

The ‘Full Liberty of Public Writers’:¹
Special Treatment of Journalism in English Law

D Phil thesis

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¹ *Wason v Walter* (1868) LR 4 QB 73 93.

Abstract

This thesis investigates whether institutional journalism should receive special treatment at the hands of the law. Special treatment encompasses the affording of benefits to and the imposition of liabilities on journalistic institutions and the individuals who work for them. The arguments against special treatment are pragmatic and theoretical: pragmatic arguments emphasise, *inter alia*, the difficulty of providing a definition of journalism, and theoretical arguments emphasise the difficulty in explaining why special treatment can be coherent. The former can be addressed by describing how special treatment is already afforded to institutional journalism, both liabilities and benefits, to individuals and institutions, and showing that some of the problems foreseen by the pragmatic arguments have not proved as difficult as they appear. The arguments that special treatment is incoherent can be addressed by arguing that the credibility and assessability of institutional journalism still provide a *prima facie* rationale for special treatment irrespective of the rise of public speech on the Internet, when combined with the integral nature of journalism to democracy. Two basic arguments are advanced why this is so. The first, the free speech values argument, is a consequentialist account that holds that special treatment is appropriate when (or because) institutional journalism contributes to free speech values. It is attractive, but presents difficulties, both when considered in the abstract and when applied to the free speech value of democracy. The second, a rights-based argument, based on the notion that freedoms of speech and of the Press are distinguishable, can be based on either on Dworkin's theory of rights as trumps or Raz's theory of rights as interests. Raz's account is preferable, as it complements the free speech values thesis in explaining the coherence of special treatment.

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Chapter 1: Introduction: special treatment of ‘the Press’ in

English law

This thesis examines the appropriateness of granting special treatment to institutional journalism. Before exploring this issue and explaining its relevance, it is important to provide an outline of the meaning of the terms used to frame the general issue. The ‘special treatment’ with which we will be concerned is of a legal nature, and covers both benefits and liabilities specifically granted to institutional journalism. ‘Institutional journalism’ covers both institutional journalists and journalistic institutions, the term being used to distinguish a class of journalist from other individuals or institutions that perform similar tasks. ‘Institutional journalists’ are members of journalistic institutions who undertake journalism, and are generally bound by a type of contract to perform their task, often having been the recipient of some journalistic-related training, and are generally subject (in theory at least) to various codes of practice and/or regulation. ‘Journalistic institutions’ are institutions whose primary task is the production of journalism, or for whom the production of journalism is a substantial part of their activity. ‘Journalism’ is a term the boundaries of which are difficult to describe with precision,¹ but I will adopt a working definition of ‘the portion of the media oriented toward current affairs and public policy [...] and related expression historically identified

¹ Debate about the term is extensive within and outside of the law. Within the law, the meaning of the term in the Freedom of Information Act 2000 was the subject of analysis by the Supreme Court in *BBC v Sugar* [2012] UKSC 4, [2012] WLR 439 (Lord Wilson) [38] [39]. This analysis, though a testament to the viability of the term as a useful conceptual tool in doctrine, does not amount to an improvement over Baker’s working definition, as it is attempting to determine in what ways the processes of ‘journalism’ can be distinguished from the administrative processes within the BBC.

with newspapers'.² Chapter two will explain 'special' and 'treatment' in more detail, discuss some aspects of the theoretical context of the special treatment of institutional journalism, and suggest a taxonomy of such treatment, providing doctrinal examples of each proposed type. It will also provide an answer to the charge that the imprecision of these descriptions amounts to a bar to the special treatment of institutional journalists.

Expanding consideration beyond the more commonly addressed question of whether individual journalists are the beneficiaries of special rights reveals a clearer picture of the extent to which the law affords special treatment to institutional journalism, and is one way in which this argument is distinguished from some other studies.³ Another is the specific focus on institutional journalism. Fenwick and Phillipson, for example, are concerned with a broader 'media freedom'⁴ and do not seek to restrict their focus to journalism. There is also considerable scholarship, for example Craufurd Smith,⁵ Hitchens,⁶ and Gibbons and Humphreys,⁷ interested in the position of traditional

²C. Edwin Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955, 1022. Support for such a definition can also be garnered from Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press 1982) 106, and Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010) 109/110.

³ A recent example of such an approach is Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) Journal of Media Law 57, though he does consider liabilities at 71. This four-fold analysis of considering special treatment by looking at benefits and liabilities, and at individuals and institutions, is derived from Baker, and will be discussed in chapter two text to n 26ff.

⁴ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006).

⁵ Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Clarendon Press 1997)

⁶ Lesley Hitchens, *Broadcasting Pluralism and Diversity : a Comparative Study of Policy and Regulation* (Hart Publishing 2006).

⁷ Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (Routledge 2012).

broadcasting, now more commonly termed audiovisual media. These other approaches are valuable. Choosing to draw a line on the boundary between the media and other forms of expression, the approach of Fenwick and Phillipson, is illuminating, as different arguments are likely to pertain to the media than apply to other forms of expression.⁸ Similarly, distinguishing between print and audiovisual journalism is sensible, for, as will be seen, the question merits investigating of whether there are relevant differences between print and audiovisual journalism sufficient to justify the difference with which the law has traditionally treated these activities. However, there are cogent reasons for concentrating, as the current study does, on institutional journalism. This is not least because such a focus is narrower than concentrating on ‘the media’, a wider concept that groups together journalistic and non-journalistic activities. This narrower focus is beneficial because some of the arguments for special treatment that will be canvassed have more persuasive force in relation to journalism, whether traditional print, traditional broadcast or on-line, than to other media activity, such as the production of entertainment. Indeed, some law rests on this distinction.⁹ An example of an argument that turns on this point that will be described in chapters three and five suggests that journalism merits special treatment as it operates as a check on governmental power.¹⁰ This is much more convincing in relation to journalism and how it can operate in society than it is in relation to other outputs of the media. Moreover and conversely, other

⁸ Chapter six considers these arguments.

⁹ The Communications Act 2003 creates a distinction between news and other programmes, in that due impartiality can be created over a series for non-news programmes, in contrast to news programmes, which must observe due impartiality in each act of reporting: s 319 (2) (c) and s 320(1) (a). Fenwick and Phillipson discuss the provisions at 997, and they will be examined in chapter 2.

¹⁰ This is the Fourth Estate argument discussed in chapter five.

arguments surveyed in these pages apply with somewhat lesser force to journalism than to entertainment, such as Raz's arguments about how public speech can provide a validation of life choices, described in chapter seven.¹¹

Nevertheless, there are problems that are created by focusing on institutional journalism. One significant concern is that the term does not admit of precise limits: how should one regard the position of a freelancer, or the occasional contributor to a newspaper, or a blogger? This may, as has been indicated, amount to a reason to reject affording special treatment to institutional journalism in practice (though this thesis will argue in chapter two that this is not the case), but this lack of clarity should not preclude the term being used for at least three reasons. First it is not the case that the term describes an empty class, nor that it is impossible to comprehend. Indeed, the European Court of Human Rights, as will be seen in chapter two, frequently uses the term 'the Press' to describe an identifiable group of people.¹² Further, the term is sufficiently informative to provide the basis of various administrative decisions. Anderson draws attention to some of the products of such decisions: 'the press pass, the press gallery, the press room, the press office, the press secretary (or public-information officer), the press bus or plane, and the press pool'.¹³ To this can be added the Press visa, namely the I-

¹¹ Text to n 50

¹² Chapter two, text to n 79ff.

¹³ D A Anderson, 'Freedom of the Press' (2002) 80 Texas Law Review 429, 430. While Anderson accepts that the term is sufficiently precise to permit the affording to the Press of particular benefits, he denies that these should be pursuant to a right of Press freedom. Consideration of this issue is the focus of chapter seven.

Visa,¹⁴ afforded to institutional journalists who visit the US, and the press identification card issued by the UK Press Card Authority Ltd.¹⁵ Indeed, the concept that the term ‘institutional journalism’ seeks to convey can be identified, on one reading of the term, with the phrase ‘the Press’ in the term ‘freedom of the press’.¹⁶ Pursuant to this, I will often adopt the term ‘the Press’ as an alternative to the phrase ‘institutional journalism’ in this work. Admittedly, there is a danger in this usage, as ‘the Press’ can be also taken to refer to what was historically print journalism as opposed to broadcast journalism, but I will strive to avoid this ambiguity by distinguishing, where appropriate, between my uses of the term as relating to print and other journalism, and capitalising the initial letter of ‘the Press’ when I use it to refer to institutional journalism in general.

Second, the term permits the framing of significant and important questions that are worth addressing. These are commonly addressed in US doctrine and scholarship, and the term is often used to facilitate such discourse. An eminent example of this in US doctrine can be found when Burger CJ talks of the institutional Press in his argument against providing special treatment to institutional journalists in the US Supreme Court case *First National Bank v Bellotti*.¹⁷ Examples in US scholarship are also readily available. Bollinger recently used the term, arguing that:

¹⁴ I-Visas are available only to non-freelance members of the media -- --, 'I Visas - Members of the Media' (Visa Eligability Requirements, US Embassy, London 2009) <http://www.usembassy.org.uk/cons_new/visa/niv/media.html> accessed 26 09 09.

¹⁵ Raz acknowledges the same point, observing that: ‘[i]n most liberal democracies the press enjoys privileges not extended to ordinary individuals’. Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 253.

¹⁶ D A Anderson, ‘The Origins of the Press Clause’ (1983) 30 UCLA Law Review 455; also discussed in chapter five text to n 10.

¹⁷ *First National Bank of Boston v Bellotti* 435 US 765 (1978)799 – 802.

For the press to flourish, it must be an *institution* ... The concept of an institution can encompass many different forms, but it starts with the importance of having organizations large and powerful enough to be able effectively to monitor and check the authority of the state. For this reason, the press cannot be composed of a multitude of isolated individuals or small organizations, however much each may be committed to high-quality journalism.¹⁸

The substantive points Bollinger and Burger make are contentious, and argument is needed as to why they should be persuasive in the UK.¹⁹ These matters will be subject to analysis in the chapters that follow, but whether they are endorsed or rejected it is evident that the concept ‘institutional journalism’ is sufficiently useful to be employed in a discussion.²⁰

Third, while these remarks are not sufficient to provide an accurate and precise definition, such insufficiency is not fatal to consideration of the matter at hand, for it is not necessarily a fatal flaw to fail to be able to provide an account of where the peripheries of a concept are if one can provide an account of where the core of the concept is. To assert otherwise might be termed a core-periphery fallacy. This point has been recognised by Raz, in respect of the identification of rights: ‘It seems to be a

¹⁸ Bollinger (n 2) 109 – 10: Bollinger’s point is discussed below in chapter five text to n 15. Other examples include Potter Stewart, ‘Or of the Press’ (1975) 26 Hastings LJ 631, Vincent Blasi, ‘The Checking Value of the First Amendment’ (1977) American Bar Foundation Research Journal 521, C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) chapters 10 and 11, Frederick Schauer, ‘Towards an institutional first amendment’ (2005) 89 Minneapolis Law Review 1256 1275 and Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007).

¹⁹ Text to n 83 to n 85.

²⁰ Sunstein (n 18) adopts the term ‘General-Interest Intermediaries’ to describe a concept similar to institutional journalism, 29.

common philosophical mistake to think that the core justification of a right or any other normative institution is sufficient for fixing its boundaries.’²¹

Why this merits attention

There are at least three reasons why it is pertinent to consider the propriety of providing special treatment to institutional journalism. The first is that there appears to be an inconsistency in the approach of the law to the treatment of institutional journalists, and studying the propriety of such treatment may alleviate this inconsistency; the second is that technological change – and in particular the development of public speech on the Internet and the convergence of traditionally different sectors of the media – makes examining the appropriateness of providing special treatment to the institutional Press timely; and third, the question is pertinent to contemporary debate about the ethics and practices of the print press, and the consequent Leveson proposals for the further regulation of print journalism.

An inconsistency: ‘a toaster with pictures’?

The law, and discussion of the law, is often inconsistent as to whether institutional journalism should be treated in a way distinct to other activities. This inconsistency is most marked when one compares the position in regard to benefits and liabilities afforded to institutional journalists and journalistic institutions, as individual institutional journalists are not frequently afforded benefits, while liabilities are quite frequently imposed on journalistic institutions. Studying the propriety of special benefits and liabilities for the Press will help understand this inconsistency.

²¹ Joseph Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Rev. edn, Clarendon 1995) 148.

Considering the position of benefits afforded to institutional journalists first, there are a considerable amount of dicta to the effect that institutional journalists should receive nothing, or nothing significant, from the law that is not also provided to others. Sir John Donaldson set out a significant statement of this view during the *Spycatcher* litigation of the 1990s:

It is elementary that our constitution provides no entrenched guarantee of freedom of speech or of the press, and neither the press nor any other medium of public communication enjoys (save for exceptions immaterial for present purposes) any special position or privileges.²²

It may be that, in practice this principle is over-stated, for, as Barendt, Smith and Fenwick and Phillipson, amongst others, have observed, and chapter two will demonstrate, there are indeed instances of special benefits available to the institutional Press.²³ But, even though the situation may not now be as Sir John describes, there remains widespread and significant skepticism in doctrine and scholarship as to the propriety of the provision of special benefits to the institutional Press. Blom-Cooper, for example, after surveying the law, comes to the conclusion that: ‘What more is there to say than the journalist by occupation acquires nothing from the law that does not apply to anyone minded to take the opportunity to exercise the right of free speech’.²⁴ And, indeed, many statutory and common-law examples can be found that validate such a view. The Data Protection Act 1998, for example, explicitly includes purveyors of

²² *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 HL, 218.

²³ Eric Barendt, ‘Press and Broadcasting Freedom: Does anyone have any rights to free speech?’ (1991) 44 CLP 63; Anthony Smith, ‘The Press, the Courts and the Constitution’ (1999) 52 CLP 126 ; Fenwick and Phillipson (n 4), 24, 109, 124.

²⁴ Louis Blom-Cooper, ‘Press Freedom: a Constitutional Right or Cultural Assumption?’ [2008] PL 260, 268. Such a view find echoes in Geoffrey Robertson and Andrew G. L. Nicol, *Media Law* (5th edn, Thomson / Sweet & Maxwell 2007) 5-052, 5-078.

literary and artistic material along with journalists as the recipients of special provisions,²⁵ as do similarly drafted sections of the Human Rights Act 1998²⁶ and the Freedom of Information Act 2000.²⁷ Pains appear to have been taken to prevent these clauses from affording special benefits to the institutional Press. In a similar way the Contempt of Court Act 1981, which provides the statutory rationale for the protection of journalistic sources, is catholic in its benefits²⁸ – a fact that Barendt²⁹ and Blom Cooper³⁰ have emphasised. The principle is also evident in the common law. For example, it has been stressed that the *Reynolds*³¹ defence to libel, sometimes called the ‘responsible journalism’ defence or privilege, is not – contrary to some authority³² – a defence of particular benefit to journalists, but is one of which anyone, in certain circumstances, can avail themselves.³³ Such a position is now reflected in the statutory replacement of *Reynolds*, section 4 of the Defamation Act 2013.

The wariness of providing individual institutional journalists with special benefits can be traced back to Dicey, who observed in relation to the absence of special benefits afforded to the Press that it was ‘hardly an exaggeration to say ... that liberty of the press

²⁵ S 32.

²⁶ Human Rights Act, 1998 s 14 (4).

²⁷ Pt VI of Sch 1, the provisions discussed in *BBC v Sugar*(n 1) .

²⁸ s 10.

²⁹ Eric Barendt, *Freedom of speech* (2nd edn, Oxford University Press 2007), 437.

³⁰ Blom-Cooper (n 24) 269.

³¹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL: discussed further chapter two text to n 6; chapter five text to n 32; and chapter eight.

³² *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 1 WLR 1357(Simon Brown LJ) [2].

³³ *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359(Lord Hoffmann) [54].

is not recognised in England'.³⁴ This wariness is not necessarily prompted by hostility to institutional journalism, as it is consonant with the concept of the common law being founded on a system of residual liberties that affords stronger protection than that which avails from the concept of rights.³⁵ One prominent contemporary media law textbook endorses this view:

Journalism is not just a profession. It is the exercise by occupation of the right to free expression available to every citizen. That right, being available to all, cannot in principle be withdrawn from a few by any system of licensing or professional registration, but it can be restricted and confined by rules of law that apply to all who take or are afforded the opportunity to exercise the right by speaking or writing in public.³⁶

However, in contrast to the scepticism with which the affording of benefits to the institutional Press is viewed, the law and discussion of the law does not often demonstrate comparable wariness about imposing liabilities on the institutional Press, or the media more widely. This can be seen at many levels of the law: domestic, European and international.³⁷ In these fields one can see a preparedness to regard both journalistic institutions and the speech of some institutional journalists as meriting this type of special treatment. A brief survey will be sufficient to establish that this is the case in relation to both individuals and institutions, as a more thorough consideration of these provisions will form the basis of chapter two. In relation to individuals, the readiness to impose special treatment is most evident in the imposition of restrictions on what audio-

³⁴ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Emlyn Wade ed, 10 edn, Macmillan & Co Ltd 1961), 247; discussed in chapter six text to n 7 and chapter seven text to n 56.

³⁵ *Douglas v Hello! (No 1)* [2001] QB 967 CA 986.

³⁶ Robertson and Nicol (n 24) xvii.

³⁷ For the most part, international law will not be studied in this thesis, but Keller's survey validates the claim in the text: Perry Keller, *European and International Media Law: Liberal Democracy, Trade, and the New Media* (Oxford University Press 2011).

visual journalists can say. European and domestic law regulate individual institutional journalists in respect of the content of their on-air speech, ensuring that it is impartial,³⁸ fair,³⁹ decent and does not offend,⁴⁰ for example. Legislation also exists to compel speech by institutional journalists, embodied in regulations that require broadcast journalists to offer a right of reply.⁴¹ Similarly the law imposes wide liabilities on journalistic institutions, both in relation to their speech and their structures, whether these institutions are traditional print or audiovisual. In relation to speech, for example, European law manifests examples of positive harmonisation designed to ensure that media propagate a certain amount of speech of European origin.⁴² In relation to the structures of journalistic institutions, there are arguably many examples of special liabilities – at a European level, one can point towards the Merger Regulations,⁴³ and at a domestic level the sector specific merger regulations in the Communications Act 2003.⁴⁴ Indeed, the very notion of media plurality, now enshrined in article 11 (2) of the Charter, can be seen as a

³⁸ Communications Act 2003 ss 319 (2)(c) and 320 .

³⁹ Fairness can be distinguished from impartiality, as notes Hitchens (n 6) at 170.

⁴⁰ The statutory law is summarised and analysed in *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

⁴¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD) Chapter IX.

⁴² AVMSD Art 16. Under domestic law there are equivalent rules establishing quotas for independent production companies, s 277-78, and regional programmes s 286 Communications Act 2003.

⁴³ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation) [2004] OJ L24/1 art 21 (4) specify plurality of the media as one of three named legitimate interests that Member States can take action to protect in certain circumstances.

⁴⁴ Communications Act 2003 ss 373-89, and Enterprise Act 2002. The interplay between the provisions is complex, but it is unnecessary to explore them here. It is well summarised in Gibbons and Humphreys, 105 and Hitchens 100-03, and *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2, and is discussed in more detail in chapter two.

manifestation of the view that it is appropriate to impose special liabilities on journalistic institutions.⁴⁵

Aspects of this inconsistency have received attention. The difference between the reluctance to impose liabilities on traditional print journalism and the readiness to impose liabilities on what was traditionally broadcast journalism has been widely recognised as an inconsistency that needs explaining. Once, resolution was found in the idea that the spectrum scarcity involved in (what was then) broadcasting provided the basis for such differential treatment,⁴⁶ but such an argument is untenable, even if it was ever tenable, now that the Internet means there is, in effect, an unlimited capacity for anyone to broadcast. Other differences between print and broadcast have been highlighted as providing a basis for this differential treatment, for example the intrusive nature of audiovisual journalism, or the immediacy and efficacy of pictures as a communicative tool,⁴⁷ but there is somewhat of a consensus that such differences provide an insufficient basis for the differences in regulatory approach that exist.⁴⁸ For a time there was wide support for Bollinger's view that, despite the distinction being illogical, it was beneficial on the grounds that the deficiencies of one regulatory regime are remedied by the benefits

⁴⁵ Charter of Fundamental Rights of the European Union [2000] OJ 364/01 art 11(2).

⁴⁶ For example, Gibbons and Humphreys (n 7) 92, relying on Ofcom, *Ofcom Review of Public Service Broadcasting: Phase 2 - Meeting the Digital Challenge* (2004), 4.

⁴⁷ *R (BBC) v Justice Secretary* [2012] EWHC 13 (Admin), [2013] 1 WLR 964 [45]; *ProLife*(n 40) (Lord Hoffmann) [20]; *Mosley v UK* (2011) 53 EHRR 30 [115]; *Animal Defenders International v UK* (2013) 57 EHRR 21 Grand Chamber, para 119.

⁴⁸ Barendt, *Freedom of speech*, (n 29) 444 – 49.

of the other,⁴⁹ although this proposal was nonetheless challenged, either on the grounds that there should as a rule be fewer liabilities on audio-visual journalism,⁵⁰ or greater liabilities on what were traditionally newspapers.⁵¹ But it is no longer clear that even this is convincing, given the convergence of the means by which journalism is consumed. Nowadays what used to be print journalism is frequently consumed on the same platform as what used to be broadcast journalism. It is, as Fielden has observed, curious in the extreme that the *Daily Mail*'s website is subject to different regulation than that of *Channel 4 News*, merely on the basis of the historic means by which this journalism was disseminated, when both are now frequently disseminated in the same manner.⁵² However, the current inconsistency raised here is distinguishable from this question. That is because the problem which seeks attention here is that the law has an inconsistent attitude to journalism *per se*, whether traditionally print or broadcast. It is a problem of whether journalism as a whole is sufficiently different from other similar activity to merit being afforded special benefits or having special liabilities imposed on it. Refocusing attention on the inconsistency of the differential treatment of journalism when contrasted with other activity is merited because it is a distinct question to the one that concentrates on the differential treatment of traditional broadcast and print.

⁴⁹ Lee C Bollinger, 'Freedom of the Press and Public Access: Towards a Theory of Partial Regulation of the Media' (1976) 75 Michigan Law Review 1, Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century*(n 2) 54-64.

⁵⁰ Lucas Powe, *American Broadcasting and the First Amendment* (University of California Press 1987) .

⁵¹ Hitchens, (n 6) 62.

⁵² Lara Fielden, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism 2012). The point has been noted elsewhere, for example: Roger Laughton, 'Bringing the News to Where You Are' in Tim Gardam (ed), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008), 134.

Resolving the inconsistency

The difference between the readiness with which the law imposes special liabilities on the Press and the reticence with which it hands out special benefits presents a problem because it is not clear why, if special liabilities are appropriate, special benefits should not also be appropriate. For either to be coherent, institutional journalism needs to be shown to be different. It may be appropriate not to afford special benefits to institutional journalism, but not on the grounds that there is no difference between such an activity and other comparable activities when, at the same time, special liabilities are being imposed on the basis that there is a difference. Likewise, it may well be that it is appropriate to afford to the Press liabilities but no benefits, rather in the same way as it is appropriate to impose liabilities on a polar bear because of the danger it poses but not afford benefits to it for the very same reason, but at the very least an explanation needs to be provided of what the particular dangers are that the Press poses that merits the imposition of particular liabilities.

There are essentially two ways of resolving the problem: either to hold that institutional journalism is not sufficiently distinct from other similar activities to merit special treatment, or it is different. If the Press is not sufficiently distinct to merit special treatment, then – unless other cogent arguments can be advanced – it should receive no special treatment, whether beneficial or in terms of liabilities. If the Press is indeed distinct, then there are four possible conclusions: the Press should be afforded special liabilities but no special benefits; it should be afforded special benefits but no special liabilities; the Press should be the recipients of both special liabilities and benefits, or,

finally, that neither liabilities nor benefits are appropriate, despite any differences that exist.

Examples of many of these approaches to the problem can be found in media law and media law discussion. One striking example of a rejection of special treatment based on an assertion that there is no difference between institutional journalism – at least in some aspects – and other activity is manifest in the famous argument of Mark Fowler, the Regan-era chair of the FCC, that:

[t]he television is just another appliance--it's a toaster with pictures...We've got to look beyond the conventional wisdom that we must somehow regulate this box, we must single it out.⁵³

More prevalent, however, in the doctrine and literature, is the view that institutional journalism, or elements of it, is sufficiently distinct from other activity to merit special treatment. Perhaps the most common conclusion is that the Press should be the recipients of special liabilities, particularly evident, as indicated above, in discussions of media plurality, that attest to the distinctness of journalism by emphasising the dangers that arise if too much institutional journalism is controlled by a few individuals: concerns about the businesses of Rupert Murdoch or Silvio Berlusconi spring to mind. However, such arguments seldom explain why the differences that merit such restrictions on the Press should not also, potentially at least, also mandate the affording of benefits.⁵⁴ The

⁵³ 'Reason Interview: Mark S Fowler' *Reason* (November 1981) <<http://reason.com/archives/1998/12/01/voices-of-reason/4>> accessed 9/10/13, Cited in Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century*(n 2) 82, and Gibbons and Humphreys (n 7) 21.

