause issues for citizen journalists in respect of anonymous and pseudonymous expression.
[135] For example, see: *Bladet Tromsø and Stansaas v Norway* [1999] App. no. 21980/93 [65]; *Fressoz and Roire v France* [1999] App. no. 29183/95 [54]; *Bergens Tidende and others v Norway* [2000] App. no. 26132/95 [53].
[136] T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) *Journal of Media Law* 5(2), 202-219, 214.

situation, the media must take all reasonable steps to verify the accuracy of the information prior to publication.[137]

3.3 THE MEDIA ACTING IN GOOD FAITH

The ECtHR has consistently held that media actors must act in good faith.[138] This is illustrated by the Court's decision in *Alithia Publishing Company Ltd and Constantinides v Cyprus*[139] in which it held that civil liability for a false, defamatory statement made in bad faith is always justifiable.[140] This begs the question, what does 'good faith' look like? According to Oster, the concept consists of two distinct components: (i) the veracity of the statement and; (ii) the integrity of the motivation of the publisher,[141] both of which, it is submitted, are indicative of the norms set out at section 4 of Chapter Three that facilitate speech that conforms with the media-as-a-constitutional-component concept and its social responsibility.

The 'veracity of the statement' component is relatively uncontroversial, and therefore warrants little attention. Pursuant to Strasbourg jurisprudence, it dictates that media actors must not intentionally distribute statements that are false and harmful, or act with a negligent disregard for the truth.[142] ECtHR's case law indicates that the media must not publish statements based on improper motives or intentions, such as to stigmatise an individual or group, or to encourage violence and hatred.[143] Thus, the 'integrity of the motivation of the publisher' component is of even greater significance than the 'veracity of the statement' component, as it measures the value of the speech according to the speaker's intentions. Accordingly, this consideration by the courts of the speaker's intentions in respect of factual statements means that they effectively determine whether the respective publication is morally acceptable or unacceptable. However, if the publication, and its factual statements

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[137] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 45.
[138] For example, see: *Bladet Tromsø and Stansaas v Norway* [1999] App. no. 21980/93 [65]; *Fressoz and Roire v France* [1999] App. no. 29183/95 [54]; *Bergens Tidende and others v Norway* [2000] App. no. 26132/95 [53]; *Novaya Gazeta and Borodyankiy v Russia* [2013] App. no. 14087/08 [37].
[139] [2008] App. no. 17550/03 [67].
[140] See also: *Pedersen and Baadsgaard v Denmark* [2004] App. no. 49017/99 [78].
[141] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 45-47.
[142] *Alithia Publishing Company Ltd and Constantinides v Cyprus* [2008] App. no. 17550/03 [66]; *Gutiérrez Suárez v Spain* [2010] App. no. 16023/07 [38].
[143] *Nilsen and Johnsen v Norway* [1999] App. no. 23118/93 [50]; *Selistö v Finland* [2004] App. no. 56767/00 [68]; *Lindon, Otchakovsky-Laurens and July v France* [2007] App. nos. 21279/02 and 36448/02 [57].

subject to the dispute relate to a matter of public interest, the application of moral scrutiny should be rejected, as it is not within the remit of the courts to impose their own moral standards on the media. [144] As advanced by Habermas and Oster, this position accords with the principles underpinning discourse theory: validity claims arising from descriptive sentences, which exist to ascertain facts, can be accepted or rejected from the standpoint of the truth of proposition; to the contrary, only evaluative sentences or value judgments can be accepted or rejected as a result of the speaker's express intentions or feelings.[145] Thus, in *Beckley Newspapers v Hanks Corporation*[146] the US Supreme Court held that where a false defamatory statement has been published 'from personal spite, ill will or desire to injure' it does not amount to malice pursuant to *New York Times v Sullivan*[147] so long as the speaker believed the statement to be true and was not reckless in respect of their truthfulness. Therefore, the Supreme Court applies the 'malice' standard 'only as an instrument pertaining to the factual veracity of the statement and so as a policy to minimize the chilling effect of the law of defamation on speech on public figures',[148] but not as a moral sincerity test.

Additionally, the ECtHR, in particular, imposes a further 'duty and responsibility' on the media that correlates with the media-as-a-constitutional-component concept and social responsibility theory: to act according to the 'ethics of journalism' and the 'principles of responsible journalism.' This duty and responsibility applies not only to the content of the publication, but also to the media actor's newsgathering activities and methods and the manner in which the information is presented. These ethical standards are often found in media self-regulatory codes of conduct, such as the BBC's Editorial Guidelines, and are inherent within the new regulatory framework advanced in Chapter Seven. Although not formal laws, they serve to animate the standards of care that media actors are subject to. Accordingly, the Strasbourg Court has held that a violation of these ethics could tip the balance against media freedom in any given case.[149]

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[144] J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 46.
[145] Ibid; J. Habermas, *The Theory of Communicative Action, vol. 1: Reason and the Rationalization of Society* (1981) (translation by T. McCarthy, Beacon Press, 1984), 39, 99; J. Habermas, *The Theory of Communicative Action, vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (1981) (translation by T. McCarthy, Beacon Press, 1987), 120.
[146] 389 US 81, 82 (1967).
[147] 376 US 254 (1964).
[148] R.C. Post, 'Defaming Public Officials: On Doctrine and Legal History' (1987) *American Bar Foundation Research Journal* 539, 553; J. Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2015), 47.
[149] *Ricci v Italy* [2013] App. no. 30210/06 [57].

4. CONCLUSION

This chapter has established how the concept advanced in Chapter Three affects the various elements critical to the application and operation of the right to media freedom. It has complemented the previous chapter by providing a complete picture of the concept's impact on the freedom of the media, by exploring the parameters it sets, and the limits it imposes, to all media actors, regardless of the medium used to disseminate information. In doing so it has completed the normative framework upon which the remainder of this thesis will build upon. Specifically, it has set out the standards of behaviour and the norms of discourse that are imposed by the media-as-a-constitutional-component concept, as underpinned by social responsibility theory and the argument from democratic self-governance. Under this framework, for a media actor to benefit from the enhanced right to media freedom, it must abide by these standards and norms. Equally, as is discussed in Chapter Seven, which advances a new regulatory framework, they are inherent within its rationale. Therefore, for media actors to benefit from, not only media freedom, but the advantages of membership of the regulatory scheme, they must adhere to these standards and norms.

Thus, the following chapters will explore how the concept, and the standards and norms set out in this chapter that it imposes, could better deal with some of the legal challenges that arise from citizen journalism operating within the current libertarian paradigm, as identified in the previous chapter. In particular, it will consider: balancing speaker and audience interests in respect of anonymous and pseudonymous speech; balancing state interests and individual rights in respect of maintaining the integrity of trials, the open justice principle and protecting reputation, and; regulating citizen journalists.

CHAPTER FIVE

ANONYMOUS AND PSEUDONYMOUS SPEECH

1. INTRODUCTION

As alluded to in Chapter Three,[1] the Internet facilitates anonymous and pseudonymous expression, [2] which has become synonymous with citizen journalism. This chapter begins, at section 1.1, by briefly introducing the concepts of speaker and audience interests. It does this by setting out, in broad terms, the arguments that are analysed in detail throughout this chapter in favour and against these conflicting interests. Section 2 sets out how anonymous and pseudonymous speech is treated in the UK, US and by the ECtHR. It establishes that UK jurisprudence has, traditionally, treated free speech, and by extension anonymous and pseudonymous expression, not as a right, but rather a liberty, in that it exists only where its exercise is not restricted by law. Recent case law suggests that this is a position predominantly based on audience interests, rather than that of the speaker.[3] It argues that this position has evolved to an extent. Consequently, a right to free speech and, therefore anonymous and pseudonymous expression, does, in fact, exist as part of the free speech guarantee. However, this right is not absolute and, as a result, is only subject to a limited level of protection. This view is then compared with the polarised position of the US (and to an extent, Germany) in which exists a clearly recognised speaker interests-orientated right to anonymous and pseudonymous speech, which is subject to constitutional protection. What is apparent from the Strasbourg case law is that protection afforded for anonymous and pseudonymous expression falls short of an absolute right. Consequently, at present at least, it seems to sit, rather opaquely, somewhere between the two sides. This feeds into section 3,

[1] See section 3.2.2.

[2] See generally: S. Levmore, 'The Internet's Anonymity Problem' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 50-67; J. Bartlett, *The Dark Net Inside the Digital Underworld* (Random House, 2014), ch. 2; E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), ch. 6; R. Arnold and M. Sundara Rajan, 'Do Authors and Performers Have a Legal Right to Pseudonymity' (2017) 9(2) *Journal of Media Law* 189; P. Coe, 'Anonymity and Pseudonymity: Free Speech's Problem Children' *Media & Arts Law Review* (2018) 22(2) 173-200; B. Arnold, 'Has social media really shifted the line between personal and private forever? https://inforrm.wordpress.com/2016/10/13/has-social-media-really-shifted-the-line-between-personal-and-private-forever-bruce-baer-arnold/. See also the Director of Public Prosecution's comments relating to Crown Prosecution Service guidelines on prosecuting online crimes: 'Internet trolls targeted with new legal guidelines', 10th October 2016 http://www.bbc.co.uk/news/uk-37601431.

[3] *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22.

which examines the problems that are symptomatic of relying exclusively on either speaker or audience interests at the expense of the other. It argues that, particularly in the modern context of online speech and citizen journalism, this bifurcated approach, which has hitherto been applied in the UK, Europe and the US, can lead to a 'double-edged sword': on the one side, pursuant to audience interests, people may be dissuaded from participating in the exchange of information and ideas, because their anonymity or pseudonymity is not protected; on the other side, a constitutionally protected right to free speech based entirely on speaker interests could inadvertently protect unwanted and damaging speech. Ultimately, this chapter argues that neither interest should, in fact, trump the other. Rather, to support citizen journalism, which is now an integral part of the modern media, and critical to how we communicate, a balance needs to be struck between these interests. Thus, the chapter concludes at section 4, by exploring how the media-as-constitutional-component concept, as underpinned by social responsibility and the argument from democratic governance, can achieve this harmonisation.

1.1 INTRODUCING THE CONCEPTS OF SPEAKER AND AUDIENCE INTERESTS

As set out above, this chapter considers the contrasting positions of UK, European and US jurisprudence in respect of reliance on speaker or audience interests. What these concepts mean in practice will depend on whether they are, in any given context, underpinned by free speech or privacy rationales. By way of introducing these concepts, the following paragraph sets out the broad arguments in favour and against the competing interests. These arguments are applied and analysed in-depth throughout the chapter.

The privacy rationale for anonymity and pseudonymity underpins the right to keep the speaker's identity secret.[4] From a freedom of expression and media freedom rationale perspective, particularly in the context of citizen journalism, protecting the speaker interests, by preserving their anonymity or pseudonymity, will encourage them, and others, to speak more freely, and therefore will facilitate the dissemination of more information; if they are

[4] See: Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 22nd May 2015, A/HRC/29/32, [16]ff; J. Oster, *European and International Media Law* (Cambridge University Press, 2017), 47; The privacy rationale for anonymity and pseudonymity is considered in light of Eady J's judgment in *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22 at section 2.1 below.

permitted to communicate anonymously or pseudonymously they do not need to fear harassment or prosecution.[5] So far as audience interests are concerned, there are conflicting arguments. As set out in section 3, on the one hand, it can be said that the anonymity or pseudonymity of the speaker can benefit the audience, in so far as it promotes free speech, as an anonymous or pseudonymous speaker is more inclined to impart information and ideas to the audience for the reasons set out above. On the other hand, the audience interest will usually favour transparency, for the following reasons: (i) knowing the identity of the speaker enables the audience to evaluate the speaker's veracity; (ii) if the speaker's identity is known they are more likely to express themselves responsibly, and less likely to engage in harmful, offensive, irresponsible and damaging speech; (iii) remedial action and/or prosecution with respect to damaging, offensive and harmful speech is easier to facilitate if the identity of the speaker is known.[6] Section 4 advances the argument that the media-as-a-constitutional-component concept can bring harmony to these competing interests. By virtue of the standards of behaviour and norms of discourse it imposes, and the regulatory framework that it underpins,[7] its adoption could satisfy the audience interests in points (i) to (iii) whilst facilitating a speaker interest orientated approach.

2. A POLARISATION OF LAW AND JURISPRUDENCE

Through recourse to both statute and case law relating, where possible, to online speech and citizen journalism, this section considers how the respective law has been applied to anonymous and pseudonymous speech. In doing so, it looks at jurisdictions that have opposing views as to the extent to which such expression is protected.

[5] Ibid (Oster); R. Arnold and M. Rajan, 'Do authors and performers have a legal right to pseudonymity' *Journal of Media Law* (2017) 189-214, 198.
[6] Ibid. (Arnold and Rajan).
[7] See Chapter Seven.

2.1 THE VIEW FROM THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS: A QUALIFIED RIGHT TO ANONYMOUS AND PSEUDONYMOUS SPEECH

In his book *Anonymous Speech*, Barendt provides a detailed history of anonymous and pseudonymous speech in the UK. [8] What is clear is that, despite this established tradition, and unlike the US, where a strong constitutional right to anonymous speech has emerged, in the UK an absolute right is not recognised.[9] This position derives from how freedom of expression has historically been treated under UK law: as a bare or residual liberty rather than a right, existing only where the law does not restrict its exercise.[10] Thus, traditionally at least, the 'freedom lives…in the gaps of the criminal and civil law'.[11] However, as illustrated by cases such as *Brutus v Cozens*[12] and *Redmond-Bate v DPP*,[13] a stronger principle of free speech has been applied by the courts to narrowly interpret legislation so that the respective statute's interference with freedom of expression is minimised. Equally, a common law right to free speech has been established by jurisprudence relating to, for instance, the creation and development of defences of fair comment and public interest privilege to libel actions.[14] The protection afforded to freedom of expression was augmented further by the incorporation of the ECHR, including Article 10, into UK law by the Human HRA 1998. As discussed in Chapter Three, pursuant to section 6(1), the courts must take account of the right when

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[8] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), ch. 2.

[9] For the US and German position, see section 2.1.1 below. This view on the positions of English and US law is supported by Arnold and Rajan: R. Arnold and M. Rajan, 'Do authors and performers have a legal right to pseudonymity' *Journal of Media Law* (2017) 189-214, 197.

[10] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 81, 89. Barendt provides examples of laws such as obscenity, libel and contempt of court, which have restricted the application of freedom of expression.

[11] Ibid.

[12] [1973] AC 854. The House of Lords held that the word 'insulting', pursuant to section 5 of the Public Order Act 1936, should not be interpreted to penalise the use of offensive language during an anti-apartheid demonstration at Wimbledon.

[13] [2000] HRLR 249; (1999) 7 BHRC 375; [1999] Crim LR 998. The case related to three women Christian fundamentalists who were preaching from the steps of Wakefield Cathedral. Fearing a breach of the peace amongst the crowd, a police officer asked the women to stop, and subsequently arrested them for willfully obstructing an officer in the execution of his duty contrary to section 89(2) of the Police Act 1996. The Court of Appeal held that the police had no right to stop citizens engaging in lawful conduct, unless there were grounds to fear that it would, by interfering with the rights or liberties of others, provoke violence which in those circumstances might not be unreasonable. Accordingly, the preachers were entitled to say things which members of their audience may find irritating or controversial, but they did not threaten or provoke violence. As a result, the police officer was not acting in the execution of his duty when he told them to stop.

[14] For example, see: *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743; *Spiller v Joseph* [2011] 1 AC 852, [107]-[108]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Jameel v Wall Street Journal Europe* [2007] 1 AC 359.

developing the common law.[15] Similarly, section 3 imposes an obligation on the judiciary to interpret legislation in conformity with Article 10. As a result, it is no longer correct to regard free speech as a mere residual liberty.[16]

How do these developments relate to online speech and, in particular, citizen journalism, in the context of anonymous and pseudonymous communication? As set out above, it is submitted that, as is the case with the print and broadcast media, there is, under UK law, a right, albeit not an absolute one, to communicate anonymously and pseudonymously online.[17] However, this type of communication is subject to the same legal restrictions that can be applied to the traditional media, such as public order laws, laws relating to hate speech, obscenity laws, the Protection from Harassment Act 1997[18] and, more specifically, section 127 of the Communications Act 2003[19] and sections 32[20] and 33[21] of the Criminal Justice and Courts Act 2015. In the context of civil liability and, in particular, the protection of reputation, section 5 of the Defamation Act 2013 provides website operators with a defence to defamation actions where an operator did not, itself, post the allegedly defamatory imputation on the website. The defence will operate so long as the claimant can identify the speaker who posted the imputation, or the operator takes steps to provide the claimant with the speaker's full name and address or, if the speaker prefers, to remove the statement from the website.[22] Consequently, the only way anonymous speakers will be able

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[15] See Chapter Three section 3.1.

[16] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 90.

[17] The existence of such a right is demonstrated by section 10 of the Contempt of Court Act 1981 which provides that a court cannot compel a person to disclose, nor is a person guilty of contempt of court for refusing to disclose, the source of information contained within a document for which that person is responsible, unless the court is satisfied that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

[18] J. Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355, 357-365.

[19] This provision makes it an offence to send through a public electronic communications network a message which is 'grossly offensive or of an indecent, obscene, or menacing character'. For analysis of this provision see: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 31-35. See also: *DPP v Woods* Unrep. October 2012 (MC); *Chambers v DPP* [2012] EWHC 2157.

[20] This amended the offence of sending a letter, electronic communication or article of any description which conveys a threat or abuse, pursuant to section 1 of the Malicious Communications Act 1988, to a triable either way offence. The amendment was made, partly, to tackle concerns over an increase in 'cyber-bullying'.

[21] This provision has made 'revenge porn' a specific triable either way offence. It is defined as '[d]isclosing private sexual photographs and films with intent to cause distress', and covers the sharing of images, both online and offline. This means that images posted over the Internet, as well as those distributed by text message, email or in hard copy are captured.

[22] For detailed analysis of this provision see: J. Price QC and F. McMahon (eds), *Blackstone's Guide to the Defamation Act 2013*, (Oxford University Press, 2013), ch. 6.

to keep their defamatory statements on websites is with the website operator's assistance. This is unlikely as the operator is then, by default, exposed to liability. Thus, these provisions, relating to both criminal and civil liability, appear to suggest that online anonymous communication is, to an extent, discouraged, and clearly have the potential to limit freedom of anonymous and pseudonymous speech. Therefore, they could be subject to challenge. However, it is likely that this would be met with strong arguments to the contrary, as the courts are unlikely to favour submissions that they should not be applied when they operate to protect against, for example, defamatory attacks,[23] invasions of privacy and expression which undermine the integrity of a trial.

The existence or otherwise of a right to anonymity was considered in *Author of a Blog v Times Newspapers Ltd*[24] as an element of personal privacy, as opposed to an aspect of the right to freedom of expression. The case concerned a blog, known as *Night Jack*. The author of the blog used it as a platform for discussing his work as a serving police officer. Within these discussions he was extremely critical of government ministers and police operations. Indeed, in his judgment, Eady J was of the opinion that much of what the claimant published could be characterised as 'political speech'.[25] *The Times* wanted to reveal the blogger's identity;[26] consequently he applied to the court for an interim injunction to restrain the newspaper from publishing any information that could lead to his identification as the person responsible for the blog. Hugh Tomlinson QC, on behalf of the claimant, argued in terms of his right to privacy. However, it is arguable that, additionally, some of the arguments were underpinned by the free speech rationale. Both the privacy and free speech arguments were predominantly based on the interests of the speaker. He advanced the argument that the claimant, and other citizen journalists, would be 'horrified' if their anonymity could not be protected,[27] a proposition clearly based on the privacy rationale that anonymity (and, by

[23] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 90.
[24] [2009] EMLR 22.
[25] [2009] EMLR 22, [24].
[26] Interestingly, this case dealt with rather unique circumstances: *The Times* journalist had identified the claimant by deduction not, as was accepted by counsel for the claimant, by breach of confidence. Therefore, the matter related to whether an enforceable right to maintain anonymity existed in the situation where another person has been able to deduce the identity in question. Eady J recognised that bloggers generally may want to conceal their identity. However, in relying on *Mahmood v Galloway* [2006] EMLR 26, Eady J stated that it is a 'significantly further step to argue, if others are able to deduce their [the claimant's] identity, that they [*The Times*] should be retrained by law from revealing it.' Thus, potentially at least, the situation may be different if the identity of the speaker could not be deduced but, for example a newspaper, wanted to disclose it. Ibid. [3], [9] and [10].
[27] Ibid. [4].

extension, pseudonymity) allows speakers to keep certain information secret, including their identity.[28] He submitted, firstly, as a general proposition, that 'there is a public interest in preserving the anonymity of bloggers.'[29] It is submitted that this argument is founded on the free speech rationale, and is based, foremost, on speaker interests, as preserving the anonymity of citizen journalists enables them to exercise their right to impart information and ideas, as guaranteed by Article 10(1) ECHR (and that, conversely, revealing their identity would restrict their right to do this).[30] Secondly, he suggested that there was no public interest in the disclosure of the claimant's identity, as the publication of such information would make no contribution to a debate of general interest.[31] In giving judgment for the defendant, Eady J did not expressly accept or reject any arguments based on the free speech rationale by the claimant. However, he rejected the claimant's application, and their privacy arguments, on the ground that 'blogging is essentially a public rather than a private activity,'[32] consequently the claimant had no reasonable expectation of privacy.[33] He went on to state that even if this requirement had been met, the public interest in revealing that a police officer was expressing strong criticism of the police and political figures outweighed his right to privacy[34] and that revealing his identity enabled readers to assess his veracity.[35] Thus, the judgment seems, largely, to ignore any speaker-orientated arguments based on the free speech rationale advanced on behalf of the claimant and, rather, based on the interests of the audience, disagrees with counsel's second argument.

A discrete area of UK law where the privacy rationale has successfully been applied to protect anonymity relates to *Norwich Pharmacal* orders.[36] For instance, in *Totalise plc v The Motley Fool Ltd*[37] the claimant had successfully applied for such an order for the

[28] Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 22nd May 2015, A/HRC/29/32, [16]ff; Oster above n 4, 47.
[29][2006] EMLR 26 [5].
[30] Ibid. [18]. Of course, there is the secondary argument that preserving the anonymity of bloggers protects the audience interest in receiving information of public interest, as bloggers may be dissuaded from doing so should their identity be compromised.
[31] Ibid. [22].
[32] Ibid. [11], [29] and [33].
[33] This is a threshold requirement for claimant's pleading misuse of private information.
[34] [2009] EMLR 22, [21]-[23] and [33].
[35] Ibid. 21. See analysis and criticisms of this point at section 3.1 below.
[36] *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133: Under the *Norwich Pharmacal* procedure the court can order that an individual or entity, who is not a party to the court proceedings, but who is innocently or not, mixed up in the wrongdoing, to assist a party to the proceedings, by providing specified information or documents in respect of the proceedings.
[37] [2001] EWCA Civ 1897; [2002] 1 WLR 1233.

disclosure by *Motley Fool* of the identity of a third party who had posted, pseudonymously, defamatory comments of the claimant on a bulletin board. In giving the judgment of the Court of Appeal, Aldous J said that in such cases 'the court must be careful not to make an order which unjustifiably invades the right of the individual to respect for his private life' and that there was 'nothing in Article 10' which supported the argument that 'it protects the named but not the anonymous' and that 'there are many situations in which…the protection of a person's identity from disclosure may be legitimate.'[38] Consequently, as observed by Arnold and Rajan, in the context of pseudonymity specifically: '[c]onsistently with [*Totalise*] there have been cases…in which *Norwich Pharmacal* orders for the disclosure of the identities of pseudonymous persons posting on chatrooms and websites have been refused on the ground that the wrongs alleged against them did not justify invading their private lives.'[39]

Notwithstanding the jurisprudence relating to *Norwich Pharmacal* orders, Eady J's judgment in *Author of a Blog* clearly suggests, and is indicative of the fact, that freedom of anonymous and pseudonymous speech enjoys very limited protection under modern UK law. This case, along with *Reno v American Civil Liberties Union*,[40] are considered in more detail in section 3, as they animate the problems associated with relying exclusively on either audience or speaker interests respectively.