⁵⁴ Arguments to this end have indeed been made, notably by Gibbons: Thomas Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] PL 279 (discussed in chapter three text to n 37, and the cross-references indicated there); Baker, who within the context of US constitutional law, recommends liabilities in C. Edwin Baker, 'Private Power, The Press, and the Constitution' [1993] Constitutional Commentary 421, and benefits in Baker, *Human Liberty and Freedom of Speech*, (n 18) chapter 10.

current work will seek to argue that there is a difference between the Press and other individuals and institutions, and that this provides a *prima facie* rationale for the affording of both special benefits and special liabilities. Such an argument chimes with the views of authors such as Barendt, Smith, and Fenwick and Phillipson, described above,⁵⁵ and is consistent with the recent argument of Lord Leveson, who observed that: ‘[t]he press must be independent from those in power and must be afforded the privileges necessary to enable investigative journalism to take place’.⁵⁶

Technological change: lonely pamphleteers and bloggers

The second reason for considering whether it is appropriate to provide institutional journalists with special treatment relates to the development of various communication technologies and practices linked to the Internet, such as social media and citizen journalism.⁵⁷ These developments have attracted a significant amount of scholarship, but this need not be considered at length for present purposes, as there is but one point that needs to be emphasised to demonstrate the utility of the current investigation –that the claim for special treatment for the institutional Press frequently rests on the uniqueness or predominant influence of the Press in the performing of various tasks. These tasks, as will be described in later chapters, particularly chapter five, relate to the operation of a democracy. The development of communication technologies has undermined such a rationale for the provision of special treatment, because the boundaries between the Press

⁵⁵ Barendt, ‘Press and Broadcasting Freedom: Does anyone have any rights to free speech?’ (n 23) 65, Smith, ‘The Press, the Courts and the Constitution’, (n 1) 129-30, Fenwick and Phillipson (n 4) 109, 124.

⁵⁶ Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012) vol 1 part B section 4.5 65.

⁵⁷ J. Kelly, *Red Kayaks and Hidden Gold: the Rise, Challenges and Value of Citizen Journalism* (Reuters Institute for the Study of Journalism 2009).

and others in the performance of these tasks appear to have been diminished.⁵⁸ If these boundaries have been eroded to the extent that the institutional Press are now functionally indistinguishable from others in terms of the contribution and the value of their product to society, then the rationale for special treatment – both special liabilities and benefits – is extinguished. For, if citizen journalists, for example, are equivalent to institutional journalists, what grounds remain for the provision of special benefits to institutional journalists to – for example – enter courts that others cannot? Or, to consider the liability side of the coin, what grounds remain for continuing sector specific regulation of Press institutions, for example, or regulation of on air speech to prevent harm, indecency or offence?⁵⁹

However, there is a danger here of being blinded by the fact that technology has changed so dramatically. This is because this argument is largely a manifestation of an older problem of media law, but undoubtedly one that now has heightened significance because of the Internet. The older problem was that individuals such as ‘lonely pamphleteers’ performed the same tasks of importance to democracy as the Press, tasks on which rested a claim of the Press for special treatment, and given this, any such claim for special treatment (in this case, most often argued as special benefits) should fail. An example of this in practice can be found in the 1972 US Supreme Court case of *Branzburg v Hayes*, in which the term ‘lonely pamphleteer’ appears. In this case the court found that there was no reason in US law to afford special treatment to a large

⁵⁸ Keller (n 37) 198. This argument will be considered in chapter two and chapter three.

⁵⁹ It should be conceded that this is to over-simplify the question. Irrespective of the democratic arguments, there may be reasons for special treatment derived from the non-journalistic activities of the wider media, or due to mere commercial (as opposed to democratic) rationales.

metropolitan publisher but withhold it from an individual.⁶⁰ This doctrinal context is not of great importance, as the point is that the modern version of this argument in any jurisdiction sets the Press not against the ‘lonely pamphleteer’, but the ‘lonely blogger’.

That said, the phenomenon of the lonely blogger does indeed bring different variables into play. These derive from the massive expansion of the opportunities for public speech provided by the Internet, as will be described in chapter three. This makes the question of the propriety of the affording of special treatment to institutional journalists of greater significance, and of wider application. It is of greater significance because the modern plethora of public speech undermines any case for special treatment based on the uniqueness or predominant importance of institutional journalistic speech. It is of wider application, as the increased availability of opportunities of public speech means that this question affects more people. Consequently, while the problem for special treatment arguments posed by the Internet may not be new, the Internet does make the task of considering the propriety of affording special treatment to the institutional Press – the subject of this work – timely, and of heightened importance. Chapter three will propose an argument to address one aspect of the challenges posed by the Internet to the case for special treatment.

Contemporary politics: the shadow of Leveson.

The third reason why considering the question of the propriety of affording special treatment to the institutional Press arises because of the contemporary proposals of Lord Justice Leveson as to aspects of the regulation of print journalism. One of Leveson’s

⁶⁰ *Branzburg v Hayes* 408 US 665 (1972)(White J) 703.

proposals is to link the provision of special benefits to the Press to the imposition, on the print press, of special liabilities: for example, he recommends that members of the print Press should be afforded immunity from liability to the award of exemplary damages when they affiliate with a regulatory authority.⁶¹ The current work examines the propriety of affording special treatment to institutional journalists in general, and it can be seen that this can inform a discussion of Leveson's particular proposals. Additionally, the imposition of liabilities on the Press could come under fire as being inimical to the principle of Press freedom. However, this principle is often considered in insufficient detail, and in particular its conceptual justification and ambit are not evaluated: as Barendt observes, '[a] lot of nonsense is written about freedom of the press'.⁶² The current study will undertake an assessment of what a theory of Press freedom entails, and evaluate the connection between Press freedom and the imposition of special benefits and liabilities – an examination, it can be seen, relevant to an evaluation of the Leveson proposals, and the reactions to it. It will be found that freedom of the Press can indeed countenance the imposition in principle of liabilities such as these.

It should be emphasised, however, that the current work is not intended to be a critique of Leveson, or a gloss on his work. Reference will be made from time to time to Leveson, but the work will not be focused on the Leveson report. It is intended to be both of wider and narrower application. Wider, as the study is not confined to the print press, but also narrower as the intention of the current study is not to arrive at a set of

⁶¹ Leveson LJ (n 56) vol 4 part K chapter 7 7.3 1781.

⁶² Barendt, *Freedom of speech* (n 29) 449; a measured analysis of the concept in relation to Leveson's proposals for regulating the Press is Jacob Rowbottom, 'Leveson, Press Freedom and the Watchdogs' (2013) 21 *Renewal* 57.

recommendations intended to address concerns about the ethics and practises of (traditional) print journalism.

Thesis outline

As indicated, the thesis will defend the proposition that institutional journalism, both in terms of institutions and individuals, is sufficiently different to merit the receipt of special treatment at the hands of the law. This is not a novel proposal, and a significant amount of argument has been made for and against it, which can be roughly divided into two camps: those that argue that special treatment of institutional journalism is impractical, and those that argue that it is incoherent. To some extent the division between impracticability and incoherence is an over-simplification, because the impracticability of identifying journalists may lead, for example, to incoherent results. White J combines the two in *Branzburg v Hayes* when he observes that the problems of defining ‘institutional journalists’, what I term a practical problem, may lead to the denial of benefits to those who fall outside such a definition,⁶³ what I term a incoherence problem. However, while these two classes of argument are linked, they are sufficiently different to be worth distinguishing, not least because concerns of practicability can be addressed, to an extent at least, by considering that in practice they are often overcome, while incoherence concerns cannot be addressed so easily in this way, and require a consideration of theory. In any event, the deficiencies of this taxonomy should not be fatal to the current study, as I intend to address both types of argument.

⁶³ *Branzburg v Hayes* (n 60) 703.

Practical arguments against the thesis of journalistic difference

The first set of arguments against the journalistic difference thesis stress that it is difficult, inadvisable, or impracticable to afford special treatment to the institutional Press, whether individuals or institutions. Most often these arguments are expressed as arguments against the provision of special benefits to the institutional Press, but they can also be taken as arguments against the imposition of special liabilities. Chapter two will demonstrate that while these arguments may be valid, they are over-stated. They can be valid because the difficulty they describe is real, or the risk they fear is a serious concern, both in respect of providing special treatment to journalistic institutions and individuals, but they are over-stated because, however cogent and persuasive such arguments are in theory, in practice special treatment already exists in many forms, without necessarily creating the difficulties of application or damaging consequences arising that the impracticability arguments foresee. Given that the law already provides special treatment to journalists and journalism, whatever the conceptual difficulties they raise, these concerns should not be seen as insurmountable.

I will provide some examples of arguments of this type, but others, no doubt, can be found. The first is that the provision of special treatment raises the spectre of licensing. This is an argument that special treatment will create undesired consequences, and on this basis it is inadvisable. Licensing, as is well known, was the prior restraint of print publication that could only take place with the authority of the Stationers' Company.⁶⁴ Special treatment is evidently not the same as licensing, but similar problems

⁶⁴ Useful contrasting surveys of licensing can be found in Cyndia Clegg, *Press Censorship in Elizabethan England* (Cambridge University Press 1997); and Fredrick Seaton Siebert, *Freedom of the Press in England, 1476-1776 : the Rise and Decline of Government Control* (University of Illinois Press 1965).

arise with special treatment as arise with licensing, namely undue influence of the Press. This is for at least two reasons. The first is that the provision of special treatment will need a threshold test to determine who merits special treatment (particularly benefits), and who does not. There is a risk that undue influence could be exerted on the Press by those who set the threshold criteria, or by the gatekeeper. It is not necessary that any malign intention be imputed to those who set the threshold or administer it, as the desire on the part of the Press to meet the threshold may be as manipulative as any undue influence. There is also a concern that the imposition or withdrawal, or the threat of imposition or withdrawal, of already extant special treatment may be a source of unwanted influence. Blom-Cooper is one who has articulated this concern. He observes that identifying and accrediting institutional journalists raises difficulties:

If representatives of newspapers or news agencies possess the right, any selection process will involve accreditation [...] the procedure will smack of a licensing system – something the media have justifiably set their face against ever since 1694. Judges must not be censors.⁶⁵

An associated concern, slightly odd to European ears and odd in the current climate of Press misfeasance, but that has been expressed in the American literature, is also concerned with this problem of undue influence. This problem is that with the provision of special treatment will come undue self-restraint on the part of the Press. Lewis has articulated these concerns. He raises the prospect, as précised by Baker: ‘that a Fourth Estate constitutional status for the Press will lead to demands for accountability or regulation as a public fiduciary that are inconsistent with the Press’s, and especially the

⁶⁵ Blom-Cooper (n 24) 267.

journalist's, historical and proper nature "as a freebooter outside the system."⁶⁶ Lange echoes this concern, observing that providing journalists with special privileges may alienate journalists from the public:

This is not to suggest that the press is likely to be put down by armed revolt or anything half so satisfyingly dramatic. Instead, my speculation is that it will simply be nibbled to death by gnats—that is, it will finally fall victim to an unending stream of complaints coupled with unceasing demands for greater responsibility.⁶⁷

A second concern with the provision of special treatment to institutional journalists is the difficulties already noted of definition.⁶⁸ This is the practical question of how a definition of an institutional journalist can be provided, a condition precedent to affording special privileges to such people, given that there is no professional regulatory body for journalists. Where does one draw the line: is a representative of *Autotrader* a journalist, given that they work for a magazine that provides information of value to society, and for which people pay, and they are employed, ultimately, by the Scott Trust, owners of *The Guardian*? Are all the following journalists: a sub-editor on *Hello!*, Iona Craig, the retained non-staff reporter for the Times in Yemen, and the political blogger Guido Fawlkcs?

A third concern is that the provision of special benefits to the Press may paradoxically result in them being afforded lower protection than is afforded to the general public. Robertson and Nichol consider that these concerns have been validated in respect of certain protections of use to journalists, once afforded to the public at large by

⁶⁶ Antony Lewis, 'A Preferred Position for Journalism?' (1979) 7 Hofstra Law Review 595 605 .

⁶⁷ David Lange, 'The Speech and Press Clauses' (1975) 23 UCLA Law Review 42 (n 16) 108.

⁶⁸ Baker, 'The Independent Significance of the Press Clause under Existing Law' (n 2) 1016.

the common law, but reserved to journalists by the Police and Criminal Evidence Act.⁶⁹ Before codification these benefits were of substantial use, Robertson and Nichol argue, but the courts have interpreted the provisions of the Act in such a way that removes the benefit, thereby ‘decid[ing] that the protection was not very special after all.’⁷⁰ A fourth, and opposite concern is that the provision of special benefits to the Press reduces the strength of other benefits. Lange, describing this argument, is concerned that if institutional journalists are granted special treatment ‘speech interests which are seen as distinct from the Press may be ignored or undervalued, and thus begin to wither’.⁷¹

Journalistic difference is incoherent

The second set of arguments against journalistic difference and special treatment is that providing institutional journalism with special treatment is incoherent. These will be addressed in chapters three to seven. The concern about incoherence arises because the provision of special treatment to the institutional Press is significantly justified by virtue of what it brings about: the Press is instrumentally valuable, and by virtue of this instrumentality, can merit being afforded special treatment.⁷² However, this instrumentality is a source of vulnerability for anyone seeking to argue for special treatment because if others also bring about this value, or if the Press damages the value, then the rationale for the provision of special treatment becomes less cogent. This will be

⁶⁹ s 19.

⁷⁰ Robertson and Nicol (n 55) 5-078.

⁷¹ Lange (n 16) 118.

⁷² The proposition that the Press is of instrumental value accords with the views of Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 385; and Raz, *The Morality of Freedom* (n 15) 253.

discussed at length in later chapters.⁷³ Incoherence arguments have been advanced widely: a first example can be found in Blom-Cooper. He asserts that there is no theoretical legitimacy for affording special benefits to institutional journalists. Where these exist, they are anomalous and abhorrent in principle. So, as will be seen, one example of a special benefit is the exclusive right of access for some institutional Press to family courts under s 69 (2) Magistrates Court Act 1980),⁷⁴ and Blom-Cooper argues that this right is incoherent:

If the public is excluded, whence do journalists derive their personal right of access? Apart from the statutory right in family proceedings in the magistrates' court, there is no basis whatsoever for any such right.⁷⁵

Lange poses a similar concern when he asks why a journalist should be permitted access to a prison to interview a prisoner, but such permission be refused to – say – Solzhenitsyn?⁷⁶ There is no cogent reason for restricting access to an institutional journalist and denying it to an author given that both can produce works that are useful to society as a result of such access. Indeed, if the journalist in question writes for the *Star* it might be perverse to grant them access and deny it to a respectable author. Similar arguments may be advanced as to why a journalist should be provided with treatment denied to an academic, an NGO worker, or even – perhaps – an opinion pollster. Those arguments emphasised the incoherence of providing special treatment to individuals, and similar case can be about providing special treatment to institutions. Anderson asks why

⁷³ Chapters four, five and seven.

⁷⁴ Discussed in chapter two, text to n 33.

⁷⁵ Blom-Cooper(n 24) 266.

⁷⁶ Lange(n 16) 105 .

grant privileges to journalists on the grounds that they communicate and disseminate useful information, but deny such privileges to people who perform the same function but work for credit reference agencies and the like? He holds: ‘there is no other rational basis for distinguishing the press from many other information businesses’.⁷⁷ In relation to both individuals and institutions, as noted above, the Internet increases the force of these concerns.⁷⁸ Indeed, this is *a fortiori* true if, as some argue, institutional journalism frequently damages as much as contributes to democracy.⁷⁹

Limitations of the current approach

There are a number of ways in which the current study will be limited, notably the limitations that arise in its methodology, the assumptions it will be necessary to make, and the related but distinguishable questions that the study will not address.

Methodological limitations

The current methodology is a doctrinal and theoretical study. Other valuable and informative ways of analysing the question of the propriety of legal special treatment of institutional journalism could have been undertaken. An empirical study, for example, could have been undertaken to evaluate whether there is a recognition in particular sections of society of a distinctness to journalistic activity and speech, and such research would have a bearing on the propriety of the law’s providing institutional journalism with special treatment. Alternatively, legal history could have been researched to discern how

⁷⁷ Except on the basis of making judgments about the relative value of different types of speech, which Anderson deprecates: Anderson, ‘Freedom of the Press’ (n 13) 530.

⁷⁸ Text to n 58.

⁷⁹ For example, John Lloyd, *What the Media are Doing to our Politics* (Constable & Robinson 2004).

any differential treatment of journalistic speech that exists arose, and whether the conditions that led to any such treatment still pertain. However, neither of these approaches, while useful, would fully get to grips with the question of why legal special treatment of the institutional Press can be appropriate, as legal history would explain the origins of the position we find ourselves in now but not, necessarily, a full explanation as to the merits of such a position; and an empirical study, while potentially very useful as a basis for evaluating competing hypotheses, does not supplant reasoning about the hypotheses themselves.

Another approach that would be more fruitful would be to undertake a comparative law study, as such a study would demonstrate the differences in approach to institutional journalism that exists in similar countries, and from this it might have been possible to draw lessons for the UK. There are a number of such studies in the literature.⁸⁰ Indeed, as will have become evident there are comparative elements to the current work, as an Anglophone study of the legal position of the Press in a developed democracy can hardly avoid drawing on the US material, which, even if derived from a foreign constitutional system is extensive and of considerable influence given the pedigree and history of American jurisprudence of freedom of speech and the Press.⁸¹ It is notable that *Bollinger* holds that every law school in the US has courses on freedom of speech and the Press,⁸² but until recently ‘Freedom of the Press’ did not even merit a

⁸⁰ Notable examples include Eric Barendt, *Broadcasting Law: a Comparative Study* (Clarendon Press 1993); Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart 2002); Hitchens (n 6); Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe*(n 7) .

⁸¹ Some early essays are usefully collected in part 1 of Eric Barendt, *Media Law* (Dartmouth 1993)

⁸² *Bollinger, Uninhibited, Robust, and Wide Open : a Free Press for a New Century*(n 2) 160.

separate entry in the index of *Halsbury's Laws of England*. For example, I have already drawn on American work to illustrate the viability of the concept of 'institutional journalism' in US law, and deduced from this it may be viable as a concept in UK law too. Nevertheless, a full comparative study would have taken the focus of this thesis too far from the question of the theoretical appropriateness of special treatment of the Press in the law of England and Wales, and so it has not been undertaken. And, in any event, a comparative study can only take one so far, as care needs to be taken with the American material because the differences between the jurisdictions mean that the conclusions found therein should never be transposed to the UK without consideration as to how apposite they are in a different context. US doctrine and scholarship founded on the First Amendment may be inappropriate or unconvincing in the UK, as some authors recognise⁸³ more than others.⁸⁴ It will be borne in mind throughout this work.⁸⁵

Further, there is a great deal of literature outside law and socio-legal studies in other disciplines that touches on the current investigation. These too could profitably be investigated. Sociology and political science, to select two significant examples, are interested in the relationship between journalism, law, and democracy, and consideration of this literature would advance understanding of the topic being discussed. Gibbons and Humphreys, for example, draw on significant work that distinguishes between political

⁸³ Stephen Sedley, 'The First Amendment: A case for import controls' in Ian Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Hart 1998) ; Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005); Frederick Schauer, 'Who Decides?' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 221.

⁸⁴ Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century*(n 2).

⁸⁵ Chapter two text to n 29; chapter four text to n 12; chapter five text after n 22; chapter six text to n 18; chapter seven text to n 27.

systems and journalistic culture that is highly likely to be relevant to the current discussions.⁸⁶ However, such material does not directly evaluate the rules that exist that govern the Press, the justifications given by judges and law-makers for these rules, nor the analysis provided of these reasons by legal scholars, or the relationship between these laws and our intuitions about the appropriate place of the Press in our democracy. This is a task better undertaken by the doctrinal and theoretical approach adopted here.

Limitations of scope

However, the work undertaken here is not intended to develop a logical a priori argument, aimed at establishing an ontologically robust case for special treatment for all societies and all cultures. To some extent, it follows Raz's modest aspirations, in that '[m]any of the claims here are not a priori or conceptual truths. They describe, if true, general features of human existence'.⁸⁷ However, the approach here is more modest than this. In the passage just quoted, Raz aspires to describe general features of human existence, but the intention here is rather to provide an explanation that merely accords with the relatively coherent and identifiable shared intuition about the appropriate treatment of institutional journalism in our society. This also accords with Raz's approach:

[t]he claim made for the undefended assertions that follow is that they are a part of an explanation of such general features of practical thought. This claim is validated in part by their ability to account for what we call intuitions.⁸⁸

⁸⁶ Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (n 7) 12 – 17.

⁸⁷ Raz, *The Morality of Freedom* (n 15) 288.

⁸⁸ *Id* 289.

The thesis is, to follow Wittgenstein's famous metaphor, an attempt to show the fly the way out of the fly bottle;⁸⁹ and not an attempt to deduce the existence of the fly from first principles. Such a methodology is both contestable and limited. It is limited because it does not extend much beyond our current society and political system. In this it also follows Raz's lead:

I do not really believe that political philosophy provides us with eternally valid theories for the government of all human societies. To my mind political philosophy is time-bound. It is valid – if it is valid at all – for the conditions prevailing here and now. Its conclusions apply to similar situations.⁹⁰

And the methodology is contestable as it is based on a contentious assumption about the existence of relatively cogent and identifiable shared intuitions about institutional journalism, and the value of explaining such intuitions and providing theories that are in accordance with them.

It is clearly beyond the scope of this thesis to embark on a defence of this limited view of political philosophy in general, and the aspect of it that informs the analysis of media law in these pages. It is also beyond the scope of this thesis to evaluate this phenomenological,⁹¹ or perhaps intuitional, approach to legal theory, with approaches of a more platonic cast that challenge these significance and value of investigating these intuitions. At the very least, intuitions can be misleading, and this approach could be challenged as building an edifice informed by one's unexamined prejudices.

Nevertheless, 'all inquiries ... start in the middle',⁹² and it is not possible and perhaps not

⁸⁹ Ludwig Wittgenstein, *Philosophical Investigations* (Oxford University Press 1988) s 309 .

⁹⁰ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* id (n 21) 170.

⁹¹ Id, 44, 45.

⁹² Raz, *The Morality of Freedom* (n 15) 288.

necessary to defend every methodological limitation in detail. That observation is not sufficient of itself to defend the methodological approach I take in these pages, but more support can be drawn from the fact that I am not advancing a positive case about the limitations of political philosophy in general and the value of intuitions as a basis for analytical work. Rather, these comments describe a negative case about the limitations of application of the current work, as the work, as Raz suggests, should be limited to the conditions prevailing here and now, and is limited to an attempt to explain and validate some pre-existing beliefs about the place of institutional journalism in our society. Its success or failure is determined largely by reference to these aspirations.

Necessary assumptions

Further limitations in the current approach derive from the necessary assumptions that have to be made for the analysis to proceed. Two of the important assumptions will be described.

Media influence

The first assumption is that the journalistic media has some effect on public opinion. This is to take a position in an on-going dispute: on the one hand, some theorists assert that the Press follow opinion rather than lead it. So Curran and Seaton observe:

Newspapers do not 'represent' their readers' views in a literal sense, because readers buy papers partly to be entertained: thus, survey research shows that only a minority of the Sun's readers actually voted the same way as their paper in the four general elections of the Conservative ascendancy (1979-92).⁹³

⁹³ James Curran and Jean Seaton, *Power Without Responsibility : Press, Broadcasting, and the Internet in Britain* (7th edn, Routledge 2009) 331-32 .

An extreme variety of the view that the Press have no power to, or only have a minimal ability to, influence their readers can be termed ‘media impotence’. In contrast, many scholars, particularly those who believe that the Press should be regulated, assert that the Press do indeed have greater power, a view that can be termed ‘media influence’. Most notably in recent times Leveson LJ has attested to the potential existence of such a Press power:

Even if newspapers are, as editors have forcefully suggested, merely the passive conduits of their readers’ views, the argument for a multiplicity of such views is clear. To the extent that the press does more, and is capable of influencing public opinion, the argument becomes even stronger. These arguments are recognised in general terms by plurality and media specific competition laws, which apply both to the print and broadcast media⁹⁴

The current thesis assumes a middle position between extreme Press influence and extreme Press impotence. It assumes the Press have some influence, even if only in a basic way as a means of transmission of information, as such an assumption is a necessary precondition for much media law, in particular for many of the arguments about imposing liabilities and affording benefits to the Press, and is a necessary precondition for this thesis. If it is shown not to be the case, and if it is shown that journalism has no influence, then the argument for special treatment – either liabilities or benefits – is considerably weakened. However, it is not evident that there is an immediate risk of such a conclusion being established by empirical research, for this is a contested area, and has been for a number of years.⁹⁵

⁹⁴ Leveson LJ (n 56) vol 1 part B 5.7 66.