Under section 2(1) HRA 1998 domestic courts must take account of decisions of the ECtHR, although any such ruling does not bind it. As a result, anonymous and pseudonymous expression could be subject to stronger protection under UK law if there were a clear indication of the existence of a free speech anonymity right from the Strasbourg Court. However, the Court has, to date, not been required to consider the extent to which a limit imposed on anonymous speech would render any such limit as incompatible with Article 10 ECHR. If such an issue were to be brought before the Court, it is likely that a state would robustly argue for restrictions to be placed on anonymous and pseudonymous expression, for example, on the basis that it needs to protect the right to respect for private

[38] Ibid. [25].
[39] R. Arnold and M. Rajan, 'Do authors and performers have a legal right to pseudonymity' *Journal of Media Law* (2017) 189-214, 202. The cases cited by Arnold and Rajan include: *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB) and *Clift v Clarke* [2011] EWHC 1164 (QB); [2013] Info TLR 13. See also: M. Daly, 'Is There an Entitlement to Anonymity? A European and International Analysis' (2013) *European Intellectual Property Review* 198.
[40] 521 US 844 (1997). See section 2.1.1.

life pursuant to Article 8 ECHR, including the right to reputation, which can require, as discussed above in relation to section 5 of the Defamation Act 2013, disclosure of the speaker's personal details. Additionally, far from providing clarity on the existence, or otherwise, of a right to freedom of anonymous speech conveyed online and via social media, ECtHR jurisprudence on the matter has been equivocal. In *KU v Finland*[41] the Court held that any guarantee of privacy and freedom of expression rights for an individual placing an anonymous advertisement is not absolute, and must accord precedence to other rights and interests, such as the prevention of crime and the protection of rights of others. However, although the ECtHR's decision in *Delfi AS v Estonia*[42] seems to be based explicitly on audience interests in free speech,[43] the Court afforded online anonymous communication a greater level of importance. *Delfi*, an Internet news portal service, had been required by the Estonian courts to compensate the victim of threatening and defamatory comments which had been posted on its service, even though it operated a 'notice-and-take-down' procedure when readers complained of these statements. The issue before the Court was whether or not there had been an infringement of the freedom of expression of the owner of *Delfi*. The Grand Chamber of the Court held that the Estonian Supreme Court's ruling was compatible with the ECHR, stating that '[i]t is mindful…of the interest of Internet users in not disclosing their identity.'[44] According to the Court, anonymity 'is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet.'[45] Consequently, it rejected *Delfi's* argument that victims of defamatory statements must bring defamation proceedings against the authors of comments after their identity had been established.[46] Other Council of Europe institutions have emphasised the importance of online anonymous communication. For instance, in *Delfi* the Court considered a Declaration of the Council of Ministers on freedom of communication on the Internet.[47] Principle 7 of the Declaration recognises that 'to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the [I]nternet not to disclose their identity.'[48] Additionally, an earlier Recommendation of the

[41] App. no. 2872/02 (2009) 48 EHRR 52.
[42] App. no. 64569/09, Decision of the First Section Chamber of the Court, 10th October 2013, (2014) 58 EHRR 29, upheld by the Grand Chamber of the Court in a Decision of 16th June 2015, [2015] EMLR 26.
[43] Speaker and audience interests are discussed in section 3.
[44] [2015] EMLR 26, [147].
[45] Ibid. [147].
[46] Ibid [151].
[47] Ibid. [44].
[48] Declaration of Council of Ministers adopted on 28th May 2003, Principle 7 (Anonymity).

Committee of Ministers had suggested recognition of anonymity in the context of Internet communications as an aspect of personal privacy protection.[49] Although these provisions, and the Strasbourg Court's decision in *Delfi*, do not, as yet, establish an absolute right to anonymous and pseudonymous speech, it is submitted that such explicit recognition of the importance of anonymous and pseudonymous expression from the ECtHR[50] and Council of Europe institutions suggests that, in the correct circumstances, such a right could be brought into existence. As will be seen in the following section, the US position (and, to an extent, the position in Germany) is markedly different. In the US, a constitutional right to anonymous speech, both generally, and online, has been consistently held to exist and has been protected.

2.2 THE GERMAN AND US POSITION: THE *SPICKMICH CASE* AND *MCINTYRE V OHIO ELECTIONS COMMISSION* – AN ABSOLUTE RIGHT TO ANONYMOUS AND PSEUDONYMOUS SPEECH?

Unlike the ECtHR's equivocal stance on anonymous and pseudonymous online expression, German jurisprudence is clearer as to the courts' adopted position. This is illustrated by the *Spickmich* case,[51] which concerned a teacher who argued that her name, the details of her school and, specifically, anonymous assessments of her teaching by pupils should be removed from www.spickmich.de, a portal for community schools, which was accessible via registration, by providing the user's name, email address and school details. The issue before the German courts concerned conflicting rights. On the one hand, the teacher submitted that the storage and publication of the information contravened her right to informational self-determination – in that she should be able to determine what, if any, information should be made available to those with access to the portal. This privacy right is subject to robust protection under German law.[52] However, on the other hand, the argument was advanced

[49] Council of Europe, Committee of Ministers, Recommendation No. R. (99) 5 *For the Protection of Privacy on the Internet*, 23rd February 1999, Guidelines 3 and 4.
[50] See also: *Høiness v Norway* [2019] App. no. 43624/14.
[51] Decision of 23rd June 2009, Neue Juristische Wochenschrift (NJW) 2009, 2888.
[52] The origins of the right to informational self-determination date back to 1983, when the German Federal Constitutional Court declared unconstitutional certain provisions of the Revised Census Act that had been adopted unanimously by the German Federal Parliament but were challenged by diverse associations before the Constitutional Court. BVerfGE 65, 1 – Volkzählung Urteil des Ersten Senats vom 15th December 1983 auf die mündliche Verhandlung vom 18th and 19th October 1983 – 1 BvR 209, 269, 362, 420, 440, 484/83 in den Verfahren über die Verfassungsbeschwerden; See generally: A. Rouvroy and Y. Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in S. Gutwirth et al (eds), *Reinventing Data Protection?* (Springer, 2009).

that, based on the right to freedom of expression, students should be able to assess the teaching qualities of their teachers anonymously. The Federal Supreme Court,[53] in upholding the rulings of the lower court, dismissed the teacher's complaint. The Court's decision was founded on three key points: firstly, anonymity is an inherent aspect of the use of the Internet;[54] secondly, in any event, section 13 VI of the Telemedia Act 2007 protects anonymity and pseudonymity. Pursuant to this provision service providers must, as far as is technically possible and reasonable, allow the anonymous or pseudonymous use of their services; and, finally, as a matter of principle, an obligation to identify an individual with the expression of a particular view would, both generally, and in the specific context of this case, lead to self-censorship from fear of the negative consequences of identification.[55] The Court held that the imposition of such an obligation would be incompatible with Article 5.1 of the German Basic Law.[56] At this juncture it is worth considering that the Court's claim that 'anonymity is an inherent aspect of the use of Internet' could be perceived as a naturalistic fallacy, and open to the rejoinder that just because anonymity is largely a part of cyber-culture, does not force the conclusion that it ought to be that way.[57] Instead, it is submitted that the judgment is more subtle and nuanced, as it does not impose a de facto 'cyber-right' to anonymity, but rather 'reveals the strong attachment' of German law to the freedom to use online communications anonymously,[58] in that it demonstrates that freedom of such speech takes precedence over the important countervailing right to informational self-determination as an element of personal privacy. Thus, the reasoning of the Court is clearly indicative of a speaker interest-orientated approach. It is less equivocal than the jurisprudence of the ECtHR and demonstrates stronger support for speaker interests than is present in the UK. For instance, although the context of the cases is different, in *Author of a Blog*, in Eady J's judgment, the speaker's identity was required to enable the audience to assess the value of his publications. In other words, the public interest dimension of the speaker's claim was impaired by anonymity.[59] To the contrary, the citizen journalist's argument for anonymity

[53] The Bundesgerichtshof.
[54] Indeed, this had been recognised in an earlier decision of the Court, which held that contributors to a discussion forum must accept the risk of personal attack from pseudonymous participants: Decision of 27th March 2007, NJW 2007, 2558.
[55] Decision of 23rd June 2009, Neue Juristische Wochenschrift (NJW) 2009, [38].
[56] The Court also found that the portal facilitated the right of the students, parents and teachers to receive information, which is also protected by article 5.1: Ibid. [40].
[57] P. Coe, 'Anonymity and Pseudonymity: Free Speech's Problem Children' *Media & Arts Law Review* (2018) 22(2) 173-200, 182.
[58] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 153.
[59] [2009] EMLR 22, [21]-[23].

was based on the fact that it allowed him (and other citizen journalists) to disseminate important information, as a whistleblower, without fear of reprisals from his employers or the state.[60] This argument is, fundamentally, the same as the Court's reasoning for dismissing the teacher's complaint in *Spickmich* as, in the Court's view, anonymity allowed the speaker (the children) to advance their honest view without fear of retribution. However, unlike the US position examined below, the *Spickmich* decision is not solely based on the interests of the speaker. Rather, it is submitted that the judgment also exhibits elements of an audience interest approach. This is on the basis that the free dissemination of information about the teacher enabled those with access to the portal to make an informed decision as to the performance of the teacher and the school.

In the US there has been even stronger jurisprudential support for freedom of anonymous and pseudonymous online expression that is, therefore, diametrically opposed to the UK position. The Supreme Court case of *McIntyre v Ohio Elections Commission*[61] concerned Margaret McIntyre, who had distributed leaflets at public meetings at an Ohio school. The leaflets expressed opposition to a proposed school tax levy. McIntyre had produced the leaflets at home on her own computer. In some of the leaflets she was identified as the author. However, others were addressed from 'Concerned Parents and Tax Payers'. She continued to distribute these particular leaflets despite being warned that they contravened § 3599.09(A) of the Ohio Revised Code, pursuant to which, authors were not permitted to write, print or disseminate campaigning literature without providing their name and address. Consequently, McIntyre was fined, a decision upheld by the Ohio State Supreme Court. As in *Author of a Blog*, the 'speech' in *McIntyre* was political in nature,[62] as it engaged a State provision related specifically to 'campaign literature'. It is submitted that the fundamental basis of the State Supreme Court's judgment, founded on audience interests, is similar to Eady J's reasoning in *Author of a Blog*, in which it was held that the blogger's anonymity impaired the operation of the public interest as his identity was required to better enable the audience to determine his veracity.[63] According to the State Supreme Court the burden placed on an author of campaign literature to identify themselves is 'more than counterbalanced' by the public interest in 'providing the audience to whom the message is

[60] Ibid. [5].
[61] 514 US 334 (1995).
[62] [2009] EMLR 22, [24].
[63] Ibid. [21]-[23].

directed with a mechanism by which they may better evaluate its validity' and enables the identification of authors publishing fraudulent and defamatory communications.[64] Eventually, the case was heard by the US Supreme Court. [65] Stevens J, giving the judgment of the Court, stated: 'an author's decision to remain anonymous…is an aspect of the freedom of speech protected by the First Amendment'.[66] As a result of this seminal ruling, which has been followed in a number of subsequent cases,[67] enshrined within the First Amendment is an absolute free speech right to communicate anonymously or pseudonymously.[68]

Two strands emerge from Stevens J's judgment to justify the anonymity right.[69] The first is paradigmatic of the argument from democratic self-governance and, as is advanced at section 3 below, goes to a speaker's interest in anonymous expression. It advances the argument that '[a]nonymity is a shield from the tyranny of the majority'[70] and, according to Barendt, enables 'radicals and dissenters to express unpopular views free from the fear of retaliation or prosecution.'[71] This instrumental argument is clearly aligned to free speech rationale arguments in *Author of a Blog*,[72] and the speaker interest-orientated reasons given by the Federal Supreme Court in the *Spickmich* case. Similarly, in an earlier decision, the Supreme Court, in *Talley v California*,[73] recognised 'a tradition of anonymity in the advocacy of political causes'[74] accordingly, in the absence of anonymity, valuable political speech may

[64] 618 NE 2d 152 (1993). The State Supreme Court relied on the case of *First National Bank of Boston v Bellotti* 435 US 765 (1978) in which it was held that not only are such interests sufficient to overcome the minor burden placed on individuals to disclose their identity in this context, but that these interests and pursuant regulations would survive constitutional scrutiny.
[65] 514 US 334 (1995).
[66] Ibid. at 342. Ginsburg J and Thomas J gave separate concurring judgments. Thomas J gave an account of anonymous political writing in the US in the eighteenth century. From this examination he inferred that the Founding Fathers of the Constitution intended anonymous speech to be covered by the First Amendment: Ibid. 359-371.
[67] As Barendt observes, although the decision has been distinguished in cases relating to litigation concerning the disclosure of election expenditure, its 'fundamental correctness' has rarely been questioned within US jurisprudence. E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 56 and ch.7.
[68] For example, see: *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* 515 US 557 (1995); *Buckley v American Constitutional Law Foundation* 525 US 182 (1999); *Watchtower Bible and Tract Society of New York v Stratton* 536 US 150 (2002); *American Civil Liberties Union of Nevada v Heller* 378 F3d 979 (2004).
[69] L. Lidsky and T. Cotter, 'Authorship, Audiences and Anonymous Speech' (2006) 82 *Notre Dame Law Review* 1537, 1542-1544,
[70] *McIntyre* 514 US 334 (1995), 357.
[71] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 58.
[72] [2009] EMLR 22, [4] and [18].
[73] 362 US 60 (1960).
[74] *McIntyre* 514 US 334 (1995), 343.

not be published.[75] The second strand is rights-based. According to Stevens J 'the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude'.[76] Thus, an author is free to determine the contents of their publication, and they are entitled to write anonymously or pseudonymously. As a rejoinder to the contention that an audience may have a real interest in knowing the identity of the author to assess their credibility and the strength of their views, Stevens J employed the argument that to compel an individual to disclose their name (or any other identifying details) is equivalent to requiring them to express a particular opinion. [77] This argument is considered in more detail in section 3 below.

The *McIntyre* decision has been followed in the context of online communications[78] and, therefore, by extension, would apply to citizen journalism. In *American Civil Liberties Union v Zell Miller*[79] a federal District Court held that a Georgia statute making it an offence to transmit messages over the Internet using a false name was invalid, as it contravened the First Amendment. In the same year, in *Reno v American Civil Liberties Union*,[80] the US Supreme Court, in determining that there was no basis for qualifying the protection afforded by the First Amendment guarantee of freedom of speech in the context of the Internet, rejected the argument that the Internet could be subject to similar special content regulation that had traditionally been applied to, and had constrained, broadcast media. In particular, the Court stated that although some of its earlier cases had recognised special justifications for regulation of the broadcast media, these are not, necessarily, applicable to other speakers.[81] It

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[75] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 58.
[76] *McIntyre* 514 US 334 (1995), 348.
[77] Ibid. 348-349. Consequently, the Supreme Court rejected the Ohio State's argument that the disclosure requirement was justified as it provided the audience with more information.
[78] However, the right to communicate anonymously on the Internet is not absolute. For example, pursuant to Federal statute it is an offence to use a telecommunications device, without the user disclosing their identity, with intent to abuse, threaten or harass any specific individual. See: 47 US Code section 223(a)(1)(c); D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 124-125. According to Barendt this law would, almost certainly, survive constitutional challenge, as true threats, instilling a real fear of violence are not protected by the First Amendment: E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 126; *Planned Parenthood of the Columbia/Williamette Inc. v American Coalition of Life Activists* 290 F3d 1058 (9th Cir, 2002).
[79] 977 F Supp 1228 (ND, GA 1997).
[80] 521 US 844 (1997).
[81] Ibid. 868-870. For instance, in *Red Lion Broadcasting Company v FCC* 395 US 367 (1969), 399-400 and *FCC v Pacifica Foundation* 438 US 726 (1978) the Court relied on the history of extensive government regulation of the broadcast media. Other factors included (i) the scarcity of available frequencies at its inception: *Turner Broadcasting Systems Inc. v FCC* 512 US 622 (1994), 637-638; (ii) its 'invasive' nature: *Sable Communications of California Inc. v FCC* 492 US 115 (1989), 128.

was of the opinion that the factors it had relied upon in relation to the broadcast media[82] 'are not present in cyberspace'.[83] Eady J's judgment in *Author of a Blog* was based exclusively on audience interests. To the contrary, this decision was based entirely on the interests of the speaker.[84] Thus, the right to communicate anonymously, both online and offline, has now been accepted as an integral part of the First Amendment.

This section has established that, at present, anonymous and pseudonymous online expression is faced with two opposing schools of thought. In the UK, freedom of expression provides a limited level of protection for such speech. Whereas the US (and to a lesser extent, Germany) clearly recognises a constitutional right for these types of communication. What is apparent from the Strasbourg case law is that protection afforded for anonymous and pseudonymous expression, at the moment at least, falls short of a clearly recognised right and, consequently, seems to sit, rather opaquely, somewhere between the two sides. However, based on the explicit importance placed upon anonymous and pseudonymous speech by the ECtHR in *Delfi* and by Council of Europe provisions, there seems to be potential for the establishment of such a right. These schools of thought are based on opposing interests: those of the speaker and the audience. The following section will consider these rights, and how they apply to online anonymous and pseudonymous speech.

3. SPEAKER VERSUS AUDIENCE INTERESTS: AN OBSOLETE DISTINCTION IN THE CONTEXT OF THE MODERN MEDIA?

The speaker versus audience interests dichotomy has consistently been the subject of arguments relating to free speech generally.[85] Within these arguments there has been a clear delineation between these 'competing' interests. The case law explored above demonstrates that, on the one hand, speaker interests in free speech (and privacy) have been used to support

[82] Ibid. 868-869.
[83] Ibid. 869
[84] Both cases are considered again in section 3, which looks at the problems that are symptomatic of relying purely on one interest.
[85] For example, see: T. Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204; R. Dworkin, 'Introduction' in *The Philosophy of Law* (Oxford University Press, 1977), 15; F. Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982), 105-106, 158-160; L. Alexander, *Is There a Right to Freedom of Expression?* (Cambridge University Press, 2005), 8-9; S. Kreimer, 'Sunlight, Secrets and Scarlet Letter: The Tension between Privacy and Disclosure in Constitutional Law' (1991) 140 *University of Pennsylvania Law Review* 1, 85-86; R. Post, 'The Constitutional Concept of Public Discourse' (1990) 103 *Harvard Law Review* 603, 639-640.

a right to anonymous expression, whereas, on the other hand, audience interests have tended to have been employed to argue for the author's identity to be known or, at the very most, for a limited level of protection for anonymous speech.[86] This section will advance the argument that the exclusive application of either interest as a basis for free speech, particularly within the context of anonymous and pseudonymous online expression, as has hitherto been the practice in the UK, the US and Europe, is problematic, for the following reasons: A US-type right to anonymous speech, based on speakers' interests, goes too far. It does not adequately protect other countervailing rights and, inadvertently, protects speakers who disseminate harmful and damaging speech. However, the UK and ECtHR positions that, at best, provide limited protection for anonymous and pseudonymous speech, based on audience interests, do not go far enough in protecting citizen journalists who often rely on being able to communicate anonymously or pseudonymously.

3.1 THE PROBLEMS ASSOCIATED WITH RELYING EXCLUSIVELY ON AUDIENCE OR SPEAKER INTERESTS

As already discussed, the Supreme Court's decision in *McIntyre* is based on the right of the speaker to determine the content of their speech. According to the Court, this speaker interest took precedence over the audience's right to information regarding the speaker's identity, in order for the reader to be able to properly assess the credibility of the author's publication. In its judgment the Supreme Court approved a New York court's decision in *New York v Duryea*[87] that, when it comes to anonymous sources, the public is able to determine the value of speech,[88] as compared to communications from an identified speaker:

> 'Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read the message. And then, once they

[86] See *Delfi AS v Estonia* [2015] EMLR 26 above.
[87] 351 NYS 2d 978, 995 (1974); *McIntyre* 514 US 334 (1995), 348, n 11.
[88] Indeed, Post argues that speech should be assessed entirely divorced from the context in which it is made, including the origin of the communication: R. Post, 'The Constitutional Concept of Public Discourse' (1990) 103 *Harvard Law Review* 603, 639-640.

> have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.'[89]

The decisions that followed, in cases such as *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*,[90] *Buckley v American Constitutional Law Foundation*,[91] *Watchtower Bible and Tract Society of New York v Stratton*,[92] *ACLU of Nevada v Heller*[93] and, in the context of online communication, *ACLU* and *Reno*,[94] were similarly based on speaker interests to support anonymous and pseudonymous expression. The interests of the speaker were also the dominant interests in the German Federal Supreme Court's ruling in *Spickmich*.

The Supreme Court's decision in *Reno* highlights some of the issues surrounding online and social media speech generally and, in particular, anonymous speech conveyed via these mediums. Thus, the efficacy of the judgment, based purely on speaker interests, if applied to a modern context, is questionable. Like *Author of a Blog*, it highlights problems symptomatic of applying one interest exclusively. The Court was of the opinion that '…the Internet is not as invasive as radio or television.'[95] In coming to this decision, the Court relied upon the finding of the District Court that:

> 'Communications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident…[a]lmost all sexually explicit images are preceded by warnings as to the content…odds are slim that a user would come across a sexually explicit sight by accident.'[96]

This decision is indicative of the pace at which online communication has developed, as the findings upon which the decision is based are arguably at odds with current online

[89] This accords with Lord Kerr's view in the recent case of *Stocker v Stocker* [2019] UKSC 17, [41] and [43] in which his Lordship referred to a 'new class of reader: the social media user' who understands that an online platform 'is a casual medium in the nature of conversation rather than carefully chosen expression.'
[90] 515 US 557 (1995).
[91] 525 US 182 (1999).
[92] 536 US 150 (2002).
[93] 378 F3d 979 (2004).
[94] See section 2.1.1 above.
[95] Ibid.
[96] 929 F. Supp, 844 (finding 88).

expression. Internet communications can be invasive. To an extent this may be 'allowed' by the user of, for example, a social media platform, by virtue of registering with the platform and joining particular communities. However, users are still subject to 'unbidden' messages regularly appearing on their mobile telephone, tablet and laptop screens.[97] Further, the availability of sexually explicit content has been proliferated by social media, and is synonymous with platforms such as WhatsApp and Snapchat, as demonstrated by the 'revenge porn' phenomenon.[98] 'Unbidden' messages and content of a sexually explicit nature are, very often, anonymous or pseudonymous, meaning that there exists a lack of accountability which can seriously impact upon an individual's ability to seek recourse,[99] for instance in relation to damage caused to their reputation by virtue of libel proceedings.[100]

Contrary to judgments based purely on speaker interests, Kreimer suggests that, in many situations, anonymous or pseudonymous expression is not appropriate, as it is important for the audience to be able to identify the speaker. Knowing the origin of the speech enables the audience to attribute a value and assess the veracity of their previous communications, as they will be publicly accessible. Therefore, this allows them to evaluate their prior experience.[101] This view is animated by Eady J's judgment in *Author of a Blog*[102] in which he upheld *The Times'* argument that the public was entitled to know the identity of the author of the blog to assess the strength of his criticisms of the police force in which he was serving.[103] Accordingly, Schauer and Alexander are of the opinion that free speech is predominantly concerned with audience interests. They believe that speakers enjoy only derivative rights, which are subject to protection only to ensure that the interests of the audience are safeguarded.[104] Some social media platforms have adopted this stance in respect

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[97] For detailed analysis of how the economic constructs of social media has influenced this issue see: J. Van Dijck, *The Culture of Connectivity* (Oxford University Press, 2013), 163-176.

[98] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 28-29; See generally: B. Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 155-173.

[99] This is discussed in more detail below.

[100] B. Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 155-173; S. Levmore, 'The Internet's Anonymity Problem' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 50-67.

[101] S. Kreimer, 'Sunlight, Secrets and Scarlet Letter: The Tension between Privacy and Disclosure in Constitutional Law' (1991) 140 *University of Pennsylvania Law Review* 1, 85-86.

[102] [2009] EMLR 22. See section 2.1 for the facts of the case.

[103] Ibid. [21].

[104] F. Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, 1982), 105-106; L. Alexander, *Is There a Right to Freedom of Expression?* (Cambridge University Press, 2005), 8-9.

of their anonymity and pseudonymity policies. Facebook, for example, at least 'officially', does not allow registration under a pseudonym.[105] The platform believes that users are more responsible in debate and social commentary when they use the site under their real name.[106] Similarly, between 2011 and 2014 Google+ required users to register under their 'common name' (the name by which they were known to family, friends and colleagues). It used an algorithm to detect likely pseudonyms, and automatically suspend these accounts, even when these users were generally known by a pseudonym or nickname. Google said that it introduced the policy to promote the safe use of the Internet, and to prevent the dissemination of anonymous spam. The views of Kreimer, Schauer and Alexander, Eady J's judgment, and Facebook's policy, correlate with Barendt's argument that the case for freedom of speech dictates that, when it comes to general political and economic discourse, the public should know something about the credentials of the speaker. Equally, an audience wants to know the identity of the speaker to enable it to evaluate the worth of the publication.[107]

It is submitted that these views, the decision in *Author of a Blog*, and Facebook's policy are problematic, particularly in the context of anonymous and pseudonymous online expression, for the following reasons. Firstly, they do not take into account the use of pseudonyms. If the audience is unaware that the speaker is communicating under a pseudonym they may not adjust the value they attribute to that respective communication.[108] Secondly, knowing the speaker's true identity does not, necessarily, add any value. Just because one can see the name of the speaker does not mean they can assess their credibility. This observation is particularly pertinent in respect of citizen journalism. These journalists, who may well be disseminating information of real constitutional value, may not have a 'background' to assess that is accessible to the public. In these circumstances, they may as well be acting under a pseudonym, as their real identity does not provide any usable information for the audience to evaluate. Equally, the symbiotic relationship that this thesis

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[105] R. MacKinnon, *Consent of the Networked* (Basic Books, 2012), 150. Incidentally, Facebook's real name policy has been held to infringe German data protection law. Specifically, section 13, VI of the Telemedia Act 2007 and section 3a Data Protection Act 2003. The ruling was successfully challenged by Facebook in the state Administrative Court on the ground that the law only applied when the data controller was established in Germany, or non-EU state. The Court accepted that Facebook was established in Ireland, which did not prescribe in law the freedom to communicate anonymously: S. Schmitz, 'Facebook's Real Name Policy' (2013) 4 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 190.

[106] Facebook Guidelines of March 2015 for the removal of hate content.

[107] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 66-67.

[108] L. Lidsky and T. Cotter, 'Authorship, Audiences and Anonymous Speech' (2006) 82 *Notre Dame Law Review* 1537, 1567.

has established exists between citizen journalists and the traditional media, means that the traditional media increasingly rely on citizen journalists as a source of news. Consequently, as discussed in Chapter Three,[109] speech is 'recycled' through traditional forms of media that may come from speakers that are identified, but unknown, or from anonymous sources, or from speakers operating under a pseudonym. Thirdly (and directly linked to the points above) Facebook's anonymity and pseudonymity policy relies on users to report fellow users using pseudonyms. In many instances, it is likely that these users will have no idea that a pseudonym is being used. Notwithstanding this, from a practical perspective, it is almost impossible for online platforms, such as Facebook, to monitor and vet the millions of messages carried each week.[110] Furthermore, it also conflicts with the advice given to police officers to use a pseudonym on social media to protect their identity. Many police officers do use pseudonyms for this purpose on Facebook, among other social media platforms. For the same reason, the General Medical Council supports the right of doctors to express themselves online anonymously or pseudonymously.[111] Finally, the problems that could potentially flow from the decision in *Author of a Blog* are, like *Reno*, in respect of speaker interests, symptomatic of applying audience interests exclusively. These judgments illustrate the need for a balance to be struck between both interests. There is currently an abundance of blogs, operated and published by citizen journalists, that are similar to *Night Jack*, that disseminate information of constitutional value; indeed, in 2009 *Night Jack* received the Orwell Prize for citizen journalism. Because the decision required the author to identify himself it surely has the propensity to dissuade other citizen journalists from communicating in a similar way.

The decision in *Author of a Blog* illustrates a further challenge faced by citizen journalists.[112] Contrary to the media-as-a-constitutional-component concept, if these journalists are not considered 'media', they are not subject to the enhanced right to media freedom. As a result, they cannot avail themselves of a journalist's immunity from being required to disclose sources of information. If the author of *Night Jack* would have taken his 'story' to *The Times*, rather than publish it on his blog, the newspaper may have published it,

[109] Section 3.2.
[110] S. Levmore, 'The Internet's Anonymity Problem' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 59.
[111] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 135.
[112] See generally: P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-53.

and then refused to identify its source because it, as a recognised media entity, would not have had to disclose its source pursuant to the right to media freedom. In doing so, it would have argued that the public interest in the story took precedent over any interest the police force had in identifying the whistleblower. The judgment, based exclusively on audience interests, seems to favour the traditional media, in that, by virtue of the right to media freedom, it is immune from disclosing its sources, yet it is also able to identify a respected citizen journalist who independently publishes a story for which it could claim journalists' privilege.[113]

Taking this argument a step further, as well as bestowing certain privileges on the media, as discussed in the previous chapter, the right to media freedom, and the media-as-a-constitutional-component concept impose upon media actors concomitant duties and responsibilities, including transparency.[114] The journalistic media is subject to a right of reply.[115] Therefore, at least within a European context, the media has to make available certain information about the publisher or editor. [116] As Oster states, '[w]hile anonymity is part of freedom of expression, responsible journalism requires that at least the editor of the publication be immediately identifiable in order to facilitate effective protection against defamation and privacy violation.'[117] This duty runs counter to a culture of anonymity and pseudonymity prevalent on the Internet and amongst citizen journalists. Thus, notwithstanding the fact that a citizen journalist, such as *Night Jack*, is not considered media, and therefore not subject to media freedom, even if they were, the fact that they are the 'source', 'author' and 'publisher' would mean that they would not be fulfilling their journalistic responsibilities pursuant to the right if they published anonymously or under a pseudonym. Whereas, to the contrary, a journalist for *The Times* could use their editor, or the newspaper's publishing company to 'shield' their identity. Herein lies a significant challenge for citizen journalists: what is relevant to the concept of responsible journalism is that a person, whether that be the journalist or their editor, or an organisation, such as the

[113] E. Barendt, 'Bad News for Bloggers' (2009) 2 *Journal of Media Law* 141, 146-147.
[114] See the ECtHR case of *Fatullayev v Azerbaijan* [2010] App. No. 40984/07.
[115] For example, see: Article 28 Audiovisual Media Services Directive 2010/13/EU, OJL 95; *Ediciones Tiempo S.A. v Spain* [1989] App. No. 13010/87; Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the right of reply – Position of the individual in relation to the press; Recommendation Rec(2004) 16 of the Committee of Ministers to Member States on the right of reply in the new media environment (1974).
[116] According to Oster, this presumably applies to all European countries. J. Oster, *European and International Media Law* (Cambridge University Press, 2016), 49.
[117] Ibid.

publishing company, claims responsibility for a publication, and can, as a result, be held liable. For example, it is the policy of *The Economist* to publish all of its articles anonymously.[118] However, it is clear that *The Economist Newspaper Ltd* is responsible for its articles, and can, therefore, be held liable for them. Consequently, both *The Economist*, and its journalists, in respect of this at least, comply with their journalistic responsibilities. To the contrary, because of the nature of citizen journalism, particularly the fact that many bloggers operate alone as both the author and the publisher, means they do not have the 'shield' of an identifiable editor or organisation that could be held liable. If they did, this would defeat the very purpose of their anonymity or pseudonym. However, by not providing the details of an identifiable person or organisation they are not conforming to the concept of responsible journalism. Indeed, Nicklin J's judgment in *Sooben v Badal*[119] adds weight to this argument as, pursuant to the decision, the *Reynolds* criteria[120] for responsible journalism should be applied to non-professional journalists.[121] Ultimately, this challenge faced by citizen journalists could undermine the value of such journalism and, paradoxically, damage audience interests, as less people will engage with it, which will, in turn, hinder democratic participation and self-fulfilment.

Barendt suggests that the rights and interests of speakers, distinct from those of the audience are 'emphasised' by the argument from self-fulfilment, in that 'speech is an essential aspect of the right to self-development and fulfilment, or of individual autonomy, and so must be respected as an aspect of that autonomy.'[122] Baker takes this further. He argues that the right to freedom of expression should take precedence over countervailing rights because it facilitates autonomy – by allowing individuals to exercise self-expression or self-disclosure they control whether or not to reveal themselves to others and, therefore,

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[118] Historically, this was the case with all newspapers.
[119] [2017] EWHC 2638 (QB).
[120] The criteria for responsible journalism laid down by Lord Nicholls in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 (HL), 204-205 is explored in detail in Chapter Six section 3.2.3. This section explains that the *Reynolds* defence was abolished in 2013 and replaced by section 4 of the Defamation Act 2013 which provides for a public interest defence. However, section 4 effectively codifies the *Reynolds* criteria. This section also deals with the Court of Appeal's judgment in *Economou v de Freitas* [2018] EWCA Civ 2591; [2019] EMLR 7, which determined, inter alia, that citizen journalists, bloggers and casual social media users alike may be able to avail themselves of the section 4 defence so long as they can show that they reasonably believed that publishing the defamatory statement was in the public interest, even if their conduct might fall short of that expected of a trained and experienced journalist. Accordingly, the defence is not confined to media. Per Sharp LJ, [104]-[110].
[121] *Sooben v Badal* [2017] EWHC 2638 (QB), [32]-[34].
[122] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 62.

enables the respective individual to be treated as autonomous.[123] According to Barendt this argument is problematic. He suggests that the argument from self-fulfilment is the 'least plausible rationale' for freedom of speech and that it would be 'odd' to base the right to free speech on the speaker's interest in self-development or fulfilment. Specifically, he states: '[h]ow does the mask of anonymity claimed by someone who prefers to remain nameless or to publish under the disguise of a pseudonym advance that person's self-development as an individual?'[124] It is submitted that the position adopted by Barendt is flawed, in respect of anonymous and pseudonymous expression conveyed online and by the traditional media for the reasons discussed below.

In *Reno* District Judge Dalzell stated that the Internet is 'the most participatory form of mass speech yet developed'.[125] It provides a way of not only receiving information, but of transmitting views on any topic instantaneously. Consequently, it has facilitated a convergence of audience and producer.[126] Thus, anonymity and pseudonymity is a culturally inherent aspect of citizen journalism and online communication generally.[127] According to Suler the ability to communicate anonymously is a principal factor for online disinhibition effect, whereby people are less inhibited to say things online, which they would not say in a 'real life' encounter. It allows them to hide their identity and to operate under the assumption, at least, that their real identities cannot be linked to messages they send, and so they cannot be held responsible for the consequences of that expression.[128] In this context the 'mask' of anonymity or the 'disguise' of a pseudonym can advance a person's self-development as it gives them a voice in circumstances where, without anonymity or pseudonymity, they would not be able to express themselves. A pertinent example is academic speech. One only has to

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[123] C.E. Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), ch. 3; C.E. Baker, 'Autonomy and Hate Speech' in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) 142-146.

[124] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 63.

[125] *Reno v American Civil Liberties Union* 929 F Supp 824, 833 (ED Pa, 1996).

[126] See: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law' *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 23; J.M. Balkin, 'The Future of Free Expression in a Digital Age' (2009) 34 *Pepperdine Law Review* 427, 440; J.M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1; J. Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355, 365.

[127] M. Collins, 'The Ideology of Anonymity and Pseudonymity' http://www.huffingtonpost.com/malcolm-collins/online-anonymity_b_3695851.html 2nd August 2013.

[128] J. Suler, 'The Online Disinhibition Effect' (2004) 7 *CyberPsychology and Behaviour* 321, 322. It has been acknowledged that young people in particular are more likely to discuss their anxieties and attempt to form friendships online under a pseudonym rather than use their real name: S. Turkle, *Alone Together* (Basic Books, 2011) 189-198, 229-231.

look at *Times Higher Education* to see regular instances of academics writing anonymously about controversial issues within their University, or Higher Education generally. Of even greater significance is academic speech in countries where academics fear persecution for expressing views.[129] In both of these examples, arguably academics are developing intellectually. In these type of situations where they could not, or would not want, to reveal their identity through fear of persecution or reprisals, by virtue of being able to express themselves anonymously or under a pseudonym, they are able to engage in dialogue with other academics and/or the process of research, writing and, ultimately, the peer review of their work (which tends to be conducted anonymously in any event).[130] Of course, the rejoinder to this argument is that such disinhibition, by virtue of anonymity and pseudonymity, can potentially act as a catalyst for irresponsible and unacceptable speech.

It has been argued that Mill's argument from truth, and the argument from democratic self-governance are, predominantly, associated with audience interests.[131] Indeed, in relation to the argument from democratic self-governance, and in the context of the regulation of speech at public meetings, Meiklejohn was of the opinion that it is important that 'not everyone shall get to speak, but that everything worth saying shall be said'.[132] However, in *McIntyre* the Supreme Court justified the existence of a right to anonymous and pseudonymous expression as a protection against the tyranny of the majority.[133] Consequently, an additional argument to support a right to anonymity based on speaker interests is that without such a right speakers would not participate at all in political discourse. According to scholars such as Dworkin, Post and Redish, such a right is

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[129] For example, see: *Erdogan v Turkey* (346/04 and 39779/04) [2014] ECHR 530; A. Mendonca, 'European Court of Human Rights upholds academic freedom: Mustafa Erdogan v Turkey' *Entertainment Law Review* (2014), 25(8), 304-305; 'Turkey must stop persecuting its academics' https://www.timeshighereducation.com/letters/turkey-must-stop-persecuting-academics 24th March 2016.

[130] In the humanities and social sciences, 'double blind' reviews remain standard practice (the author does not know the identity of the reviewer and vice versa), whereas within science and medical disciplines, 'single blind' reviews tend to be employed (the author does not know the identity of the reviewer, but the reviewer knows the author's name and institution): Report of Science and Technology Committee, *Peer Review in Scientific Publications,* HC 856 (2010-12), [15]-[16].

[131] See generally: E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 61; Sir J. Laws, *Meiklejohn, the First Amendment and Free Speech in English Law,* in I. Loveland (ed), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA,* (Hart Publishing, 1998), 123-137; A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 3 [1.06]; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 18; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 69.

[132] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1960), 64.

[133] 514 US 334 (1995), 357.

incorporated within a speaker's right to contribute to public life.[134] It is submitted that the argument from democratic self-governance, and the argument from self-fulfilment, do not operate exclusively from each other as justifications for anonymous and pseudonymous speech. To the contrary, self-fulfilment is an integral and supportive aspect of an individual's ability to participate in democratic discourse. The argument from democratic self-governance, as supported by the argument from self-fulfilment, is particularly pertinent to online communication, as it supports the primary rationale for a right to anonymous speech within these arenas; anonymous expression enables more people to engage in public discourse and, in so doing, contribute valuable information and ideas to society than would be the case if their speech were inhibited by a requirement to disclose their identity. Indeed, David Kaye, the UN Rapporteur on the promotion of freedom of expression, has robustly supported a right to communicate anonymously online. Kaye's support of anonymous communication on the Internet is indicative of a combination of the arguments advanced above in that, in authoritarian countries there will be universal reluctance to speak freely and contribute to public and political discourse, both online and offline, for fear of persecution.[135] As Barendt states: '[a]nonymity enables the circumvention of the myriad restrictions on the exercise of freedom of expression imposed by authoritarian governments.'[136] It can also facilitate democratic participation in liberal societies more tolerant of political dissent.[137] In fact, the example of academic speech in relation to self-fulfilment given above is equally applicable to this point. Anonymity is essential for individuals wishing to express views that may expose them to disciplinary action or dismissal by their employer, or ostracism from colleagues.[138]

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[134] See generally: R. Dworkin in 'Foreword' to I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009); R. Post, 'The Constitutional Concept of Public Discourse' (1990) 103 *Harvard Law Review* 603; M.H. Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591.

[135] Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, (2015) A/HRC/29/32, [23] and [31].

[136] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 129.

[137] Ibid. Oster refers to Justice Holmes' marketplace of ideas theory laid down in *Abrams v United States* 250 US 616 (1919), in which it was asserted that: 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' (630-631), in relation to this argument. He states that pursuant to the theory '…everyone should have a voice in public debate. If speech is either made anonymously or not all, then it is preferable that it is being made anonymously. This applies even more given that fear of harassment or sanctions often – but of course not necessarily – arises in cases in which the speaker wants to contribute to a controversial matter of general interest, such as political or religious affairs.' J. Oster, *European and International Media Law* (Cambridge University Press, 2016), 49.

[138] Ibid.

These are the very reasons why Eady J's judgment in *Author of a Blog*, based exclusively on audience interests, is so fundamentally flawed as, paradoxically, by potentially dissuading individuals from participating in citizen journalism, it damages audience interests, as less people are exposed to information that may have a constitutional value. This can limit their engagement with democratic discourse and hinder their self-fulfilment. Equally, according to Stein, protection of anonymous and pseudonymous speech, particularly in 'cyberspace', 'provides a context' for lesbians and gay men 'in which to speak freely, without identifying themselves, and without having to be physically present to communicate with others.'[139] This can be extended to vulnerable groups, such as asylum-seekers, immigrants and the mentally and physically disabled, amongst others, in that, for the same reasons, anonymity and pseudonymity enables them to exercise their freedom of speech and, therefore, not only develop intellectually, but also participate in, and contribute to, public discourse.[140] However, there is a robust rejoinder to this argument. Thomas Scanlon's individual autonomy concept, which is based on the right of the audience to receive information, be exposed to every type of argument and to be free from governmental intrusion into the process of individual decision-making,[141] is equally applicable, as access to minority views, that may not be available without anonymous or pseudonymous communication, are an essential aspect of audience rights.

Thus, where citizen journalism and online communication are concerned, speakers have a particularly strong claim to the right to freedom of expression[142] and, by extension, the right to communicate anonymously or pseudonymously. As discussed in Chapter One,[143] this is because the audience and producer convergence contributed to the ascendance of citizen journalism. Consequently, free speech is facilitated by the fact that these speakers are not subject to, for instance, political bias, censorship, the influence of media ownership and editorial control, at least to the same extent as they would be within the context of the

[139] E. Stein, 'Queers Anonymous: Lesbians, Gay Men, Free Speech and Cyberspace' (2003) 38 *Harvard Civil Rights – Civil Liberties Law Review* 159, 199-205.
[140] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 64, 129.
[141] T. Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204, 223; F. Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982), 69.
[142] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 130.
[143] See section 3.3.

traditional media,[144] where greater emphasis is usually placed on the interest of the audience who, to assess the reliability of the journalist or broadcaster, are concerned with being apprised of that individual's identity.[145] Ekstrand argues that those who communicate online are more likely to tolerate anonymity,[146] either because it is generally accepted that anonymous and pseudonymous communication is 'normal' in these arenas[147] or because their expectations are lower as to the reliability of the information provided or the expertise of those responsible for disseminating the information. To the contrary, Citron suggests that certain aspects of the Internet may make online communication potentially more damaging than information disseminated offline.[148] A consequence of the way in which online communication has become ingrained within our social and cultural fabric, is that habits, conventions and social norms, that were once informal manifestations of daily life, are now infused within these methods of communication. What were casual and ephemeral actions and/or acts of expression, such as conversing with friends or colleagues or swapping/displaying pictures or exchanging thoughts that were once kept private or maybe shared with a select few, have now become formalised and permanent. These actions and expressions are, in the click of mouse, or the flick of a finger, publicised for the world to see. Thus, unlike broadcasts or newsprint, that are perceived to be more transitory in nature, and are 'tomorrow's fish and chips' paper',[149] online communication lends itself to permanency;[150] it enters the 'public domain, with the potential for long-lasting and far reaching-consequences'.[151] Search engines, such as Google, provide users with links to harmful communications. These can remain accessible to the public, sometimes for very long

[144] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law' *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 21, 24; E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 130.
[145] Ibid, (Barendt) 61-65.
[146] V.S. Ekstrand, 'The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law' (2013) 18 *Journal of Technology Law and Policy* 1, 18.
[147] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 130.
[148] D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 4-12.
[149] Although, the print press has long held archives, both physically and, more recently, online.
[150] See generally: V. Mayer-Schőnberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).
[151] J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 6-7; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law' *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40, 25; J. Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355, 366-377.

periods of time, and certainly longer than with the traditional media, after they were initially published.[152] This can have negative and long-lasting effects on individuals' lives.

The fact that information disseminated online can, potentially, remain available permanently, and is easily accessible by anybody, gives rise to three issues, which are amplified by anonymous and pseudonymous expression, particularly in the context of citizen journalism. These issues form the foundation for a strong audience interest based argument against a speaker interest orientated right to anonymous and pseudonymous speech. Thus, they provide support for the restriction of anonymous and pseudonymous speech in an online context.

As stated above, many citizen journalists choose to publish their material anonymously, or operate under a pseudonym, often for entirely legitimate reasons.[153] In fact, in a social media context, in contrast to platforms such as Facebook, that have adopted real name policies,[154] some sites have implemented policies that enable their users to communicate anonymously or under a pseudonym.[155] As set out in section 1.1 this conflicts with the audience interest preference for transparency, which gives rise to three particular concerns that have been articulated throughout this chapter. Firstly, in line with Eady J's judgment in *Author of a Blog*, anonymity and pseudonymity does not allow the audience to assess the veracity of the speaker. Secondly, it encourages irresponsible and damaging expression. This is animated in the context of citizen journalists by Levmore who points to the distinction between the traditional and online media.[156] He states that, with the traditional media, the danger posed by anonymity is mitigated by the presence of an active intermediary,[157] in the form of a separation between the journalistic, editorial and publication functions. In this context the journalist, editor or publisher can vouch for the integrity and reliability of their source or speaker. They can also check the story prior to publication or broadcast and, if need be, refer it to their legal team to prevent the dissemination of any material that may present

[152] B. Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 155-173, 155.
[153] See sections 2.1 and 2.2.
[154] See the discussion above.
[155] Examples include sites such as Social Number, Gaia Online, Evsum and Anonyming. See: E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 134
[156] S. Levmore, 'The Internet's Anonymity Problem' in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010), 50, 54-55.
[157] Ibid. See also: S. Levmore, 'The Anonymity Tool' *University of Pennsylvania Law Review* 144 (1996) 2191-2236.

disproportionate legal risks. To the contrary, it is usual for citizen journalists to fulfil all three functions, without access to these pre-publication resources that provide checks and balances on the material and, in turn, aid responsible journalism. Thus, it is submitted that because of citizen journalism's symbiotic relationship with the traditional media, for the reasons advanced in Chapter Three,[158] this can contribute to the proliferation of fake news. Thirdly, anonymous and pseudonymous expression prevents, or at the very least makes it difficult, for a victim of, for example, defamation or an invasion of privacy, to identify the origin of the material, which in turn can create an insurmountable barrier to remedial action and/or prosecution. Moreover, the fact that a victim is unaware of the perpetrator, and their proximity to them, can make the harm suffered more acute.[159]

These issues serve to support the argument that a constitutionally protected speaker interest orientated right to anonymous and pseudonymous speech could be claimed by anybody, including those disseminating fake news, or engaging in, for example, defamation or privacy invading expression. Consequently, such a right could inadvertently protect speakers engaging in unwanted and damaging speech. However, despite this, it is submitted that for the reasons set out above in favour of a speaker interest approach it is non-sequitur that an exclusively audience interest approach prevails. This is because the ability to speak anonymously or under a pseudonym encourages free speech, by enabling more people to communicate and exchange ideas and information. As a result, it fuels greater participation in public discourse and facilitates self-fulfilment. In doing this, it aids the democratic process by facilitating self-governance. If this type of speech is restricted or prohibited then these tangible advantages will be lost. Consequently, and paradoxically, this can damage the interests of the audience as it may dissuade people from engaging with this form of media and contributing to valuable citizen journalism that, in turn, could limit the amount of people able to participate in democratic discourse. Furthermore, the benefits gained by the audience from requiring speakers to identify themselves, particularly in respect of online speech is questionable; it does not, necessarily, enable the audience to accurately assess the credentials of the speaker and, therefore, the value of the communication. Rather, this section has demonstrated that to support citizen journalism and modern media speech, a balance needs to

[158] See section 3.2.
[159] E. Barendt, *Anonymous Speech* (Hart Publishing, 2016), 132.

be struck between the two interests. The following and concluding section will set out how the media-as-a-constitutional-component concept can help to achieve this harmonisation.

4. CONCLUSION: HARMONISING SPEAKER AND AUDIENCE INTERESTS

As established in Chapter Four, the media-as-a-constitutional-component concept, as underpinned by social responsibility theory and the argument from self-governance, not only provides a new definition of media, but requires media actors to abide by certain behavioural standards and norms of discourse for them to benefit from the enhanced right to media freedom.[160] Furthermore, it provides the normative and philosophical foundation for the regulatory framework advanced in Chapter Seven.[161] This means, that for a media actor to be a member of a scheme, and therefore take advantage of the statutory and non-statutory incentives it offers, including significant reputational benefits, they must adhere to the standards and norms.[162] Thus, for the reasons set out below, it is submitted that the concept provides a mechanism that encourages a speaker interest approach by satisfying the audience interests in: (i) being able to effectively assess the veracity of anonymous or pseudonymous speakers; (ii) encouraging responsible journalism and negating the need for a distinction between journalistic, editorial and publication functions; and (iii) if required, enabling the easier identification of the speaker.

Firstly, as explained in Chapter Seven, media actors that can demonstrate positive engagement with the standards and norms by, for example, being members of the regulatory scheme, would be able to objectively demonstrate that they are part of a group of media that are accountable and value responsible journalism.[163] Secondly, the identity of anonymous and pseudonymous actors that join the scheme would be protected, so long as they abide by these values. Only in extreme cases of misconduct or criminal activity would their identity be divulged.[164] Therefore, from a speaker interest perspective, the actor can join the scheme, and take advantage of its benefits, which includes access to training and legal support, safe in the knowledge that their identity, and ability to publish anonymously or pseudonymously, is

[160] See Chapter Four section 3.
[161] See section 4.1.
[162] See Chapter Seven section 4.4.
[163] Ibid. Section 4.4.2.
[164] Ibid.

protected. Conversely, from an audience interest perspective, the standards imposed by the regulatory scheme on its members provides a method for the audience to objectively and rationally assess the veracity of the speaker and their material, and the speaker's adherence to responsible journalistic practice, regardless of whether or not they are publishing material anonymously or under a pseudonym. Furthermore, even if a citizen journalist member is fulfilling all three journalistic, editorial and publication functions, the audience will know that they have access to legal and other support to provide external checks and balances on their material. Finally, to an extent (as it is recognised that not all citizen journalists operating anonymously or pseudonymously are responsible or will join the scheme),[165] it alleviates the audience interest concern regarding identification of the anonymous or pseudonymous speaker. These members of the regulatory framework will not be named unless they engage in harmful, damaging or criminal activity. In these instances the audience interests are protected as, subject to a review from a panel, the speaker will be identified to allow for remedial action or prosecution.[166]

[165] Non-members of the regulatory scheme are dealt with in section 4.6 of Chapter Seven.

[166] As Citron advocates, users who have previously been allowed to communicate anonymously or under a pseudonym, but who have abused that privilege, by engaging in harmful speech should be prevented from doing so in the future by being required to use their real name. D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 239.

CHAPTER SIX

CONTEMPT OF COURT AND DEFAMATION

1. INTRODUCTION

This chapter considers the law of contempt of court and defamation. It sets out how they operate, and the rationales that underpin them; namely maintaining the integrity and fairness of trials and protecting reputation respectively. As will be discussed, the principles upon which they are founded can be at odds with media freedom, which can create an imbalance between the state or claimants and the media. This chapter argues that the adoption of the media-as-a-constitutional-component concept, as underpinned by social responsibility theory, and the standards of behaviour and norms of conduct that it imposes on media actors, provides a mechanism that, at the very least, alleviates this imbalance. Thus, the first half of this chapter applies the concept to contempt of court and the principle of open justice. The second half of the chapter does the same in respect of defamation and the defences of truth, honest opinion and publication on a matter of public interest.

2. MEDIA FREEDOM VERSUS FAIR TRIALS: THE GENESIS OF CONTEMPT OF COURT

This section sets out the development of the law of contempt of court, and how the principles that now underpin it accord with the notion of open justice which, it argues, could be facilitated by citizen journalism, subject to two issues: (i) the current rules on accessing certain court hearings are unfavourable to citizen journalists, thereby creating a democratic deficit; (ii) the fact that citizen journalism has the potential to undermine the integrity of legal proceedings to a far greater extent than the traditional media. Consequently, this section provides the foundation for the discussions that follow in sections 2.1 and 2.2 on how the media-as-a-constitutional-component concept offers a mechanism that harmonises media freedom and open justice and, therefore, deals with these issues.