⁹⁵ Judith Lichtenberg (ed), *Democracy and the Mass Media: a Collection of Essays* (Cambridge University Press 1990) 8-10; Lieve Gies, *Law and the Media* (Routledge-Cavendish 2008) 57-65; Curran and Seaton (n 93) 167; Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press 2007) 19- 25, concentrating on the traditional broadcast media.

Autopoiesis theory

The second assumption is also to do with questions of influence and effect, and relates to the relationship between the Press and the law. It is often assumed that discourse in the Press has an affect on the law, and that the law has an affect on the Press: the idea that publicity, particularly in the Press, has an affect on the processes of the courts is central to the doctrine of open justice, for example, as it provides one of the main stated rationales for the courts being open and public.⁹⁶ The assumption of influence is also manifest in the view that the reporting of miscarriages of justice by programmes like the BBC's *Rough Justice* contributed to the overturning of convictions in the days before the Criminal Cases Review Commission was established. However, autopoiesis theory challenges this assumption, and suggests that, in effect, the two spheres of legal and Press discourse operate in silos and have a limited influence on each other.⁹⁷ This is not to say that there is no influence, but rather stresses the view that both discourses talk using different terms, with different values, and different assessments of success in their respective discourses. Hence there is little chance of mutual comprehension, but perhaps more importantly, little influence of each on the other. The current discussion must assume that this theory is not true, or that strong versions of it are not true, and that there is a meaningful interaction between the Press and the law. Such an assumption is necessary as the mutual influence of the law on the Press and vice-versa is an inherent

⁹⁶ *Scott v Scott* [1913] AC 417 HL . Such a rationale has been doubted without invoking autopoiesis theory, but merely on the grounds that judges ignore the media: Joseph Jaconelli, *Open Justice: a Critique of the Public Trial* (Oxford University Press 2002), but the authority remains good law: *Global Torch v Apex Global Management* [2013] EWCA Civ 819, [2013] WLR (D) 276

⁹⁷ The idea is propounded by Richard Nobles and David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press 2000), and discussed from 99 - 109 in Gies (n 96).

aspect of the whole thesis. This is because the current thesis is an attempt to justify differential treatment of institutional journalism by the law at least in part on the basis that these activities have influence on each other and democracy. However, if research establishes that this influence does not in fact take place and validates the claims of autopoiesis theory, then the current argument would need to be re-examined.

Distinguishing the issue from other similar controversies

The final limitation of the current thesis described here is that examining the propriety of affording special treatment to institutional journalism is related to other similar questions, but will not provide an answer to them. The first area that overlaps with the question of special treatment for the institutional Press but won't be considered in detail here is the difference between the public and private Press. The public-private distinction is an important one, even though the stability of the distinction has been challenged, in media law because the distinction has important consequences in relation to, for example, the different way that the BBC, Channel 4, and Sky should be treated, and in particular the extent to which they are public bodies for the purposes of the Human Rights Act 1998. It is therefore clearly relevant to questions of differential special treatment that can derive from this Act, but it won't be investigated further as it is not of determinative importance to key issues discussed here. The second area that is associated but distinct from the current study relates to the appropriate funding model for institutional journalism, and the question of whether it should be funded with public money or by private enterprise. Such funding can be seen as a type of special benefit, as public Press organisations, notably the BBC, derive special funding not available to other institutions. The overlap between questions that examine the propriety of such funding and the current area of interest are

patent, but the debate about the appropriateness of public funding and the concomitant restriction of private enterprise that this causes will not be considered in detail here, again because of the lack of centrality to the questions at issue.

The third area that the current work does not examine in detail is the content regulation that requires some journalists – traditional broadcasters in particular – to disseminate public service material.⁹⁸ The propriety of such content regulation is contentious: in the past, as noted above, the imposition of such regulations was often justified with reference to spectrum scarcity, though such arguments are unlikely to be viable given the fact that there is no longer limited opportunity to broadcast. Nevertheless, arguments may still be found to ground such content regulations, notably perhaps on the basis of Public Sphere conceptions of the Press that will be discussed in chapter five. However, the current work will not examine this debate in detail as such content regulation is but one instance of the special treatment with which this work is concerned.

Patently, however, these issues overlap. The question of the special treatment of institutional journalism, the appropriateness of public funding for journalism, and the extent to which the content of a journalistic enterprise should be left to commercial or other decisions are all questions about the propriety of special treatment. A thesis that addresses the propriety of special treatment will have implications for these other debates, but does not necessarily answer them because the relationship between these

⁹⁸ Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (n 7) 90 – 102 provide a useful analysis of the relevant law as do Curran and Seaton (n 93) chapter 22.

questions is, as Curran and Seaton observe, somewhat more complex.⁹⁹ The complexity comes from the fact that each of these variables is related to the others, but they are not coterminous. The relationship can be usefully conceived by envisaging a three-dimensional graph. On the X-axis, there is a range of special treatment from no special treatment at one end, to a great deal of special treatment at the other. On the Y-axis, there is a range of solely commercial funding at one end of the scale, to full public funding at the other end of the scale. On the Z-axis, the range is between journalism that is determined solely by commercial imperatives and journalism that is highly regulated by reference to a canon of public service criteria. These are plotted on figure 1, below.

This diagram helps envisaging the relationship between these variables by considering where certain journalistic institutions would be placed on this graph. The BBC, for example, as a publically funded institution would be placed at the top end of the Y-axis. As an institution that is subject to strict content regulation that mandates that it should produce public service material, it is towards the far end of the Z-axis. Yet if BBC journalists are not provided with any, for example, special access to courts, or source protection rights, or special defences in defamation, then the position of the BBC should be plotted towards the left end of the X-axis. Contrasting with this, one would plot *The Times* towards the bottom of the Y-axis as it receives no public funding, towards the near end of the Z-axis, as it is not subject to public service requirements, but would plot it on a similar place as the BBC on the X-axis, as *Times* journalists receive similar special treatment to BBC journalists in respect of the availability of special rights of access to courts and so on. One can see that Channel 4, would be placed in a position different to

⁹⁹ Curran and Seaton (n 93) 393-94 .

The Times and the BBC, as would, for example, *Sky News*, the *Huffington Post*, or a citizen blogger undertaking journalistic activity. Hence it can be seen that the question of the propriety of legal special treatment afforded to institutional journalists is relevant to these other matters, but that it does not necessarily provide answers to the difficulties they raise. It is for this reason that they merit separate consideration.

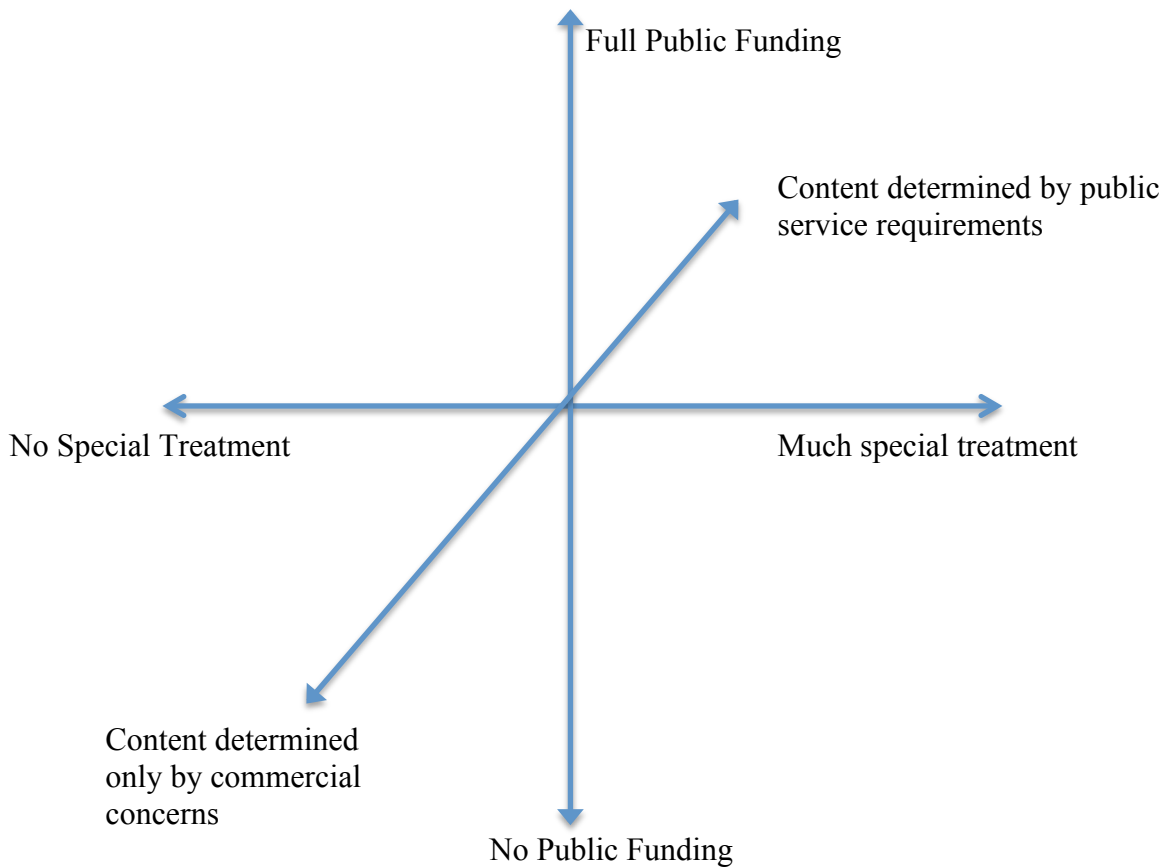


Figure 1: Representing the relationship between three issues in media law

Conclusion

This work will consider the propriety of the special treatment by the law of institutional journalism. It will propose and examine the idea that institutional journalists and institutions of journalism are sufficiently different to other activities and institutions to merit being afforded special benefits and have special liabilities imposed on them by the

law. The arguments against this thesis can be divided into pragmatic arguments, and incoherence arguments. The pragmatic arguments will be addressed in chapter two by demonstrating the extent to which special treatment already exists without the problems such arguments foresee being created. This chapter will also explain in more detail what ‘special treatment’ can mean, and will provide doctrinal examples of such treatment. The incoherence arguments will be addressed in chapters three to seven. Chapter three will propose a reason why institutional journalism is different. Chapters four and five will evaluate a prominent contemporary theory that explains why special treatment can be appropriate. Chapters six and seven will examine a theory that explains why special treatment can be appropriate by reference to the existence of a right, possibly a constitutional right, of Press freedom. Chapter eight will provide a conclusion.

Chapter 2: Types and instances of special treatment

The last chapter introduced the suggestion that institutional journalism should receive special treatment at the hands of the law, and noted some of the problems with such a thesis. One set of counter arguments holds that providing special treatment to institutional journalism is incoherent, and these arguments will be addressed in later chapters. This chapter addresses another set of arguments that emphasise the practical difficulties in affording special treatment to institutional journalism. One particularly significant argument is that if you cannot define what institutional journalism is, then any attempt to justify the provision of special treatment to the Press is futile; and another is that any special treatment is likely to lead to consequences one would deprecate. It is these arguments that the current chapter predominantly addresses. It addresses the definitional argument not by attempting to provide a necessary and complete definition of what institutional journalism may be, but rather to demonstrate that the law does already provide instances of special treatment to institutional journalism in particular and the institutional media in general. It addresses the argument about undesirable consequences by observing that these have not inevitably arisen from such treatment.¹ The thrust of this chapter, therefore, is not to deny that these difficulties are real and acute, but rather to note that they should not be overplayed, and in practice should not present insurmountable difficulties to those arguing that the Press should be afforded special treatment by the law.

¹ A similar argument is advanced by Jacob Rowbottom, 'Leveson, Press Freedom and the Watchdogs' (2013) 21 *Renewal* 57.

The chapter also has secondary aims. As well as being a necessary preliminary step to addressing the impracticability arguments, the clarification of what special treatment entails will be useful for three other purposes: it will provide a detailed description of the subject matter of this thesis, providing a framework that will be returned to in later chapters, and it will help resolve a disagreement in the literature as to the extent to which current doctrine does indeed provide special treatment – in particular special benefits – to institutional journalism. Hence the chapter will also provide examples of other types of special treatment, beyond that required to challenge the pragmatic arguments.

The disagreement has already been prefigured to some extent in chapter one.² On one side are authors who hold that institutional journalism receives no special treatment, or more accurately no special benefits, or if it does, such treatment is minimal and anomalous. This is the view held by Robertson and Nicol,³ and Blom-Cooper,⁴ and is in accordance with notable dicta from the House of Lords, such as that of Lord Bingham, cited in chapter one, that the ‘press... enjoy no special position nor privileges’.⁵ This perspective can be considered supported by the common law’s extension to others of

² Chapter one, text to and n 22.

³ Geoffrey Robertson and Andrew G. L. Nicol, *Media Law* (5th edn, Thomson / Sweet & Maxwell 2007), xvii, 5-052, 5-078.

⁴ Louis Blom-Cooper, ‘Press Freedom: a Constitutional Right or Cultural Assumption?’ [2008] PL 260, 268.

⁵ *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 HL, , 183. Lord Bingham recognised that there are exceptions to this observation, and those that he had in mind may include the measures mentioned in this chapter.

some benefits that were apparently exclusive to institutional journalists. The *Reynolds*⁶ privilege for ‘responsible journalism’ in defamation actions, for example, was in *Kearns v General Council for the Bar* considered by Simon Brown LJ to be only available to media publications,⁷ but such a view was repudiated by Lord Hoffmann in *Jameel v Wall Street Journal*, when he observed: ‘the defence is of course available to anyone who publishes material of public interest in any medium’.⁸ The perspective is also supported by the existence of statutes that have been drafted in ways that prevent institutional journalists being the sole recipients of benefits. Chapter one described provisions to this effect in the Human Rights Act 1998, the Data Protection Act 1998, and the Freedom of Information Act 2000, and further examples can also be found of statutory rules being altered to extend benefits, once exclusive to some institutional journalists, to others.⁹

Yet, on the other hand, some authors hold that there are indeed instances of special treatment afforded to institutional journalists. As early as 1991, before the passing of the Human Rights Act 1998 and the associated changes that Act heralded to

⁶ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL; discussed in chapter one n 31; chapter five n 32; and chapter eight.

⁷ *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 1 WLR 1357 [2] [2]; echoing *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300 [23].

⁸ *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359 [54]; a view endorsed in *Seaga v Harper* [2008] UKPC 9, [2009] AC 1 [11], albeit in the Privy Council.

⁹ The statutory protection affording absolute and qualified privileges for the reporting of various public proceedings including Parliament, courts and public inquiries, was originally found in s 2 of the Newspaper Libel and Registration Act 1881, replaced by s 4 of the Law of Libel Amendment Act 1888, and was originally afforded only to newspapers *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277 (Lord Bingham) 285, but was extended to radio and television by the Broadcasting Act 1990 sch 20 para 2. The Defamation Act 1996 has extended it further to informal reporters (assuming the statutory criteria for affording the protection are met): Robertson and Nicol (n 3) 8-118; Defamation Act 1996, s 15 and sch 1.

constitutional law, Barendt provided a list of some instances of special treatment,¹⁰ and in 1999 Smith performed a similar task,¹¹ surveying contemporary changes in the law¹² and positing that the following areas were privileges that the law provided to the institutional Press: source protection, access to courts and pre-trial reporting, and some defamation defences. More recently, and subsequent to the coming into force of the HRA 1998, Fenwick and Phillipson have suggested further categories, describing: ‘special access rights to information, including in particular rights of access to court rooms, special exemptions from data protection rules, and privileges in relation to police search and seizure powers under the Police and Criminal Evidence Act 1984.’¹³ Additionally, Barendt in *Freedom of Speech* notes four areas where ‘the institutional media may enjoy rights which ordinary individuals do not, and indeed cannot share’: areas of taxation law, competition law, Press rights of access to information, and the privilege not to disclose sources of information.¹⁴ More recently, Leveson LJ assented to the proposition that the law provides institutional journalists with special treatment, and in particular special benefits.¹⁵ Indeed, the dilemma was summed up by Lord Steyn in the *Reynolds* case: ‘It

¹⁰ Eric Barendt, ‘Press and Broadcasting Freedom: Does anyone have any rights to free speech?’ (1991) 44 CLP 63.

¹¹ Anthony Smith, ‘The Press, the Courts and the Constitution’ (1999) 52 CLP 126, 129-130.

¹² Notably the House of Lords decision in *Reynolds* (n 6).

¹³ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 24. They distinguish between special treatment under statute, and special treatment under common law noting the different effects of the HRA 1998 and European Convention on Human Rights on both: 109, 124.

¹⁴ Eric Barendt, *Freedom of speech* (2nd edn, Oxford University Press 2007) 427 – 435.

¹⁵ Examples can be found at Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012) vol 1 part B 6.2, 68 in relation protection of journalistic sources, and vol 1 part B 4.4 82-3 in relation the position of the print press in a democracy.

is true that in our system the media have no specially privileged position not shared by individual citizens. On the other hand, it is necessary to recognise the 'vital public watchdog role of the press' as a practical matter'.¹⁶

What is 'special treatment'?

Part of the disagreement as to whether the law affords institutional journalists special treatment can be ascribed to confusion over terminology, and clarifying what is meant by special treatment can resolve such confusion.

'Special'

The word 'special' in the phrase 'special treatment' can mean at least two different things: it can indicate that there is treatment for journalism that is 'exclusive to journalism', or it can mean treatment that is 'particularly aimed at journalism'. The confusion can be illustrated by considering, for example, the Police and Criminal Evidence Act 1984, which proffers a measure of protection to journalistic material from police applications for disclosure, but also provides this protection for two other classes of material – in essence, personal business records and medical specimens used for diagnosis and treatment.¹⁷ Robertson and Nicol hold the 1984 Act provisions to be special protection for journalists from the normal process of the law.¹⁸ Yet, while they are right in that these provisions are special in the sense that they are particularly aimed at

¹⁶ *Reynolds* 214 (n 6) quoting *Goodwin v UK* (1997) 25 EHRR 1, para 39.

¹⁷ Police and Criminal Evidence Act 1984, pt II, ss 11 and 13. Similar provisions in Human Rights Act 1998, and under the Data Protection Act 1998 will be discussed below: text above n 117 and n 95 respectively.

¹⁸ Robertson and Nicol (n 3) 5-078.

journalism, they are not correct if one holds 'special' to mean 'exclusive', as the provisions are also provided to material other than journalism.

A further example of this ambiguity arises when one considers the case law and commentary on the legal protection of journalistic sources. Leveson describes the source protection rules as a 'principal press privilege',¹⁹ one interpretation of which is that he believes it to be an instance of exclusive special treatment. Indeed, there are some dicta in the case law that present such a view. One example is the dissenting opinion in *Goodwin v UK*, the leading European Court of Human Rights (ECtHR) case on the subject, in which Walsh J objected to the decision of the majority that recognised a right of source protection on the grounds that it entailed that: 'a journalist is by virtue of his profession to be afforded a privilege not available to other persons', a state of affairs he felt should be deprecated.²⁰ The nub of Walsh J's complaint is that the Press are being provided with exclusive treatment. Yet source protection provisions, while particular to institutional journalists, are not exclusive to them. This is true in relation to the statutory provisions of the Contempt of Court Act 1981, as has been recognised by Barendt and Blom-Cooper, whose analysis will be discussed below,²¹ and is likely to be also true of *Goodwin*: some support for this interpretation can be gained the fact that the Special Court for Sierra Leone has interpreted the Goodwin principle as affording protection to

¹⁹ Leveson LJ (n 15) vol 1 part B 6.2 68; cf Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 67.

²⁰ *Goodwin v UK* (1997) 25 EHRR 1 (Walsh J), para 1.

²¹ Barendt, *Freedom of speech* (n 14) 437 and Blom-Cooper (n 4) 269: see text above n 111.

researchers for NGOs such as Human Rights Watch and Amnesty International,²² and also from the reluctance of the ECtHR to confine high levels of source protection to the institutional Press.²³ Walsh J's dissent seems to founder on this confusion, as his complaint emphasises that source protection benefits are exclusive to institutional journalists, when in fact they are only particularly useful to such individuals.

Clarifying what is meant by 'special' in the phrase 'special treatment' would help avoid such mistakes, and four ways that such treatment can be special can be distinguished. The first type of special treatment consists of those instances where membership of the Press is both a necessary and sufficient condition for special treatment: this is exclusive special treatment.²⁴ The second meaning of the term is where institutional journalism is a necessary but not sufficient condition for special treatment. This means that institutional journalism is the only activity to be provided with special treatment, but more is required for the provision of such treatment in addition to being an institutional journalist – for example, to receive special treatment, the journalism in question should be in the public interest. The third type of special treatment consists of those instances of special treatment where membership of the institutional Press is sufficient but not necessary for the affording of special treatment. Here the treatment is provided to members of the institutional Press because they are members of the

²² *Prosecutor Brima* Case No SCSL-204-16-AR73 Judgment of Appeal Chamber, 26 May 2006, noted in Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law and Human Rights* (2nd edn, Oxford University Press 2009) 6.15; and see the discussion in the text to n 91 below.

²³ *Steel and Morris v UK* (2005) 41 EHRR 22

²⁴ Whether the treatment is necessary and sufficient depends on the reference group of people. In one sense, no privileges are ever exclusive if others are also afforded them. So, for example, even if there is exclusive Press access to a prime ministerial Press conference, it is not exclusive when one considers that spin doctors, cleaners, technicians, police officers, civil servants and even prime ministers also get access. The exclusivity in question therefore has to be of a substantial nature rather than complete exclusivity.

institutional Press, but it is not only provided to them. Others can also avail themselves of such treatment, if certain criteria are met. The fourth meaning of the term does not really comprise special treatment in the same way as the other uses of the term, as it consists of those instances of special treatment where membership of the institutional media is neither necessary nor sufficient for the affording of the special treatment, even though the media may be predominant beneficiaries of such treatment. This sort of special treatment can easily be confused with ‘special treatment’ more strictly understood, and is the most widespread form of special treatment. However, as it is equally available to all, it does not really amount to special treatment in the same way as the other categories.

Treatment

The next term to consider is ‘treatment’. As Baker recommends, one should look beyond the extent to which the law provides individuals with rights to get a clearer picture of the way in which the law provides special treatment to institutional journalism, and evaluate the provision of liabilities and rights, and consider the extent to which these are imposed on or enjoyed by both individual journalists and journalistic organisations, in comparison with non-journalists and non-journalistic institutions.²⁵ The narrower framing of the issue to focus only or predominantly on rights is common in discussions based in American constitutional law: Anderson, for example, concedes that while there are benefits afforded to the Press, these should not be considered constitutional rights,²⁶ and Dworkin

²⁵ C. Edwin Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 Hofstra Law Review 955.

²⁶ D A Anderson, ‘Freedom of the Press’ (2002) 80 Texas Law Review 429.

makes a similar point.²⁷ And, indeed some scholarship that considers the position of the Press in the UK also appears to adopt this as a prime focus.²⁸ Such a focus is understandable. In the context of American constitutional law it is sensible given the disjunctive drafting of the First Amendment, which separately enumerates the rights of speech and the Press, as the question naturally arises as to whether the Press can expect special rights.²⁹ It is also sensible outside the US, as any right of Press freedom that exists in any constitutional framework may well generate special benefits.³⁰ Further, recognising a distinction between rights and other benefits is also sensible because, as Anderson emphasises, different arguments apply as to the propriety of providing constitutional rights to the Press than apply to the propriety of providing the Press with other legal benefits.³¹ However, concentrating on the question of rights in general, and constitutional rights in particular, to the exclusion of other benefits is a mistake if one is evaluating the pragmatic arguments against special treatment because such an approach is myopic, as it overlooks other significant areas where the law may – and indeed does – provide special treatment to institutional journalism.

²⁷ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 376.

²⁸ For example, Blom-Cooper (n 4) and Fenwick and Phillipson (n 13). The latter, while they consider both in their book, frame their ‘variable geometry of media freedom’ more in terms of rights: 27.

²⁹ Significant essays examining this question are collected in part 1 of Eric Barendt, *Media Law* (Dartmouth 1993), and the main issues are surveyed in Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010) ch 1, and a critique provided in Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (n 25). Discussed in chapter six, text to n 24.

³⁰ The consequences of a right of Press freedom will be discussed in chapters six to eight.

³¹ Anderson, ‘Freedom of the Press’(n 26) 432.