The conflict between media freedom and the fairness of legal proceedings has been the subject of much academic and jurisprudential debate, both historically, in relation to the

traditional media,[1] and more recently, in respect of online speech and citizen journalism.[2] This debate stems from the rationale that underpins the law of contempt of court in the UK; a fear of 'trial by media', in that prejudicial publications can distort the trial process[3] by undermining its integrity and, ultimately, its fairness. This can, for instance, stigmatise the defendant before, or even in the absence of, a guilty verdict,[4] lead to the abandonment of trials[5] and, in extreme cases, the quashing of convictions.[6] Furthermore, it is arguable that trial by media is inherently unfair, as the media is not constrained by the rules of evidence, or subject to any procedural safeguards. According to Rowbottom, this argument reflects 'a concern with media power, namely that the media should not use its communicative resources to select and interpret evidence and publicise its own conclusions on alleged transgressions of the law.'[7] Rather, pursuant to the argument against trial by media, a person's guilt should be determined by the court, rather than public opinion.[8]

In the UK contempt of court has roots in both common law and statute. Common law contempt is an act or omission calculated to interfere with, or prejudice, the due administration of justice,[9] with intent to do so. Although it has been expressly preserved by section 6 of the Contempt of Court Act 1981, unlike the statutory version, it is not subject to a strict liability rule. This rule determines that conduct may be treated as a contempt of court when it 'interferes with the course of justice in legal proceedings' regardless of any intention

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[1] For example, see: *R v Bolam, ex parte Haigh* (1949) 93 SJ 220; *Attorney-General v The Times Newspapers Ltd* [1974] AC 273 (HL); *Sunday Times v United Kingdom* App. no. 6538/74 (1979-1980) 2 EHRR 245; G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002). 345-350; J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 112-114; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), ch. 6.

[2] For example, see: *Attorney-General v Associated Newspapers Limited* [2011] EWHC 418 (Admin); *R v Harwood* [2012] EWHC Misc 27 (CC); D. Grieve, 'Contempt: A Balancing Act' (*Speech at City University, London*, 1st December 2011); I. Cram, G. Borrie and N. Lowe, *Borrie & Lowe: The Law of Contempt* (4th ed. LexisNexis, 2010), 687; D. Mac Síthigh, 'Contempt of court and new media' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar, 2017), 83-103, 86-92; J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 151-152.

[3] G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002), 345.

[4] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 112, 114.

[5] *R v Reade, Morris and Woodwiss*, Central Criminal Court, 15th October 1993, Garland J; *R v Knights* Harrow Crown Court, 3rd October 1995. However, to the contrary, see *R v West* [1996] 2 Cr. App. R. 374, 386 in which Lord Taylor CJ said that it would be ludicrous if heinous crimes could not be tried because of the extensive publicity they inevitably attracted. In the Court's view, all that is required is that the trial judge takes particular care to warn the jury to try the case only on the evidence. See also: *R v Michael Stone* [2001] Crim. L.R. 265 (CA); *Montgomery v Her Majesty's Advocate* [2001] 2 WLR 779 (PC) per Lord Hope at 673.

[6] *R v McCann* (1990) 92 Cr. App. R. 239; *R v Taylor (Michelle Ann and Lisa Jane)* (1993) 98 Cr. App. R. 361; *R v Wood* The Times, 11th July 1995, (CA).

[7] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 112.

[8] Ibid.

[9] For the offence to be engaged, there has to be a real risk as opposed to a remote possibility that interference or prejudice would result from the act or omission.

on the part of the media actor to do so. Section 2 of the Act sets out the scope of the rule,[10] stating that it applies to 'a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded[11] or prejudiced'[12] if 'the proceedings in question are active[13] within the meaning of this section at the time of the publication.'[14]

The common law version of contempt was used to deal with trial by media. Perhaps the highest profile example of this is the controversial *Sunday Times* litigation, relating to its campaign for victims of the drug Thalidomide, which, for the reasons explained below, acted as a watershed moment for common law contempt of court. *The Sunday Times* had published an article arguing that Chemie Grünenthal, the manufacturer of Thalidomide, should make a more generous offer of compensation to those affected by the drug. The newspaper then proposed to publish a further article, criticising how the drug was tested and marketed, which led to the Attorney-General obtaining an injunction to restrain publication on the grounds that it would be a contempt of court. In *Attorney-General v The Times Newspapers*[15] the House of Lords upheld the injunction, on the basis that legal disputes should not be prejudged, and prejudiced by, the media. Specifically, Lord Diplock stated that holding a litigant up to 'public obloquy' could discourage people from pursuing their legal rights,[16] and that there is a danger that media discussion could lead to its own determination of the legal dispute, thereby usurping the function of the court.[17] Similarly, Lord Reid warned of the dangers of

[10] Pursuant to section 7 contempt of court proceedings can only be instigated by the Attorney-General or by the court itself.

[11] Although contempt is commonly concerned with material that could influence a juror, the strict liability rule applies to publications that can impede the course of justice in other ways, such as where a publication applies pressure that could alter the conduct of a party or witness during the litigation (see: *Attorney-General v Unger* 1 Cr App R 308, 315). In *Attorney-General v Mirror Group Newspapers* [2011] EWHC 2074 (Admin); [2012] 1 WLR 2408 it was held that the newspaper articles vilifying Christopher Jeffries, who was wrongly accused of the murder of Joanna Yates, were in contempt because the negative stories may have discouraged people from coming forward to say positive things about Jeffries' character. See: J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 119.

[12] Contempt of Court Act 1981, section 2(2). As the law of contempt aims to deter the risk of prejudice or impediment at the time of publication, the fact that the publication did not cause any actual prejudice to a trial is not relevant to whether it is contempt. See: *Attorney-General v English* [1983] 1 AC 116, per Lord Diplock at 141-142; Ibid. (Rowbottom), 119.

[13] Pursuant to Schedule 1 of the Act, in respect of crime, 'active' essentially means from arrest to conviction.

[14] Ibid. section 2(3).

[15] [1974] AC 273 (HL).

[16] Ibid. 313.

[17] Ibid. 310.

'trial by media', which would give rise to 'disrespect for the processes of the law' that would be prejudicial to 'unpopular people and unpopular causes.'[18]

Because of the judgment, the newspaper was not able to publish its full investigation into the testing and marketing of the drug until the injunction was discharged in 1976. Ultimately, the ECtHR determined that the injunction violated Article 10 ECHR. According to the Court, due to the article being 'couched in moderate terms', it did not pose any substantial risk of 'trial by media'.[19] It found that the domestic court had failed to give priority to freedom of expression, especially as the proposed article related to a matter of 'undisputed public concern', and that the role of the media was not confined to discussing the general principles away from specific cases.[20] However, more importantly for media freedom, the Court also took the opportunity to lay down general principles of policy, stating that the 'courts cannot operate in a vacuum' and, although the courts are the final arbiter of legal disputes, 'this does not mean that there can be no prior discussion of disputes elsewhere.'[21]

The Strasbourg Court's judgment highlighted the endemic problem with the application of common law contempt of court which, according to Robertson and Nicol, treated '"the public interest" as synonymous with "the interests of those involved in the legal process", imposing secrecy and censorship without regard for the countervailing benefits of a free flow of information about what happens in the courts.'[22] The Court's ruling, along with the *Report of the Committee on Contempt of Court*,[23] ultimately, acted as a catalyst for the introduction of the 1981 Act. Although shortly after the Act's introduction, in *Attorney-General v English*[24], Lord Diplock stated that 'trial by the media, is not to be permitted in this country',[25] the statutory version of contempt is not designed to prevent the public from forming its own judgment on particular matters.[26] Rather, despite the Act's purpose being to preserve the integrity of the legal system, and ensure that publicity does not interfere with

[18] Ibid. 300.
[19] *Sunday Times v United Kingdom* App. no. 6538/74 (1979-1980) 2 EHRR 245, [63].
[20] Ibid. [66].
[21] Ibid. [65]. See also: *Axel Springer v Germany (No. 1)* [2012] App. no. 39954/08, [80], [96].
[22] G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002), 345.
[23] *Report of the Committee on Contempt of Court* (Cmnd 5794, 1974).
[24] [1983] 1 AC 116.
[25] Ibid. 141-142.
[26] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 113.

legal proceedings, its ability to 'guard' against trial by media is limited.[27] Thus, this development of the law reflected a shift in the role of public opinion, as it recognised that the public have a right to form their own views on legal proceedings.[28]

This shift in the principles underpinning the operation of contempt of court accords with the notion of open justice which could be facilitated by citizen journalism. However, there are two issues with this. Firstly, the current rules limiting access to the courts, in certain situations for citizen journalists, combined with the traditional media's reluctance to report on legal proceedings, has created a democratic deficit. Secondly, although, on the one hand, citizen journalism has the potential to support open justice, on the other hand, it presents a modern dichotomy, as arguably the conflict between media freedom and the fairness of legal proceedings has been amplified by online expression, including citizen journalism, and its libertarian foundations[29] which, due to its reach and speed of dissemination, has the potential to encourage and facilitate trial by media, and therefore undermine the integrity of the legal process, to a far greater extent than the traditional media.[30]

The following section will, firstly, set out the open justice principle and how, in theory, it could be supported by citizen journalism and, secondly, the dichotomy referred to above. In section 2.2 it will be argued that the media-as-a-constitutional-component concept, as underpinned by social responsibility theory,[31] and the inherent behavioural standards and norms of discourse it imposes on media actors, offers a mechanism that harmonises media freedom and open justice, thereby dealing with these issues.

2.1 OPEN JUSTICE AND CITIZEN JOURNALISM: THE DEMOCRATIC DEFICIT AND A CONFLICT BETWEEN MEDIA FREEDOM AND FAIR TRIALS

The principle of open justice[32] is simple: it determines that legal proceedings must be conducted transparently and publicly. It is deeply rooted in the foundations of the common

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[27] Ibid.
[28] Ibid.
[29] See Chapter Three.
[30] Ibid. Section 3.
[31] Ibid. Sections 4 and 5.
[32] For analysis of the arguments for, and the limitations placed on, open justice, see: E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005), 338-351; J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 132-154; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), chs. 4 and 5. E. Barendt et al, *Media Law: Text, Cases and Materials* (Longman, 2014), ch. 13; G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002), 12-18.

law, as demonstrated by Lord Shaw's remark in *Scott v Scott*,[33] that the principle had received 'a constant and most watchful respect' since the end of the Stuart era.[34] In the same case, Lord Shaw also underlined the principle's constitutional importance, stating that the open administration of justice is a 'constitutional right', as opposed to a matter of judicial discretion.[35] Thus, although the principle is not absolute,[36] its requirement that the administration of justice is conducted publicly is enshrined within, and fundamental to, the rule of law[37] and democracy.[38] It has been given more weight in recent years by Article 6 ECHR, which determines that 'everyone is entitled to a fair and public hearing' in relation to their 'civil rights and obligations or of any criminal charge.'

In *Attorney-General v Leveller Magazine Limited*[39] Lord Diplock divided open justice into two elements: (i) that proceedings are 'held in open court to which the press and public are admitted'; and (ii) the freedom to publish 'fair and accurate reports of proceedings that have taken place in court.'[40] The first element essentially refers to the right to sit in the public gallery and hear what is happening in court.[41] The second element is the right to report on court proceedings. Therefore, subject to any reporting restrictions, the media is free to publish what has been said in open court, without legal obstacle.

The important role played by the media in conveying events to the public was emphasised by Lord Reed in *A v BBC*,[42] in which his Lordship stated that as 'the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom

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[33] [1913] AC 417. See also, *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618 per Toulson LJ at [2].
[34] Ibid. (*Scott*), 477.
[35] Ibid.
[36] For instance, where access to legal proceedings may result in the risk of harm to others, the court will conduct a proportionality test to decide whether access should be granted or denied. See: *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618, [85].
[37] *R (on the application of Ewing) v Cardiff and Newport Crown Court* [2016] EWHC 183 (Admin), [16]. It has also been adopted by other Commonwealth countries and the United States: see E. Barendt, *Freedom of Speech* (2nd ed. Oxford University Press, 2005), 338 and *Richmond Newspapers v Virginia* 448 US 555 (1980) respectively.
[38] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 167; I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart Publishing, 2002), 10-11.
[39] [1979] AC 440.
[40] Ibid. 450.
[41] Including taking notes. See: *R (on the application of Ewing) v Cardiff and Newport Crown Court* [2016] EWHC 183 (Admin).
[42] [2014] UKSC 25; [2015] AC 588.

of the media to report on court proceedings.'[43] Moreover, in *Sunday Times v United Kingdom*[44] the ECtHR held that 'not only do the media have the task of imparting such information and ideas [relating to the settlement of disputes in court]: the public also has a right to receive them.'[45] Consequently, media freedom serves the ends of justice through its facilitation of open justice, by virtue of the informing and scrutinising roles that it plays,[46] the exercise of which, enhances the moral authority of the justice system.[47] According to Fenwick and Phillipson, reporting restrictions that are in place to ensure the fairness of court hearings are intended to secure the integrity of the criminal and civil justice systems. However, the legal significance attached to the principle is also aimed at ensuring such integrity, and a key reason for insisting upon open justice is to allow for media scrutiny of the justice system.[48] Indeed, in *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*[49] Lord Judge CJ stated that '[i]n reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens.'[50]

As a general rule, the principle of open justice is available to anybody,[51] but, because of the legal privileges bestowed upon media actors by the enhanced right to media freedom, the media is in a particularly strong position to take advantage of the rights that it provides.[52]

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[43] Ibid. [26].
[44] App. no. 6538/74 (1979-1980) 2 EHRR 245.
[45] Ibid. [65]. See also *Axel Springer v Germany (No. 1)* [2012] App. no. 39954/08, [80], [96] in which the ECtHR stated that '[i]t is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large; the public have an interest in being informed…about criminal proceedings.'
[46] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 167-168.
[47] T. Allan, 'Procedural fairness and the duty of respect' [1988] 18 *Oxford Journal of Legal Studies* 507-510.
[48] 167-168.
[49] [2010] EWCA Civ 158; [2011] QB 218.
[50] Ibid. [38]. See also *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582 in which Watkins LJ stated at 591: 'no-one nowadays surely can doubt that [the journalist's] presence in court for the purpose of reporting proceedings conducted therein is indispensable. Without him, how is the public to be informed of how justice is being administered in our courts?'
[51] *Attorney-General v Leveller Magazine Limited* [1979] AC 440, per Lord Diplock at 449-450; *R v Re Crook (Tim)* (1991) 93 Cr. App. R. 17, 24. The same applies to public meetings, as illustrated by Regulation 4(6) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 which provides a right for anyone wanting to report proceedings to be 'afforded reasonable facilities for taking their report.' See also: *Cape Intermediate Holdings Limited v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 in which the Supreme Court held that the public should be allowed access not only to parties' submissions and arguments, but also to documents which have been placed before the court and referred to during the hearing. Thus, even if the judge has not been asked to read the document and/or has not done so, provided the document has been referred to during the hearing, there is a prima facie right of access (albeit this is subject to an application by the party seeking access to the document).
[52] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 131.

As set out in Chapter Two, media freedom provides institutional protection for media actors. This includes a positive obligation placed on the state to facilitate media reporting and newsgathering by allowing those acting as media to access court proceedings and documents.[53] Thus, unlike the general public, an application by a member of the media to report on court proceedings where access has been limited and requires permission, will be given considerable weight.[54] The media's enhanced right to access legal proceedings in situations that are otherwise unavailable to the general public has been enshrined within various legislation,[55] and, more recently, has found its way into Practice Guidance relating to the use of 'live forms' of communication: members of the media are able to use social media to report on court proceedings without the court's permission, so long as the proceedings are open to the public and there are no reporting restrictions in place. To the contrary, if a member of the public wants to live-tweet about a trial they would need to ask the court's permission to activate their laptop, mobile phone or tablet to send the messages.[56]

Despite the constitutional importance attached to the media's role in reporting on court proceedings, in recent years, there has been a decline in the traditional media performing this task due to it no longer being profitable.[57] This accords with the observations made in Chapter One that, in some cases, the traditional media's focus has shifted onto commercially viable stories that sell, and/or are aligned to the political agenda of owners, as opposed to reporting on matters of public concern.[58] It is submitted that citizen journalists are perfectly placed to fill this gap left by the traditional media. However, as explained above, under the current rules, unless the court recognised the citizen journalist as 'media' they

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[53] See section 3.3.4.

[54] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 131.

[55] For example, see section 37 of the Children and Young Persons Act 1933, which allows the media access to the court when a child or young person is giving evidence in cases involving indecency; Section 25 of the Youth Justice and Criminal Evidence Act 1999 allows the court to exclude the public and the media, other than one sole representative, from the hearing when children give evidence in cases relating to sexual offences.

[56] Lord Judge, *Practice Guidance: The Use of Live Text-Based Forms of Communications (Including Twitter) From Court for the Purposes of Fair and Accurate Reporting* [2012] 1 WLR 12.

[57] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 131, 151-152.

[58] See Chapter One section 3.1; See also: C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain,* (7th ed. Routledge, 2010), 96-98; J. Curran, 'Mass Media and Democracy' in J. Curran and M. Gurevitch, *Mass Media and Society* (Edward Arnold, 1991), 86; T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 214; T. Gibbons, 'Freedom of the press: ownership and editorial values' (1992) *Public Law* 279, 286-287, 296; T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 485; R. McChesney, *Rich Media, Poor Democracy* (University of Illinois Press, 1999), 275.

would be afforded the same status as the general public and would, therefore, not be subject to the same advantages in securing access to certain legal proceedings, or being able to report those proceedings in the same way, as the traditional media.[59] Thus, at present, the traditional media's reluctance to report on legal proceedings, combined with the current rules on accessing certain hearings and documents being unfavourable to citizen journalists, creates a democratic deficit as, in situations where access to the court is limited, the public is not able to benefit from its constitutional right to open justice through the conduit of the media.

It is submitted that the adoption of the media-as-a-constitutional-component concept would provide a mechanism to deal with this deficit. However, before discussing this it is appropriate to briefly deal with the second issue that could stem from the intersection of online expression and open justice; namely how this has the potential to undermine the fairness of trials to a far greater extent than the traditional media.

In *Attorney-General v Associated Newspapers Limited*,[60] Moses LJ remarked on the 'viral nature' of online communication, stating that '[o]nce information is published on the [I]nternet, it is difficult if not impossible completely to remove it' and, consequently, that there is a 'need to recognise that instant news requires instant and effective protection for the integrity of a criminal trial.'[61] Fuelled by prosecutions for contempt of court arising from the use of social media, [62] Moses LJ's comments were indicative of growing judicial concern over seemingly unstoppable online expression[63] and its impact on criminal trials.[64] Indeed, in 2011, the then-Attorney-General, Dominic Grieve stated:

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[59] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 151-152.
[60] [2011] EWHC 418 (Admin).
[61] Ibid. [54]. Similarly, according to Cram et al, there are 'obvious and…possibly insuperable legal and other obstacles' to the robust enforcement of the law of contempt against non-traditional media. I. Cram, G. Borrie and N. Lowe, *Borrie & Lowe: The Law of Contempt* (4th ed. LexisNexis, 2010), 687. See also: D. Mac Síthigh, 'Contempt of court and new media' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 89.
[62] For example, although coming after *Associated Newspapers* see: *Attorney-General v Harkins and Liddle* [2013] EWHC 1455 (Admin); *Attorney-General v Baines* [2013] EWHC 4326 (Admin). See generally: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40.
[63] D. Mac Síthigh, 'Contempt of court and new media' in D. Mangan and L. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017), 90.
[64] *Attorney-General v Harkins and Liddle* [2013] EWHC 1455 (Admin), [22]. Similar comments were recently made in Australia in the context of defamation litigation. In *O'Reilly v Edgar* [2019] QSC 24 Justice Bradley, in considering the effects of social media, opined that it can make it 'impossible to track the scandal, to know what quarters the poison may reach.'

> 'Unlike major news organisations, which on the whole act in a responsible and measured manner,[65] the inhabitants of the [I]nternet often feel themselves to be unconstrained by the laws of the land. There is a certain belief that so long as something is published in cyberspace there is no need to respect the laws of contempt or libel. This is mistaken.'[66]

Grieve's statement is echoed by Leveson LJ's comments that bloggers can, if they choose, act with impunity,[67] as the Internet is a 'Wild West, law free zone',[68] and is indicative of the concerns with, and the problems created by, libertarianism as the de facto communication theory for online speech that were dealt with in Chapter Three.[69] Clearly, people publishing information online about legal proceedings can detrimentally impact on the fairness of trials. However, members of the general public who, for example, publish the name and/or pictures of a complainant in a criminal trial, may well be in contempt of court but, in most cases, this will not fatally or even critically affect the trial, as due to their (often relatively) limited following, if dealt with quickly, any damage to the integrity of the trial will be limited. The same cannot be said for many (although not all) citizen journalists, who may enjoy significant follower numbers across a variety of 'immediate, pervasive and accessible' platforms,[70] and who may also be publishing anonymously or pseudonymously.[71] Moreover, as advanced throughout this thesis, citizen journalists have become trusted sources of news, and, in some instances, are more trusted by the public to deliver the news in an unbiased and impartial way than the traditional media.[72] This trust extends to other media actors, including the traditional media, who increasingly rely on citizen journalists as a source of news. This

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[65] As argued throughout this thesis, it is submitted that this is not always the case. Incidentally, this comment seems to conflict with Grieve's earlier statement in the same speech that: 'I have been concerned, even before I was appointed Attorney-General, at what I perceived to be the increasing tendency of the press to test the boundaries of what was acceptable over the reporting of criminal cases. At times it appeared to me the press had lost any sense of internal constraint and felt able, indeed entitled, to print what they wished, shielded by the right to "freedom of expression" without any of the concomitant responsibilities.' D. Grieve, 'Contempt: A Balancing Act' (*Speech at City University, London,* 1st December 2011).

[66] Ibid.

[67] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 736, [3.2]. See Chapter Seven Section 2.

[68] A.C. Yen, 'Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace' (2002) 17 *Berkeley Technology Law Journal* 1207.

[69] See Sections 2 and 3 for detailed analysis of libertarianism and why it should be rejected as a normative framework for media speech.

[70] See Chapter Three Section 3.2.

[71] See Chapter Five. See generally: P. Coe, 'Anonymity and Pseudonymity: Free Speech's Problem Children' *Media & Arts Law Review* (2018) 22(2) 173-200.

[72] In particular see Chapter One Section 3.1. For detailed discussion on the concept of trust and how this relates to regulation, see generally: T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219.

symbiotic relationship creates a cycle, in which material published by citizen journalists is recycled by other forms of media regardless of its accuracy and/or legality.[73] The fact that the material has been re-published by a 'trusted' media outlet has a 'halo effect', in that it adds credence to the citizen journalist and the material itself, thereby, in some instances, creating a perpetual cycle of misinformation.[74] Furthermore, the recycling of information means that potentially damaging material including, in a contempt of court context, material that could undermine the integrity of a trial, is distributed far more widely by virtue of 'support' from other media outlets.

2.2 CITIZEN JOURNALISM, THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT AND THE HARMONISATION OF MEDIA FREEDOM AND OPEN JUSTICE

The previous section has established how citizen journalism could support open justice by filling the gap left by the traditional media, albeit, due to the current rules on accessing certain court hearings being unfavourable to citizen journalists, there exists a democratic deficit. However, with online expression comes an increased risk in the integrity of trials being undermined. This section will consider how the media-as-a-constitutional-component concept, as underpinned by social responsibility theory, provides a normative framework that would overcome these issues, thereby harmonising media freedom and open justice.

Firstly, pursuant to the concept, and its functional definition of media set out in Chapter Three,[75] citizen journalists are operating as media so long as they are publishing material of constitutional value, whilst complying with the standards of behaviour and norms of discourse set out in Chapter Four. The concept and its social responsibility foundations require that the material published by media actors derives from accurate, and the best available, information, and that the newsgathering process has been conducted responsibly and ethically. [76] In the context of reporting on court proceedings, adherence to these standards

[73] As observed by Gibbons, this is particularly evident in the context of the pressurised 24-hour news environment within which many media actors operate, which give rise to 'a concomitant incapacity to avoid recycling old material, investigate thoroughly, or check accuracy.' T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 214. See also: N. Davies, *Flat Earth News* (Vintage, 2009), 370-371.
[74] This relationship is dealt with throughout the thesis. In particular see, Chapter One generally and Chapter Four Section 3.2.
[75] See Sections 4 and 5.
[76] See Section 3.

and norms would require the media actor to provide an accurate, balanced and transparent report that complies with any legal obligations laid down by the court.