A taxonomy of special treatment

Figure 2 sets out in a table the ways identified above in which institutional journalism can be provided with special treatment by the law. The first column contains the four different classes of ways in which treatment of institutional journalism can be special, where each class is a different permutation of the extent to which being associated with an institution is necessary and/or sufficient for the provision of special treatment. The remaining columns show the distinction between beneficial treatment and treatment that amounts to a liability, and the distinction between treatment being afforded to (or imposed on) individual journalists, or on journalistic institutions.

Figure 2

	Individuals vs. non institutional		Institutions vs. non media	
	Benefits	Liabilities	Benefits	Liabilities
Class 1 Institutional journalism necessary and sufficient				
Class 2 Institutional journalism necessary but not sufficient				
Class 3 Institutional journalism sufficient but not necessary				
Class 4 Institutional journalism neither necessary nor sufficient				

Figure 2 also clarifies the consequences of the argument noted in chapter one, that the development of the Internet leads to an argument that there should be a move from providing special treatment to institutional journalists to providing such treatment to others who perform similar tasks: from institutional to functional journalists.³² This argument would lead to the conclusion that one should reduce the instances of class 1 and

³² Perry Keller, *European and International Media Law: Liberal Democracy, Trade, and the New Media* (Oxford University Press 2011) 198; Oster (n 19).

2 special treatment, and increase the instances of class 3 and 4 special treatment. This thesis, as indicated in chapter one, seeks to explain why this should not necessarily happen.

Types and instances of special treatment

Evidently, no challenge has been made to the impracticability arguments, as the discussion so far has not identified any instances of special treatment. To do this requires a brief survey of the law.

Class 1: Institutional journalism both necessary and sufficient

The first category of special treatment comprises those benefits and liabilities that are given to and imposed on individuals and institutions of the Press, for the imposition of which membership of journalistic institutions is a necessary and sufficient condition.

Benefits and liabilities for institutional journalists

Dealing first with the position of individual institutional journalists, as opposed to institutions of journalism, it will be seen that there is exclusive special treatment provided to them by the law. This tends to undermine the suggestion that identifying who should receive such treatment poses insurmountable difficulties, and that such treatment poses various unbearable risks. Experience shows that, as such treatment already exists, the difficulties are surmountable as such treatment already exists, and it does so without having resulted in an unacceptable threats to the activity of journalism. I will consider benefits first, and then liabilities.

Benefits

A prominent example of a benefit offered to institutional journalists is the right that representatives of news agencies and members of the media who carry a Press card have under section 69(2) of the Magistrates Court Act 1980 to attend some (otherwise closed) hearings of the family proceedings court. Furthermore the law allows the media, but not members of the public or others, to attend some public law child cases,³³ and following amendment of the Family Proceedings Rules 1991³⁴ the media now have extended rights of access in family proceedings in the High Court and county courts. Practice Directions have been issued to address the change, and deal with matters such as how to identify members of the institutional media and how the media may appeal against reporting restrictions.³⁵ This instance of a special privilege for institutional journalists is prominent but it is controversial, and Blom-Cooper argues it is inappropriate.³⁶ One aspect of Blom-Cooper's argument involves the assertion that such a privilege for institutional journalists is unprecedented, and the linked observation that Press freedom is not a doctrine that provides any special treatment for journalists at law. Later chapters argue that the second assertion is misconceived, but it is worth examining in a bit more detail here the assertion that privileged access to courtrooms as afforded by section 69 is unprecedented. Given

³³ *Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146.

³⁴ Family Proceedings (Amendment) (No 2) Rules 2009, 2009 No 857.

³⁵ *Practice Direction (Family Proceedings: Media Representatives: Magistrates' Courts)* [2009] 1 WLR 1115 Fam, *Practice Statement (Family Proceedings: Media Representatives: Applications)* [2009] 1 WLR 1119 Fam; Family Proceedings Rules 1991/1247 r10.28; Family Proceedings Courts (Miscellaneous Amendments) Rules 2009; Family Proceedings (Amendment) (No.2) Rules 2009. The regime is considered and applied in, for example, *Surrey County Council v Z AH* [2013] EWHC 2190 (Fam), [2013] All ER (D) 31 (Aug). An extended analysis of the rationale for these rules is provided by Sir James Munby P in *Re J (A Child)* [2013] EWHC 2694 (Fam) [26] to [37], touching on many of the arguments in this thesis.

³⁶ Blom-Cooper(n 4)

the practical application of the principle of open justice in English and Welsh courts, it is not clear that it is.

To start, the common law has, on occasion, acknowledged that there are times when the courts should permit the Press to be present when the public are excluded, for example in an appropriate obscenity case,³⁷ and there are other examples of the law affording benefits to the Press not offered to others. One can be found in the design of the court buildings themselves, as there is frequently a Press bench reserved to the institutional Press, and in one court in particular, the Old Bailey, access to the main body of the court building itself is not granted to the general public, who have to enter by a separate door and sit in separate viewing galleries. Access to the interior of the court complex is restricted to lawyers, defendants, police and witnesses and so on, and institutional journalists bearing a UK Press Card. In addition to there being Press benches in the courtrooms, the Old Bailey contains a special office set aside for the Press. Further, on certain occasions, other courts are required to consider setting aside rooms for the Press, for example when the court needs to restrict access to the courtroom itself to those ‘with an immediate and direct interest in the outcome of the trial’. It may need to do this when trying a young defendant for a notorious crime. In circumstances such as those, the trial process may need to be relayed to a room to which the Press has access.³⁸ As well as discretionary privileges of physical access, journalists may have similar privileges of

³⁷ *R v Waterfield* [1975] 1 WLR 711 CA

³⁸ *Practice Direction (Crown Court: Young Defendants)* [2000] 1 WLR 659 a result of *V v UK* (1999) 30 EHRR 121. The position is different civil courts: professional journalists can have access to chambers hearings when the public generally might be granted access *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 CA 1072 and Civil Procedure Rules (CPR) 39.2.

access to information.³⁹ In this regard, in *Attorney General v Guardian News and Media Ltd (No 3)* Brooke J said: ‘the courts should be diligent and understanding in accommodating the legitimate interest of the press’.⁴⁰ So, for example, it has been held that copies of skeleton arguments should be made available to the Press (but not in cases involving children, or in which special reporting restrictions apply),⁴¹ and this openness to applications to see documents for ‘proper journalistic purpose[s]’ was affirmed by the Court of Appeal in *R (Guardian News and Media Ltd) v Westminster Magistrates’ Court*.⁴²

However, it might be argued that members of the public could also avail themselves of some of these privileges, as, after all, they are founded on the idea that justice should be done in public,⁴³ and support for such a view comes from considering the rights of appeal against reporting restrictions imposed by a judge, provided by s 159 of the Criminal Justice Act 1988. While this provision was the consequence of a case brought by a journalist to the ECtHR,⁴⁴ it is not exclusive to journalists as the words of sub-section 1 provide that ‘any person’ may use the provision and seek appeal in appropriate circumstances. But even if that is the case, some instances of beneficial

³⁹ David Eady, A. T. H. Smith and Anthony Arlidge, *Arlidge, Eady & Smith on Contempt* (3rd edn, Sweet & Maxwell 2005) 2-49 to 2-69.

⁴⁰ *Attorney General v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874 QB 886G.

⁴¹ *Lombard North Central v Pratt* (1989) 139 NLJ 1709 CA; *Criminal Practice Directions* [2013] EWCA Crim 1631 5B.15ff: note that this section is headed ‘Access by reporters’ – emphasis added

⁴² *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, [2013] QB 618 [85] (Toulson LJ).

⁴³ *Re Crook (Tim)* (1989) 93 CrAppR 17 CA (Lord Lane).

⁴⁴ *Hodgson v UK* (1987) EHRR 503

treatment are less wide. To take as an example the ability of the Press to address Magistrates who are considering making a reporting restriction under s 4(2) Contempt of Court Act 1981, the Divisional Court has decided that, as an exception to the general rule restricting who should have locus to address a Magistrates' court, Magistrates have a power to hear representations from the Press when considering granting a s 4(2) order.⁴⁵ Mann LJ said that Magistrates can hear from journalists 'who might, by virtue of s 4(2), suffer a curtailment of their freedom to report'.⁴⁶ There is an argument that this might permit Magistrates to hear from anybody who might wish to report the proceedings in a Magistrates' Court, but in practice it is difficult to imagine a Magistrate consenting to hear representations on s 4(2) orders from a member of the public on this basis. Indeed, Leonard J was concerned that this ruling should not overburden already busy Magistrates with prolix and repetitious applications.⁴⁷ Given the perceived need not to add to Magistrates' burdens, it is unlikely that this ability to address the court will extend beyond the Press bench.⁴⁸

Given the above, the tradition of open justice has provided the institutional Press with a number of special rights, and it seems clear that s 69 MCA 1980 should not be seen as an unprecedented extension of the rights of journalists. But such privileges do not only exist pursuant to the principle of open justice, as there have been other such benefits enjoyed by some members of the institutional Press. Two examples, albeit not from

⁴⁵ *R v Clerkenwell Stipendiary Magistrate ex p Telegraph plc* [1993] QB 462 Divisional Court

⁴⁶ *Id* 471.

⁴⁷ *Id* 472.

⁴⁸ The Crown Court is similarly encouraged to hear representations from the Press: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870 pt 1 [3.2].

current law, will suffice to show this. First, a historical example given the abolition of seditious libel, s 8 of the Law of Libel Amendment Act 1888 provided a benefit to sections of the institutional Press, holding that: ‘no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained.’ This protection was narrow, covering only office-holders of an institutional newspaper (not other media, not individual journalists),⁴⁹ but it was indeed exclusive to these people. The second example of an exclusive benefit, which has already been mentioned, is the statutory protection that used to afford absolute and qualified privileges for the reporting of various public proceedings in parliaments, courts, public inquiries and so on contained in the Defamation Act 1996, which has now been extended to some informal reporters.⁵⁰

Finally, it should be observed that as Anderson notes, there are extensive administrative benefits that are regularly exclusively afforded to institutional journalists.⁵¹ A non-exhaustive list includes: exclusive Press enclosures for photographers and journalists at places as diverse as football matches and outside Number 10 Downing Street, exclusive Press access to events as diverse as the Olympics and conferences of political parties, and exclusive provision of information to the Press by means of embargoes and Press releases by a wide variety of organisations. The existence of such benefits, while not strictly relevant to an analysis of the legal special

⁴⁹ Robertson and Nicol (n 3) 3-083.

⁵⁰ N 9.

⁵¹ Anderson, ‘Freedom of the Press’ (n 26) and chapter one text to n 13.

treatment of institutional journalists, are relevant to some aspects of the pragmatic arguments against providing such people with any legal special treatment. This is because administrative decision makers demonstrate little difficulty in identifying who the institutional Press are for the purposes of affording them with benefits, and so one should be cautious about over-stating the difficulties such identification may pose to legal decision makers.

Liabilities

Turning now to liabilities placed on individual journalists, many prominent examples can be found in the statutory regulation of broadcasting. These are widely known and extensively considered, and mentioning a representative sample of these should be sufficient to show that some of the practical arguments against providing special benefits to the Press seem less cogent, as these liabilities exist without posing insurmountable obstacles. For example, the argument that imposing on the Press the obligation to offer a reply leads to supine and intimidated journalism is to some extent met by the observation that such an obligation exists for broadcast journalism, without having necessarily made it supine.

Significant regulations affect the content of broadcasts by virtue of the Audio Visual Media Standards Directive,⁵² and are imposed on non-BBC broadcasters by the Communications Act 2003 on services that are susceptible to licensing by Ofcom,⁵³ and

⁵² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD)

⁵³ Communications Act 2003, ss 232-240, 325.

similar conditions on the BBC through its Charter and Agreement with the government.⁵⁴ A notable example of such a liability is the requirement imposed on broadcasting teams and on-camera presenters to be impartial when dealing with the news. The essence of these can be found in three places in the Communications Act: section 319, which provides a requirement that broadcast news be presented with due impartiality; section 320(1)(a) which says that the opinions of persons providing a programme service on matters of industrial or political controversy or current public policy must be excluded, and section 320(1)(b) which mandates that all programming preserve due impartiality on these matters. It can be seen that there is a distinction between news and other programmes, in that due impartiality can be created over a series for non-news programmes, in contrast to news programmes, which must observe due impartiality in each act of reporting.⁵⁵ The statutory requirement of impartiality imposed on broadcasters is not an unusual instance of the content of broadcasters' speech being regulated by the law. Extensive other content regulations exist affecting what individual journalists can or cannot say that result from the interplay of the 2003 Act and the Directive, for example in respect of: fairness,⁵⁶ the incitement of various kinds of hatred,⁵⁷ rights of access to the airwaves – including rights of reply⁵⁸ and rights of access to the airwaves in times of

⁵⁴ Department of Culture Media and Sport, *An Agreement Between Her Majesty's Secretary of State for Culture Media and Sport and the British Broadcasting Corporation* (Cm 6872, 2006) 43-63

⁵⁵ Discussed in Fenwick and Phillipson (n 13) 997ff.

⁵⁶ Ofcom, *Broadcasting Code* (2013) s 7, pursuant to, *inter alia*, s 326 Communications Act 2003.

⁵⁷ *Inter alia*, Audiovisual Media Standards Directive (n 52) art 6

⁵⁸ Id ch IX. The right may also derive from the European Convention on Human Rights Rónán Ó Fathaigh, 'The Recognition of a Right of Reply under the European Convention' (2012) 4(2) *Journal of Media Law* 322.

election⁵⁹ – restrictions on advertising content and placement,⁶⁰ and a mandatory quota of domestically produced material that must be carried.⁶¹

In addition to these instances of special exclusive legal liabilities imposed on some individual journalists, there are also – as was seen to be the case with benefits – exclusive non-legal liabilities that are imposed on individual journalists. One prominent example of this is the requirement that journalists who are accredited to the Parliamentary Press Gallery or for parliamentary broadcasting disclose their financial interests in a public document.⁶² As was the case in respect of the existence of exclusive benefits, the existence of exclusive liabilities such as these tends to undermine some of the pragmatic arguments against the propriety of special treatment.

Benefits and liabilities for journalistic institutions

Considering the exclusive benefits and liabilities to institutions of journalism adds an extra dimension to the question of special treatment. Here, there are more liabilities imposed than benefits, but some benefits exist. Both are more frequently applied to the media more generally than to institutional journalism, but as chapter five will argue, a significant rationale for the provision of these instances of special treatment is because of the operation of journalism in a democracy.

⁵⁹ Communications Act 2003 s 333, analysed in Lesley Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing 2006) 187.

⁶⁰ Audiovisual Media Standards Directive art 10 and 11.

⁶¹ Id art 16.

⁶² Office of the Parliamentary Commissioner for Standards, *Register of Journalists' Interests* (2013), pursuant to a resolution made by the House of Commons on 17 December 1985.

Liabilities

Perhaps the most prominent example of journalistic institutions being treated differently to other institutions is in the field of competition law, where there are sector-specific rules that impose particular liabilities on the media, in addition to the liabilities manifest in provisions of general competition law. These have a domestic and an EU element to them. The existence of regulations such as these supports the view that there is something distinct about the media and institutional journalism sufficient to validate the imposition on the Press of extra structural regulation to which other industries are not subject.

Regulations relating to media mergers provide the best example of sector specific rules. The current regulations are derived from the Communications Act, which make provision that a merger involving a media company may be referred to Ofcom for consideration as to whether such a merger is in the public interest.⁶³ The public interest considerations vary depending on whether the intended merger involves only newspaper or broadcast companies, or cross-media mergers. They operate when there's a relevant merger, which for media companies can be of a lower size than is usual for a competition law investigation to be initiated. In effect, they mean that an investigation into many media mergers will 'range more broadly than the traditional merger inquiry, which will be bounded by market definitions'.⁶⁴ These sector-specific merger regulations are controversial, and have been described by Lord Puttnam, one of the architects of the

⁶³ These are found in the Enterprise Act 2002, as amended by the Communications Act 2003 ss 373—89. The interplay between these is complex, and well summarised in Hitchens (n 59) 100-103 and 209- 213; and Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* 105.

⁶⁴ Hitchens, (n 59) 212.

Bill,⁶⁵ as ‘hard won’. Lord Puttnam explains, to his mind at least, the motivation behind these provisions, as ‘designed to address undue consolidation of ownership within broadcasting and between newspapers and broadcasters, with a consequent homogenisation of output.’⁶⁶ The contrary view, a rationale behind the de-regulatory approach of EU single market laws, is that the efficient operation of the market should be the main determinant of the propriety of media mergers, as it is with mergers in other sectors; but it is notable that the EU’s Merger Regulation itself recognises that the media should be treated differently. It provides, by article 21(4), that media plurality is a legitimate interest, which, by article 19, Member States may protect⁶⁷ - though this provision that also additionally adumbrates other legitimate interests, and so isn’t an example of exclusive special treatment.

A further area where being a media institution is a necessary and sufficient condition for special treatment by the law is in the related area of media ownership and control. Many countries have sought to regulate who owns media outlets. In the past in the UK, quite a wide section of people and groups were barred from ownership of broadcasting licences, including political organisations, religious bodies and advertising agencies, but since the 2003 Communications Act, these have been relaxed. However, restrictions on who can be granted a broadcasting licence remain, so the bar on political

⁶⁵ Id 268 – 280.

⁶⁶ David Puttnam, ‘Lessons from the First Communications Act’ in Tim Gardam and David A. L. Levy (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008) 36, 38.

⁶⁷ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation) [2004] OJ L24/1 art 21(4); discussed in Jackie Harrison and Lorna Woods, *European broadcasting law and policy* (Cambridge University Press 2007) 156.

organisations owning broadcasting licences, for example, is still in force,⁶⁸ and more generally the test that only ‘fit and proper’ people may hold broadcast licences remains.⁶⁹ Further, there used to exist in the UK a bar to ownership of broadcast licences based on nationality, though this has been repealed.⁷⁰ It is evident that both historically and to this day, the media has been considered to be such a sensitive sector that it requires special handling by the law. The existence of these regulations tend to support the view that media institutions are treated differently to other organisations, and are subject to exclusive special treatment.

Benefits

There are fewer instances of benefits afforded exclusively to journalistic institutions, but one potential candidate derives from the EU’s state aid rules.⁷¹ These benefits arise because public service broadcasting, a particularly significant aspect of which is the journalism that is the focus of this thesis, is considered a viable exception to the restrictions on state aid imposed in the European Union. This is a complex area that is difficult to summarise in the space that can be afforded to it in this thesis, but in essence the Commission and the Council recognise that journalism, in the form of public service broadcasting, may be an appropriate exception to the rules that prohibit state intervention

⁶⁸ The Communications Act 2003 s 348 did not remove this from the Broadcasting Act 1990 sch 2 pt II.

⁶⁹ Broadcasting Act 1990 s3 and Broadcasting Act 1996 s 3.

⁷⁰ Communications Act 2003 s 348(1).

⁷¹ One, of historic interest given the abolition of criminal libel, was s 8 Libel Amendment Act 1888, which provided that before a newspaper owner or editor be prosecuted for criminal libel, leave must be obtained from a High Court judge: discussed in Robertson and Nicol (n 3) 3-083.

that distorts trade.⁷² These provisions have resulted in a string of Commission decisions and ECJ judgments, and an extensive jurisprudence has arisen to determine under what circumstances state aid is appropriate when it is intended to support public service broadcasting.⁷³ This jurisprudence establishes, to adopt Harrison and Woods' useful summary, that while 'there is little consensus as to the scope of public service broadcasting and the mechanisms by which it can be delivered', still it is 'generally accepted at both European and national level to fulfil an important role', and amounts to an exception to the general rules against states providing aid to their industries.⁷⁴ It is true that this does not apply to journalism so much as public service broadcasting,⁷⁵ so in a strict sense it is not an example of exclusive special treatment to journalism, but it does apply to the media more widely construed. To this extent it is an example of special treatment but for the institutional media, rather than the institutional Press.

⁷² The law is summarised in the Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting. COM (2000) 580 final. Of significant importance is the 'Protocol on the system of public broadcasting in the Member States' appended to the 1997 Treaty of Amsterdam, which states that EC treaties shall be without prejudice to the ability of Member States to fund public service broadcasting: Treaty of Amsterdam, [1997] OJ C340.

⁷³ *AltmarkTrans GmbH v Nahverkehrsgesellschaft Altmark GmbH* C-280/00, [2003] nyr, judgment 24 July 2003 laid down the basis for assessing when central funding for public service obligations can be appropriate: the subsequent development of the law is complex and summarised in Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (n 63) 154-163. An index of the Commission decisions can be found at European Commission Competition Directorate-General, 'Legal Framework Conditions Applicable to State Aid to Public Service Broadcasting: Commission Decisions on State Aid to Public Service Broadcasting (1999-2012)' (2013) <http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf> accessed 25/9/13

⁷⁴ Harrison and Woods (n 67) 310.

⁷⁵ A point underlined by the 2009 Communication, which emphasizes the ability of the EU to pay cognizance to cultural requirements in assessing appropriate action, s 33.

Conclusion

The foregoing discussion shows that the law provides exclusive special treatment, both in terms of benefits and liabilities, to individuals and institutions of journalism, though sometimes to journalism as a part of the wider media. This establishes at least two points – first, that the provision of exclusive special treatment to institutional journalism is not unprecedented, and second that experience has shown the difficulties the practical arguments envisage have on occasion, not proven to be insurmountable, nor that the risks they predict always crystallise. It is clear that the law provides some instances of such treatment, and so there is no *a priori* practical difficulty with providing institutional journalism with others: further, the existence of such treatment shows that special treatment to institutional journalists *per se* is not unknown, and not abhorrent, to the law.⁷⁶ Admittedly, this is quite a minimal conclusion, as there may well be cogent reasons to refrain from extending special treatment any further. Moreover, the absence of a positive case in support of providing the Press with special treatment is patent, and it will need to be advanced in later chapters.

As the primary aim of this chapter has been achieved it may be thought unnecessary to examine the law any further, but further consideration remains useful, as analysing the other classes of special treatment provides a fuller account of what such treatment entails, and also helps clarify the extent to which such treatment currently exists in the law.

⁷⁶ A conclusion consonant with Baker's about US law: Baker, 'The Independent Significance of the Press Clause under Existing Law', 969

Class 2: Institutional journalism necessary, but not sufficient

The second class of treatment of institutional journalism contains those instances of special treatment where being an institutional journalist (or institution) is a necessary, but not a sufficient condition, to qualify for the special treatment being conferred. These instances of treatment are only afforded to institutional journalists, but more is required than merely being an institutional journalist.

One candidate for special treatment in this class arises from the interpretation by the ECtHR of cases involving article 10 of the European Convention on Human Rights⁷⁷ and the Press. This, admittedly, is a somewhat contentious point,⁷⁸ but the consensus view sees the ECtHR jurisprudence as considering the Press to be worthy of particular treatment in various ways. This is because that the ECtHR provides institutional journalism with special treatment by treating it as a different class of case, as it holds the Press have a ‘pre-eminent role in a State governed by the rule of law’,⁷⁹ and ‘the most careful of scrutiny is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of public concern.’⁸⁰ The ‘most careful scrutiny’ test has other formulations, such as that of

⁷⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950.

⁷⁸ The proposal has been affirmed in *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] EMLR 19 [48], and commentators who agree include Nicol, Millar and Sharland (n 22) 2.18 – 2.21, 5.32—5.34; Fenwick and Phillipson (n 13) 39; Oster, (n 19) 60.

⁷⁹ For example, *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, para 63; *Ozturk v Turkey* [2009] ECHR 17095/03, paras 28, 29; *Sunday Times v UK* (1979) 2 EHRR 245, para 65; *Sanoma Uitgevers BV v Netherlands* [2009] ECHR 38224/03

⁸⁰ *Times Newspapers Ltd (No 1 and 2) v UK* [2009] ECHR 3002/03, para 41 .

‘utmost caution’,⁸¹ or ‘strict review’.⁸² Further dicta suggest that journalists may ‘exaggerate or provoke’ in a way, it follows, that others may not,⁸³ and journalists may be afforded particular latitude as ‘[i]t is not for the court to take the place of the press by saying what reporting technique journalists should adopt’,⁸⁴ the inference being that the court would not be so deferential to the decisions of other speakers in respect of their choice of how to speak. Further, on occasion, the Court suggests that journalists should be punished less than others, or at least benefit from a higher threshold in relation to when particular types of punishment are legitimate: ‘recourse to criminal prosecution against journalists for purported insults raising issues of public debate [...] should be considered proportionate only in very exceptional circumstances’.⁸⁵ The approach of the Court may be considered as recognising there is a handicap placed on states when they seek to restrict activities of institutional journalism in the view of Keller: ‘in Article 10 applications, a state party that has restricted a media publication will bear a heavier burden of justification’.⁸⁶ Further or alternatively, it is a factor that the court takes into account when discerning the appropriate margin of appreciation to afford to a state, or in the stringency of the proportionality review it undertakes:

The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog

⁸¹ *Cumpana v Romania* (2005) 41 EHRR 14.

⁸² *Thoma v Luxembourg* (2003) 36 EHRR 21.

⁸³ *Id* (n 82), para 46.

⁸⁴ *Radio France v France* (2005) 40 EHRR 29

⁸⁵ *Bodrozic v Serbia* [2009] ECHR 38435/05; similarly *Affaire Belpietro v Italy* App no 43612/10 (ECtHR, 24 September 2013), *Reinboth v Finland* [2011] ECHR 30865/08, para 90.

⁸⁶ Keller (n 32) 195.

...freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. ... Accordingly, the Court scrupulously examines the proportionality of a restriction of expression by the press in a television programme on a subject of general interest⁸⁷

Importantly, however, not least as a result of the court's decision in cases such as the *Von Hannover v Germany* rulings⁸⁸ the ECtHR jurisprudence indicates that the Press should only receive special beneficial treatment when their speech is in the public interest.

Membership of the media, and particularly the journalistic media, is therefore a necessary, but not a sufficient condition, for this sort of treatment.

The Committee of Ministers of the Council of Europe have endorsed the view that this is the correct way to approach media cases that entail public interest journalism. Two communications, amongst others, can be cited in support of this assertion. In the first, the *Declaration on Freedom of Political Debate in the Media*,⁸⁹ the Committee opined: '[t]he use of penal sanctions against the media for defamatory publications, except in the most serious of cases, will be a disproportionate interference with freedom of expression.' Similarly, in the *Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism*, the Committee 'called on public authorities in member states to refrain from adopting measures equating media

⁸⁷ *Animal Defenders International v UK* (2013) 57 EHRR 21 Grand Chamber, *Animal Defenders International v UK*, paras 102, 103, internal citations omitted.

⁸⁸ *Von Hannover v Germany (No 1)* (2006) 43 EHRR 7; *Von Hannover v Germany (No 2)* 55 EHRR 15 Grand Chamber; *Von Hannover v Germany (No 3)* [2013] ECHR 835; *Times Newspapers Ltd (No 1 and 2) v UK* (n 80), para 42; *Axel Springer v Germany* (2012) 55 EHRR 6 Grand Chamber, para 82.

⁸⁹ Council of Europe Committee of Ministers, *Declaration on Freedom of Political Debate in the Media* (12 February 2004) ; cited in Keller (n 32) 322.

reporting on terrorism with support for terrorism.’⁹⁰ It seems clear that the institutions of Strasbourg treat the Press differently, and these institutions consider that membership of the Press to be a necessary condition for the affording of special treatment.

Nevertheless, it is true that it is arguable as to whether membership of the journalistic media is the sole necessary condition for the affording of this treatment. It may be the case that others may also receive this treatment – NGOs, for example, as was described earlier, may be afforded protection under the source protection rules, and in *Steel and Morris v UK*⁹¹ the court rejected a submission that the high level of protection afforded to the Press under article 10 should be restricted to the institutional Press, and held that it could be extendable to others who contribute to the public debate by disseminating information on matters of general public interest.⁹² If others can be afforded this treatment, to say that membership of the institutional Press is a necessary condition for this treatment is a curious use of the term ‘necessary’ to say the least. Given that, it could be argued, the approach of the ECtHR should not be considered an example of treatment of the Press that falls into the category being discussed. However, such an argument, while plausible, does not reflect the general approach of the European Court, which repeatedly in its judgments makes a difference between the media and others seeking the protection of article 10: as mentioned, the ECtHR observes that the Press hold a ‘pre-eminent’ position.⁹³ So, despite there being a possibility that some instances of special

⁹⁰ Council of Europe Committee of Ministers, 'Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism' (2 March 2005); cited in Keller (n 32), 277.

⁹¹ *Steel and Morris v UK* (2005) 41 EHRR 22.

⁹² Id (n 91) [89].

⁹³N 79. A recent survey of such cases has been provided by Leveson LJ (n 15) vol 4 app 4.

treatment are restricted to the institutional Press, the tenor and approach of the ECtHR is to see the Press as different.

Class 3: Institutional journalism sufficient, but not necessary

The next category of special treatment is where membership of the institutional Press is sufficient to be afforded special treatment, but not necessary. These are the protections that are afforded to the institutional Press, but are also afforded to others who meet certain criteria. As noted above, these are not instances of exclusive special treatment, yet they can be confused with those that are. Two sub-categories within this class can be distinguished: the first where journalism is expressly mentioned in the threshold criteria by which the special treatment is afforded, and the second where it is not.

Journalism mentioned

Earlier in this chapter I described examples of this sort of special treatment, mentioning provisions under the Police and Criminal Evidence Act 1984⁹⁴ and the Data Protection Act 1998⁹⁵ that provide benefits to journalism but also to others too. To these could be added protections against some types of police investigation provided by the Police Act 1997,⁹⁶ or even the rules that indicate that VAT on newsprint should be zero rated, along with some other printed matter.⁹⁷ This type of special treatment is not confined to

⁹⁴ Text to n 17.

⁹⁵ Ss 32, 55.

⁹⁶ Police Act 1997 s 97(2)(b)(iii) states that the potential obtaining of ‘confidential journalistic material’ by a type of investigation means that investigation has to be approved by a figure in authority. ‘Confidential journalistic material’ is defined by s100.

⁹⁷ Value Added Tax Act 1994, s 30 which zero-rates the goods listed in Schedule 8, of which item 2 in group 3 comprises of ‘newspapers, journals and periodicals’; discussed in Barendt, *Freedom of speech* (n 14) 428.

domestic law, and the tripartite list of journalism, art and literature of the DPA 1998 (and also s 12 Human Rights Act 1998)⁹⁸ derives from the same tripartite list contained in the EU Data Protection Directive.⁹⁹ (The Supreme Court has interpreted the list as capable of denoting a sole commodity, namely the ‘output’ of the BBC,¹⁰⁰ but for the reasons identified in chapter one there remains good cause to distinguish journalism from other media output.) This sort of special treatment is not only statutory, and the common law also contains comparable examples, most notably the ability of the institutional Press to visit prisons to talk to prisoners who maintain that they have been the victims of miscarriages of justice. This was recognised by the House of Lords in *R v Home Secretary ex p Simms*,¹⁰¹ and the *Simms* benefit falls into this class of special treatment as it is an ability that is not only available to journalists, but also to other writers.

It is worth clarifying that many of the statutory provisions described protect the activity of journalism and not institutional journalists themselves. An example is the wording of the PACE 1984 provisions, as these indicate that the quality to be afforded a benefit is ‘journalistic material’. Therefore, one does not have to be an institutional journalist as long as one is undertaking an activity that could be described as journalistic, and functional as well as institutional journalists stand to benefit from these provisions.

Nor, indeed, does a person have even to be a functional journalist to be afforded some of

⁹⁸ This should not be considered to be an instance of this class of special treatment, for reasons that will be discussed below in the text to n 122.

⁹⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L-281/31 (Data Protection Directive) recital 17, 37 art 9.

¹⁰⁰ *BBC v Sugar* [2012] UKSC 4, [2012] WLR 439 [38].

¹⁰¹ *R v Home Secretary, ex p Simms* [2000] 2 AC 115 HL.

these protections, for Robertson and Nicol point out, in relation to the PACE 1984 provisions that protect journalists from revealing their sources: '[t]he holder need not be a professional journalist if the material was acquired or created for journalistic purposes'.¹⁰² This means that a caveat needs to be made to the assertion that being an institutional journalist is sufficient to be afforded this type of protection. This is because, as the protection applies to the material not to the activity of the possessor of the material, the protection will not be afforded to material that the institutional journalist provides not related to their work as a journalist. Domestic shopping lists and the like would not be covered. However, there is still a case that these types of treatment should be considered as instances of special treatment in the current category, as it is likely that being an institutional journalist will be sufficient for the treatment to be offered at least in regards to material the journalist produces during the course of their employment. There is likely to be, in other words, a rebuttable evidential presumption that the work of institutional journalists will be protected by these provisions. This will be discussed further below.

Journalism not mentioned

A contrast can be drawn between these instances of special treatment, and those that do not mention 'journalism' or journalistic activity in terms. The most prominent example of this sort of special treatment is the protection the law affords journalists (in particular) against compelled disclosure of the identity of their sources. In English civil law,¹⁰³ the

¹⁰² Robertson and Nicol (n 3) 5-075.

¹⁰³ The equivalent criminal law protection is found in Police and Criminal Evidence Act 1984, discussed in the text in the preceding paragraph.

main framework for these rights is the measure of protection founded on s 10 Contempt of Court Act 1981 that the law affords against *Norwich Pharmacal*¹⁰⁴ applications for disclosure or discovery of information. Section 10 was reviewed by the ECtHR in *Goodwin v UK*,¹⁰⁵ and the traditional approach of the English courts was held deficient, leading to the obiter dicta of the Court of Appeal in *Ashworth Hospital Authority v MGN Ltd* to the effect that the English courts did not traditionally afford the same weight as the European Court to Press freedom.¹⁰⁶ When this case reached the House of Lords, Lord Woolf CJ resolved any lingering difference by citing *Goodwin* and saying that the approach of the ECtHR ‘can be applied equally to section 10 now that article 10 is part of our domestic law’.¹⁰⁷ The protection is now triggered when the information reported, derived from a source, is in the public interest. Where there is a clash of rights, for example where privacy issues are engaged, a balancing exercise is required, which will entail the weighing of considerations similar to those operative in the *Reynolds* defence, sometimes called the ‘reasonable journalism’ defence, in defamation, mentioned earlier.¹⁰⁸

These provisions have been justified by reference to the needs of the Press and this might be considered evidence that the provisions are exclusive benefits for

¹⁰⁴ *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 HL.

¹⁰⁵ *Goodwin v UK*(n 20).

¹⁰⁶ *Ashworth Hospital Authority v Mirror Group Newspapers Ltd* [2001] 1 WLR 515 CA [97].

¹⁰⁷ *Ashworth Hospital Authority v Mirror Group Newspapers Ltd* [2002] UKHL 29, [2002] 1 WLR 2033[38].

¹⁰⁸ *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, 94 BMLR 84 The test to apply when such a clash of rights occurs is set out in *Re (S) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2004] 1 AC 593 which will be discussed in chapter eight.

institutional journalists. The Master of the Rolls held in 2007 that ‘section 10 of the 1981 Act and article 10 ... have a common purpose in seeking to enhance the freedom of the Press by protecting journalistic sources’,¹⁰⁹ and Lord Woolf CJ in the House of Lords in *Ashworth Health Authority* stressed that the rationale of the rule was to protect journalists, as if the courts did not protect source anonymity in these cases, sources of information useful to society would dry up.¹¹⁰ However this is probably insufficient to demonstrate that the benefits of the statutory provisions are restricted to institutional journalists. This is because the wording of s 10 is not restricted to institutional journalists, and cannot, therefore, be a privilege afforded particularly to them. Rather, it provides that: ‘[n]o court may require a *person* to disclose... the source of information contained in a publication for which he is responsible’ (The emphasis has been added). It is, in Blom-Cooper’s words: ‘indiscriminate in its cloak of protection’, because: ‘[j]ournalists and other regular purveyors of information may be more vulnerable to proceedings for disclosure, but the law applies without reference to the undisclosed material and the suspected source’.¹¹¹ Barendt, relying on dicta of Lord Diplock in a pre-HRA case, *Defence Secretary v Guardian Newspapers Ltd*,¹¹² agrees, noting that: ‘[t]he right is not confined to the press...it may be asserted by anyone...it is wrong to label the freedom... as a journalists’ privilege’.¹¹³

¹⁰⁹ *Mersey Care NHS Trust v Ackroyd (No 2)*(n 108) [9], emphasis added.

¹¹⁰ *Ashworth HA v MGN Ltd* (n 107) [61]. A similar view was expressed in *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 703, cited in Leveson (n 19) vol 4, appendix 4, 2.43 p1853

¹¹¹ Blom-Cooper, (n 4) 269.

¹¹² *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

¹¹³ Barendt, *Freedom of Speech* (n 14) 437; Oster 77 .

Given this, it might be questioned whether, as the provisions are ‘indiscriminate in [their] cloak of protection’, and whether being an institutional journalist provides any advantage, and hence whether institutional journalism is truly a sufficient condition to be afforded these benefits. This is similar to the query that was raised in respect of the PACE 1984 provisions. If it is not a sufficient condition, then these provisions should be classified as the fourth class of special treatment, rather than as the third. However, being an institutional journalist does indeed amount to a sufficient condition, because the benefit that accrues to an institutional journalist is not the benefit of having one’s sources protected *per se*, so much as being readily conceived by the court as having such a benefit *prima facie* available to one. This is because a journalist will not have to argue that they have the *locus standi* to be afforded the right given their job, and so being an institutional journalist is likely make a court start from the presumption that a source protection right is appropriately available, subject to whatever competing arguments are in play in a particular case. On these grounds, source protection is an instance of a benefit for which membership of the institutional Press is sufficient, but not a necessary condition, and so it is best conceived as an instance of class 3 special treatment.¹¹⁴

A final point should be mentioned whilst discussing these types of special treatment to acknowledge that even if some of the practical arguments against special treatment can be met, some powerful arguments against the practice remain. This argument is made by Robertson, and is in essence the Diceyan point that if one affords particular protections to the institutional media, one makes it easier for

¹¹⁴ This argument is supported by the wording of *Criminal Practice Directions*, (n 41,) 5B.62, as it is worded in terms provide that there should be a ‘greater presumption’ for access for accredited journalists to material in a criminal trial: Joshua Rozenberg, ‘Open Justice Rises up the Agenda’ *Guardian* (4/10/13) <<http://www.theguardian.com/law/2013/oct/04/senior-uk-judges-open-justice>> accessed 9/10/13.

those protections to be removed or reduced than if such protections were afforded to the public at large.¹¹⁵ As noted in chapter one, Robertson describes this as having happened in respect of the protections afforded to institutional journalists under PACE 1984 for material that has not been transmitted.

Prior to the 1984 statute, police had not been granted access to untransmitted material at common law. But once a statutory route for obtaining material came into existence, albeit with ‘special protections’, the police naturally exploited it and the courts naturally decided that the protection was not very special after all.¹¹⁶

Class 4: Institutional journalism neither necessary nor sufficient

The fourth category is not special treatment in the sense that has hitherto been discussed, as membership of the institutional media is neither necessary nor sufficient for the affording of any benefits or liabilities. This category contains those instances of special treatment that benefit speech in general, but which may at first sight be considered as particularly afforded to journalism. It is useful to provide two examples of some provisions that may at first sight appear to fall into one of the earlier categories, but in reality are more appropriately placed here, namely s 12(3) of the Human Rights Act 1988 and defences in ‘privacy’ actions and injunctions.

Section 12 (3) Human Rights Act 1998

One candidate for a provision that may amount to special treatment is s 12 of the Human Rights Act, which applies when a court is considering whether to grant any relief which, if granted, might affect the right of freedom of expression set out in article 10 of the

¹¹⁵ Chapter one, text to n 34.

¹¹⁶ Robertson and Nicol (n 3) 5 -078.

European Convention on Human Rights. The notion that this section may amount to special treatment arises not least because section 12 in general, and s 12(3) in particular, has been stated to have been designed to benefit journalists;¹¹⁷ and, indeed, s 12(3) has been interpreted as strengthening the hand of the Press in some situations. This occurs in applications for interlocutory injunctions, because the courts have interpreted s 12(3) as raising the threshold for the granting of an injunction in freedom of expression cases. The old test was set out in *American Cyanamid v Ethicon Ltd*,¹¹⁸ and held that an injunction can be granted if a claim is ‘not frivolous or vexatious, in other words that there is a serious question to be tried’, and that the balance of convenience favours the grant of an injunction. The new test, set out in *Cream Holdings v Bannerjee*,¹¹⁹ does not raise the bar across the board in s 12(3) applications because of various practical considerations, but now the courts in media cases (arguably)¹²⁰ ‘will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the courts he will probably (“more likely than not”) succeed at the trial.’¹²¹ Further, the notion that this is an instance of special treatment could be reinforced by the recognition that the courts’ interpretation of s 12(3) in a way that is beneficial to the Press is in contrast to the interpretation that has been made of s 12(4). Section 12(4) appeared on its face to be of particular benefit to journalism, as it explicitly provides that the court, when the material before it is

¹¹⁷ Leveson LJ (n 15) vol 4 Appendix 4, 2.29 1850, citing evidence from Jack Straw.

¹¹⁸ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 HL.

¹¹⁹ *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253; followed in *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 296, [2008] QB 103 .

¹²⁰ [S 12(3) sought to set] ‘a higher threshold for the grant of interlocutory injunctions against the media than the American Cyanamid guideline’. *Cream Holdings Ltd v Banerjee* (n 119) (Lord Nicholls) [15].

¹²¹ *Id* [22].

journalistic, literary or artistic, should pay particular regard to a given set of considerations. However, s 12(4) has been interpreted in a way that rules out any special benefit to the Press.¹²²

However, despite all these arguments, and despite Lord Nicholls' recognition that the rule is designed to benefit journalists, it is clear that such treatment is not exclusive to them. This is because s 12(1) is drafted in wide terms, in a way that does not confine its cloak of protection to the media but rather applies to: 'any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.' It can be seen that the section covers all exercising of the right of freedom of expression, and hence is not merely restricted to journalism of any type, whether performed by a journalist or a member of the public.

Actions for 'privacy'

Another candidate for special treatment relates to injunctions against institutional journalistic speech in actions to prevent 'misuse of private information'.¹²³ Here, at one stage at least, it seemed there were exclusive benefits for the institutional Press. Such a view was founded on the judgment of the Court of Appeal in *A v B plc*,¹²⁴ a case in which

¹²² In *Douglas v Hello! (No 1)* [2001] QB 967 CA 986 Sedley LJ noted at [133] that an effect of the drafting of s 12(4) was that no priority could be given to freedom of expression, even though the wording of the sub-section tells the court to pay particular regard to article 10 of the ECHR where proceedings relate to (amongst other things) journalism. This is because article 10 includes article 10(2), which provides that 'the rights of others' may be a legitimate restraint on freedom of expression. Hence if the court pays particular regard to article 10, it also must pay particular regard to the rights of others, and any presumed priority for article 10 thereby dissolves. The House of Lords has endorsed Sedley LJ's argument, for example, in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [111].

¹²³ The re-named tort of breach of confidence, into which the article 8 right of privacy has been 'shoe-horned': *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [8]

¹²⁴ *A v B plc* [2002] EWCA Civ 337, [2003] QB 195.

a professional footballer applied for an injunction restraining ‘a kiss and tell’ story. In that case, Lord Woolf laid down principles for the courts to take into account in future applications of this sort, principles distinctly beneficial to institutional journalists. In particular, he held:

The fact that if the injunction is granted it will interfere with [...] in particular the freedom of the press is a matter of particular importance. This well-established common law principle is underlined by section 12(4). Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest.¹²⁵

He went on to emphasise that: ‘[r]egardless of the quality of the material which it is intended to publish prima facie the court should not interfere with its publication.’¹²⁶ In these passages, Lord Woolf is taking notice of the argument that: ‘if newspapers do not publish information which the public are interested in, there will be fewer newspapers published.’¹²⁷ He concluded by saying: ‘Once it is accepted that the freedom of the press should prevail, then the form of reporting in the press is not a matter for the courts but for the Press Complaints Commission and the customers of the newspaper concerned’.¹²⁸ It is somewhat rare for an argument of this mould to find favour in the eyes of the judiciary, but has been recognised as viable on occasion, notably by Lord Denning writing extra-curially,¹²⁹ and by the House of Lords in *Re BBC (AG ref 3 of 1999)*.¹³⁰ It has been

¹²⁵ Id [11(iv)].

¹²⁶ Id [11(v)].

¹²⁷ Id [11(xii)].

¹²⁸ Id [48].

¹²⁹ Alfred Denning, *The Road to Justice* (Stevens & Sons 1955) 79.

¹³⁰ *Re BBC (Attorney General's Reference No 3 of 1999)* [2009] UKHL 34, [2009] 3 WLR 142.

advanced, with only limited success, by journalists since the first days of the law's encounter with the Press.¹³¹ However, it is an interesting argument that is rather too readily discounted, for as well as raising the more obvious issues of commercial speech, raises issues of the value of the audience's autonomy as gauged by their expressed preference as to what stories to consume. These will be discussed in chapter four.¹³²

Nevertheless, it is very unlikely that *A v B plc* remains good law in the light of the judgment of the ECtHR in *Von Hannover*, the cases that considered media coverage of Princess Caroline of Monaco. As has been discussed above, the court found that: 'a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society ... and reporting details of the private life of an individual who ... does not exercise official functions.'¹³³ Sedley LJ, speaking extra-curially, observed that *Von Hannover* made it 'extremely doubtful whether [*A v B plc*] could now be decided as it was',¹³⁴ a view which the Court of Appeal validated in *McKennitt v Ash*, by observing that: 'the width of the rights given to the

¹³¹ *Curry v Walter* (1796) 1 Bos & Pu 525, 126 ER 1046, 1 Esp 456, 170 ER 418 was a libel action against an early editor of *The Times*. The editor, Walters, attempted to defend himself or mitigate with the argument that '[u]nless newspapers contained what the temper of the day required they would be read by none but the printer, and the trade would become useless'. Ashurst J, giving sentence, was caustic about this line of argument: 'He had attempted to justify his conduct upon the principle of necessity of the times; there never could exist any necessity for such calumny; nor could courts of justice ever admit of the defendant's conduct.' Cited in Marjorie Jones, *Justice and Journalism* (Barry Rose 1974), 11, relying on *The Times* London., *The World and the Times: The Thunderer in the Making, 1785-1841*, vol 1 (*The Times* 1935) 55.

¹³² Chapter four, text following n 31.

¹³³ *Von Hannover* (n 88) [63].

¹³⁴ Sarah Webb, 'Curbs on a Modern Miller's Tale' *Guardian* (London, 11/12/06) <<http://www.guardian.co.uk/media/2006/dec/11/mondaymediasection9>> accessed 05/08/09.

media by *A v B plc* cannot be reconciled with Von Hannover's case.¹³⁵ Indeed, as Eady J has observed, at the first instance hearing of that case:

It is clear that there is a significant shift taking place as between, on the one hand, freedom of expression for the media and the corresponding interest of the public to receive information, and, on the other hand, the legitimate expectation of citizens to have their private lives protected¹³⁶

Moreover, in *CC v AB*¹³⁷ Eady interpreted *A v B plc* in a restrictive way, thus avoiding following it, and hence despite Lord Woolf's dicta in *A v B plc*, the better view is that there should be no presumption in favour of media speech in cases such as these.¹³⁸

Conclusion

The chapter attempted to challenge the pragmatic arguments against special treatment. It did this by clarifying the extent to which current doctrine provides institutional journalism with special treatment, and in doing so set up a framework that will be returned to later in the thesis, and providing examples of such special treatment. The most significant category of special treatment that challenges the pragmatic arguments comprises those instances of special treatment where membership of the institutional Press is a necessary and sufficient condition for being afforded the treatment in question. After considering both individuals and institutions and benefits and liabilities, it can be seen that there are instances of exclusive special treatment afforded or imposed by the

¹³⁵ *McKennitt v Ash*(n 123) [62], a view endorsed by Leveson LJ (n 15) vol 4 app 4 3.77 1878

¹³⁶ *McKennitt v Ash* *McKennitt v Ash* [2005] EWHC 3003 (QB), [2006] EMLR 10 [57].

¹³⁷ *CC v AB* [2006] EWHC 3083 (QB), [2007] 2 FLR 301

¹³⁸ The correct approach to balancing article 8 rights of privacy with article 10 rights of freedom of expression is the 'intense focus' test set out in *Re (S) (Identification: Restrictions on Publication)*(n 122). This will be discussed in chapter five text to n 108. It is not clear, however, that the argument of *A v B plc* is quite dead: it was recognized as potentially valid by the Court of Appeal in *Hutcheson (KGM) v NGN Ltd* [2011] EWCA Civ 808 [36].

law on institutional journalism, and on the wider media. This conclusion meets some of the concerns of the pragmatic arguments: at the least, it shows that the law already identifies who is a journalist sufficient to identify to whom special treatment should be granted, and that this difficulty is not insurmountable. It also shows that some predictions of dire consequences following from the provision to journalists of special treatment have not come true, though it should be conceded Robertson discerns a watering down of benefits enjoyed by institutional journalists to have taken place as a result of one instance of special treatment.

No attempt was made, though, to provide a positive argument to explain why special treatment should be afforded to institutional journalism. That will be the task, as has been mentioned, of later chapters, but such a positive argument begins to emerge when considering two of the rationales suggested for the existence of doctrine described in this chapter. The first is found in a recital to the Audio Visual Media Services Directive,¹³⁹ parts of which regulate the speech of individual broadcasters. Recital five (which it should be noted affirms in terms the view that there are instances of special treatment, exactly the point at issue in the present chapter) provides an explanation as to why the Directive is necessary:

Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.