In principle at least, recognition that citizen journalists are acting as media would give them the same positive rights of access to those court proceedings[77] that are off-limits to the public as the traditional media which could, in theory, help to eliminate, or at least reduce, the democratic deficit. By way of analogy, this recognition would accord with the treatment of citizen journalists by the Court of Justice of the European Union in the context of data protection jurisprudence,[78] which has afforded citizen journalists the same status, and the ability to take advantage of the same exemptions, as the traditional media. [79]

Secondly, a media actor's appetite for engagement with the standards and norms imposed by the concept provide an objective benchmark for a court, or other stakeholders in other contexts, to assess the actor's commitment to responsible journalism. The corollary to this is that citizen journalists that do not adhere to them are not acting as media and are therefore not able to avail themselves of the enhanced right to media freedom and the benefits this bestows upon its beneficiaries, including accessing legal proceedings and documents off-limits to the general public.[80]

Finally, it is argued in Chapter Seven that because the concept and its normative and philosophical foundation provide a mechanism for citizen journalists to be classed as media, and therefore benefit from media freedom, as media actors they should be subject to the same regulatory regime as the traditional media.[81] This Chapter sets out a framework for a new self-regulatory, yet highly incentivised, scheme that would effectively capture citizen journalists.[82] Membership of the scheme is dependent on the media actor, whether they be traditional media or citizen journalists, publishing material and behaving in accordance with

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[77] See Chapter Two Section 3.3.4 for a discussion on media freedom and positive rights.
[78] *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy* (*Satamedia)* Case C-73/07; *Sergejs Buivids v Datu valsts inspekcija* Case C-345/17.
[79] The *Satamedia* and *Buivids* cases relate to the applicability of Article 9 of the Data Protection Directive (95/46/EC) to citizen journalists, as it provides a special purposes exemption for journalism. A slightly modified version of this exemption was found in section 32 of the now repealed Data Protection Act 1998 and has subsequently been imported into Article 85 of the General Data Protection Regulation and the Data Protection Act 2018, by virtue of Part 5, paragraph 26 of Schedule 2 of the Act. See Chapter Seven section 2 for a brief discussion on this exemption.
[80] See Chapter Two for a discussion on how media freedom protects speech and the media as an institution.
[81] See section 2.
[82] See section 4.

the concept, and its inherent standards and norms.[83] Thus, a recommended non-statutory incentive is that membership of the scheme would be a mark of responsibility, that would demonstrate to the outside world the media actor's appetite for accountability. This would confer upon them a reputational advantage over non-members as they would be awarded something like a kitemark to demonstrate their compliance with the scheme.[84] A second non-statutory incentive is access to training. This would include providing members with a requisite level of knowledge to report appropriately on court proceedings.[85] A recommended statutory incentive is that members would have access to court proceedings and documents otherwise closed to the public.[86] Therefore, notwithstanding the arguments set out in the previous paragraphs, only members of this new regulatory scheme could access these legal proceedings. This would provide the courts, at the very least, with reassurance that citizen journalists reporting on restricted legal proceedings are adhering to the same objective standards as the traditional media, and that they belong to a group that is committed to acting responsibly and ethically.

3. DEFAMATION

In a contempt of court context the previous section has talked a lot about responsible journalism, and the benefits of media actors adhering to the behavioural standards and norms of discourse inherent within the media-as-a-constitutional-component concept. As that section established, the concept can play a vital role in supporting citizen journalists' facilitation of open justice, thereby enabling the public to realise a constitutional right. Incidentally, this supports both the rule of law and democracy. This section will argue that the concept can play an equally important role in promoting and protecting media freedom in the context of the law of defamation.

3.1 SERIOUS HARM, DEFAMATION LITIGATION AND COSTS

Section 1(1) of the Defamation Act 2013 provides that for a statement to be defamatory it must have caused, or is likely to cause, the claimant's reputation serious harm.[87] The test is

[83] Section 4.1.
[84] Section 4.4.2.
[85] Ibid.
[86] Section 4.4.1.
[87] For bodies that 'trade for profit' this is qualified by section 1(2), which says that to meet this threshold, companies need to demonstrate that the statement has caused, or is likely to cause, serious financial loss.

not defined or explained explicitly by the Act. [88] Therefore, it has been left to case law to interpret it, as illustrated by the recent high-profile judicial scrutiny it received in the *Lachaux v Independent Print Limited* litigation.[89]

Prior to the enactment of the 2013 Act, pursuant to Tugendhat J's judgment in *Thornton v Telegraph Media Group Ltd*,[90] for a statement to be defamatory, it had to cross a 'threshold of seriousness'. Accordingly, the appropriate test was whether a statement had a tendency to cause 'substantial' reputational harm.[91] In the *Lachaux* High Court proceedings[92] Warby J's interpretation of section 1(1) was that it does more than just raise the threshold from a tendency to cause 'substantial' to 'serious' reputational harm, and that claimants are required to go beyond showing a tendency to harm reputation.[93] This means that claimants have to adduce extrinsic evidence demonstrating as a fact that either serious harm has occurred or, on the balance of probabilities, that it is more likely than not to occur,[94] unless the meaning of the words complained-of is so serious that serious reputational harm is inevitable and can therefore be inferred.[95] The judgment represented a significant departure from the common law, under which inferences as to the seriousness of the allegations could routinely be drawn from the offending words themselves. Therefore, it presented a situation where libel is not actionable per se, as it had long been thought to be at common law.[96]

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[88] For analysis of the uncertainty this has created in relation to both the section 1(1) serious harm test and the section 1(2) serious financial loss test, see: P. Coe, 'A comparative analysis of the treatment of corporate reputation in Australia and the UK' in P.Wragg and A. Koltay (eds), *Research Handbook on Comparative Privacy & Defamation Law* (Edward Elgar Publishing, 2020); P. Coe, 'The Defamation Act 2013: we need to talk about corporate reputation' (2015) *Journal of Business Law* (4) 313-333; D. Acheson, 'Corporate reputation under the European Convention on Human Rights' (2018) 10(1) *Journal of Media Law* 49-76; D. Acheson, 'Empirical insights into corporate defamation: an analysis of cases decided 2004–2013' (2016) 8(1) *Journal of Media Law* 32-66.

[89] [2015] EWHC 2242 (QB); [2017] EWCA Civ 1334 (CA); [2019] UKSC 27.

[90] [2010] EWHC 1414 (QB).

[91] Ibid. [90]-[92].

[92] [2015] EWHC 2242 (QB);

[93] Ibid. [45].

[94] Ibid.

[95] Ibid. [57]. For example, if the words purport to identify an individual as involved a conspiracy to murder or committing a serious sexual crime. In respect of inferential proof, Warby J relied upon Bean J's judgment in *Cooke and Midland Heart Limited v MGN Limited and Trinity Mirror Midlands Limited* [2014] EWHC 2831 (QB) who limited the doctrine of inferential proof to cases 'so obviously likely to cause harm to a person's reputation.' In these instances 'a claimant could rely on inferential proof.'[43] This was approved by Warby J in *Ames v The Spamhaus Project* [2015] EWHC 127 (QB), and later developed in *Lachaux* in which Warby J held that: 'As recognised in *Cooke* and *Ames*…the serious harm requirement is capable of being satisfied by an inferential case, based on the gravity of the imputation and the extent and nature of its readership or audience.'

[96] *Ratcliffe v Evans* [1892] 2 QB 524, 528 per Bowen J; *English and Scottish Co-Operative v Odhams Press Ltd* [1940] 1 KB 440, 461 per Goddard LJ.

According to the Court of Appeal, [97] Warby J's interpretation of section 1(1) represented a radical shift in the law. Therefore, it was effectively reversed by the Court on the basis that there is no mention in the Act of Parliamentary intention to alter the long-held view that libel is actionable per se.[98] Consequently, in conflict with Warby J's judgment, the Court of Appeal's decision determined that, ordinarily, claimants do not need to adduce extrinsic evidence of actual damage in order to show that words complained-of are 'likely to cause' serious reputational harm; inferences of a likelihood of serious harm may continue in line with the common law, in that they can be drawn from the words themselves,[99] and not just in the most extreme cases, as was suggested in *Cooke and Midland Heart Limited v MGN Limited and Trinity Mirror Midlands* by Bean J and in *Ames v The Spamhaus Project* and *Lachaux* by Warby J.[100]

Ultimately, the Court held that section 1(1) had merely raised the threshold from one of 'substantiality' to one of 'seriousness', with the latter conveying something 'rather more weighty' than the former,[101] and that the words 'is likely to cause' should be taken as connoting a tendency to cause.[102] Consequently, by enshrining a modified version of the *Thornton* test within the Act,[103] the judgment also had the effect of raising the bar for bringing a claim.

Perhaps unsurprisingly, the Court of Appeal's decision was the subject of a further appeal to the Supreme Court.[104] The appeal was heard by Lords Sumption, Kerr, Wilson, Hodge and Briggs on 13th and 14th November 2018, and the judgment was handed down in June 2019. The Court unanimously overturned the Court of Appeal's interpretation of 'serious harm', thereby preferring the analysis of Warby J.[105] It held that section 1 not only raises the threshold of seriousness from that in *Jameel v Dow Jones & Co Inc*[106] and *Thornton*,[107] but requires its application to be determined by reference to the actual facts

[97] [2017] EWCA Civ 1334 (CA), per Davis, Sharpe and McFarlane LJJJ. The leading judgment was given by Davis LJ, with which Sharpe and McFarlane LJJ agreed.
[98] Ibid. [56]-[63].
[99] Ibid. [72].
[100] See n 94 above.
[101] *Lachaux v Independent Print Limited* [2017] EWCA Civ 1334 (CA), [44] per Davis LJ.
[102] Ibid. [50].
[103] Ibid. [49]-[50].
[104] *Lachaux v Independent Print Ltd* [2019] UKSC 27.
[105] Ibid. [20], per Lord Sumption.
[106] [2005] QB 946.
[107] [2010] EWHC 1414 (QB).

about its impact, not merely the meaning of the words.[108] In doing so, the Court held that the Court of Appeal's analysis gave little or no effect to the language of section 1 and was internally contradictory.[109]

It is clear from the *Lachaux* litigation that mass media publication is likely to be an important factor in determining whether the seriousness threshold has been met.[110] This could have serious repercussions for citizen journalists, who can, and often, reach mass audiences, either as a primary publisher, or as a result of their material being recycled by other media actors. Defending defamation claims can be complex and expensive and, if unsuccessful, can result in the payment of significant damages.[111] Indeed, even determining the meaning of a defamatory statement can require preliminary hearings before the full trial, which increase costs further.[112] The traditional media tend to have the financial and legal resources at their disposal to prevent defamation litigation from arising in the first place, by virtue of pre-publication advice and, in the event of being sued, to deal with defamation claims and absorb legal costs and awards of damages. To the contrary, most citizen journalists are not going to be in the same position. Thus, citizen journalists are vulnerable to wealthier claimants who may wish to silence them, regardless of the truth of the alleged defamatory statement. As discussed throughout this thesis, citizen journalists are no longer an outlier of free speech. Rather, they are central to how we receive and impart information and ideas and are, therefore, critical to a functioning and healthy democracy. Consequently, if citizen journalists are prevented from publishing material of constitutional value through fear of the costs of litigation, or because they do not have the resources to obtain pre-publication advice, or to

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[108] *Lachaux v Independent Print Ltd* [2019] UKSC 27, [12] per Lord Sumption.
[109] Ibid. [20].
[110] *Lachaux v Independent Print Limited* [2017] EWCA Civ 1334 (CA), [65] per Davis LJ; *Cooke and Midland Heart Limited v MGN Limited and Trinity Mirror Midlands* [2014] EWHC 2831 (QB) per Bean J at [43]; J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 49.
[111] The government has commenced section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in respect of 'publication and privacy proceedings.' Section 44 was generally brought into force in April 2013, pursuant to the LASPO (Commencement No. 5 and Saving Provision) Order 2013, SI/2013/77. However, as the 2013 Commencement Order made clear, the government deliberately opted not to bring section 44 into force in respect of 'publication and privacy proceedings'. These proceedings were defined in Article 1 of the 2013 Commencement Order as 'proceedings for (a) defamation, (b) malicious falsehood; (c) breach of confidence involving publication to the general public (d) misuse of private information or (e) harassment, where the defendant is a news publisher'. Thus, until the 6th of April 2019 when, pursuant to Article 2 of the LASPO (Commencement No. 13) Order 2018 SI/2018/1287, section 44 commenced in respect of 'publication and privacy proceedings' (defined in Article 1(2) of the 2018 Commencement Order in exactly the same terms as Article 1 of the 2013 Commencement Order), claimants could still recover Conditional Fee Agreement success fees from the defendant in these types of proceedings. The decision reflects the ECtHR's decision in *Mirror Group Newspapers Limited v United Kingdom* App. no. 39401/04 (2011) 53 EHRR 5 that success fees violated Article 10 ECHR.
[112] G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002), 82-83.

appropriately deal with defamation claims, then a vital democratic component is potentially lost. Thus, the following section will consider how the media-as-a-constitutional-component concept can go some way to alleviate these issues through its application to specific defences.

3.2 THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT AND DEFENCES

The Defamation Act 2013 and cognate legislation[113] provides for a number of defences to defamation claims. This section will argue that the standards of behaviour and norms of discourse imposed by the media-as-a-constitutional-component concept support the operation of these defences and, in turn, media freedom; specifically, the defences of truth[114], honest opinion[115] and publication on a matter of public interest.[116]

3.2.1 TRUTH

Section 2 of the 2013 Act provides a defence to an action for defamation if the defendant can show that the statement complained of is substantially true. Consequently, the defence applies a reverse burden of proof, which means that unless the defendant can prove that the defamatory statement is true on the balance of probabilities, it is presumed to be false. According to Sir David Eady, powerful institutions, such as the media, should not benefit from an assumption that 'their allegations, however serious, are true' and, therefore, the imposition of the reverse burden reflects the 'awesome power of the press' to damage individuals' reputations.[117] Thus, according to Rowbottom 'it is the power of the media to damage a name that invokes the 'innocent until proven guilty' principle and it is reasonable to expect the media to take on the risk of any inaccuracies.'[118]

Despite the rationale behind the reverse burden, it has been subject to criticism for chilling media speech and protecting undeserved reputations. For example, in Weir's view '[t]his absurd reversal of the normal burden of proof encourages claimants to sue even if they

[113] Defamation Act 1996.
[114] Defamation Act 2013 section 2.
[115] Ibid. section 3.
[116] Ibid. section 4. Arguably, it can also help with the operation of the defences for secondary publishers pursuant to section 10 of the 2013 Act and section 1 of the Defamation Act 1996, as media actors that are members of the regulatory regime set out in Chapter Seven would be easily identifiable.
[117] D. Eady, 'Defamation: Some Recent Developments and Non-Developments' in M. Saville and R. Susskind (eds), *Essays in Honour of Sir Brian Neil: the Quintessential Judge'* (LexisNexis, 2003), 155.
[118] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 54.

know that what the defendant said was perfectly correct.'[119] It is submitted that, in the context of citizen journalism, and the critical role that citizen journalists now play in free speech, the concern articulated by Weir, and the damage that can flow from this, is arguably more acute. As discussed above, citizen journalists tend not to have the same 'awesome power', at least in financial terms and access to legal resources, at their disposal as the traditional media.[120] As a result they are more vulnerable to an imbalance in power and, therefore, more susceptible to litigation between themselves and wealthy claimants wishing to silence them. Thus, although in *McVicar v United Kingdom*[121] in a traditional media setting the ECtHR found that the reverse burden of proof is compatible with Article 10 ECHR,[122] it is arguable that would not be the outcome if applied to citizen journalism.

Notwithstanding the above, the reverse burden is applicable to any defendant wishing to use the defence. As Robertson and Nicol suggest, proving the truth of a defamatory imputation on a balance of probabilities can be challenging[123] for any media actor. Accordingly, for investigative journalism that, for example, requires research into areas lacking transparency, or the use of confidential sources or piecemeal evidence, or evidence that would be inadmissible in court, there is a significant risk of error.[124] Thus, the defence encourages media actors to operate diligently and ethically, and to maintain a proper paper trail and to verify the veracity of their sources.[125] Operating in this way accords with the behavioural standards and norms of discourse inherent with the media-as-constitutional-component concept,[126] and the jurisprudence of the ECtHR.[127] It is submitted that adherence to these standards and norms is particularly important for citizen journalists, who do not have the same institutional infrastructure behind them to support them in these activities as the traditional media. By adhering to the behaviours imposed by the concept, they stand a better chance of being able to successfully run the defence by overcoming the reverse burden. Moreover, as explained in section 2.2, membership to the regulatory framework advanced in

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[119] T. Weir, *Tort Law* (Oxford University Press, 2002), 168.
[120] See section 3.1 above. However, it has been recognised throughout this thesis that citizen journalists do have significant power in terms of followers, trust, reach, and speech of dissemination.
[121] App. no. 46311/99 (2002) 35 EHRR 22.
[122] Ibid. [83]-[87]. This case concerned the reverse burden under the common law defence of justification, which was abolished by section 2 of the 2013 Act.
[123] G. Robertson QC and A. Nicol QC, *Media Law*, (4th ed. Penguin Books, 2002), 114-115.
[124] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 54.
[125] Ibid.
[126] See Chapter Four sections 3.2 and 3.3.
[127] *Alithia Publishing Company Ltd and Constantinides v Cyprus* [2008] App. no. 17550/03 [66]; *Gutiérrez Suárez v Spain* [2010] App. no. 16023/07 [38].

Chapter Seven is dependent upon the media actor operating in a way that accords with the behaviours required to at least make it possible to run the truth defence successfully. This adherence to the concept's behaviours and norms is 'formalised' through the recognition that the regulatory scheme provides. Additionally, membership of the scheme would give members access to an infrastructure that will provide support, in the form of legal advice and training, on how to satisfy the requirements imposed by the various defences to defamation claims, including the section 2 reverse burden of proof and the section 3 defence of honest opinion and the section 4 defence of publication on a matter of publication interest, both of which are considered below.

3.2.2 HONEST OPINION

A defendant wishing to run the defence has to meet three conditions. Firstly, section 3(2) states that the defendant must show that the defamatory statement was one of opinion, rather than fact.[128] A nuance of this condition animates the complexity of the defence. Some statements of fact may be defended as expressions of opinion if the respective statement's deductions or conclusions can be inferred by other facts that are sufficiently stated or indicated and that it is obvious to the reasonable person that the publisher could not have had direct knowledge of the matter and, therefore, must have been expressing an opinion or inference.[129] Secondly, under section 3(3), the statement must indicate the 'basis of the opinion'. Thirdly, pursuant to section 3(4)(a) and (b) the statement must be one that an honest person could have held on the basis of 'any fact which existed at the time the statement complained of was published'[130] or 'anything asserted to be a fact' contained within a privileged statement 'published before the statement complained of'.[131] Finally, pursuant to section 3(5), the defence is defeated if the claimant can show that the defendant did not hold the opinion.

Section 3(4)(b) concerns the position of the publisher who bases an opinion on facts published by somebody else. If those facts prove to be false, the publisher of the opinion exposes themselves to liability, and will effectively be asked to prove the validity of the

[128] According to *Telnikoff v Matusevitch* [1992] 2 AC 343, in assessing this rather than assuming the reader had any particular background knowledge, the court will look at the article in isolation.
[129] M. Collins, *Collins on Defamation* (Oxford University Press, 2014), [9.12]. See also the Defamation Act 2013 Explanatory Notes, [21].
[130] Defamation Act 2013, section 3(4)(a).
[131] Ibid. section 3(4)(b).

privilege by proxy,[132] which may prove impossible.[133] According to *Gatley on Libel and Slander* this creates a problem for 'social media commentators,' as the way in which section 3(4)(b) is drafted significantly diminishes the utility of the defence for publishers who base their opinions on facts published elsewhere.[134] By extension the same argument applies to citizen journalists and also, in some circumstances, to the traditional media, by virtue of their symbiotic relationship and its inherent recycling of material. The media-as-a-constitutional-component concept's behavioural standards and norms of discourse require media actors to check their sources thoroughly before publication.[135] Thus, it is submitted that adherence to the concept can go some way to reduce citizen journalists not being able to rely on the defence because they are unable satisfy this condition, as those conforming to its standards, and operating within the regulatory framework advanced in Chapter Seven,[136] are more likely to have undertaken the necessary checks to ensure the veracity of the source/material they are using and, as discussed the below, have undergone appropriate training to help them carry out these checks and understand the requirements of the defence.

Clearly, although the defence of honest opinion is broad, its application is complex.[137] It requires an understanding of its nuances, particularly the difference between fact and opinion, the way in which the court assesses this, and the role that inferences can play in the operation of the defence. For the reasons discussed in the previous section, unlike the traditional media, citizen journalists may not have the training, experience or access to legal support to help them delineate between opinion or fact within their reporting, or, for instance, understand how inferences work which, ultimately, makes them vulnerable to litigation. As explained above in relation to the defence of truth, membership of the regulatory scheme advanced in Chapter Seven would give members access to legal advice and training, which would help to navigate the section 3 conditions.

3.2.3 PUBLICATION ON A MATTER OF PUBLIC INTEREST

Section 4 of the Defamation Act 2013 has enshrined a public interest defence within statute. Prior to this, at common law, a more limited public defence could be found in the form of

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[132] A. Mullis and R. Parkes QC (eds), *Gatley on Libel and Slander* (12th ed. Sweet & Maxwell, 2013), [12.23].
[133] Ministry of Justice, *Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm. 8295, 2012), [41].
[134] A. Mullis and R. Parkes QC (eds), *Gatley on Libel and Slander* (12th ed. Sweet & Maxwell, 2013), [12.23].
[135] See Chapter Four sections 3.2 and 3.3.
[136] See Section 4.
[137] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 56.

Reynolds privilege which was created in *Reynolds v Times Newspapers Limited.*[138] In order to avail themselves of the defence the defendant needed to show that the: (i) publication was on a matter of general interest; (ii) publication of the defamatory statement was justifiable as a contribution to the discussion of the matter concerned; and (iii) they had met the requirements of responsible journalism. To determine whether the defendant had met the 'responsible journalism' condition, Lord Nicholls provided non-exhaustive criteria for judges to consider when making their assessment. This included: (i) the 'seriousness of the allegation'; (ii) the 'source of the information'; (iii) the 'steps taken to verify the information'; (iv) '[w]hether comment was sought from the [claimant]'; and (v) the 'tone of the article'.[139]

Although, like the media-as-a-constitutional-component concept, the defence took a functional approach to defining the media,[140] which meant that it was available to anybody that could demonstrate responsible journalism by fulfilment of Lord Nicholls' criteria, the defence had serious limitations for non-traditional media actors, and even smaller 'traditional' publishers. This is because the responsible journalism requirements were designed to follow the practices of the established mass media and were, therefore, in practice, most useful for traditional media actors and were, as a result, more difficult for other media actors to satisfy.[141] This is illustrated by evidence given to the Culture, Media and Sport Select Committee by Alan Rusbridger, a former editor of *The Guardian*, who described the 'long, drawn out, rather arduous way of processing stories' and the legal oversight required to comply with the *Reynolds* criteria.[142] In Rusbridger's opinion, although national newspapers had the resources to do this, the same was not true for local newspapers.[143] Arguably, if an established local newspaper would struggle to meet the *Reynolds* standards, and afford the legal input required, by extension, it would be harder, if not impossible, for a citizen journalist to do so. How these limitations have been addressed by the current law is considered next.

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[138] [2001] 2 AC 127 (HL). For a detailed summary of the law prior to the 2013 Act, see: J. Price QC and F. McMahon (eds), *Blackstone's Guide to The Defamation Act 2013* (Oxford University Press, 2013), [5.02]-[5.49].
[139] *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 (HL), per Lord Nicholls at 204-205.
[140] See Chapter Two section 5 for the arguments against the adoption of an institutional approach to defining the media and Chapter Three section 5 for a new 'functional' definition of the media.
[141] Accordingly, in Rowbottom's opinion: 'Unlike a political journalist in a leading newspaper, a blogger or social media commentator should not be expected to phone up a politician for comment before making a defamatory statement.' J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 90-91.
[142] House of Commons, Culture, Media and Sport Select Committee, *Press standards, privacy and libel* (HC 2009-10, 362-II), evidence given on 5th May 2009 at [155], Q897.
[143] Ibid.

The *Reynolds* defence was abolished in 2013 and replaced by section 4, albeit the intention behind the provision was to largely codify the *Reynolds* criteria and follow a negligence standard.[144] Despite this, prima facie at least, the section 4 test is formulated differently. It contains two elements that the defendant must satisfy: (i) the publication 'was, or formed part of, a statement on a matter of public interest';[145] and (ii) 'the defendant reasonably believed' that it was in the public interest to publish the statement complained of.[146]

The effective employment of the defence is largely dependent on the second limb of the test and, specifically, the application of the reasonable belief standard.[147] In assessing whether that standard has been met, pursuant to section 4(2) and (4), the court 'must have regard to all the circumstances of the case' and 'make such allowance for editorial judgment as it considers appropriate' respectively. The Court of Appeal's recent judgment in *Economou v de Freitas*[148] has provided much needed clarity on the scope of the reasonable belief standard, and how this applies to citizen journalists.[149] Firstly, the Court determined that in assessing the reasonableness of the defendant's belief that publication of the statement was in the public interest, the court should pay close attention to the *Reynolds* criteria set out above.[150] Secondly, when making this assessment, the court should exercise considerable flexibility, taking into account all the circumstances of the case,[151] including an appraisal of the defendant's role.[152] Consequently, the court should not be compelled to hold each defendant to the same high standard of 'responsible journalism.'[153]

The judgment determines that citizen journalists and casual social media users alike may be able to avail themselves of the section 4 defence,[154] so long as they can show that they reasonably believed that publishing the defamatory statement was in the public interest, even if their conduct might fall short of that expected of a trained and experienced

[144] Defamation Act 2013, Explanatory Notes, [35].
[145] Defamation Act 2013 section 4(1)(a).
[146] Ibid. section 4(1)(b).
[147] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 91.
[148] [2018] EWCA Civ 2591; [2019] EMLR 7.
[149] See also: *Seratin v Malkiewicz* [2019] EWCA Civ 852.
[150] *Economou v de Freitas* [2018] EWCA Civ 2591; [2019] EMLR 7 per Sharp LJ, [76].
[151] Ibid. [110].
[152] Ibid.
[153] Ibid. [104]-[110].
[154] Ibid. Sharp LJ was clear that the 'defence is not confined to the media' and is, therefore, of general application.

journalist.[155] However, the judgment is also clear that this will not afford citizen journalists immunity to report on contentious subjects without risk, nor the freedom to rely, and fall back on, the professional judgment of others. This caveat to the judgment raises some potential challenges for citizen journalists that the media-as-a-constitutional-component concept can help to meet.