¹³⁹ Audiovisual Media Standards Directive (n 52).

The second is a justification of why some institutions of the Press, public service broadcasters, should receive special treatment. The EU Commission explains the rationale thus:

The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. ... Broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately ensures that all citizens participate to a fair degree in public life¹⁴⁰

It will be apparent that these observations appear to relate only to broadcasting, and the latter to one type of broadcasting, but it is plausible that they apply equally to other forms of institutional journalism – indeed, an assumption of this work is that the position of institutional journalism as an activity should be considered, rather than a sector of it marked out by the historical accident of whether it was disseminated by print or broadcasting. The observations provide the basis of one aspect of a positive case for providing special treatment, whether liabilities or privileges, and whether afforded to individuals or institutions, for institutional journalism on the familiar grounds that the Press deserve special treatment because of the part they play in the public sphere in a democratic polity. This will be examined further in the chapters that follow, and what will become evident is that there are at least two ways of conceiving the place of the media in a democracy: the first, referenced here, of participating in democratic discourse, and the second, a Fourth Estate conception of the Press as a watchdog on the

¹⁴⁰ Communication from the Commission on the application of State aid Rules to Public Service Broadcasting. COM (2000) 580 final para 5, 8.

government. It will be demonstrated that these theories are in tension, and the consequences for the argument for special treatment explored.

Chapter 3: An argument that institutional journalism is different

This chapter will focus on the argument that it is incoherent for the law to provide special rights or responsibilities for institutional journalists, as there is no significant difference between institutional journalists and other individuals performing similar activities. This chapter addresses this argument by suggesting ways in which institutional journalism is sufficiently distinct from other similar activities to merit special treatment. The chapter will concede these have been significantly undermined by the development of communication technologies and social and political change associated with the Internet, but will argue that they remain, when supplemented by other considerations, sufficiently persuasive to justify the idea of special treatment.

The starting point is the argument that institutional journalism is sufficiently distinct to merit differential treatment because of two features of journalism that, when combined, provide a case for special treatment. The first relies on the function and importance of journalism in our democracy, and the second on the inherency of public speech to journalism and the reach of such speech. The first feature will be considered at length in chapter five, so I will not devote too much space to it here. Part of the case is summarised by Bollinger: ‘by training, experience, and professional disposition, the press is more agile, quicker to see the story, and better able to explain it to the public than any other institution.’¹ but the idea is additionally that journalism is, in a way not substantially replicated by other activities, integrally linked to the formation and

¹ Lee C. Bollinger, *Uninhibited, robust, and wide open : a free press for a new century* (Oxford University Press 2010) 87.

distribution of political opinion in our democracy, and so is an engine on which our democracy relies, for good and ill; and also that journalism operates as an institutional counterweight to the organs of the state, again in a way not substantially replicated by other activities. It is in part because of this that special treatment is appropriate: chapter five will explore these ideas, and describe how the two different arguments for special treatment along these lines can be in tension. But it is the second feature that is the focus of this chapter. This, too, can be split into two observations: journalism is by its nature public speech as journalistic expression is by definition public in whatever medium such journalists ‘write’, and journalism in general reaches more of the public than other forms of speech – what has been called by Lord Leveson, the ‘megaphone effect’.² It can be seen that the two points are distinct, as the inherency of public speech to the activity of journalism is a function of the nature of the activity of journalism, while the reach of the activity of journalism is a contingent fact of how it operates. These qualities are possessed to a greater extent by journalism than by many other activities that are similar to journalism. So, for example, in relation to the first point, in contrast to academics, credit agencies and the like, journalists by nature communicate to the public at large while other activities that may also speak publically have other prime audiences; and in

² Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012) vol 1 part B ch4 2.2 76; Jan Oster, ‘Theory and Doctrine of ‘Media Freedom’ as a Legal Concept’ (2013) 5(1) *Journal of Media Law* 57, 66, citing UN Human Rights Committee, *General Comment No 34* (2011), para 44, who, as Oster observes, appear not to pay sufficient regard to the other features of institutional journalism.

relation to the second point, the reach of journalism is in general terms greater than other comparable activities.³

When combined, these features of journalism provide one explanation of why we afford special treatment to institutional journalism: it is integral to our democracy, it is speech of an inherently public nature, and in general it reaches more of the population than other comparable activities. This is an account that has been recognised, in many respects, by the common law, both in terms of affording specific benefits and liabilities to the Press. It can be found in the leading nineteenth century authority of *Wason v Walter*, for example, deployed by Lord Cockburn to explain why faithful reports in a newspaper of a debate in Parliament are not actionable in defamation, as Lord Cockburn pays particular regard to the fact that the public gain from the ‘full liberty of public writers to comment on the conduct and motives of public men’.⁴ It can also be found underpinning the doctrine of open justice, which arguably provides special benefits to institutional journalists in respect of their reporting of the courts,⁵ as this doctrine rests squarely on the idea that widespread publicity provides benefits to the processes of the law, such publicity being provided by journalistic public speech of great reach.⁶

³ This is a broad definition, and elides problems about, for example, specialist journalism, with a narrower remit. But these comments are intended as preliminary observations, and the chapter will seek to explain why these problems do not undermine the case for journalistic difference.

⁴ *Wason v Walter* (1868) LR 4 QB 73 94.

⁵ *Scott v Scott* [1913] AC 417 HL, and see chapter two text to n 34ff.

⁶ The extent to which this rationale for the doctrine is convincing has been challenged by Joseph Jaconelli, *Open Justice: a Critique of the Public Trial* (Oxford University Press 2002); reasons similar to those advanced by autopoiesis theorists (discussed in chapter one text to and following n 97) but space precludes an analysis of these arguments.

In respect of liabilities, the distinct nature of the Press in a democracy and the nature of its speech are some of the rationales that lie behind the rules that restrict the extent to which access to the Press can be bought. They help explain why we wish to prevent political parties from spending large amounts of money to secure coverage in the Press about political matters,⁷ because we consider the Press to be a significantly important form of speech for influencing opinion in our democracy. Indeed, the concern about the risks that flow from permitting organisations to purchase coverage in the Press is so great that the government legislated to restrict political speech in the broadcast media, despite recognising such an act might be a breach of fundamental rights of free expression, or to be more exact, despite being unable to make a statement pursuant to s 19(1)(a) of the Human Rights Act 1998 that these provisions were compatible with European Convention on Human Rights.⁸ The concern about undue influence is also patent in our wish to prevent Rupert Murdoch or Silvio Berlusconi, for example, from owning too many newspapers and television channels because of the need to preserve media plurality: we wish to preserve media plurality partly because of fears that concentrating control of the Press also concentrates influence.⁹ We have also traditionally been wary of permitting foreigners and those perceived to be unfit and not proper from

⁷ *R (Animal Defenders International) v Culture Secretary* [2008] UKHL 15, [2004] 1 AC 185 (Lady Hale) [47]

⁸ Communications Act 2003 ss 319 and 321; Joint Committee on Human Rights, *Nineteenth Report of the Session 2001-2002* (HL Paper 149, HC Paper 1102, 19 July 2002) 62-64; *R (Animal Defenders) v Culture Secretary*(n 7) [13] – [15]; affd *Animal Defenders International v UK* (Application no 48876/08) (2013) 57 EHRR 21 Grand Chamber .

⁹ Chapter two n 63; Lesley Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing 2006) ch 2.

owning sectors of the Press for similar reasons.¹⁰ Ultimately we fear, partly on the basis of the lessons of the twentieth century, that control of this distinct form of public speech may lead to control of democratic power.

This second feature of the argument for journalistic difference, and hence special treatment, has always been challenged, as the Press has never had a monopoly on public speech: lonely pamphleteers, for example, also sought to speak to the public at large, even if in practice they may not have reached many people.¹¹ Such a challenge is part of the reason why the courts have been reluctant to afford extensive exclusive benefits to the Press, as it seems incoherent to provide special benefits to the institutional Press but deny it to the lonely pamphleteer and their like.¹² Curiously, though, this argument has had less purchase in respect of the other type of special treatment, namely the imposition of special liabilities on the Press. The fact that there are others who perform similar activities to the Press has seldom been seen as a sufficient reason to refrain from imposing restrictions on the Press such as a right to reply, impartiality or sector specific merger regulations.¹³ This inconsistency can be plausibly explained, at least in part, by the disproportionate size, influence and reach of Press public speech in comparison with that of lonely pamphleteers: one needs to control a polar bear, but can ignore the gadfly.

¹⁰ The ownership rules are complex, and it is not necessary to describe them in detail here, but they are summarised in Leveson LJ (n 2) vol 1 pt C ch 4 para 3.1-3.30, 183- 190; and chapter two, text to n 63.

¹¹ Discussed in chapter one text to n 56.

¹² For example, the ability to visit prisoners to investigate allegations of miscarriages of justice is afforded to institutional journalists, but also to other writers: *R v Home Secretary, ex p Simms* [2000] 2 AC 115 HL.

¹³ Discussed in chapter two text following n 51 to n 70.

However, in recent times, the challenge to this aspect of the case for journalistic difference and hence special treatment has grown. This is because the Internet has given everyone the capacity for public expression of great reach, and any individual person can now potentially reach as many people as the most syndicated journalist, if not more. This means that the Press no longer clearly exclusively dominate the ‘networked public sphere’ of political discourse,¹⁴ and is no longer remarkable either because of the inherent public nature of its speech, or because of the extensive reach of its speech. This, as Keller observes, weakens the case for special treatment:

[t]he erosion of boundaries that once defined journalism has challenged the very idea of a distinct, professional news media. In the Internet era, the news media now includes many individuals who are not trained journalists and do not operate under the control of dedicated media organisations, but nonetheless provide current affairs information to the general public. The most obvious solution is to develop a more functional and less status based approach to the information watchdog role in a democratic society.¹⁵

Keller’s proposal leads to the conclusion that there should be increased special treatment for functional, not institutional journalism; or, to use the taxonomy proposed in the last chapter, his idea is that there should be fewer instances of special treatment of class 1 and 2, and more of 3 and 4.¹⁶ There should, in other words, be fewer examples of special treatment for the affording of which being a member of the institutional Press is a necessary condition. To some who hold Press benefits to be inappropriate this may not be a particularly disturbing conclusion, but to those – and there are many more of them –

¹⁴ Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) 114—15; *Re J (A Child)* [2013] EWHC 2694 (Fam) [42] [43].

¹⁵ Perry Keller, *European and international media law : liberal democracy, trade, and the new media* (Oxford University Press 2011) 198.

¹⁶ Chapter two text following n 31.

who believe it appropriate to impose liabilities on sections of the Press, this conclusion poses more of a concern. This chapter takes issue with Keller's conclusion, if not his argument. It does not do so by challenging his assertion that the Internet has made the public speech and reach arguments for journalistic difference decline in force, although it is likely that these do still remain at least in part an aspect of the case for journalistic difference. Rather, it identifies other characteristics of Press speech that remain relevant to the case for special treatment when they combine with the continuing function of journalism in a democracy. The features that will be highlighted are the credibility and assessability of institutional journalism, in broad terms its reputation, and the effect on these of the Internet will be considered.

One concession should be though, as there are other specific classes of speech that may have the qualities I will describe below to a greater extent than journalistic speech. Speech by medics and academics, for example, often have greater credibility than institutional journalistic speech, and hence, any claim that these qualities are distinct to institutional journalism is not strong. Further, it is not the case that each piece of journalistic expression always possesses these qualities in equal measure, as they are not definitional qualities. However, it is still a convincing claim that, particularly when considered together, these qualities do attach themselves to institutional journalistic speech as a class of public speech, in such a way as to distinguish it from other classes of speech and general expression. And, crucially, it is when these aspects of institutional journalism are considered in the light of the integral nature of such qualities to democracy that an argument for special treatment emerges.

I should also emphasise three limits of this analysis. First, the methodological approach is limited to arguments that are present in, or arise from, media law. Second, consideration is given to a limited way in which the Internet poses a challenge to institutional journalism. Other relevant issues, such as the issue of whether the institutions of journalism can survive the Internet's undermining of the business models on which many depend,¹⁷ or whether the Internet does in fact replace institutional journalism or merely regurgitate it¹⁸ are largely beyond the scope of this thesis. Third, and as a result of this, the analysis presented is not intended to be comprehensive, and the conclusion arrived at will be limited, being subject to further technological and social change that might undermine the case that institutional journalism should receive special treatment.

Credibility

The first claim is essentially that public speech issued from the institutional Press confers on such speech, in general, an imprimatur that makes such speech more likely to be considered to be credible than public speech that doesn't come from the Press. To put the point more concisely but somewhat less precisely, Press speech has a credibility that distinguishes it from other public speech. This may appear a brave claim, given the notorious fact that the Press often gets things wrong, and trust in journalists is patchy at best. But the suggestion remains plausible, and was attested to by Leveson:

¹⁷David Levy and Rasmus Nielsen (eds), *The Changing Business of Journalism and its Implications for Democracy* (Reuters Institute for the Study of Journalism 2010).

¹⁸Sunstein (n 14) 14-18; Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 1) 82, below n 63.

There is no doubt that the press is considered a voice of authority in society. In many quarters, it has rightly earned a reputation for accurate and vigorous reporting, independence and holding power to account. It is because of the authoritative quality of the press, combined with its access to mass audiences, that communication by the press, as an institution of considerable power, has a significant impact on society. It can set the news agenda, shape culture and change.¹⁹

The claim is a psychological and sociological one, and one that can also be tested empirically, and indeed some empirical evidence will be discussed later.²⁰ However, the approach of this section is to demonstrate the claim's plausibility by reference to our common reactions to certain situations, and to consider some reasons that can be advanced to support the claim.

The claim that material published under the auspices of the institutional media is afforded a *prima facie* credibility can be supported by the following example. Imagine a stranger on a bus declaring, for example, that Prince Harry is James Hewitt's son. Now imagine a similar statement being made by an unknown newsreader on *Sky News*. Both speakers are equally unknown to their respective audiences, but – other things being equal – there is a difference between the two statements in relation to their credibility. The difference is founded on the distinct reputations of the speakers. The stranger on the bus has little reputation, but in contrast the unknown newsreader on *Sky News* will have a substantial reputation, derived from the institution for which she works. She is not credible merely because of who she is, but rather because of the job she does and the environment in which she is speaking: her reputation derives more from her institutional affiliation than from her own character. A similar reputation accrues to the speech of

¹⁹ Leveson LJ (n 2) vol 1 pt B ch 4 2.6 77-8.

²⁰ Text to n 59.

institutional journalists in general, even if this imprimatur is not of constant value across different journalistic institutions. That this is so can be gauged from considering the different reputation and measure of authority afforded to a fact published in the *Sun on Sunday*, *Private Eye*, *The Times*, and *The New York Times*. The reputation of institutional journalistic speech can lead to dramatic results, or at least dramatic allegations. For example, the BBC's business editor was blamed by the British Bankers' Association (amongst others) for creating the run on Northern Rock.²¹ The reason his speech was considered damaging was not just because he was Robert Peston, but because he was the BBC's business editor and because he was reporting on official BBC channels. The perceived damage was derived from his reputation, and his reputation was derived, at least in part, from his institutional affiliation.²²

The view that we have assumptions about the credibility of institutional journalism also draws some tentative support from considering the disappointment that is commonly felt on discovering journalistic errors and mistakes. Such disappointment is prompted, at least in part, by an expectation that institutional journalists will get things right, and a feeling that we have been let down when they fail. Indeed, if this was not the case, and if there were not expectations of credibility in journalism, it is difficult to explain why it was considered necessary to have the six significant inquiries into the Press that have taken place since the second world war.²³ This assumption of credibility

²¹ BBC, 'I did not cause Rock run - Peston' (*BBC News*, 4/2/09)
<http://news.bbc.co.uk/1/hi/uk_politics/7870240.stm> accessed 7/10/09.

²² It is true that, over time people like Robert Peston acquire independent reputations of their own, but that does not rebut the assertion that there is also a reputation that comes from being an institutional journalist.

²³ Leveson LJ (n 2) vol 1 pt D ch1 8.2 216

is evident when one considers the different response one has, all things being equal, to discovering that an unknown journalist operating under an institutional affiliation has got a story wrong or has made an unsubstantiated allegation, and compares that to the response one has when one discovers that a blogger has made a false or unsubstantiated allegation. One has greater expectations of the institutional media than one does of the blogger, and so all things being equal (and the fact that some bloggers have good reputations will be discussed in a moment), the inaccuracy in institutional media speech is cause for concern, which is not necessarily the case where the blogger is concerned.

To some extent, this credibility of institutional journalistic speech is recognised by the law. It may explain why libels carried by or privacy intrusions carried out by institutional journalism can be considered more serious than similar acts uttered in private correspondence or in other communication, as those who read or watch allegations contained in the institutional Press will often assume that what they see or read is true. Lord Neuberger, MR observed, speaking extra-curially at a press conference in 2011:

At the moment the law seems to be that even if the information which is the subject matter of the injunction is on the web, or may go on the web, that is by no means the same degree of intrusion under privacy as the story being emblazoned on the front page of a national newspaper, which people trust more and has far greater circulation than those bloggers and tweeters.

This was a view with which Lord Judge, LCJ, was in accordance:

there is a difference between a report in a reputable newspaper - everybody knows about defamation... I suspect that they [everybody] would pay much more attention to an article in a newspaper or on the

media than they would to anything that anybody can put out on modern technology. I think there is a significant difference.²⁴

Some reasons for the expectation of journalistic credibility

The implicit credibility afforded to institutional journalistic speech may be the result of legal mechanisms that operate to try and make institutional journalists reliable. This arises in part because institutional journalists do not utter personal speech, so much as utter the speech of the institution of which they are members. Indeed, institutional journalists working for the institutional Press make (or should make) institutional decisions rather than personal ones, and their judgment is (or is expected to be) relatively independent of their personal preferences. This is because the journalist's news judgments should be informed by the editorial approach of the journalistic outlet for which journalists work: journalists may have a personal interest in Zimbabwean politics, for example, but if they work for *The Sun*, or BBC Radio 1's *Newsbeat*, they should be prepared to discount their personal interests when evaluating whether and in what way to cover a story.²⁵

When speaking institutionally, members of the institutional Press are bound by their contractual relationship with their employer which will often contain implicit or explicit terms regulating the quality of their work, terms relating to acting with reasonable skill and care, that touch on the quality and hence credibility of their output.

²⁴ Judiciary of England and Wales, 'Press Conference held by the Lord Chief Justice and the Master of the Rolls' (2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf>> .

²⁵ An exception to this is the case of journalism that is selected to express an opinion or a point of view, for example in an opinion piece. But this exception does not undermine the point being made, as even where a journalist is speaking in a personal capacity, their view has been selected to be a piece of the wider institutional speech of the institutional media outlet in question.

Journalists can be fired for making things up, or disciplined for failing to check their work sufficiently.²⁶ Institutional journalists are also subject to industry codes and other forms of regulation that also promotes credibility (or should do, even if they do not always achieve their end). And these codes also provide means by which people can officially complain about the work of institutional journalists, even though these may be all too frequently ineffective, as demonstrated by the state of affairs that led to the commissioning of the Leveson Inquiry. These legal mechanisms may contribute to the social and psychological assumptions that institutional journalistic speech has a *prima facie* credibility. Indeed, this has been recognised by Leveson himself.²⁷

Further, there are professional and organisational reasons that may also undergird the existence of an implicit (though admittedly often misplaced) confidence in the veracity of the institutional media. An example of a professional reason would be the rules of verification to which journalists often work, that entails that they are (or should be) unwilling to publish material, even if not legally contentious, until certain standards of proof are met. A notable example of this is the ‘two-source rule’, the idea that a supposed fact should not be printed or broadcast until it comes from two distinct and unrelated sources. And various institutional resources also operate to improve the verifiability of journalists. So, large journalistic institutions often employ people who have expertise in particular areas of politics or international or local affairs on whose knowledge and advice institutional journalists can draw, which contributes to the

²⁶ Dan Barry and others, ‘Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception’ *New York Times* (New York, 11/5/13) <<http://www.nytimes.com/2003/05/11/national/11PAPE.html?ex=1367985600&en=d6f511319c259463&ei=5007&partner=USERLAND>> accessed 26/9/13.

²⁷ Leveson LJ (n 2) vol 1 part C ch 3 4.9 169.

likelihood that institutional journalists get things right; to which institutional structures like compliance regimes, in-house ethical codes²⁸ and corporate legal oversight can also contribute.²⁹ Again, this is a point of which Leveson has taken note.³⁰

These mechanisms have been recognised in other contexts. Rowbottom, for example,³¹ draws on a similar analysis when arguing that there are significant differences between the public speech of institutional journalists and others, and that it is inappropriate to hold non-institutional journalistic speech – casual tweets and the like – to the legal standards traditionally imposed on institutional journalistic public speech. The standards to which Rowbottom refers are those relating to the decisions of whether to prosecute people for breaches of various offences relating to public speech such as contempt and public order, and what sentences should be imposed for such breaches. Prosecuting and strictly sentencing institutional journalists for public order offences or contempt may be appropriate, but it may be inappropriate to treat other public speakers in the same way. This is because the laws relating to public speech were commonly framed with institutional journalists in mind, and such people ought to be held to a higher standard than others due to their ability to rely on the sort of resources, professional training and other expertise identified above. Conversely, the holding of non-journalists to the standards of public speech expected of journalists is unfair, Rowbottom argues, as such people do not have access to these resources. These differences that Rowbottom

²⁸ Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 1) 110.

²⁹ *Id* (n 1) 87 .

³⁰ Leveson LJ (n 2) vol 1 pt C ch3 4.18-4.19 171.

³¹ Jacob Rowbottom, ‘To Rant, Vent and Converse’ (2012) 71 CLJ 355.

observes mesh with the argument currently being advanced, in that they illustrate that we expect more from institutional journalists because we know that they can rely on training, experts, access and a professional culture that ought to contribute to their getting things right. We also know that, on the whole, they are not speaking in a personal capacity, off the cuff, but are speaking within their institutional framework. This is part of the reason why it matters when, despite all this, they get things wrong, but also part of the reason that we afford them a *prima facie* credibility.

The hypothesis is, then, that there is a psychological and sociological assumption that the speech of the institutional media has a *prima facie* credibility, and this is evident from our reactions to such speech. This is a quality that distinguishes the Press from others who speak publicly. Support for this hypothesis is garnered from considering some common responses to journalism, and can be explained in part by the legal, professional and organisational environments in which institutional journalists work. This credibility in public speech contributes to the democratic arguments for special treatment, and thereby is part of the argument as to why special treatment should be afforded to institutional journalists.

Assessability

Yet to some ears, and particularly in the current climate, these claims of credibility for institutional journalism will sound hollow. It seems to conflict with our experience of the world in which it is commonplace to say that journalists often mislead or are selective, and audiences have a wariness of material they consume from the institutional media. Many are sceptical that the product of the ‘mainstream media’ merely perpetuates an

ideological view of the world that fits with its own interests.³² Further, asserting that the media have a *prima facie* credibility conflicts with empirical evidence on the extent to which the public distrust journalists.³³ While none of these arguments refute the assertion that such an expectation of credibility distinguishes Press from other public speech, they do make it important to emphasise that credibility is not the only facet of the reputation of media speech that is relevant to the current discussion.

It is also important to look beyond credibility as doing so draws attention to the fact that there are other aspects of Press speech that are salient in a democracy beyond its credibility. Emphasising the credibility of the Press concentrates attention on the function of the Press as a conduit for information, but other important functions of the Press in a democracy include being a source of opinion and judgment, a source of validation for views, a mouthpiece for grievances, a social glue, a campaigner for causes, and other non-neutral, non-informational and non-didactic activities. This is an important point to make, as it illustrates the existence of at least two distinguishable models of how the Press ought to function in a democracy, models that will be examined in detail in chapter five. This set of activities may be diverse, but consideration of them leads to the recognition of a second feature of the Press important in a democracy relevant to the argument about journalistic difference, but not necessarily predicated on the function of the Press as a means to convey factual information. This feature is the assessability of institutional journalism, assessable because various outlets of the institutional Press have a known reputation. Again, Lord Leveson took notice of this point:

³² Sunstein (n 14) 112/13.

³³ Discussed below, text to n 58.

Professor Baroness Onora O’Neill, who gave the Inquiry her views as a leading expert in the field of public thinking on the role of the media, describes the need for readers to be able to ‘orientate’ themselves in relation to what they read as “assessability”. Mostly, readers know where they stand with what the papers say, and can make their own minds up about it. But not always. Where they cannot do so unaided, more is needed for the press to fulfil its proper role.³⁴

The assessability of the institutional Press is a powerful commodity. It provides the institutional Press with a valuable distinctiveness from other forms of public speech, in addition to its credibility and reach. Readers and viewers assess such speech for themselves using the reputation that is conferred by institutional affiliation as an indicator of credibility or bias based on their knowledge of the stance of the journalistic institution, and this contributes to the democratic function of the Press as a medium for debate. An audience knows what to expect from the *Daily Mail* and the *Guardian*, the BBC and *Al Jazeera*, and knows that the reputations of these institutions are founded on the fact that institutional journalists taking in these outlets do not speak personally, but institutionally, or their personal viewpoint has been selected by an editor to accord with the values of the institution. The reputation of the Press can also confer assessability on individual unknown authors who communicate publicly under the auspices of a journalistic institution, a reputation that they would not otherwise have had, when their material is disseminated under the banner of the institutional media.