In 'considering all the circumstances of the case' to determine whether the belief was reasonable the court is likely to be influenced by ECtHR's jurisprudence relating to the Article 10(2) ECHR 'duties and responsibilities' qualification to Article 10(1),[156] in that the media actor is 'acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism'[157] and that they are expected to meet 'the tenets of responsible journalism.'[158] In respect of the court making appropriate allowances for 'editorial judgment', if the defendant can demonstrate that they went through the necessary pre-publication 'checks and enquiries' then greater weight is likely to be given to their 'editorial judgment.'[159] However, in line with the Strasbourg Court's decision in *Delfi AS v Estonia*,[160] in which it noted how the 'duties and responsibilities' can vary according to the role of the publisher,[161] under the *Economou* interpretation of the provision the publisher's role is critical to the assessment of the reasonable belief standard.[162] Thus, by way of example, depending on the facts[163] it seems that the experience of a citizen journalist could determine the level of adherence to appropriate journalistic conduct and the quality of the editorial judgment required to satisfy the test. Ultimately, these factors may require the court to make additional findings of fact to determine whether the reasonable standard was met, which can increase the complexity and costs of the litigation. This is compounded by the defence's fact-sensitive approach which creates a lack of certainty and adds to its complexity. As discussed above, because of the relative lack of legal and financial resources available to

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[155] This accords with Nicklin J's judgment in *Sooben v Badal* [2017] EWHC 2638 (QB), [32]-[34], pursuant to which the *Reynolds* criteria for responsible journalism should be applied to non-professional journalists. See Chapter Five section 3.1.
[156] J. Rowbottom, *Media Law*, (Hart Publishing, 2018), 91.
[157] *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [65].
[158] *Bedat v Switzerland* App. no. 56925/08 (2016) 63 EHRR 15, [50].
[159] *Economou v de Freitas* [2016] EWHC 1853 (QB); [2017] EMLR 4 per Warby J, [240].
[160] App. no. 64569/09 (2016) 62 EHRR 6.
[161] Ibid. [113].
[162] In *Economou* this related to them acting as a 'mere contributor' rather than a professional journalist. *Economou v de Freitas* [2018] EWCA Civ 2591; [2019] EMLR 7 per Sharp LJ, [18].
[163] Ibid. [110]. The Court affirmed that this assessment is highly fact sensitive.

citizen journalists compared to the traditional media, this makes them less likely to meet the requirements of the defence and more vulnerable to litigious claimants.

It has been well-rehearsed throughout this chapter that to be defined as media the media-as-constitutional-component concept requires actors to conform to certain standards of behaviour and norms of discourse, which also provide the conceptual rationale that underpins the regulatory scheme advanced in Chapter Seven.[164] It is submitted that these standards and norms are indicative of the conduct required to meet the conditions imposed by section 4. Media actors could go a long in demonstrating that they are fulfilling those standards and norms, and therefore satisfying the 'reasonable belief' requirement, by virtue of their membership to the proposed regulatory scheme. Of course, the corollary to this is that actors that do not adhere to the standards imposed by the concept are not acting as media, and therefore should not be assessed in the same way. Although the defence would still apply, what is required from them to make out the defence would be different, although, importantly, not any less onerous, as it would be unfair for one actor to be subject to a higher level of scrutiny than another because they are demonstrating appropriate journalistic behaviours. Rather, the concept could provide an objective benchmark to help the courts assess what standards need to be applied, and whether actors are meeting those standards. It is recognised that this will not solve the problems set out above completely, but it may help to reduce the uncertainty attached to the court's assessment, and therefore reduce costs.

4. CONCLUSION

Contempt of court and defamation underpin constitutionally vital principles, namely the integrity and fairness of trials and the protection of reputation. However, as established throughout this chapter, the operation of these principles can be at odds with media freedom, for a variety of reasons. The media-as-a-constitutional-component concept is not designed or intended to erode the constitutionally vital functions facilitated by the law of contempt of court and defamation. To the contrary, it accepts and embraces countervailing principles. Rather, this chapter has explained how the concept supports citizen journalism, and therefore media freedom, and how this can address the imbalance that these principles can create between the state or litigious claimants and the media, which is often more acute in the context of citizen journalists despite their central role within the facilitation of free speech.

[164] See section 4.1.

The role of the concept will be developed further in the following, and final chapter, which sets out a new regulatory framework that effectively captures citizen journalists.

CHAPTER SEVEN

THE VIABILITY OF REGULATING MEDIA ACTORS PURSUANT TO THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT CONCEPT

1. INTRODUCTION

This thesis has advanced the notion that there are two categories of free speech: (i) the personal right to freedom of expression and; (ii) media freedom. It argues that the latter ought to be treated differently to the former. However, in the current categorisation of who belongs to which group, there is a gap, as there is a definable category of actors who are, as citizen journalists, effectively, 'media', but are not recognised as such. Consequently, this thesis contends that the law's treatment of media freedom as a normative concept needs to be modernised. The new definition of media based on the media-as-a-constitutional-component concept, as underpinned by social responsibility theory and the argument from democratic self-governance, provides the appropriate framework to facilitate this modernisation and 'plug the gap'.

As explained in Chapter Three, under the concept, there is no de facto right to media freedom: citizen journalists using social media to disseminate information of constitutional value are equally as entitled to benefit from the right as 'traditional' journalists employed within the broadcast or print media. Conversely, any actor who publishes information that is not of constitutional value, such as celebrity gossip, is not, in that instance, acting as media, and therefore cannot claim to be subject to the protection guaranteed by the right to media freedom, regardless of whether they are a 'traditional' journalist writing for a newspaper, or whether they a citizen journalist. As argued in Chapter Four, the concept's normative and philosophical foundation (in the form of social responsibility theory and the argument from democratic self-governance respectively) dictates that, in order for media actors to benefit from the enhanced right to media freedom, they must conform to certain behavioural

standards and norms of public discourse, or concomitant duties and responsibilities: namely the norms inherent within this underlying rationale. Thus, Chapters Five and Six considered how the concept, and its foundations, provide a better framework for dealing with anonymous and pseudonymous speech, maintaining fair trials and defamation within the current libertarian paradigm.

The purpose of this concluding Chapter is not to discuss the merits of media regulation generally. This topic has already been the subject of significant scholarship[1] and is beyond the scope of this thesis. For the same reasons, it does not intend to tackle the issue of regulating social media or the Internet. As Scaife has persuasively argued, regulating every aspect of social media would require an 'omni-directional' regulatory system which would be extremely difficult to implement,[2] although, at the time of writing, the potential for an Internet regulator is subject to a Parliamentary Select Committee inquiry.[3] Rather, the purpose of this chapter is to address the issue of regulating citizen journalists. As stated in Chapter Three, and developed in the following section of this chapter, social responsibility theory champions self-regulation of the media, but also justifies a coercive regulatory scheme if the circumstances require it.[4] Therefore, it provides an appropriate foundation upon which to base a regulatory regime. This Chapter begins at section 2 by arguing that, as a result of the concept and its normative and philosophical foundation providing a mechanism for citizen journalists to be classed as 'media' and therefore benefit from media freedom, as media

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[1] For example see: R. Baldwin and J. Black, 'Really Responsive Regulation' *Modern Law Review* (2008) 71(1), 59-94; R. Baldwin and J. Black, 'Really Responsive Risk-Based Regulation' *Law & Policy* (2010) 32(2), 181-213; R Baldwin and J. Black, 'When risk-based regulation aims low: approaches and challenges' *Regulation & Governance* (2012) 6(1), 2-22; T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219; M. Feintuck and M. Varney, *Media Regulation, Public Interest and the Law* (2nd ed. Edinburgh University Press, 2006).

[2] L. Scaife, 'Learning from the Laws of the Sea, Foucault and Regulatory Theory: Proposing a "Regulatory Harbour" Model for the Regulation of Social Media, that Serves rather than Rules the Waves' (2018) *Northern Ireland Legal Quarterly* 69(4) 433-473.

[3] https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/. At the time of writing the government is also consulting on its *Online Harms White Paper* published in April 2019. The Paper proposes a new statutory duty of care to make online platforms take more responsibility for the safety of their users and tackle harm caused by content or activity on their services. Compliance with this duty will be overseen and enforced by an independent regulator. This is accessible via https://www.gov.uk/government/consultations/online-harms-white-paper. Germany is subject to a 'network enforcement law' known as Netzwerkdurchsetzungsgesetz law, or 'NetzDG'. See generally: S. Theil, 'Germany's legal crackdown on social media: four misconceptions dispelled', https://inforrm.org/2018/05/11/germanys-legal-crackdown-on-social-media-four-misconceptions-dispelled-stefan-theil/ both.

[4] See section 6.3. D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 76.

actors they should be subject to the same regulatory regimes as the traditional media. The new regulatory framework advanced in this chapter draws on regulatory schemes from a number of jurisdictions. Thus, section 3 explains the rationale for this multi-jurisdictional approach and discusses why citizen journalists should be subject to regulation. Finally, section 4 sets out the proposed regulatory framework.

2. THE DOMESTIC REGULATORY REGIME: MIND THE GAP

Undoubtedly, the traditional media and citizen journalists can unjustifiably damage reputations[5] and invade personal privacy.[6] The framework advanced in this thesis offers two layers of protection against this. Publications that damage reputation and/or invade privacy without justification may fall short of the standards of behaviour and norms of discourse advanced in Chapter Four,[7] as it is unlikely they would be in the public interest. As a result, these publications, in most circumstances, would not qualify for protection under media freedom.[8]

An additional layer of protection for the rights of individuals that the framework supports is regulation. The Alliance of Independent Press Councils of Europe (AIPCE)[9] is a network of national voluntary and self-regulatory media Councils that was formed to deal with complaints from the public about editorial content.[10] The AIPCE's Councils were traditionally concerned with the print and broadcast media but it has recently extended its

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[5] See generally: D. Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008); P. Coe 'The Defamation Act 2013: We need to talk about corporate reputation' *Journal of Business Law* (2015) Issue 4, 313-334.

[6] See generally: E. Barendt, 'Privacy and Freedom of Speech' in A. Kenyon and M. Richardson (eds) *New Dimensions in Privacy Law International and Comparative Perspectives* (Cambridge University Press, 2006), 11-31; R. Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013); B. Markesinis, *Protecting Privacy* (Oxford University Press, 1999); R. Barnes, *Outrageous Invasions Celebrities' Private Lives, Media and the Law* (Oxford University Press, 2010); Sir M. Warby and N. Moreham (eds), *The Law of Privacy and the Media* (Oxford University Press, 2016); P. Wragg, 'Protecting Private Information of Public Interest: *Campbell's* Great Promise Unfulfilled' (2015) 7 *Journal of Media Law* 225; R. Barnes and P. Wragg, 'Social media, sporting figures and the regulation of morality' in D. Mangan and L. Gillies (eds) *The Legal Challenges of Social Media* (Edward Elgar, 2017), 155-176.

[7] See section 3.

[8] P. Coe, '(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media' *Northern Ireland Legal Quarterly* (2018) 69(4) 403-431, 418-424.

[9] http://www.aipce.net.

[10] The Independent Press Standards Organisation (IPSO) is a member. IMPRESS is not a member. These regulatory schemes are explained in more detail below.

remit to online versions of the traditional media and to citizen journalists. Although there is no doubt that the print media has, and will continue to, publish stories via traditional methods and online, that are morally questionable, cause reputational damage and invade individuals' privacy without just cause, according to the AIPCE, complaints made by the public against citizen journalists for alleged breaches of journalistic ethical standards to its various Councils continue to increase rapidly.[11] Thus, the AIPCE, its Councils and ultimately the public, face three problems caused by the current regulatory regime, as set out in the following paragraphs.

Firstly, from a UK perspective, the print media is not, at present, subject to a compulsory or coercive regulatory regime. As a result of Leveson LJ's *Inquiry*[12] the Royal Charter on Self-Regulation of the Press created the Press Recognition Panel (PRP), a corporate body empowered to approve independent press regulators that fit the criteria imposed by the Charter. This led to the creation of two regulators: IMPRESS,[13] and its rival, the Independent Press Standards Organisation (IPSO),[14] which was created by the press industry itself. Of the two regulators, IMPRESS is the only one recognised by the PRP, and is therefore regarded as 'Leveson-compliant.'[15] It has the power to impose fines on its members who breach its code and offers an arbitration service that settles disputes without the need for litigation, whereas IPSO does not. Common to both schemes is their reliance on members of the press to voluntarily join them. Despite the self-regulatory nature of IMPRESS and IPSO, there is a framework in place for a highly-incentivised regime, grounded in social responsibility theory[16] that could, for the reasons set out in the remainder of this section, provide an appropriate balance with libertarian self-regulation.[17] In light of Leveson LJ's recommendations to 'encourage' press membership of IMPRESS, section 34 of the Crime and Courts Act 2013 enables a court to award exemplary damages against any 'relevant

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[11] A. Hulin, 'Citizen journalism and news blogs: why media councils don't care (yet) https://inforrm.org/2016/06/16/citizen-journalism-and-news-blogs-why-media-councils-dont-care-yet-adeline-hulin/#more-34437.

[12] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012).

[13] https://impress.press.

[14] https://www.ipso.co.uk.

[15] IMPRESS was recognised by the PRP as the first 'Leveson-compliant' independent press regulator on the 25th October 2016. https://www.impress.press/about-us/faq.html.

[16] G. Botma, 'The Press Freedom Commission in South Africa and the regulation of journalists online: Lessons from Britain and Australia' (2014) *Communicatio* 40(3) 223-238, 230.

[17] Ibid. 228, 230. Compare Leveson LJ's recommendations with the Australian Government, *The Report of the Independent Inquiry into the Media and Media Regulation*, 28th February 2012 ('*The Finkelstein Report*') and the Australian Government, *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012) discussed in section 3 below.

publisher'[18] in media litigation who is not a member of 'an approved regulator'. Among the requirements for an effective regulator is that it will have a low-cost arbitration system to reduce legal costs for both claimants and the press. Section 40 could be at the core of this 'costs incentives regime' as it empowers the court to award adverse costs against non-members of an 'approved regulator' by forcing the 'relevant publisher' to pay the claimant's legal costs even if the publisher is successful in defending the claim, subject to certain exceptions.[19] However, section 40 is not yet in force. As stated in the PRP's latest report,[20] the recognition system is frustrated by political involvement, in that section 40 is dormant, and remains unenforceable until it is activated by the Secretary of State for Digital, Culture, Media and Sport. Thus, Leveson LJ's recommendations have only been partially implemented.

Secondly, section 40 has always been a controversial provision. For example, in 2013, the press argued that it would violate human rights law.[21] However, this argument is flawed. The human rights relied upon pursuant to the ECHR[22] are all qualified rights, meaning their interference is lawful so long as it is justified and proportionate. It is submitted that these provisions are justified and proportionate, as section 40 could effectively balance the right to free speech with the rights of the public. This is because publishers who refuse to join an approved regulator deny claimants access to quick and affordable dispute resolution. Consequently, it is arguable that they should pay for that decision, which would otherwise impose costs on potential victims or deny them a remedy. As Hugh Tomlinson QC states:

> 'Publishers have been given a choice that no other business or profession is given: they can choose whether or not to be subject to effective scrutiny. If they choose not to, then they must pay to ensure that victims have access to justice…There is no threat to press freedom or human rights – simply a threat to

[18] Section 41 sets out what is meant by 'relevant publisher'. This is qualified by Schedule 15 which excludes certain persons and organisations from this definition and, therefore, from the ambit of sections 34 to 42. The scope of section 41 is discussed in the following paragraph.
[19] These exceptions are dealt with below.
[20] Press Recognition Panel, *Annual Report on the Recognition System,* 12th February 2019.
[21] H. Tomlinson QC, 'The Data Protection Bill, Human Rights and the Daily Mail' https://inforrm.org/2018/05/08/the-data-protection-bill-human-rights-and-the-daily-mail-hugh-tomlinson-qc/#more-39917 8th May 2018.
[22] Article 6 access to a court; Article 10 freedom of expression; Article 14 right not to be discriminated against.

> unregulated press abuse.'[23]

Furthermore, section 40 is subject to exceptions to the rule that publishers who reject independent regulation pay whether they win or lose. The court can refuse to follow it if it is 'just and equitable' to make a different award. This would apply, for example, if the claimant's case was frivolous or if the claimant had refused a reasonable settlement. Thus, the system retains flexibility to enable the courts to do justice whilst providing an incentive for publishers to join a system that gives claimants access to justice.

If media actors do not join, or comply with, an approved regulatory scheme, that sets ethical standards, and provides an appropriate mechanism for redress, then curing the 'real harm caused to real people'[24] by breaches of these standards creates a challenge. Indeed, Leveson LJ's findings were influenced by evidence given by Baroness O'Neill, who has long held the view that media freedom and individual freedom of expression are distinct concepts.[25] Accordingly, to O'Neill, the public interest in press freedom:

> '…is best construed as an interest in adequate (or better than adequate) standards of public communication, that allow readers, listeners and viewers to gain information and form judgements, as so to participate in social, cultural and democratic life. A free press is a public good because it is needed for civic and common life'[26]

According to Wragg,[27] this view is representative of the claim made by social responsibility theorists that the media's performance of its functions is critical to ensuring participation in the democratic process.[28] In their view, regulation of the media is justified by this rationale on the basis that it protects and enhances media freedom, which in turn safeguards society's

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[23] H. Tomlinson QC, 'The Data Protection Bill, Human Rights and the Daily Mail' https://inforrm.org/2018/05/08/the-data-protection-bill-human-rights-and-the-daily-mail-hugh-tomlinson-qc/#more-39917 8th May 2018.

[24] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 50, [2.2].

[25] Ibid. 55, [3.7]. See: http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-Of-Baroness-ONeil.pdf.

[26] Ibid.

[27] P. Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, forthcoming).

[28] For example, see R.C. Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell* (1990) 64 *Harvard Law Review* 255, 308; J. Rawls, *Political Liberalism* (Columbia University Press, 1996).

interest in a healthy and functioning democracy. To their mind, regulation ensures that the media achieves this aim, as the media cannot be trusted to do so without it.[29]

It is submitted that the framework advanced in this thesis provides a mechanism to deal with this challenge, as it justifies a tougher regulatory regime for all media actors. Unlike libertarianism,[30] the social responsibility paradigm champions media self-regulation where possible, but also acknowledges that a more coercive, highly-incentivsed, regime may be necessary.[31] Under the theory the government must not merely allow freedom; it must also actively promote it, which means that when necessary the government should act to protect the freedom of its citizens.[32] Inherent within this obligation is the government's status as the 'residuary legatee of responsibility for an adequate press performance.'[33] Thus, according to Hocking, if a self-regulating media is insufficient to provide society with the services it requires from it then the government is obliged to correct this by, for instance, enacting legislation to forbid flagrant abuses of the media which may 'poison the wells of public opinion.'[34] Arguably, in respect of 'relevant publishers', section 40 of the Crime and Courts Act 2013 could, if enacted, achieve this. However, the theory dictates that any government intervention should only occur when the 'need is great and the stakes are high' and even then it should intervene cautiously.[35] As Siebert, Peterson and Schramm state, under the theory, 'the government should not act with a heavy hand' as any 'agency capable of promoting freedom is also capable of destroying it.'[36]

Thirdly, citizen journalists rarely join the various self-regulatory systems that exist across Europe.[37] In his *Inquiry* Leveson LJ acknowledged that technological changes in the past few decades have led to a fragmentation of the media (and its audience), as it has introduced media actors, such as citizen journalists, that do not form part of the self-

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[29] P. Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, forthcoming).
[30] See Chapter Three.
[31] D. Weiss, 'Journalism and Theories of the Press' in S. Littlejohn and K. Foss (eds), *Encyclopaedia of Communication Theory Volume 2*, (Sage, 2009), 574-579, 577; F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 76.
[32] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 95.
[33] W. Hocking, *Freedom of the Press: A Framework of Principle* (University of Chicago Press, 1947), 182-193.
[34] Ibid.
[35] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press*, (University of Illinois Press, 1956), 95.
[36] Ibid. 95-96.
[37] A. Hulin, 'Citizen journalism and news blogs: why media councils don't care (yet) https://inforrm.org/2016/06/16/citizen-journalism-and-news-blogs-why-media-councils-dont-care-yet-adeline-hulin/#more-34437.

regulatory, or indeed any other, regulatory regime.[38] He states that the Internet is an: 'ethical vacuum…[that] does not claim to operate by express ethical standards, so that bloggers and others may, if they choose, act with impunity'[39] and, specifically, '[b]logs and other such websites are entirely unregulated.'[40] Consequently, cyberspace has been described as a 'Wild West, law free zone.'[41] As a result, those Councils that can only deal with complaints against their members are hamstrung when it comes to investigating complaints against non-members. [42] In the UK this issue has not been helped by IPSO's Code of Practice[43] and the Crime and Courts Act 2013. In respect of IPSO, citizen journalists are covered by its Code if they submit material to newspapers and magazines that it regulates.[44] This requirement would seem to exclude most citizen journalists as, it is submitted, the very nature of citizen journalism dictates an inherent tendency to eschew the mainstream media. As stated above, sections 34 and 40 of the Act apply to any 'relevant publisher'. According to section 41(1) a 'relevant publisher' is a person who, in the course of a business,[45] publishes news-related material that is written by different authors and is subject to editorial control. Section 41(2) tells us that this means that a person, who does not have to be the publisher, has editorial or equivalent responsibility for the content and presentation of the material, and the decision to actually publish it. Crucially, section 41 seems to exclude most, if not all, citizen journalists for two reasons. By definition, most citizen journalists are not publishing news-related material 'in the course of a business'. Moreover, citizen journalists tend to be both the author

[38] Ibid. 165-166.
[39] Ibid. 736, [3.2].
[40] Ibid. 171, [4.20]. What regulatory framework does exist is, itself, fragmented. For example, in his *Inquiry* Leveson LJ maps the various legislative regimes and bodies that may apply to online media publications. These include, the Internet Corporation for Assigned Names and Numbers, Ofcom, the Wireless Telegraphy Act 2006, the Audiovisual Media Services Regulations 2009 and 2010 and the Authority for Television of Demand.[40]Additionally, he notes that UK Internet Service Providers (ISPs) 'have…taken a broadly self-regulatory approach to some of the content they host and have applied a limited number of standards to that content.' In many instances, ISPs 'have cooperated with law enforcement and other agencies to remove illegal content or block access to it.' See: 166.
[41] A. Yen, 'Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace' (2002) 17 *Berkeley Technology Law Journal* 1207.
[42] For example, the Austrian and Dutch Councils and the French and Flemish Councils in Belgium will investigate complaints about any media content, regardless of the publisher. Norway's Council has recently enacted a rule change to enable it to deal with complaints against non-members. Ibid.
[43] Although the same cannot be said for IMPRESS' Code which does cover citizen journalists.
[44] https://www.ipso.co.uk/faqs/editors-code/.
[45] Whether or not carried on with a view to make a profit.

and publisher of their material, as opposed to publishing material 'written by different authors.'[46]

Although Leveson LJ's *Inquiry* was, perhaps rather short-sightedly, exclusively concerned with the print media his view that greater press regulation is required to prevent 'real harm caused to real people'[47] is equally as applicable to citizen journalists. Leveson LJ was of the view that it is 'abundantly clear that, for a regulatory regime to be effective, it must be capable of delivering any perceived benefits to online publication as much as to print'[48] and that membership of a regulatory body 'should be open to all publishers [including citizen journalists] on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different publishers.'[49] Thus, it is submitted that the Crime and Courts Act 2013's definition of 'relevant publisher' is fundamentally flawed: why should a traditional media actor, whether they publish material in their newspaper, or online, be captured by sections 34 and 40 (if it were enacted), yet a citizen journalist, by virtue of not publishing in the course of a business and being both the author and publisher of the material, not be? Surely, if a citizen journalist is acting as media they should then be subject to the same regulatory schemes as a traditional journalist? Data protection law demonstrates the inequity of this situation. Pursuant to the jurisprudence of the European Court of Justice (as it then was) and the Court of Justice of the European Union,[50] the UK Supreme Court[51] and guidance from the ICO,[52] 'journalism' has been given a very wide meaning. Thus, in *The Law Society and others v Kordowski*[53] Tugendhat J held that citizen journalists engaging in Internet journalism are able to avail themselves of the 'special purposes' exemption for 'journalistic, literary or artistic' purposes found in section 32 of the now repealed Data Protection Act 1998, and subsequently imported into Article 85 of the

[46] P. Coe, '(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media' *Northern Ireland Legal Quarterly* (2018) 69(4), 403-431, 430.
[47] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 50, [2.2].
[48] Ibid. Vol 4. 1587.
[49] Ibid. 1761.
[50] *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy* (*Satamedia)* Case C-73/07; *Sergejs Buivids v Datu valsts inspekcija* Case C-345/17.
[51] *Sugar (Deceased) v BBC* [2012] UKSC 4.
[52] *Data protection and journalism: a guide for the media,* Information Commissioners' Office, 29-30: https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf.
[53] [2014] EMLR 2, [99].

GDPR and the Data Protection Act 2018.[54] According to the ICO, the purpose of the exemption is to 'safeguard freedom of expression.'[55]

It is submitted that adopting the framework advanced in this thesis provides normative and philosophical support for a similar regime to the Crime and Courts Act that achieves a fair balance between media freedom and the rights of the public. Unfortunately, the system as it stands largely excludes citizen journalists, who now form a large and integral part of the modern media. In the same way it does in respect of the traditional media, the framework would support statutory provisions that explicitly include online media, or the introduction of new citizen journalist-specific legislation.