Evidence that this feature is important can be gleaned from considering the problems that arise when the assessability of the Press is compromised. Just as the audience can appropriately evaluate the speech of the institutional media, based on its reputation, they can also appropriately evaluate the speech of commercial advertising or

³⁴ Leveson LJ (n 2) vol 1 pt B ch 4 3.8 80; n37 O’Neill’s work is discussed in chapter six text to n 9ff.

lobbying groups, or government, as these people or institutions have a different reputation. When these reputations are obscured, by, for example, others being able to appropriate the reputation of the Press, the audience is misled. This can occur when commercial advertising or lobbying purports to be the product of the institutional media, but is in reality the product of someone else. In these situations, the audience is tricked because the advert or argument clothes itself in the reputation of institutional journalistic speech, and the audience falsely assumes it is the product of the institutional media. They assess it according to the wrong standards, and lose their capacity to use their knowledge of the reputation of institutional journalism and the reputation of advertising to appropriately evaluate speech. This has been emphasised in American literature as particularly important in respect of Government influence on the Press. Baker, for example, makes the point:

The public knows that the press may err, but if there is a “free press” that constitutes a watchdog on government, the public has a right to know that the decisions as to what the press prints under its own name are those of the watchdog and not the watched government. The objections to this use of the media lie most centrally in its destructive impact on democratic discourse.³⁵

And Hitchens provides a quote from the former commissioner of the FCC Adelstein, which articulates the point well:

We have a right to know that the people who present themselves to be independent unbiased experts and reporters are not skills hired to promote a corporate—or governmental – agenda.³⁶

³⁵ C. Edwin Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 Hofstra Law Review 955.

³⁶ Hitchens (n 9) 201, citing JS Adelstein, “Fresh is Not as Fresh as Frozen”: A Response to the Commercialization of American Media’ (Media Institute, Washington DC, 25 May 2005), 8.

But as O’Neill and Gibbons have separately observed,³⁷ such threats to the assessability of Press do not only come from without, but also from within the Press itself. This is because the Press is not infrequently complicit challenges to its assessability. Such complicity arises from a variety of sources, such as undue influence from proprietors, or as a result of commercial imperatives that make cross-platform plugging of commercial assets masquerade as news.³⁸

Evidence that this quality exists, is valuable and worth preserving can be gained from the existence of rules whose purpose is to protect the public’s ability to assess Press speech. One instance of such rules comprises the rules that seek to regulate covert advocacy by those outside the Press. Such regulations particularly relate to the speech of the broadcast media, and examples include various provisions of the Audio Visual Media Standards Directive,³⁹ the Communications Act,⁴⁰ and codes,⁴¹ but also extend to the traditional print Press in the form of administrative provisions such as the register of

³⁷ Thomas Gibbons, ‘Freedom of the Press: Ownership and Editorial Values’ [1992] PL 279), discussed in chapter one text to n 54, chapter five text to n 90, chapter six text to n 13 and n 71 and chapter seven text to n 92; O’Neill’s recommendations for transparency were endorsed by Leveson LJ (n 2) vol 1 pt B ch 4 4.15 87.

³⁸ Indeed, as with forms of censorship, there need not be a relationship of command and response, as anticipation of the desires of a funder of institutional journalism can be sufficient to inhibit or chill independent editorial judgment.

³⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD) art 10 (Sponsorship), 11(Product Placement), 19 (Editorial and advertising content readily distinguishable)

⁴⁰ For example, Communications Act 2003 ss 319 (2)(j) and 319(4)(f).

⁴¹ Ofcom, *Broadcasting Code* (2013) Ofcom, *Broadcasting Code* s 9 (Commercial References in Television Programmes) and s10 (Commercial References in Radio Programmes); BBC, *Editorial Guidelines* (2013) s14 (Editorial Integrity and Independence from External Interests); BBC, *Advertising and Sponsorship Guidelines for BBC Commercial Services* (2013).

journalists' interests, held by Parliament, equivalent to the register of MP's interests. O'Neill and Gibbons argue that these rules should be extended to prevent, in addition, covert advocacy by those within the Press, an attractive prospect, but one that cannot be discussed further here given constraints of space, but one that nevertheless is in accordance with the view being put forward here that the Press have an assessable quality that is an important distinguishing feature and worth attempting to preserve.

Two case studies

Two examples can be highlighted that illustrate what happens when the reputation of the institutional Press is stealthily co-opted by others, both of which have spawned new rules to prevent such a mischief recurring. In both cases the public was either misled or potentially misled, a mischief that was in one case found to be in breach of relevant regulations, and in the other caused regulations to be adopted to prevent such behaviour occurring again in the future. The examples are selected from different jurisdictions to show that the reputation of the Press is a value beyond the UK, and from the commercial sector as well as the BBC to illustrate that this is an issue that isn't just confined to public service broadcasting.

The first example relates to the BBC. In 2009, the BBC broadcast a series of programmes made by an independent production company, FBC Media (UK), which featured material about Malaysia. The *Independent* newspaper investigated the production company, and found that as well as making programmes for the BBC, it had been hired by the Malaysian government to work on a 'Global Strategic Communications Campaign', for which it had been paid by the Malaysian Government about £6 million

pounds in 2009 and 2010.⁴² The relationship between the government and the material broadcast on the BBC was not made evident to the BBC or the audience. Prompted by the *Independent's* investigation, the BBC Trust's Editorial Standards Committee of the BBC Trust investigated the series. They found that 'the BBC has broadcast programmes which may have promoted particular subject matters (or presented them in a certain way) as a result of a production company's financial interests',⁴³ and that 'programmes appeared to be too favourable to certain Malaysian issues and Government policies'. The Committee found that the programmes made by FBC Media were in breach of the BBC's 'Conflict of Interest' guidelines, and such a breach:

went to the heart of the BBC's international reputation and risked undermining the editorial integrity of its output. The BBC should be transparent when accepting financial assistance with programming and should not transmit programmes where there is any suggestion that a conflict of interest might arise.⁴⁴

The mischief here was that the audience was potentially misled as to whether the speech was the product of institutional journalism, with all its associated checks and balances, or whether it was paid-for speech. With sufficient identification the audience can distinguish between the two sorts of speech, but when the commercial masquerades as the institutional, the audience loses the capacity to apply its knowledge of differential reputations and assess the speech accordingly.

⁴² Martin Hickman, 'Special investigation: TV Company Takes Millions from Malaysian Government to make documentaries for BBC... about Malaysia' *Independent* (17/8/13) <<http://www.independent.co.uk/news/media/tv-radio/special-investigation-tv-company-takes-millions-from-malaysian-government-to-make-documentaries-for-bbc-about-malaysia-2338813.html>> accessed 26/9/13

⁴³ BBC Trust, *Funding Arrangements and Sponsorship of Documentary and Feature Programmes on BBC World News (a BBC Commercial Service)* (2011) 4.

⁴⁴ Id 5.

The second example occurred in Australia, and is described by Hitchens. She describes the ‘cash for comment’ affair in Australia, in which various talkback radio hosts received funds to espouse particular views on air, funded either by companies or lobby groups.

The basic pattern of these arrangements was that the presenter would provide favourable publicity, informed commentary, and editorial comment relevant to the interests of the commercial entity, often based upon material supplied by the commercial interest, and related to current public policy issues.⁴⁵

Hitchens records that these arrangements would usually include a provision that ensured that the host would refrain from criticising a particular commercial interest. These arrangements were kept from the radio station for which the hosts worked, and from the audience. This was a problem because, in the words of the Australian Broadcasting Authority:

Talkback radio is an important source of information for many Australians and some talkback presenters are highly influential figures in contemporary Australian society.⁴⁶

The fact that they were paid for espousing certain views but did not inform the public of this was the cause of scandal, and caused an Inquiry. Hitchens reports that this led to new licence conditions being imposed on a licensee, and new radio programme standards imposed on all commercial radio broadcasters obliging them to disclose, amongst other things, commercial agreements, and obliging them to separate programmes and

⁴⁵ Hitchens (n 36) 176, citing Australian Broadcasting Authority, *Commercial Radio Inquiry. Final Report of the Australian Broadcasting Authority* (August 2000).

⁴⁶ Australian Broadcasting Authority, *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into Radio 2UE Sydney Pty Ltd* (February 2000) 24; cited in Hitchens (n 9)

advertisements.⁴⁷ As with the BBC example, the reason for the scandal and the regulations that subsequently came into force was the fact that institutional journalistic reputation was purchased, and the audience not made aware of this fact. ‘Cash for comment’ meant that the audience were unable to distinguish between institutional journalistic opinion and paid-for adverts. The reputation of the institutional media was co-opted for commercial gain, and the audience misled as a result.

Both of these examples relate to broadcasting, but the same point can apply to print and on-line journalism. Paid-for print or online material should be distinguished from editorial material for exactly the reasons being discussed here. If they are not distinguished then the commercial speech can masquerade as the speech of institutional journalism, and readers lose their ability to rely on their knowledge of the reputation of the institutional media to appropriately assess the content that they are reading.

To draw together the threads of this section, it is clear that there are two aspects to the reputation of institutional journalistic speech that need to be considered. The first is the *prima facie* credibility that is afforded to the speech of institutional journalism, and the second is the fact such speech has an assessable reputation which is a tool used by the public to assess public speech. Both of these characteristics are part of what distinguishes institutional journalistic speech from other forms of public speech. When it is appreciated that they contribute to the ability of institutional journalism to perform important tasks in a democracy, what emerges is a case for the special treatment of the Press.

⁴⁷ Hitchens (n 9) 178.

Evaluating one aspect of the effect of the Internet on these claims of difference

Consideration has to be given to the extent to which the Internet has undermined these distinct qualities of institutional journalism. It will be concluded that the claims of distinctness for these qualities have been reduced, but not yet extinguished.

The starting point for consideration of both the credibility and the assessability of the institutional media is to observe that, given one well-known characteristic of the Internet, these qualities of institutional journalistic speech have become all the more important. The characteristic in question is that the Internet facilitates the propagation of anonymous speech, or speech by unfamiliar authors.⁴⁸ The fact that the authors of such speech are anonymous or unfamiliar means it is difficult to make judgments about the credibility and, more generally speaking, the assessability of this Internet speech: it is difficult to tell whether such speech is true or useful. The importance of the institutional Press is that it can confer credibility and assessability to speech that otherwise would be difficult to evaluate, not least because when speech is published under the banner of the institutional Press, the speech of anonymous or unknown individuals attains a *prima facie* credibility and assessability. In this way, the credibility and assessability of the institutional Press still adds value, and still remains a distinct form of public speech in a way that has not been undermined by the Internet. This is an argument that has been made elsewhere. Bazalgette, an eminent British television producer, provides an example of a pithy summary:

⁴⁸ A Vamialis, 'Online defamation: confronting anonymity' (2013) 21 (1) *International Journal of Law and IT* 31; *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB), [2007] All ER (D) 270 Oct; Kevin Rogers, 'Bloggers beware!' (2007) 157 *NLJ* 1718; Andrew Keen, *The Cult of the Amateur* (Rev. edn, Nicholas Brealey 2008); Sunstein (n 14) 70; *Author of a Blog v Times Newspapers* [2009] EWHC 1358 (QB).

The new online world is extraordinarily fragmented, without countless opportunities for us all to peddle our prejudices. Marvellous. But, as this thick gumbo of rumour and paranoia envelopes us, the need for a trusted source of news and information is more critical than at any time in the last hundred years. This, I believe, will become the overriding rationales of the BBC in the future.⁴⁹

While Bazalgette concentrates on the BBC, the argument could be extended to cover the institutional journalism in general; we know where we are if the speech is on the *New York Times* website, or that of *Private Eye*.

This is not to argue that anonymous speech on the Internet cannot prove to be beneficial. The literature on this subject is extensive,⁵⁰ but it is unnecessary to canvass it in detail. Suffice to say that in America there is a long tradition of protecting anonymous speech on the grounds that such speech can be democratically useful, based in part on the view that the dissemination of political truth and comment in anonymous pamphlets assisted the American Revolution, and these arguments are convincing in other contexts. One rationale for such protection is the view that anonymity can permit the communication of important facts and opinions that would not be disseminated if attribution were enforced,⁵¹ and this applies to the Internet as it does in other contexts.⁵²

⁴⁹ Peter Bazalgette, 'Is Plurality Really the Issue?' in Tim Gardam and David A. L. Levy (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008) 81.

⁵⁰ A useful survey of the arguments for and against anonymity (in the context of US law) is Daniel J. Solove, *The Future of Reputation : Gossip, Rumor, and Privacy on the Internet* (Yale University Press 2007) 139- 160.

⁵¹ Attested to, for example in *McIntyre v Ohio Elections Commission* 514 US 334 (1995)(Stevens J) 341-343.

⁵² The position in the UK in relation to anonymous printing was somewhat different, but it is unnecessary to investigate it in detail. Suffice to say that anonymity was not so jealously protected as a virtue, and various statutory provisions have been enacted to prevent anonymous libellous pamphlets: *R v Leadenhall Press Ltd* (1913) 48 L Jo 41 and Newspapers, Printers and Reading Rooms Repeal Act 1869 Sch 2. The issues are discussed in more detail in Eric Barendt, 'Bad News for Bloggers' (2009) 2 *Journal of Media Law* 141.

But to say that the anonymity of the Internet can be of value does not undermine the argument that the distinct credibility and assessability afforded by institutional journalism is an important feature that serves to distinguish it from other forms of public speech. And, indeed, the institutional Press can recognise and extended the beneficial aspects of anonymous speech on the Internet (or wherever) by conferring on such speech a reach and an institutional credibility and assessability that it would not otherwise have. This can be achieved by publishing writing without attribution, a practice that still occurs in publications like *The Economist* and in the leader columns of traditional newspapers, and which used to be prevalent across the industry.⁵³ It also occurs by the process of reporting information, which thereby is conferred with credibility and assessability, from otherwise anonymous sources.⁵⁴ Indeed, this is recognised in the law in the limited protection afforded to whistle-blowers who publish their information in the Press.⁵⁵

However, while it is the case that that the credibility and assessability of the institutional Press remains a viable source of distinctness in the days of the Internet, there are limitations to the argument. There are a number of reasons why this is so. One is that, while the credibility of the institutional media is a variable commodity, many bloggers – Paul Staines, stands out, author of the Guido Fawkes blog – hold up well when their

⁵³The Times London., *The world and the Times : tributes on the occasion of the 150th birthday of the Times and the publication of The history of the Times, vol. I, The Thunderer in the making, 1785-1841*, vol 1 (Printed and published at the office of the Times 1935), is itself an anonymously authored book.

⁵⁴ This is recognized in the law that exists to protect the continued anonymity of journalistic sources, discussed in chapter two text to n 102ff.

⁵⁵ Public Interest Disclosure Act 1998, the provisions of which are complex, but are analyzed in John Bowers, *Whistleblowing: Law and Practice* (2nd edn, Oxford University Press 2007); discussed in chapter five text to n 79.

credibility is compared with the output of institutions of journalism such as the *National Inquirer*. Indeed, Leveson canvassed this point:

Mr Staines also made clear that accuracy was as important to the credibility of a blog site like *Guido Fawkes* as it was for a print newspaper. It is for this reason that the majority of material sourced by Mr Staines was either verifiable or from a trusted source. Only some 10% of material might be from an unknown source.⁵⁶

A claim that the Press is distinct in an Internet age based on its credibility alone is undermined by developments such as this.

Caution is also necessary when considering the future viability of the claim that the institutional Press remain distinct because its speech is assessable given its reputation. This is because the Internet has developed institutions and instruments of its own to permit readers to assess speech. *Wikipedia* is an example of a site that has a reputation of being reasonably reliable comparable to some parts of the institutional media, and superior to many others, despite being largely written by anonymous or unfamiliar authors. Further, the problem of how to assess the credibility and reliability of anonymous or unfamiliar commentators can be addressed by technical means, harnessing the ‘wisdom of the crowds’.⁵⁷ One manifestation of such an approach is found on Amazon’s website, where users of the website can vote to validate customer reviews that have been posted on the site. This ensures that such reviews can be assessed, as those with the highest number of votes attesting to their helpfulness can be seen to be more trustworthy than those that have a low number of votes. Mechanisms such as these can be

⁵⁶ Leveson LJ (n 2) vol 1 pt C ch 3 para 4.14 170. Similar points are made about the *Huffington Post* vol 1 pt C ch 3 para 4.18 – 4.19 171.

⁵⁷ James Surowiecki, *The Wisdom of Crowds : Why the Many are Smarter than the Few* (Abacus 2005) . The point is of greater antiquity, demonstrated by Sunstein (n 14) who at 144 cites Aristotle to the same end: Aristotle, *Politics* (E Barker tr, Oxford University Press 1972) 123.

used more widely across the Internet to create a way of assessing the credibility of anonymous or unfamiliar commentators, and so the assessability of the institutional Press may in time no longer be a factor that distinguishes such speech from other forms of public speech.

A third reason to be wary of over-extending the current argument is because of the empirical evidence that exists on the matter of whether the Press is credible and assessable. Polling evidence does seem to undermine the claim that the Press has credibility,⁵⁸ as even though there remains trust in some institutional journalism,⁵⁹ such trust is ebbing away,⁶⁰ and in contrast, there is a rise in the levels of trust afforded to the Internet as a source of news.⁶¹ Further, the argument that the Press are distinct because of the assessability of its speech will lose force if awareness of the brands of institutional journalism, the quality that provides the basis for the assessability argument, declines in younger audiences and readers.⁶² This might indicate that, in time, younger people may

⁵⁸ Yougov.com, 'Whom do the Public Trust?' (2012) <http://cdn.yougov.com/cumulus_uploads/document/uqjs7uzk48/YG-Archive-Pol-Sun-results-Trust-Results-121112.pdf> accessed 26/9/13

⁵⁹ The most important news sources for UK citizens in a typical week are television (mentioned first by 55%), [...] When asked which news sources they trust the most, UK citizens give the highest ratings to national television (86% a lot or some trust).' Globescan, 'BBC/Reuters/Media Center Poll: Trust in the Media' (3/5/06) <http://www.globescan.com/news_archives/bbcreut.html> accessed 26/9/13; Nic Newman David Levy (eds), *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism 2013) para 3.3 54.

⁶⁰ Peter Kellner, 'The Problem of Trust' (13/11/12) <<http://yougov.co.uk/news/2012/11/13/problem-trust/>> accessed 26/9/13; Nic Newman David Levy (eds) (n 59) para 3.4 61.

⁶¹ Globescan, 'BBC/Reuters/Media Center Poll: Country Profiles' (3/5/06) <http://www.globescan.com/news_archives/bbcreut_country.html> accessed 26/9/13; Nic Newman David Levy (eds) (n 59) 11.

⁶² Though the picture is somewhat complicated, as awareness of branded news sites appears equally high in the 18-24 age group as it is in the 35-44 age group, and further, a clear majority of 18-24 year olds used websites of the institutional media over aggregators, social media and blogs: Alison Preston, 'Demographic Divides: How Different Groups Experience Online News' in Nic Newman and David Levy (eds), *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism 2013) 100 – 101.

grow up without an awareness of the Press' reputation, and so without an ability to assess its speech. Nevertheless, some care needs to be taken when evaluating the conclusions that should be drawn from this evidence. A thorough examination of the empirical evidence is clearly beyond the scope of this thesis – indeed, the very brief overview here is intended to be representative of the issues at play, and makes no claim to being comprehensive – but the evidence presented by empirical studies does appear inconclusive and ambiguous. For example, implications of surveys that indicate the rise of the Internet as an alternative trusted source of news are complicated by the fact that much news on the Internet derives from content produced by the institutional media.⁶³ This may mean that an increase in trust in the Internet as a source of news may not indicate a decrease in trust in institutional media so much as a transfer of trust from one means of delivery of information to another. And so, while it would be wise to recognise that the assessability and credibility of institutional journalism may not always distinguish it from other forms of public speech, and any claim for special treatment that involves relying on these qualities of the media may be extinguished in time, one should be wary of the claim that institutional journalism has yet lost, or will inevitably lose, its distinct credibility and assessability in an Internet age. Until it can be shown relatively unequivocally that this change has taken place, it remains viable to propose that institutional journalism retains these qualities to an extent sufficient to claim that it should be treated differently to other similar activities.

⁶³ Sunstein (n 14) 14-18; Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 1) 82.

Conclusion

The fact that the qualities that serve to distinguish the Press from other forms of Public speech in ways relevant to the provision of special treatment are under threat, even if they still remain viable, is a result of the nature of the argument that the Press are different.

This argument is based on the function of the Press in a democracy, is based on contingent qualities of the Press, and is a consequentialist account.⁶⁴ The function of the institutional Press may change, and, because some of the qualities that distinguish the Press (in particular its reach) are contingent and not necessary, the consequentialist argument that the Press are different (in ways relevant to the affording of special treatment) will be diminished should another activity contribute to democracy in a better way. This may be what is underway now, if novel forms of speech facilitated by the Internet are displacing the Press as the means by which democracy is facilitated in our society, doing more efficiently what the Press used to do. It is worth considering, though, that even if other forms of communication on the Internet supplant the Press, it is likely that another form of public speech will take the place of the institutional Press. It is a reasonable supposition that if the institutions of the journalistic media decline because their distinctive qualities are assaulted by novel ways of communicating, then other institutions may take up the place they once held. Institutional journalists may pass away, but they may well be replaced by something similar, performing a similar function, but called by a different name. This is because it is likely that there will always be a need for some group to undertake the tasks now undertaken by the institutional media,

⁶⁴ Similar observations can be made about the argument for special treatment itself: chapter four text to n 112.

independently, intelligently investigating the state funded by sufficient resources and expertise, and possessing assessable and *prima facie* credible speech. And indeed, any such new institutions may have a claim for special treatment, equivalent to the claim currently made by institutional journalism to such treatment: it is likely that there will always be a need in a democracy for an authoritative and assessable, story-teller, relatively independent of government.

One aspect of why this relates to the provision of information, as it can be questioned whether the Internet will provide socially important information more easily and appropriately than the institutional Press. Bollinger holds it cannot, observing: ‘it is not wise to expect that the gap in our knowledge about what is happening in the world will be filled by these emerging voices on the Internet’ and ‘the press remains the best option we have for fulfilling the critical role of helping us to engage in collective self-governance’.⁶⁵ Sunstein provides an explanation as to why this is so, noting the facility of the Internet for increasing polarisation and isolation, as people seek out views and information that reinforces their world view – he uses the term ‘echo-chamber’ as a shorthand for this process.⁶⁶ This is a phenomenon that has also been observed by Tait:

A free press and a free online environment mean there is scarcely a shortage of opinionated, targeted news and comment for those who do not want their existing world view challenged.⁶⁷

Seaton endorses this argument for the continued distinctness of the institutional Press, arguing that our democracy needs people to put information in context as well as

⁶⁵ Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 1) 89.

⁶⁶ Sunstein (n 14) chapter 3.

⁶⁷ Richard Tait, ‘Impartiality - Why it Must Stay’ in Tim Gardam and David A. L. Levy (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008), 111.

reporting it, needs big organisations to resist the pressure from lobbying and public relations groups, and needs big organisations to make a fuss about things citizens should know, and to communicate them – for ‘“Citizen” journalism is a magnificent democratic tool but it needs situating by people who understand how the world on the ground smells...elite understanding is never a substitute for public knowledge’.⁶⁸ The ability of the institutional Press to achieve these tasks is not least because of its credibility and assessability.

⁶⁸ Jean Seaton, ‘A Diversity of Understanding’ in Tim Gardam and David A. L. Levy (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008), 122, 123.

Chapter 4: An argument for special treatment based on free speech values

The aim of this thesis is to provide an explanation why special treatment of institutional journalism by the law can be appropriate. In chapter one it was described how the arguments against such a course of action include the suggestions that affording the Press such treatment might be impracticable and/or incoherent. Chapter two addressed some of the impracticability arguments. Chapter three began to address the arguments that special treatment may be incoherent by providing a reason to consider that institutional journalism has distinct qualities on which an argument for special treatment can be founded. What chapter three did not do was advance such an argument, though it did indicate that a case for special treatment would be likely to relate to the function of institutional journalism in a democracy. Chapters four and five, taken together, will consider a prominent democracy-based argument for special treatment that can be derived from contemporary discussions of media law. This idea will be shown to be attractive, but its significant deficiencies will be identified. Chapters six and seven will propose another way to explain how special treatment can be appropriate, founded on rights theories, which meet some of these deficiencies.