3. MULTI-JURISDICTIONAL VIEWS OF REGULATION

3.1 INTRODUCTION: A COMPARATIVE PERSPECTIVE

In the pre-Internet era, issues such as identifying who should adhere to news standards and be subject to regulation, and the process of determining the boundaries of intervention, were relatively straightforward matters. As set out in Chapter Two, historically, distinguishing media from non-media actors could be achieved by applying tried and tested approaches, namely; the press-as-technology model, the 'mass audience approach' and the 'professionalised publisher approach'.[56] As that chapter established, due to the 'disruption' caused by citizen journalists and online speech those approaches, which were perhaps once effective, now lack merit, and are, at worst, redundant.[57] Consequently, dealing with these issues has now become far more complex, as bright line distinctions between media formats and genres, creators, consumers and distributors have become increasingly blurred.[58] This has forced reviewers, policy makers and academics from a number of jurisdictions to re-examine the fundamental justification for regulatory intervention.[59] From these multi-jurisdictional

[54] The exemption has been imported into the Data Protection Act 2018 by virtue of Part 5, paragraph 26 of Schedule 2. Both the GDPR and 2018 Act have added 'academic purposes' to the list.
[55] Information Commissioner's Office, *Data protection and journalism: a guide for the media* 28: https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf.
[56] See Chapter Two section 5.
[57] Ibid. Consequently, in Chapter Three the media-as-a-constitutional-component concept was introduced as a method for distinguishing media from non-media actors.
[58] See Chapter One section 2.
[59] New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age* (2013), NZLC Report 128. ch. 6, 133, [61]; See generally: L. Fielden, *Regulating the Press A*

reviews emerges a spectrum of formulas for oversight of the news media,[60] from industry self-regulation, not requiring any legislative provision or recognition at the one end,[61] through to statutory regulation at the other.[62]

Having considered Leveson LJ's *Inquiry* in the previous section, based on the findings in previous chapters, section 3.3 will summarise why citizen journalists should be subject to regulation. This is followed, at section 4, by a blueprint for a new regulatory regime. This framework is informed by reviews, recommendations and regulatory schemes from other jurisdictions. It draws on Fielden's survey of international Press Councils[63] and, in particular, pays close attention to three wide-ranging reviews of the media that have been conducted in Australia[64] and New Zealand[65] as they have, to varying extents, considered the impact of online media, including citizen journalism, on their respective regulatory frameworks, whilst taking into account Leveson LJ's recommendations in his *Inquiry*. Consequently, the following section will briefly outline the rationale for adopting this comparative approach with these particular jurisdictions.

Comparative Study of International Press Councils, (Reuters Institute for the Study of Journalism, 2012); D. Weisenhaus and S. Young, *Media Law and Policy in the Internet Age* (Hart Publishing, 2017).

[60] Ibid. ch. 6, 146, [6.47]; L. Fielden, *Regulating the Press A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism, 2012).

[61] Ibid. (Fielden), 16 [1.3.2]-[1.3.3]. For example, see the German and Finnish models of voluntary regulation.

[62] Ibid. 16-17 [1.3.4]-[1.3.5]. For example, as discussed below in section 4.3, in Ireland the Defamation Act 2009, although not actually establishing the Irish Press Council, sets out the principal objects of the Council, which include the protection of freedom of expression of the press, the protection of the public interest by ensuring ethical, accurate and truthful reporting, maintaining certain minimum ethical and professional standards, and the protection of privacy and dignity of the individual. The Act also sets out the requirements for independence, the composition of directors, funding, investigations and hearings, and powers to require the publication of a determination in any form and manner directed by the Council. In Denmark, the Danish Press Council is an independent public tribunal established under the Media Liability Act 1998, which sets out the Council's purposes: to deal with complaints about journalistic ethics, to contribute to the development of press ethics and to handle complaints about the legal right of correction. The Act also provides for a right of reply and the sanction of being required to publish the Council's decision where a complaint is upheld, along with the punishment for failing to comply (a fine or imprisonment of up to four months).

[63] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils,* (Reuters Institute for the Study of Journalism, 2012).

[64] Australian Government, *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012); Australian Government, *Convergence Review* (Final Report to the Minister for Broadband, Communications and the Digital Economy, Sydney, 2012).

[65] New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age* (2013), NZLC Report 128.

3.2 THE RATIONALE FOR A COMPARATIVE APPROACH

Between 2011 and 2012 Fielden conducted a wide-ranging study of international Press Councils.[66] The Report is illuminative for the purposes of this thesis, and its proposal for a new regulatory regime, for the following reasons. Firstly, it focussed on six countries which share many of the same characteristics of the UK.[67] According to Fielden, these countries were chosen as:

> '…each is a mature democracy, with a 'free press' according to press freedom indices.[68] Each recognises the importance of the freedom to impart and receive information; of balancing competing rights for example in relation to privacy and reputation; and of wider standards of accountability. Each has a Press Council [Sweden and Ireland also have an Ombudsman working in conjunction with the Press Council]. However, each jurisdiction reveals a different approach to press regulation, for example, in relation to statutory or non-statutory powers; the balancing of industry and independent board members; funding; sanctions; and, whether its remit encompasses broadcasting as well as print and online content.'[69]

Secondly, in turn, much like the findings of Australia's *Finkelstein Report*[70] and *Convergence Review*[71] which are referred to in section 4, the report was relied upon extensively by the NZLC to inform its recommendations in its *The News Media Meets 'New Media'* report.

Unlike the UK and Australia, New Zealand's Law Commission systematically considered how online media, including citizen journalists, may be regulated, and how 'news media' may be defined in a 'converged media environment', that includes individuals as citizen journalists and traditional news media companies.[72] Specifically, the NZLC was tasked with investigating whether the growth of new media led to gaps in its regulatory

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[66] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils,* (Reuters Institute for the Study of Journalism, 2012). The report draws on interviews conducted between December 2011 and March 2012. See 14, [1.1].
[67] Ibid. 14-18, [1.2]-[1.3.6]. Sweden, Germany, Finland, Denmark, Ireland and Australia. The regulatory regimes in Canada, Norway and New Zealand also informed the report's findings.
[68] Ibid. [1.2]. The indices referred to in the report include The Reporters Without Borders Press Freedom Index and the Freedom House index: https://rsf.org/en and https://freedomhouse.org/.
[69] Ibid. 14, [1.2].
[70] *Finkelstein Report*.
[71] *Convergence Review*. The *Finkelstein Report* and the *Convergence Review*, which related to reviews of Australia's media and its regulatory framework, were both published in 2012.
[72] New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age* (2013), NZLC Report 128, 22-24 and ch. 3.

regime that needed to be addressed.[73] In March 2013, after two years of investigating New Zealand's then current state of regulation, and after consultation with the traditional 'mainstream' media, new media and other stakeholders,[74] the NZLC published *The News Media Meets 'New Media'* report. In summary, the NZLC recommended that the complex and fragmented system of media regulation that existed at the time, that included a statutory authority for broadcasters, the Broadcasting Standards Authority and a self-regulatory Press Council for the print media, be replaced, with one over-arching 'Grand Regulator,'[75] known as the News Media Standards Authority (NMSA).[76] The NZLC's recommendations for a Grand Regulator were not adopted. Justice Minister Judith Collins commented that the regulatory review was not driven by a crisis of confidence in the mainstream media, and that New Zealand's media had already made progress in dealing with the challenges posed by the impact of media convergence. Consequently, she concluded that there was no pressing need for statutory or institutional change of the regulatory bodies.[77]

The fact that the NMSA was not adopted is, arguably, rather unfortunate: had it been brought into existence it would have provided a 'working example' of a regulatory framework that 'would enforce one set of standards across all publishers of news, irrespective of format or method of distribution.'[78] In doing so, it would have accepted and resolved complaints relating to news, current affairs and news commentary, as well as content such as documentaries and factual programming.[79]

Thus, Fielden's survey, combined with the Australian and New Zealand reviews, provide comprehensive and overarching comparative views of the multi-jurisdictional regulatory environment. For reasons discussed in section 4, the normative and practical reasons underpinning the NZLC's Report, in particular, fit very closely with the concepts and principles advanced in earlier chapters. Thus, its recommendations provide support for the regulatory framework advanced by this thesis. However, before discussing the new

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[73] Ibid. 24.
[74] Ibid. Appendix B, 384-386. Other stakeholders include, for example, academics and non-media bodies.
[75] U. Cheer, 'Regulatory Responses from a Southern Archipelago' in D. Weisenhaus and S. Young (eds) *Media Law and Policy in the Internet Age* (Hart Publishing, 2017), 187-209, 196.
[76] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, ch. 7.
[77] New Zealand Ministry of Justice, *Government Response to Law Commission Report 'News Media meets New Media'* (October 2013), 9-10 http://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/News-media-meets-new-media-government-response-to-law-commission-report%20%28D-0503423%29.PDF.
[78] U. Cheer, 'Regulatory Responses from a Southern Archipelago' in D. Weisenhaus and S. Young (eds) *Media Law and Policy in the Internet Age* (Hart Publishing, 2017), 187-209, 196.
[79] Ibid.

framework, the following section will set out why citizen journalists should, in principle, be subject to a regulatory scheme.

3.3 WHY CITIZEN JOURNALISTS SHOULD BE SUBJECT TO REGULATION

The purpose of this section is to briefly summarise the arguments advanced in Chapters One to Four that, it is submitted, provide justifications for the creation of a regulatory framework that provides for the regulation of citizen journalists. What that framework will look like, and its 'nature' and 'scope',[80] will be discussed in the following sections. These arguments can be summarised as follows:

1. As set out in Chapter One, the news media, including the traditional media and citizen journalists, provides an important source of information that informs the public's views and decisions on democratic issues and enables it to exercise its democratic rights. For this reason there is an overriding public interest in ensuring the protection of a robust multi-format news media. For the reasons discussed at section 4.2.1 and 4.2.2 below, regulation provides a way to protect this interest.

2. The Internet has created a step-change in the way in which individuals communicate and exercise their right to freedom of expression. As set out in Chapter One this new digital communication environment has acted as a stimulus for citizen journalism. Social media, in particular, has facilitated an audience and producer convergence that has circumvented traditional barriers to publication, allowing citizen journalists to easily publish information of constitutional value. Citizen journalism is no longer an outlier of free speech. Rather, it plays a central role in how we communicate and impart information and ideas. Thus, protecting their right to media freedom is of fundamental importance to free speech and democracy. Consequently, in the current era of technological and media convergence there is a strong public interest in ensuring that any regulatory scheme for the news media encourages rather than stifles format diversity, meaning that any regulatory regime must focus on content rather than format or delivery platform.

[80] For example, whether a regulatory regime should be compulsory, voluntary or coercive.

3. To the contrary, the news media is a powerful institution in its own right. As discussed in Chapter Three, as well as facilitating the democratic process it is also capable of distorting it through unfair, selective, inaccurate or misleading reporting. Arguably, as discussed in Chapter Five, this issue can be amplified by the anonymous and pseudonymous nature of many online publications. This applies equally to citizen journalists and the traditional media. Furthermore, as explained in Chapter One, and developed in Chapter Four,[81] the emergence of citizen journalism has given rise to a symbiotic relationship with the traditional media, in which citizen journalists increasingly act as a source of news, meaning that information published by citizen journalists is often 'recycled' by the traditional media. Thus, in the same way that citizen journalists may regurgitate false or misleading information obtained, for instance, from the traditional media or other bloggers, the traditional media may do the same in respect of information obtained from citizen journalists. Consequently, due to the respect given to the reputations of some traditional media this can add credence to the citizen journalist and inadvertently perpetuate support for fake news. It is therefore in the public interest for there to be an effective mechanism, in the form of an appropriate regulatory framework, for holding the media to account for the exercise of its power regardless of format.[82]

4. The enhanced right to media freedom confers certain benefits on media actors.[83] The enjoyment of this right is contingent upon the fulfilment of certain standards of media discourse, or concomitant duties and responsibilities.[84] Pursuant to the media-as-a-constitutional-component concept, media freedom, and the duties and responsibilities attached to it, applies to any media actor publishing information of constitutional value.[85] Therefore, an appropriate regulatory framework will not only protect media freedom and help to ensure that media actors fulfil their duties and responsibilities, but will also apply to any media actor regardless of format.

[81] See Chapter One generally and Chapter Four section 3.2.
[82] T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 203, 211, 213.
[83] See Chapter Two sections 3.2 and 3.3.
[84] See Chapter Four sections 2, 3.2 and 3.3.
[85] See Chapter Three section

5. As explained in Chapter Three, actors disseminating information of constitutional value, pursuant to the media-as-a-constitutional-component concept are, essentially, publishing a special type of content that is of democratic value. Ultimately, this requires a different regulatory approach because of its fundamental importance to a healthy democracy.[86]

4. A NEW REGULATORY FRAMEWORK

In addition to drawing on the reviews, recommendations and regulatory schemes from the jurisdictions set out in section 3.2, this section will apply the concepts and principles laid down in earlier chapters to construct a blueprint for a new regulatory framework. As explained in section 4.2.1 below, this thesis recommends a single converged regulator, providing regulatory oversight for the print, broadcast and online media. However, because the focus of this thesis is citizen journalism it will only consider how the regulatory scheme will operate in relation to citizen journalists.

4.1 CONCEPTUAL FOUNDATION

As established in Chapter Three, the media-as-a-constitutional-component concept is underpinned by social responsibility theory and the argument from democratic self-governance. This concept offers a new definition of media that provides an effective method for distinguishing media from non-media actors, and therefore those entities that are subject to the enhanced right to media freedom, and its concomitant duties and responsibilities, and who should, in principle, be subject to a regulatory scheme. In turn, as set out above at section 2, the underlying values attributed to social responsibility theory and the argument from democratic self-governance provide an appropriate normative and philosophical foundation from which to build a regulatory framework. This is evidenced by the principles underpinning the NZLC's recommendations, which are set out below.

[86] This view correlates with the view of the NZLC which 'news and current affairs' media as a special type of content that requires a unique regulatory approach other forms of media, such as entertainment media. See New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age* (2013), NZLC Report 128, Ch.7, 158-159, [7.14].

The primary objective of the NZLC's review was to determine which publishers of news content should be entitled to the legal rights, and subject to the countervailing responsibilities, which have traditionally applied to the news media.[87] Its proposals were founded on the following four principles: (i) Some citizen journalists are undertaking functions traditionally performed by the mainstream media, including holding the various branches of government to account;[88] (ii) There 'is a public interest in recognising the news media as a special type of communicator with access to certain legal privileges and exemptions and in continuing to hold them accountable to ethical standards';[89] (iii) Consequently, 'a commitment to basic ethical standards, such as accuracy and fairness, is fundamental to the type of communication the law intended to privilege';[90] (iv) It is in the 'public's interest to ensure all those who wish to fulfil the news media's functions, and are prepared to accept the associated responsibilities, be entitled to do so, rather than confining these privileges to those who meet certain organisational requirements, such as audience size or commercial purpose.[91] As discussed in section 4.2, principles (i) and (iv) are also relevant the question of 'who could be subject to the framework and are, therefore, discussed further in that context.

However, all four principles are indicative of social responsibility theory. Indeed, as the Report states, its recommendations formalise the unwritten social contract that has traditionally existed between the news media and the public it serves, by providing a mechanism to cement the connection between the rights and freedoms of the media and their concomitant duties and responsibilities.[92] Thus, as stated above, the NZLC's Report, including the principles underpinning its recommendations, lends credence to the regulatory framework proposed by this thesis, as it reflects what this new scheme is trying to achieve. Much like principles (ii) and (iii), the foundation of this new scheme dictates that for media actors to take advantage of media freedom, and the privileged protection it provides,[93] those actors must abide by certain behavioural standards and norms of discourse which,

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[87] Indeed, a 'key driver' behind the review was the emergence of new media. New Zealand Law Commission, *The News Media Meets 'New Media' Rights Responsibilities and Regulation in the Digital Age* (2013), NZLC Report 128, 158, [7.13].
[88] Ibid.
[89] Ibid. 156, [7.1].
[90] Ibid. [7.2].
[91] Ibid.
[92] Ibid. 157-158, [7.7]-7.8].
[93] See Chapter Two section 2.

sequentially, underpin it. These standards and norms were set out in Chapter Three,[94] and subsequently developed in Chapter Four.[95] Essentially, in respect of behavioural standards, the media's privileged protection is subject to it conducting itself in a particular way. This includes, ensuring that it acts ethically and in good faith, and that the material it publishes or broadcasts is based on reasonable research to verify the provenance of its sources.[96] Pursuant to the norms of public discourse, the enhanced right to media freedom is available to any media actor disseminating speech of constitutional value; it awards media actors for engaging in discourse that is in the public interest.[97] Conversely, expression which is not of public concern is not afforded the same level of protection.

4.2 WHO COULD BE SUBJECT TO THE FRAMEWORK?

The issue of who could be subject to a regulatory framework can be broken down into two questions: Firstly, how should a regulatory regime deal with convergence and new media? Secondly, what is the eligibility criteria for membership? This section will answer these questions in turn.

4.2.1 CONVERGENCE AND NEW MEDIA

As stated above, Fielden's survey of Press Councils focussed on six countries with similar characteristics to the UK.[98] Fielden makes a general observation that, without exception, all of these countries' Press Councils have extended, at least to an extent, 'their jurisdiction from print publications, and in some cases broadcast journalism, to associated online media including "pure player", i.e. online-only providers.'[99] More specifically, according to the Report, the Press Councils in Norway, Finland and Denmark cover the three print, broadcast and online media platforms.[100] The Norwegian Press Council extended coverage to associated social media sites, such as Twitter and Facebook. This means that material provided by journalists on social media, including private accounts are captured by the regulatory framework if they are used in connection with their journalism. Thus, as Fielden states:

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[94] See sections 4.1 and 4.2.
[95] See sections 3.1 to 3.3.
[96] Chapter Four sections 3.2 to 3.3.
[97] See Chapter Four section 3.1.
[98] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils,* (Reuters Institute for the Study of Journalism, 2012), 66. Canada, Norway and New Zealand also informed the report's findings.
[99] Ibid. 34, [3.2].
[100] Ibid. 35-37, [3.2].

> 'Under such a system a reporter's private Twitter account could be held in breach of the press code if it was used in connection with his or her journalism, for example, to provide additional information about a story that has been excluded from the published version. The registered editor-in-chief could be held responsible for the associated material made available on the journalist's private Twitter, Facebook, or other account, just as s/he is responsible for print or online publications.'[101]

Similarly, the Danish Press Council has registered blogs and Twitter accounts as members of its regulatory framework.[102] The Finnish Press Council has developed rules for media websites and deals with user-generated content,[103] whereas Sweden has a cross-platform code, albeit administered by three different regulators.[104] In Australia and New Zealand, the *Finkelstein Report, Convergence Review* and the NZLC Report recommended dealing with convergence in much the same way, in that they proposed a single converged regulator.[105] As discussed in the following section, in respect of the *Finkelstein Report* and NZLC Report, this regulator would cover any media entity classed as 'news media', subject to a threshold level.

The fact that the European regulatory regimes discussed above have dealt with convergence and the impact of new media on a reactionary basis, combined with the proposals for a converged regulator from Australia and New Zealand, lends support to the notion of a regulatory framework purposefully configured for a converged media environment, as advanced by this thesis. This regulatory scheme proposes to deal with convergence in a similar way to the *Finkelstein Report* and the recommendations of the NZLC in that, it too, recommends a single converged regulator. Thus, unlike the IPSO Code, it will apply to citizen journalists operating as media.[106] However, as explained in section 4.2.2 below, in accordance with the new workable definition of media advanced in Chapter Three, pursuant to the media-as-a-constitutional-component concept,[107] it differs from the

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[101] Ibid. 35, [3.2].
[102] Ibid. 36-37, [3.2].
[103] Ibid. 36, [3.2].
[104] Ibid. 34-35, [3.2].
[105] *Finkelstein Report*; *Convergence Review*, 41; New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 155, [6.71].
[106] See section 2 above.
[107] See Chapter Three sections 4.3 and 4.4.

Finkelstein Report and NZLC recommendations in respect of the definition of 'news media' and its subsequent eligibility criteria, which are discussed in the following section.

4.2.2 THE DEFINITION OF MEDIA AND ELIGIBILITY CRITERIA

The definition of media and the subsequent question of eligibility have courted significant debate, particularly in Australia in relation to the *Finkelstein Report* and the *Convergence Review.* Although they were not adopted, because the findings of these respective reviews (in particular the *Finkelstein Report*) influenced the NZLC's recommendations which, in turn, feed into the scheme proposed by this thesis, it is important to consider them at this juncture.

As alluded to above, the *Finkelstein Report* proposed that a single converged regulator, the News Media Council (NMC), would cover all media that falls within the definition of 'news media' advanced in the NZLC's 2011 Issues Paper,[108] subject to some changes (as set out below). Pursuant to the definition any publisher, in any medium, who meets the following criteria, would be subject to the applicable law and regulation: (i) a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value; (ii) they disseminate this information to a public audience; (iii) publication must be regular; (iv) the publisher must be accountable to a code of ethics and a complaints process.[109] The changes suggested by the Report included, for instance, that for online publishers of news the respective site had to receive a minimum of 15,000 'hits' per annum to be subject to the NMC and the regulatory framework. In respect of the print media, the recommended threshold was more than 3,000 copies of print per issue.[110] If the threshold is met, then it becomes compulsory for the respective media actor to join the regime. However, if the threshold is not met, the media actor could still opt in. The Report acknowledges that the threshold figures are 'arbitrary' but that 'the line has to be drawn somewhere.'[111]

Similarly, the *Convergence Review* recommended that major media organisations should be required to participate in any scheme, regardless of platform, and they should not be able to opt out. Media actors falling outside the threshold for mandatory participation

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[108] New Zealand Law Commission, *The News Media Meets the 'New Media' Rights, Responsibilities and Regulation in the Digital Age*, (2011) NZLC IP27.
[109] Ibid. 'Summary and Preliminary Proposals', [29].
[110] *Finkelstein Report*, [11.67].
[111] Ibid.

would be able to opt in to membership. The *Review* suggested, firstly, giving the new regulator discretion in determining whether a threshold level of size and influence has been reached,[112] and, secondly, that the threshold level should be 'set at a sufficiently high level so that only the most substantial and influential media groups are categorised as content service enterprises.'[113] However, because of the high threshold level, the *Review* effectively excluded all but the largest providers of professional news content.[114] Indeed, the *Review* itself estimates that only around fifteen organisations would meet the threshold.[115]

The NZLC's recommendations predominantly mirror those of the *Finkelstein Report*. The NZLC was of the view that it is 'justifiable' to adopt a broad definition of 'news', as including any publication which purports to provide factual information, and which involves real people as such publications engage journalistic standards.[116] Consequently, to be eligible the media actor must meet a recommended definition of 'news media', which contains three ingredients: (i) a significant element of their publishing activities involves the generation and/or aggregation of news, information and opinion of current value; (ii) they disseminate this information to a public audience; (iii) publication is regular and not occasional.[117]

The threshold figures advanced by the *Finkelstein Report* and the *Convergence Review*, and the requirement that a media actor should publish 'regularly' to be subject to regulation found in the *Finkelstein Report* and NZLC Report, conflict, to an extent, with the practice in other jurisdictions. For instance, as observed by Fielden, in Denmark, membership of the Danish Press Council is mandatory for all broadcast and print media who publish at least twice per year, and voluntary for the online media.[118] Furthermore, this threshold criterion does not correspond with the definition of media, pursuant to the media-as-a-constitutional-component concept, as underpinned by social responsibility theory and the argument from democratic self-governance, advanced by this thesis in Chapter Three.[119] Rather, the regulatory scheme it proposes would apply to those actors falling within that

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[112] *Convergence Review*, 2.
[113] *Convergence Review*, 12, 50.
[114] T. Flew and A. Swift, 'Regulating journalists? The Finkelstein Report, the Convergence Review and the news media regulation in Australia', (2013) *Journal of Applied Journalism & Media Studies* 2(1), 181-199, 193.
[115] Ibid. 12.
[116] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 164, [7.39].
[117] Ibid. 182, [7.120].
[118] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, 2012), 16, [1.3.4], 28.
[119] Section 4.4.

definition. The concept adopts a functional, as opposed to institutional, approach to defining media, as it focusses on the functions that are performed by media actors, as opposed to their inherent characteristics.[120] Therefore, media freedom, and its concomitant duties and responsibilities, does not have to exclusively apply to the institutional media; it can apply to any actor that conforms to the definition. The definition of media proposed in Chapter Three which would apply for the purposes of this regulatory scheme is, therefore, as follows: (1) a natural and legal person (2) engaged in the process of gathering information of public concern, interest and significance (3) with the intention, and for the purpose of, disseminating this information to a section of the public (4) whilst complying with objective standards governing the research, newsgathering and editorial process.[121]

Because this thesis argues that the media's privileged protection should be based upon the concept, as explained in Chapter Three, and developed in Chapter Four, one of the fundamental requirements for determining that an actor is media is its contribution to matters of public interest. The *Finkelstein* and NZLC Reports' recommendations that publication is regular and, in the case of the *Finkelstein Report*, meets threshold figures, is over-exclusive.[122] Actors can fulfil the definition above, and operate as a constitutional component, on one-off occasions or on an ad-hoc basis.[123] This is particularly the case within a citizen journalism context, in which valuable contributions to public discourse can be made, intermittently, via many different platforms. Thus, an individual can be acting as media, and therefore subject to the right to media freedom and its duties and responsibilities, even if they are publishing on an irregular, or even one off, basis, so long as what they publish is of constitutional value.

A further criterion recommended by the NZLC is that any actor wishing to join its regulatory scheme must be willing to comply with its code of practice, complaints process

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[120] See Chapter Three section 5 for a new definition of media based on a functional approach and Chapter Two section 5 for a discussion on the merits of the methods for distinguishing media from non-media actors based on an institutional approach. See also: T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 487.

[121] As explained in Chapter Three, these standards would include, for instance, the time spent researching stories and ensuring the provenance and reliability of information.

[122] See also Oster's argument, dealt with in Chapter Three at section 4.4, that for this requirement to be fulfilled it must occur periodically. J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *Journal of Media Law* 57-78, 74.

[123] *Editions Plon v France* App. no. 58148/00 (ECtHR 18 May 2004) [43]; *Lindon, Otchakovsky-Laurens and July v France* App. no. 21279/02 and 36448/02 (ECtHR 22 October 2007) [47].

and any subsequent rulings from the NMSA.[124] The regulatory scheme proposed by this thesis would adopt a similar expectation. It too would require that those actors subject to the scheme would be accountable to an over-arching, or 'core', code. However, it recognises that the 'category' of media within which the media actor operates is nuanced and will therefore impact upon the expectations placed on the actor. For instance, film has a different impact than print, and on-demand material, with its element of choice, differs from linear presentation. Equally, information published via social media, because of its speed of dissemination, potential reach and interactivity, can affect its audience differently than broadcasts and print publications.[125] Thus, in addition to the 'core' principles, it is submitted that sub-codes, recognising these nuances and differences, should be adopted. The IMPRESS Standards Code[126] and the IPSO Editors' Code[127] animate this point. In respect of IMPRESS, Code 1.3 requires that 'Publishers must always distinguish clearly between statements of fact, conjecture and opinion.' Similarly, IPSO's Code 1 (iv) states that 'The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.' Notwithstanding the fact that the IPSO Code does not, in practice at least, apply to citizen journalists,[128] arguably, citizen journalists could not always be expected to apply such clear delineation between opinion or comment, conjecture and fact. Instead, it has to be accepted that, due to the nature of citizen journalism, at times the lines between these types of expression may be more blurred than is the case with the traditional media.[129]

These criteria clearly allow for a converged media environment as they would admit all mainstream media, as well as citizen journalists. It has been argued that supporting media diversity in this way might dilute the 'brand'[130] associated with membership of the regulatory body.[131] However, to the contrary, as established in Chapters One and Two, in such a dynamic media environment, in which citizen journalists can, and regularly do, make valuable contributions to matters of public concern, whereas educated and professionally

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[124] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 182, [7.121].
[125] D. Mac Síthigh, *Medium Law* (Routledge, 2018), ch. 2.
[126] https://www.impress.press/standards/.
[127] https://www.ipso.co.uk/editors-code-of-practice/#Accuracy.
[128] See section 2 above.
[129] This view reflects the opinion of the NZLC which acknowledges that '[b]loggers…could not always be expected to be constrained by any requirement of balance to the extent that mainstream media might…' New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 168, [7.60].
[130] The benefits of being part of a recognised regulatory 'brand' is discussed below at section 4.4.
[131] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 182, [7.123].

trained journalists, employed by media organisations, do not always write or broadcast material that is in the public interest,[132] it would be inherently unconstitutional to take an institutional approach to membership.[133] Indeed, in respect of the professionalised publisher approach, the NZLC's recommendations support these arguments, and that advanced in Chapter Two,[134] that requiring media actors to be connected with, and remunerated by, a traditional media company, and/or to have undertaken formal journalistic education and training to benefit from the privileges attributed to media freedom and to be eligible to join a regulatory scheme is over-exclusive and unmeritorious. In its view:

> 'We are…reluctant to impose any such requirements. Some members of the new media contribute strongly and responsibly to public debate even though they have no journalistic training or experience. Conversely, some reporters and presenters on "mainstream" outlets…are not trained journalists and push the boundaries as much as most bloggers.'[135]

Equally, as argued above in section 2 in respect of the UK, the Crime and Courts Act 2013's definition of 'relevant publisher' is fundamentally flawed. It is submitted that there is no reason why the accountability of a citizen journalist who generates or aggregates news and other factual information for the purpose of public dissemination should be any different than the accountability of a traditional media actor.[136]

In its Report the NZLC stated that, in respect of its recommended framework, '[o]ur instinct is that most bloggers would wish to stay outside the system because of the greater freedom that would give them.'[137] This corresponds with Hulin's view, discussed in Chapter Three,[138] that citizen journalists rarely join the various existing self-regulatory systems that exist across Europe.[139] However, as explained in section 4.3 below, membership of the

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[132] See Chapter One section 1 and Chapter Two section 5; P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape' (2017) 37(1) *Legal Studies* 25-5, 40-41.
[133] As defined by the press-as-technology model, mass audience approach and professionalised publisher approach, all of which have been discredited by this thesis in Chapter Two sections 5.1 to 5.3.
[134] Ibid.
[135] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 182-183, [7.123]-[7.124].
[136] This view is shared by the NZLC. Ibid. 186, [7.137].
[137] Ibid. 182, [7.122].
[138] See Chapter Three section 5.1.4.
[139] A. Hulin, 'Citizen journalism and news blogs: why media councils don't care (yet) https://inforrm.org/2016/06/16/citizen-journalism-and-news-blogs-why-media-councils-dont-care-yet-adeline-hulin/#more-34437.

regulatory scheme would be voluntary in nature, meaning media actors could opt out of it.[140] Despite this, as argued in Chapter Three, it is submitted that many citizen journalists would, in fact, opt in, including those who chose to operate anonymously and pseudonymously.[141] This is because it would not only formally acknowledge them as media and therefore beneficiaries of media freedom but would also enable them to access the incentives attached to membership outlined in section 4.4.[142] This view is supported by the citizen journalist, Cameron Slater, who runs the award-winning blog *Whale Oil Beef Hooked*.[143] Slater's view was cited by the NZLC in its Report:

> 'Under this regime so long as I agree to submit to the rules, process and responsibilities as outlined then it is very simple, I will be classified as "news media".
>
> It does need to be voluntary though. When I was asked about this by the Law Commission and subsequently by journalists my answer has been the same. By having it voluntary bloggers can choose to seek "certification", so to speak, and in doing so they are signalling that they are prepared to be responsible news and commentary providers. Likewise a blogger can choose to remain outside of the regime and suffer the impression of a lack of responsibility and the accompanying diminishment of the value of what they have to say. Professionalism and competition will ensure that bloggers and other new media people will voluntarily join the regime. Remaining outside will eventually marginalize those who opt to stay outside of regulation.'[144]

Slater advocates voluntary membership to a regulatory scheme. This question as to the 'nature' of membership is discussed is more detail in the following section.

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[140] Non-membership is dealt with at section 4.6.
[141] As set out in section 4.4, the scheme would offer protection for anonymous and pseudonymous actors.
[142] See Chapter Three section 5.1.4.
[143] https://www.whaleoil.co.nz/.
[144] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 191, [7.165].

4.3 NATURE OF MEMBERSHIP

The question as to whether regulatory schemes should be voluntary, incentivised or mandatory has been at the heart of debates on media regulation in jurisdictions across the world.[145] Thus, unsurprisingly, this has given rise to a diversity of membership models.

As discussed in section 2 above, from a domestic perspective the UK's press is subject to a self-regulatory regime, overseen by two regulators: the PRP recognised, and therefore, 'Leveson-compliant', IMPRESS, and its 'rival', IPSO, which was set up by the press industry. Although self-regulatory in nature, by virtue of section 34 and 40 of the Crime and Courts Act 2013, a framework for a coercive regime exists, albeit section 40 is not yet enacted. Unfortunately, as explained in section 2, even it was enacted, citizen journalists are effectively excluded from the regime by the definition of 'relevant publisher' pursuant to section 41. Moreover, and in any event, the IPSO Code does not apply, at least practically, to citizen journalists.[146]

In a European context, countries such as Finland, Germany and Sweden have embraced voluntary self-regulation, thereby operating regulatory systems that are similar to the regime as it stands in the UK. Ireland has adopted a system that exemplifies voluntary 'independent' regulation with statutory incentives. The Irish Parliament recognises the Press Council and Press Ombudsman pursuant to section 26(2) of the Defamation Act 2009, which provides that in court proceedings considering publication of an allegedly defamatory statement:

> 'the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters it considers relevant including…in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by the Press Ombudsman and determinations of the Press Council.'[147]

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[145] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, 2012), 39.
[146] As stated in section 2 above citizen journalists are covered by the IPSO Editors' Code if they submit material to newspapers and magazines that are regulated by IPSO.
[147] http://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/pdf.

Consequently, membership of the Press Council is incentivised in two primary ways. Firstly, it allows a publication to demonstrate its commitment to ethical standards and accountable journalism and, therefore, run the defence of 'fair and reasonable' publication to defamation proceedings. Secondly, section 26(2) incentivises the extent to which the code of standards has been complied with, and Press Council determinations have been abided by. Thus, as Fielden states, a 'track record of compliance, not just the simple fact of membership, becomes important in order for a publication to demonstrate its accountability and responsibility in court.'[148] It is submitted that Ireland's incentivised regime is akin to the UK's coercive framework as, under section 40 of the Crime and Courts Act 2015, being a member of a PRP regulator (IMPRESS), means that the publisher is protected from an adverse costs order, regardless of whether or not they successfully defend the claim against them.

Denmark has adopted a co-regulatory system, combining a statutory basis with self-regulatory elements. Thus, the Danish Press Council describes itself as an 'independent public tribunal established under the Media Liability Act.'[149] The Act requires that Danish 'mass media shall be in conformity with sound press ethics'.[150] As Fielden observes, because Denmark imposes compulsory regulation it does not, prima facie, have to incentivise membership and compliance. However, in reality, the Media Liability Act does provide incentives which encourage the industry's 'acceptance' of the statutory framework and online media's desire to join it on a voluntary basis.[151] These incentives include rights in relation to the protection of journalistic sources, the gathering and storing of personal information as part of journalistic research and, perhaps most importantly, access to restricted court files for research purposes and judicial acts otherwise closed to the public.[152]

In Australia, the *Convergence Review* suggested a similar regime to Denmark. It concluded that Australia's content, platform and provider-specific codes were inconsistent, confusing and inflexible. Accordingly, it found that it was unreasonable for news and commentary to be subject to different complaint systems and enforcement depending on the

[148] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, 2012), 48, [4.2].
[149] Ibid. 52, [4.3].
[150] http://www.pressenaevnet.dk/media-liability-act/.
[151] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, 2012), 52, [4.3].
[152] Ibid.

format of the platform on which the news or commentary is delivered.[153] It proposed, inter alia, an industry led self-regulatory news standards body, independent of government [154] that would cover print, online, television and radio platforms. Similarly, the *Finkelstein Report* recommended the NMC that would also replace the Australian Press Council (APC) and apply a substantially uniform set of rules for all news producers, irrespective of the platform.[155] However, unlike the *Convergence Review*, the *Finkelstein Report's* NMC would be an entirely statutory entity.[156] According to Flew and Swift, the NMC would be 'neither a government regulator nor a self-regulatory industry body, but rather a co-regulatory hybrid mechanism that the Report terms "enforced regulation"',[157] meaning that it would set and enforce standards, and participation would be compulsory. However, as stated above at section 4.2.2, the recommendations made by both the *Convergence Review* and *Finkelstein Report* were not adopted meaning that the APC is still in operation.

The NZLC's preference was for an independent converged regulator with oversight for a voluntary, yet incentivised, regime.[158] Accordingly, its recommended model would not require legislation to establish the NMSA, but only to recognise it once it was set up, by conferring legal privileges on its members.[159] Thus, it shares similar characteristics with the Irish model and the UK's currently inactive coercive regime. In coming to this recommendation, it cited Leveson LJ's acknowledgment in his *Inquiry*, that for a voluntary model to work, membership incentives must be both attractive and robust.[160]

Rather than attempting to shoe-horn a new regulatory regime into one of the established models, which would fail to recognise the nuances of different media actors within a diverse media environment, it is submitted that a scheme combining different aspects of these models is preferable. Indeed, according to Fielden 'it is…more helpful to see the models of press regulation…as sitting on a spectrum, in which different aspects bleed into

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[153] *Convergence Review*, 49.
[154] Ibid. 50-51. Although the *Convergence Review's* recommendations do contain statutory elements, such as mandating membership for larger media entities.
[155] *Finkelstein Report* 8-9.
[156] Ibid. 9.
[157] T. Flew and A. Swift, 'Regulating journalists? The Finkelstein Report, the Convergence Review and the news media regulation in Australia', (2013) *Journal of Applied Journalism & Media Studies* 2(1), 181-199, 190; *The Finkelstein Report*, 287.
[158] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 155, [6.71].
[159] Ibid. [6.72].
[160] Ibid. [6.71].

each other' as 'attempts at categorisation are less than straightforward.'[161] Thus, the regulatory body with oversight for the scheme advanced by this thesis would not be set up by legislation, and membership would not be compulsory. Rather, membership to the body would be voluntary, albeit legislation would confer statutory incentives on members akin to the Irish model and the dormant UK coercive framework. Furthermore, members would be able to take advantage of other, non-statutory, incentives, like those recommended by the NZLC, that 'encourage' membership in the same way as the Danish model. These statutory and non-statutory incentives are set out in the following section.

As explained in section 2 above, the social responsibility theory underpinning the media-as-a-constitutional-component concept champions media self-regulation where possible, but also acknowledges that a highly-incentivised regime may be necessary in democratic societies. As a consequence, it is submitted that this hybrid approach to membership achieves a balance between protecting media freedom and safeguarding the democratic process by ensuring the media fulfils its constitutional duties and responsibilities.

4.4 INCENTIVISED MEMBERSHIP

As alluded to above, the incentives associated with membership of the regulatory scheme proposed by this thesis can be separated into statutory and non-statutory incentives. They are set out in turn.

4.4.1 STATUTORY INCENTIVES

Firstly, it will contain incentives similar to sections 34 and 40 of the Crime and Courts Act 2015.[162] The issues associated with these provisions, explained in section 2, would be remedied, in that the provisions would: (i) be enacted and operational; and (ii) unlike the 2015 Act, apply to all media actors, including citizen journalists, as they would capture actors that are operating as the author and publisher of material and those that are not publishing in the course of a business, in the same way as those that are. Secondly, much like the Danish system, these incentives would extend to access to court files and being able to attend court proceedings otherwise closed to the public. However, unlike the Danish Media Liability Act,

[161] L. Fielden, *Regulating the Press A Comparative Study of International Press Councils*, (Reuters Institute for the Study of Journalism, 2012), 39, [4].
[162] Discussed in section 2 above.

this scheme would not include an incentive that allows for the gathering and storing of personal information as part of journalistic research. This is because this is already covered by the 'special purposes' exemption for journalistic, literary, artistic or academic purposes which, as explained in section 2 above, is found in Article 85 of the GDPR and Schedule 2 of the Data Protection Act 2018 and has been held to apply to citizen journalists.[163] Finally, the scheme would introduce a provision mirroring section 26(2) of the Irish Defamation Act 2009 which affords a level of protection in defamation proceedings for members of the regulator.

4.4.2 NON-STATUTORY INCENTIVES

These incentives supplement the statutory incentives set out above, and are as follows:

1. The Cairncross Review has recommended the introduction of a government innovation fund to develop new approaches and tools to improve the supply of public-interest news.[164] It also recommends the introduction of new forms of tax relief, including extending zero-rated VAT to digital newspapers and magazine, as well as digital-only publications.[165] This scheme would take this one step further. Pursuant to the NZLC report NMSA members can access public funding for publications and programmes falling within its definition of news and adhering to the NMSA's code.[166] A similar incentive would be available to members of the regulator overseeing this scheme, so long as they were operating as news media pursuant to section 4.2.2 and adhering to the behavioural norms and standards of discourse discussed in section 4.1, as this would, firstly, serve to protect standards and, secondly, act as an incentive for media actors to join the regulatory system.

2. A mediation service would be accessible to both complainants and members of the regulator to encourage the cost-effective and efficient settlement of cases which may otherwise proceed to court.

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[163] *The Law Society and others v Kordowski* [2014] EMLR 2, [99].
[164] Dame F. Cairncross, *The Cairncross Review: A Sustainable Future for Journalism*, Department for Digital, Culture, Media & Sport, 12th February 2019, 90-102. See also: T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 487.
[165] Ibid.
[166] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 181, [7.115]-[7.117].

3. Members would be able to access training[167] to help them to comply with the framework's code and relevant sub-code and, for instance, to provide them with a requisite level of knowledge to report appropriately on court proceedings (and therefore to avoid allegations of contempt of court) and to meet the statutory conditions pursuant to defences under the Defamation Act 2013. It is submitted that this incentive would be particularly attractive to citizen journalists who are unlikely to have had any 'formal' journalistic or legal training or have access to a legal team.[168]

4. In its Report the NZLC acknowledged that belonging to a regulator (in its case, the NMSA) would be a mark of responsibility which distinguishes members from non-members and would, therefore, provide a reputational advantage to those that are part of the framework.[169] Membership of the scheme proposed by this thesis would provide similar reputational, or brand, advantages. It would demonstrate to the outside world that members are part of a group of media that place a high value on, and have bound themselves to act, responsibility. It says that they will abide by the concept's behavioural standards and norms of discourse discussed in section 4.1 and are, ultimately, prepared to be accountable for their actions. It is submitted that something akin to a 'kitemark' could be awarded to members to enable them to demonstrate membership of, and compliance with, the scheme. As explained in Chapter Five, this will also enable anonymous actors, discussed below, to advertise their membership without having to be named.[170]

Moreover, membership of the regulatory scheme would confer non-legal benefits on members. For example, news media are given preferential access in a wide range of circumstances, including: invitations to attend media conferences of public and private agencies; early embargoed access to media releases; invitations to meetings (such as shareholder meetings); access to police and emergency services briefings. As the NZLC states in its Report: 'Politicians and other powerful figures in

[167] T. Gibbons, 'Conceptions of the press and the functions of regulation' (2016) *Convergence: The International Journal of Research into New Media Technologies* 22(5) 484-487, 487.
[168] See the arguments in Chapter Six at sections 2.2 and 3.2 respectively.
[169] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 180, [7.111]-[7.113].
[170] See section 4.

society are often buffered from the media by advisers who determine which media outlets will have access to them. Most people and organisations prefer to deal with accountable media which whom there is a higher degree of trust.'[171] It is submitted that membership of this regulatory scheme is a way of demonstrating that trust.[172]

5. As established in Chapter Five, many citizen journalists contributing discourse of constitutional value choose to operate anonymously or pseudonymously. To encourage membership of the scheme from these actors, and to ensure they can continue to publish in this way, it would 'protect' their anonymity and pseudonymity so long as they adhere to the standards and norms required by this framework. This 'protection' would manifest in a number of ways. For instance, these media actors would not be named (or their pseudonym would be used) on the regulator's website and in correspondence, briefings or reports etc, and it would extend to any proceedings relating to alleged breaches of its code or sub-code. Only in extreme cases, such as in the event of breaches of the code amounting to criminal conduct, would the actors be named.[173] This means that not only can anonymous and pseudonymous citizen journalists join the scheme and take advantage of its incentives, safe in the knowledge that their identities are protected, but the audience will know that these actors are members of a scheme committed to responsible journalism by virtue of the award of a kitemark, as discussed above.

4.5 THE REGULATOR: POWERS AND SANCTIONS

In addition to the statutory incentives set out above, the regulator with oversight of the scheme would have the power to impose sanctions on members for breaches of its code or sub-codes. These include requirements to: (i) publish an adverse decision in the medium concerned, with the regulator having the power to determine its prominence and positioning (including the placement on a website and the period for which it will be displayed); (ii) take down specified material from a website; (iii) correct incorrect material; (iv) grant a right of

[171] Ibid. [7.112].
[172] See generally: T. Gibbons, 'Building Trust in Press Regulation: Obstacles and Opportunities' (2013) 5(2) *Journal of Media Law* 202-219, 203, 211, 213.
[173] D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 239.

reply to a person; (v) publish an apology, with the regulator having the power to direct its prominence and positioning.

Moreover, in exceptional cases, the regulator would have the power to suspend or terminate the membership of any member. As stated above, membership of the regulator will be a mark of responsibility that will give rise to reputational advantages. Therefore, the ability to suspend or terminate membership of a member serves two purposes. Firstly, serious offending would diminish the brand. Therefore, suspension or termination may be necessary to protect the reputation of the regulator and its other members. Secondly, it 'enforces' this incentive, particularly in respect of citizen journalists, who may rely on the brand advantage conferred on them by membership to support their reputation more than established media actors. Suspension or termination would not mean that the media actor concerned would be driven from the market or be required to cease publishing. It would continue as before, but without the benefit of the privileges accruing to membership of the regulator. The suspension or termination would also need to be proportionate to the breach. It is submitted that in most cases, the offending media actor would be able to seek reinstatement of their membership after a suitable period. It is likely that a decision to terminate or suspend membership (or to decline reinstatement) would be subject to judicial review. [174]

Similarly, as mentioned in Chapter Five,[175] in extreme cases, the regulator would have the power to name anonymous and pseudonymous members. In much the same way as described above in relation to termination and suspension, it would help to protect the reputation of the regulator and other anonymous and pseudonymous members by encouraging public confidence in those that do adhere to the codes and sub-codes, albeit anonymously or pseudonymously. However, it is recognised that, unlike suspension of membership, there is no 'no way back' once a member's identity has been revealed.[176] Therefore, an assessment of what is meant by 'extreme' and accompanying guidelines would need to be drafted to assist the regulator in making this decision. By way of example, it is submitted that conduct that has been the subject of a successful criminal prosecution would, in most circumstances, warrant the naming of the offending members.

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[174] These mirror the sanction and powers recommended by the NZLC. New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 170-171, [7.70]-[7.72].
[175] See section 4.
[176] D.K. Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014), 239.

4.6 NON-MEMBERS

Finally, it is important to consider the position of non-members. It is accepted that some media actors, and of course all non-media actors, will not be within the jurisdiction of the regulator. This is particularly likely within the context of those operating online and via social media, either because they do not meet the eligibility criteria set out above at section 4.2.2 or because they elect not to join. Indeed, this was acknowledged by the NZLC in its Report, which goes on to state that '[t]here will be bloggers, website hosts, Facebook users and a myriad of others…[who] will continue unregulated and may continue to publish as they wish.'[177]

However, it is important to note that these actors will remain subject to both civil and criminal laws,[178] and that, conversely, they are not without privileges, as the law confers certain privileges on them. For instance, as set out in Chapter Two, the protection afforded by the right to freedom of expression pursuant to Article 10(1) ECHR is available, subject to qualification, to everybody, irrespective of whether they are media. Equally, the enhanced right to media freedom can, in theory, apply to all media, regardless of whether an actor is or is not a member of a regulatory scheme. By way of example from a UK perspective, as explored in Chapter Six, the Defamation Act 2013 provides defences, such as 'honest opinion' and 'public interest',[179] which exempt publishers from liability for defamation if certain conditions are satisfied. These 'privileges' are incidental of the free speech rights conferred on everybody. Thus, this proposed regulatory scheme would not interfere with the fundamental free speech rights of citizens or non-member media actors, nor would it impose unnecessary constraints on private publishing activities. Rather, what it would do is provide clarity for those media actors who want to be considered part of the media-as-a-constitutional-component and who therefore choose to abide by the behavioural standards and norms of discourse inherent within this concept of media.

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[177] New Zealand Law Commission, *The News Media Meets 'New Media'* (2013), NZLC Report 128, 191-192, [7.167]-[7.169].

[178] For analysis of criminal sanctions see: P. Coe, 'National security and the fourth estate in a brave new social media world' in L. Scaife (ed), *Social Networks as the New Frontier of Terrorism #Terror*, (Routledge, 2017) 165-192; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law* (2015) Vol. 24, Issue 1, 16-40.

[179] See sections 3 and 4 respectively of the Defamation Act 2013. See Chapter Six section 3.2 for analysis of the concept's impact on the operation of various defences to defamation.

5. CONCLUSION

This chapter has set out a new regulatory framework which, it is submitted, could adequately deal with the issues of defining and regulating media, including citizen journalists, in a converged environment, without compromising the right to freedom of expression and the enhanced right to media freedom. However, by providing the contours of this framework it has identified new lines of enquiry, beyond the scope of this thesis, that are, nevertheless, vitally important and worthy of further research. For instance, it leaves open questions relating to the funding, governance and personnel of the regulator, and any board or panel that may adjudicate on breaches of the code and sub codes, and, of course, there is the issue of the composition of the codes and sub codes themselves. More broadly, Chapters Five and Six looked at how the media-as-a-constitutional-component concept, and its social responsibility and argument from democratic self-governance foundations, provide a model for dealing with specific legal problems created by citizen journalism and online speech within the current libertarian paradigm. However, there are other challenges, emanating from, or related to, citizen journalism that this thesis has been unable to deal with. For instance, although touched on in Chapter Five, whistleblowers are a group of actors that would, in certain situations, fall within the scope of the constitutional-component concept and its definition of media. What level of protection should be afforded to whistleblowers, and how their rights are balanced with the individuals and organisations they speak out against is open for discussion. Plurality and media ownership is an issue that is affecting social media and, as a result, both citizen and 'traditional' journalists. What impact this is having on free speech more widely is ripe for further consideration. This thesis has not had the scope to consider in, any great detail, data protection law and, specifically, from a UK perspective, the impact of the new GDPR and Data Protection Act 2018 regime on citizen journalists (subject to a no-deal Brexit which may have further repercussions on this regime). It has also not considered issues around national security that may arise from the activities of citizen journalists. Thus, in many ways this thesis is a starting point, or a catalyst, for further work in this area. In essence, the media-as-a-constitutional-component concept, as a theory of free speech, is a trunk from which more branches of enquiry will emerge.

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