The free speech values thesis

The contemporary argument for special treatment that answers the charge of incoherence suggests that the provision of special treatment can be justified because of, or to the extent to which, institutional journalism contributes to ‘certain values at the core of our

interest in free speech'.¹ I will call this the free speech values thesis. The argument is based on an idea proposed by Lichtenberg, adopted by Barendt and endorsed by Fenwick and Phillipson.² The significance of its origins, and the two interpretations – 'because of' and 'to the extent to which' – will be explored below. The free speech values thesis provides an answer to many of the incoherence arguments because if special treatment can be justified by reference to the contribution that such treatment makes to the attainment of valuable ends, then there are reasons to think it coherent. In general terms, special protection attaches to journalistic speech that promotes these ends and to the extent to which it promotes these values, and likewise special restriction attaches to journalistic speech that detracts from these ends, and to the extent that it detracts from these values. Conversely, the free speech values thesis provides a reason to withhold special treatment from journalism in many situations where it may be incoherent.

Clearly, to understand the thesis it is of great importance to know what these values are, and how they are promoted by free speech. However, this is a complex area, and providing a brief survey to explain the thesis risks over-simplifying matters. Over-simplification is problematic because it creates a risk of portraying the free speech thesis as being simpler to apply, and hence more attractive, than it is. In practice, as will be discussed later in the chapter, the complexity of free speech values and theories makes applying the thesis particularly tricky, and ultimately – it will be argued – often

¹ An amended version of Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 104.

² Other authors advance proposals which derive from Barendt's idea: for example, Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 73; Perry Keller, *European and international media law : liberal democracy, trade, and the new media* (Oxford University Press 2011) 198.

indeterminate. As such, the free speech values thesis provides an answer to the claim of incoherence that is somewhat unsatisfactory. However, this pre-empts later discussion. One more immediate difficulty that stands in the way of providing even a simple account of free speech values is the fact that the taxonomy of free speech theories is a contested area. The values at the heart of our interest in free speech may be many and varied, or may be resolvable into a single or a few highly significant values. One may side with Lichtenberg, for example, who avers that ‘plurality is not miscellany’,³ or with other authors who take a monistic approach, or who identify only a few core values at the heart of our interest in speech.⁴ Nevertheless, the benefits of providing a simple account outweigh the difficulties, and taking my cue from Raz, who observes, as mentioned in chapter one, that all inquiries start in the middle,⁵ it is sensible to take as a starting point the widely accepted taxonomies adopted by Schauer and Barendt,⁶ as these are often adopted in legal analysis.⁷ The core of Schauer and Barendt’s analysis, amended slightly,

³ Lichtenberg (n 1) 106; a view endorsed, ironically, given that he maintains that Lichtenberg adopts a monistic position on free speech theory, by Lucas A Powe, *The Fourth Estate and the Constitution : Freedom of the Press in America* (University of California Press 1991) 251. Others have a similar view, for example: Joseph Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Rev. edn, Clarendon 1995) 169.

⁴ Alan Haworth, *Free Speech* (Routledge 1998) for example, identifies twin origins of modern free speech protection in Miltonian arguments about expression (n 41) and Lockean tolerance (derived from John Locke, *A Letter Concerning Toleration* (James Tully ed, Hackett Publishing Company Inc 1983)). Dworkin develops an argument that grounds free speech significantly in equality: Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) chapter 17.

⁵ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 288; chapter one n 90.

⁶ Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press 1982) chapters 2, 3, 4 and 5; Barendt, *Freedom of speech* ch 1.

⁷ Examples including Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) chapter 1; Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart 2002) ch 1; Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law and Human Rights* (2nd edn, Oxford University Press 2009) ch 1.

is that democracy, truth, autonomy and self-fulfilment are the main values that theories have suggested are promoted by freedom of speech.

One can now see how the free speech values thesis answers some incoherence questions. For example, providing special access to courts for a court reporter from a newspaper might be justifiable if one evaluates the propriety of special treatment by reference to democracy, should one accept that the Press provides a particular check on misfeasance in court, or is particularly important in disseminating information about the criminal justice system to voters. Conversely, providing a special defence to a libel action for a radio shock jock but denying it to a social scientist might be unjustifiable if one evaluates the propriety of such an instance of special treatment by reference to the extent to which both promote truth. But, despite its attractions, the thesis presents difficulties. Some of these are easily overcome, but others are more significant. I will briefly describe the less troublesome concerns, before devoting the main body of the chapter to discussing the more significant.

Easily surmountable concerns

To explain the more easily surmountable difficulties, one needs to describe the origin of the thesis. The idea originated with Lichtenberg's concern to show how special liabilities can be imposed on the US Press without breaching Press freedom. The liabilities in question included regulations mandating public access to media on the owners of US media outlets.⁸ Lichtenberg proposed that these did not breach Press freedom as 'freedom

⁸ Lichtenberg (n 1) 103-04. Lichtenberg was arguing along the same lines as J Barron, 'Access to the Media - A New First Amendment Right' (1967) 81 Harv L Rev 1641; arguments with which others took issue: Powe, *The Fourth Estate and the Constitution : Freedom of the Press in America* (n 3) 251. In *CBS v DNC* 412 US 94 (1973) the US Supreme Court decided that political groups have no First Amendment right to purchase airtime: discussed *inter alia*, by Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a*

of the press should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally'.⁹ Barendt adopted and developed this insight, applying it to media claims for special benefits when he suggested that '[p]ress claims to special privileges and immunities should only be recognized insofar as they promote the values of freedom of speech'.¹⁰ Fenwick and Phillipson have extended the idea to apply to claims by the media not only for special benefits, but also for all media speech claims, calling this theory the 'variable geometry of media freedom'.¹¹

The first difficulty might arise from the fact that Lichtenberg was concerned with the legal position of the US media, given that there are substantial differences between the US and the UK with respect to freedom of speech. These differences include the fact that US constitutional protection of speech is drafted as an absolute rather than a qualified right, that the protection as drafted makes a distinction between speech and the Press, and that the US case law gives, in practice, stronger protection for free speech than in many other jurisdictions, including the UK.¹² These differences mean that at the least one should be hesitant about importing US approaches to speech and Press freedoms uncritically. However, while pertinent, these considerations should not undermine the

Free Press for a New Century (Oxford University Press 2010) 35. Limited rights of access – a right of reply, for example - exist in UK law, as discussed in chapter two text to n 58, but political advertising is prohibited, as discussed in chapter three text to, and n 8.

⁹ J Lichtenberg, 'Foundations and Limits of Freedom of the Press' in J Lichtenberg (ed) *Democracy and the Mass Media* (Cambridge University Press, 1990) 104.

¹⁰ Barendt, *Freedom of speech* (n 6) 422 – 424.

¹¹ Fenwick and Phillipson (n 7) 26 – 33. Nevertheless, there are particular difficulties with applying the thesis to all speech claims by the media – these are discussed text to nn 95, and 99ff.

¹² Discussed in chapter one, text to n 83, chapter five text to n 21ff, chapter seven text to n 30, and Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005).

application of Lichtenberg's insight as to why the provision of special treatment to institutional journalism may be justified. The free speech values thesis is attractive because, as Barendt notes, 'it fits well with the underlying rationale for extending free speech guarantees to mass media speech: the essential role of the media in disseminating ideas and information to the public',¹³ and this observation does not rely on these contentious features of US free speech thought. The second concern is that Lichtenberg, Barendt and Fenwick and Phillipson, do not provide a specific justification of special rights and liabilities for institutional journalism: Lichtenberg was concerned with justifying the imposition of liabilities on the Press, Barendt the affording of benefits, and Fenwick and Phillipson's interests are wider, including the mapping of the appropriate limits of all media speech and claims for benefits. However, Lichtenberg's approach also, as has been seen, can be extended to provide an explanation as to the merits of affording either liabilities or benefits, in other words special treatment in general, to institutional journalism.

Nonetheless, other more significant difficulties with the free speech values remain, and these will be explored in the rest of the chapter. And, though the consequences of this observation will not be explored in much detail, many of these difficulties also apply to Barendt's use of the thesis to justify the provision of rights to journalism, and Fenwick and Phillipson's use of the thesis to discern (amongst other things) acceptable from unacceptable journalistic speech.

¹³ Barendt, *Freedom of speech* (n 6) 422; these ideas are discussed at length in chapter five.

Distinguishing between the thesis as an act-based or rule-based test

An ambiguity needs to be clarified before the more significant difficulties with the free speech values thesis can be explained. This ambiguity arises because the thesis can be considered as amounting to either an act-based or a rule-based test. Conceived as a rule-based test, the thesis holds that institutional journalism as a class can be provided with special treatment on the grounds that it, as a class, promotes the values at the heart of our interest in free speech. Conceived as an act-based test, the thesis holds that each individual act of journalistic activity needs to be weighted in the balance to see if special treatment is merited, and such treatment is only appropriate if this particular journalistic activity promotes the values at the heart of our interest in free speech.¹⁴ The significant problems that beset the thesis can be divided into three groups based on this distinction: those that pertain to the thesis generally, whether interpreted as an act- or rule-based test, those that only pertain to the thesis when it is interpreted as act-based, and those that only apply to the thesis when it is interpreted as rule-based. I will deal mostly with the problems presented by the thesis in general, and then end with some particular problems specific to the other interpretations.

Problems with the thesis in general, whether interpreted as act- or rule-based

There are at least four problems with the thesis in general, regardless of whether it is interpreted as act- or rule-based: it is indeterminate; incomplete; does not amount to a necessary test; and it is difficult to prevent the thesis collapsing into the harm principle.

¹⁴ The act/rule distinction derives from Schauer, and much of the analysis that follows is based on his evaluation of act- and rule-based free speech theories: Frederick Schauer, 'Who Decides?' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 207. It resembles the well-recognised distinction between ad hoc and definitional balancing, distinct approaches to resolving dilemmas involving free speech: n 62.

The thesis is indeterminate, as it does not clearly mandate which instances of special treatment are appropriate, or whether special treatment is appropriate in many instances.¹⁵ It is incomplete, as it does not encapsulate all the reasons that we consider the affording of special treatment to institutional journalism to be appropriate. It is not necessary, as it does not set out conditions that need to be fulfilled for special treatment to be afforded. The risk of collapsing into the harm principle arises because it is hard to distinguish harm to free speech values from generic harm. This last difficulty means the theory can justify restrictions on the Press that seem excessive. These problems limit the utility of the thesis, but do not vitiate it completely, as it still provides a partial answer to the incoherence arguments. However, they do show why it is worth giving consideration to alternative ways of answering the concerns raised by the incoherence arguments to the proffering of special treatment to institutional journalism.

Indeterminacy

The first problem is that the thesis is indeterminate. This difficulty arises because of the complexity of free speech values. This complexity is somewhat notorious, and Raz has famously observed that ‘freedom of expression is a liberal puzzle’,¹⁶ on the grounds that it is difficult to provide full explanations for the breadth and significance afforded to the doctrine by the liberal tradition. The problem that this raises for the free speech thesis is that such complexity makes it tricky, if not impossible, to apply the thesis in such a way that it will lead to clear conclusions. There are three aspects of complexity I will highlight: first, the hierarchies between the values, second the potential conflict between

¹⁵ Examples are given in chapter five, text following n 94.

¹⁶ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 3) 146.

the values, and third the breadth, ambiguity and potential conflict within the theories that explain how free speech can promote the values. All make the application of the thesis very difficult, to the extent that it becomes indeterminate. As the basis for this discussion it will be remembered that, despite some hesitancy I adopt the taxonomy proposed by Schauer and Barendt,¹⁷ identifying democracy, truth, autonomy and self-fulfilment as the values at the core of our interest in freedom of speech.

Hierarchies between the values

The first complexity becomes evident when one interrogates the taxonomy of free speech values by considering some of the ways in which these values relate to each other or are in tension with each other. One such relationship becomes patent when one considers Raz's distinction between instrumental and intrinsic values.¹⁸ This distinction is based on the recognition that some values are held important primarily because they assist in the achievement of a prior or superior end, while others are valuable not only or substantially because of this facilitation, but significantly because of qualities present in the values themselves. The former are instrumental, the latter intrinsic. Democracy and truth are the more instrumental in Schauer and Barendt's taxonomy, and autonomy and self-fulfilment are more intrinsic. Democracy is the most instrumental value because it is merely a form of political organisation, instrumentally valuable because it facilitates the attainment of more fundamental political values.¹⁹ Such values, cited by various authors in various

¹⁷ Text to n 6.

¹⁸ Raz, *The Morality of Freedom* (n 5) 176 – 180.

¹⁹ The term can also, as Dworkin observes, entail a set of values in itself when read as the constitutional conception of democracy : Ronald Dworkin, *Freedom's Law: the Moral Reading of the American*

relevant contexts, include autonomy,²⁰ wellbeing and autonomously chosen-wellbeing,²¹ and by some accounts, truth.²² Truth is also largely an instrumental value, as bare truth in itself, devoid of context, is seldom of much value: the fact that there are a certain number of blades of grass in my garden is a true fact, but one that is very unlikely to be of much value in and of itself.²³ Autonomy and/or self-fulfilment are more likely to be considered intrinsic, as they are more plausibly foundational in a political philosophy.²⁴

This hierarchy causes a difficulty for the free speech values thesis as it brings in complications with respect to how the thesis is applied. One apparently simple conundrum, but in reality more taxing than it seems, is whether there is any point in considering instrumental values at all, or whether one should rather turn one's attention only to intrinsic values. The simple answer is that promoting an instrumental value can be valuable because it in its turn promotes an intrinsic value, and the benefit that accrues from the promotion of a more fundamental value can transfer to the promotion of an instrumental value. However, this is not the end of the matter. This is because further difficulties arise when one recognises that the question of whether particular instrumental

Constitution (Harvard University Press 1996) 15 – 19. In this sense, however, the term is used as a shorthand for a set of values, many of which are free speech values.

²⁰ Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) Sup Ct rev 245, 254.

²¹ Raz, *The Morality of Freedom* (n 5) 253; Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 3) 114-16, 153-54.

²² '[T]he fundamental rationale of the democratic process is that ... over time ... the true [will] prevail over the false': *R (Animal Defenders International) v Culture Secretary* [2008] UKHL 15, [2004] 1 AC 185 [28] (Lord Bingham).

²³ Additionally the term could refer to a more Platonic concept of Truth, which may be intrinsically valuable in a particular metaphysical scheme or important as a psychological goal. However, space precludes investigating this notion in further depth.

²⁴ Raz, *The Morality of Freedom*(n 5) ch 15; Trevor R S Allan, *Constitutional Justice: a Liberal Theory of the Rule of Law* (Oxford University Press 2001) ch 9.

values do indeed promote intrinsic values is contested. So, by way of a very brief illustration, Williams challenges any linkage of truth and fulfilment with Nietzsche's aphorism that: '[t]here is no pre-established harmony between the furthering of truth and the well-being of humanity'.²⁵ Williams also observes that the relationship between truth and democracy is complex,²⁶ and both Nietzsche²⁷ and Mill,²⁸ for example, are sceptical of the link between democracy and human fulfilment. Hence it is not certain that promoting an instrumental value will necessarily promote an intrinsic one. Now one can appreciate how applying the free speech values thesis is difficult. Does one need to resolve these philosophical debates, or at least take a defensible view on their merits, to be able to apply the free speech values thesis and determine which instances of special treatment are appropriate?

There are other complex questions. For example, how should one resolve the dilemma that arises when special treatment contributes to an instrumental value, but at the cost to an intrinsic value? Should the benefit be discounted that accrues to the instrumental value, because of the damage to the more fundamental value? It seems unsatisfactory to resolve this dilemma merely by recognising the intrinsic value of autonomy, for example, as trouncing the instrumental value of democracy. A practical example of this dilemma might occur when journalistic investigations or news reports

²⁵ Friedrich Nietzsche, *Human, All Too Human* (Marion Faber tr, Penguin 1994) s517; discussed in Bernard Williams, *Truth and Truthfulness: an Essay in Genealogy* (Princeton University Press 2002) 15. This translation is Williams'.

²⁶ Williams (n 25) 211

²⁷ 'The democratization of Europe is conducive to the production of a type prepared for slavery in the finest sense.' Friedrich Nietzsche, *Beyond Good and Evil* (R J Hollingdale tr, Penguin 1990) s 242.

²⁸ '...governments ...make themselves the organ ... of the masses ... that is to say, collective mediocrity.' John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1985) 131.

invade the privacy and damage the autonomy of public figures, but for the purpose of contributing to democratic debate. This frequently happens in political scandals. It would have occurred, for example, had a newspaper discovered that Prime Minister John Major was having an affair with his minister Edwina Currie at the same time as his government was advocating the merits of traditional family structures, which necessarily precludes extra-marital affairs. It seems unsatisfactory to prohibit the investigation and publication of the fact of the affair on the grounds that the autonomy of a political figure is an intrinsic value, and more regard should be paid to it than to the instrumental value of democracy. It is true this dilemma might be addressed, and free speech values interpreted to permit the free speech values thesis to sanction such news reports, by construing the news reports as compromising the autonomy of public figures in ways that promotes the autonomy of individuals, on the grounds that democracy is some sort of proxy for the autonomy of members of the public. But this is in turn problematical. It replaces the conflict of an instrumental value with an intrinsic value, with a conflict between two instances of the same intrinsic value, and one now has to resolve which of the two instances of the intrinsic value should be preferred. Further, or in any event, it is – as I have indicated – a somewhat controversial argument that democracy is a proxy for autonomy.²⁹ A satisfactory resolution of problems such as this may indeed be possible, and indeed the law frequently attempts to provide such resolutions, but they cannot be clearly achieved from the application of the free speech values thesis itself, without

²⁹ For example, it is challenged on occasion by Popper: ‘[T]he theory of democracy is not based upon the principle that the majority should rule; rather, the various equalitarian methods of democratic control... are to be considered as no more than well-tried and... reasonably effective institutional safeguards against tyranny.’ Karl R. Popper, *The Open Society and its Enemies* (Routledge 2003), 133.

substantial further argument. Hence, the complex relationship between free speech values can be seen to pose difficulties for the application of the free speech values thesis.

Conflict between the values

A second area of difficulty arises from the fact that the values can conflict, as application of the thesis by itself does not lead to determinate conclusions as to the propriety of special treatment where the values on which it is based conflict. An important example of such a conflict for media law is the tension between autonomy and other values. This conflict is frequently resolved against autonomy, in that special treatment is often afforded (or imposed) that promotes other values but detracts from elements of autonomy. This is not a wrong outcome *per se*, but it raises a problem for the free speech values thesis because the thesis provides no sufficient explanation, in itself, why this outcome is appropriate.

This can be seen in relation to the question of the difference between what is interesting to the public and what is in the public interest.³⁰ It is often taken as a given when determining, for example, dilemmas about whether a particular instance of speech should be protected or not, that the test of what is interesting to the public is less important than the test of what is in the public interest.³¹ Such a view is undoubtedly attractive, but it assumes a certain position with regard to the tension between free speech

³⁰ '[T]here is a wide difference between what is interesting to the public and what is in the public interest to make known' *British Steel v Granada Television Ltd* [1981] AC 1096 HL , 1168 (Lord Wilberforce). The difference is central to ECtHR jurisprudence: chapter two text to n 88.

³¹ '[T]he public are interested in many private matters which are no real concerns of theirs and which the public have no pressing need to know' *Lion Laboratories v Evans* [1985] QB 526 (Stephenson LJ) 537; *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB) [2] [48]; Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012) vol 4 app 4 para 3.102 1883.

values. In particular, it assumes that the audience's autonomy, expressed in their choice of what to see, hear or read, is not determinative, and in these circumstances other values are of greater importance. However, this position is unsupported by the free speech values thesis alone, as the thesis does not tell us how to deal with conflicts that arise between the values. In the present situation, it doesn't tell us how to deal with the conflict between audience autonomy (expressed in the audience's choice as to what to see or read), and other non-autonomy free speech values. Indeed, the free speech values thesis can be interpreted both to argue that what is interesting to the public should be determinative, and that what is in the public interest should be determinative. For, if the free speech values thesis prioritises the value of autonomy, at least as far as it is exemplified in the expressed preferences of the audience in regards of what they'd like to consume, over other values, then the thesis would justify affording special treatment to institutional journalism when it publishes matters that are interesting to the public. However, if the thesis prioritises other values, perhaps, for example, the health of democratic discourse, or even truth, it would not justify affording special treatment to institutional journalism in these circumstances, the public interest being determined by the extent to which the speech promoted the other, non-autonomy-based free speech values. Evidently one needs to resolve the conflict between autonomy and other free speech values prior to the application of the thesis in order to arrive at a conclusion about how to resolve this dilemma. Such resolution may be possible – it may be the result of examining what autonomy entails and where its legitimate boundaries lie, or of establishing a hierarchy of values, or it may take other forms – but whatever form it takes, without such prior resolution the thesis leads to indeterminate conclusions.

A second area where the conflict between autonomy and other free speech values is evident is in respect of broadcast regulation. Here tension between the autonomy of audience members and their self-fulfilment is resolved in ways that hold autonomy not to be determinative. This is evident in content regulations that implicitly discount the centrality of autonomous choices of the audience about what they should consume, preferring to disregard, or seek to alter, or attempt to change these preferences. Such regulations include quotas setting a minimum amount of nationally produced material,³² or policies aimed at educating and informing, even if the audience would not choose to watch nationally produced material,³³ or don't want to be educated or informed.³⁴ Yet it is not clear from the free speech values thesis alone why audience autonomy should be discounted to the extent that it is, and why such regulations are appropriate.³⁵ Indeed, as was the case in relation to the conflict between matters of public interest and matters interesting to the public, the free speech values thesis can provide the basis for both for

³² Chapter two text to n 61.

³³ This is not to say that none of the audience would choose to read or view this material, just that at least some would not choose to watch it. Indeed, rejecting such quotas and providing only commercially mandated material may also detrimentally affect the autonomy of those in the audience who would choose to watch or read such material, as leaving the choice of material solely to the market risks encouraging 'common denominator' material: Lesley Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing 2006), 252-260; Jackie Harrison and Lorna Woods, *European broadcasting law and policy* (Cambridge University Press 2007) 257; chapter one text to n 98.

³⁴ This is a significant problem in news and current affairs broadcasting, for as Gardam has observed: 'In moving from analogue to digital television, we have moved from a distribution economy to an attention economy [...] In the internet world, public institutions cannot presume any more to impose themselves upon citizens and demand their attention'. Tim Gardam, 'The Purpose of Plurality' in Tim Gardam and David A. L. Levy (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008) 21.

³⁵ It is important to distinguish this argument from the related, but more frequently identified argument to a similar end that suggests the Press should be permitted to pursue commercial imperatives when choosing what material to disseminate, and in what way. That argument is based on the commercial interests of the Press, and on the consequent viability of the Press as a going concern which may be of benefit to democracy (discussed above chapter two, text to and n 124). The present argument relies, in contrast, on the autonomy of the audience as expressed in their choices as to what to read or view.

an argument that autonomy should be discounted, and an argument that it should not. Hence the thesis both provides a mandate for broadcast regulation that restricts individuals' autonomy (expressed in their viewing or reading choices), and an argument that such regulation is an inappropriate instance of special treatment. Again, it can be seen that conflict between the values leads to problems of indeterminacy for the free speech values thesis.³⁶

Complexity of theories of free speech

The third area of difficulty for the application of the free speech values thesis arises from the complexity within the free speech values theories. At the least, one must be very wary of using incomplete précis of these theories when considering how to apply the thesis. But more often than not, the complexity of these theories makes it difficult to discern whether special treatment does indeed contribute to the attainment of free speech values. The next chapter will discuss this at length with reference to the free speech value of democracy, such extensive attention being appropriate given the importance of the democratic theories to media law in general, and the argument for special treatment in particular. Here, however, the point can be illustrated in shorter form by reference to the arguments relating free speech to truth.

The essential point in relation to truth is that it is simplistic to say that the free speech values thesis can be applied with reference to the value of truth, by holding that when journalistic activity does not contribute to truth, it should fail to be afforded special

³⁶ This tension between autonomy and other political values, that leads to indeterminacy as to the appropriateness of special treatment, will also be noted in respect of the Razian argument discussed in chapter seven text to n 78.

treatment. Such an error arises if one holds the theory of the relationship between truth and free speech to be essentially that truth is most likely to emerge from free and uninhibited discussion and debate.³⁷ In reality the relationship between truth and free speech is much more complex, and this makes the application of the free speech thesis more complex. I will have to provide a short account of some of the theories that explain how free speech can promote truth to illustrate this.

Truth-related theories of free speech

There are at least three classes of argument that link free speech to truth. The first two are often conflated and ascribed to JS Mill.³⁸ This conflation is an error, not least because Mill does not endorse the first argument, which is better attributed to Milton. The third is most often ascribed to Oliver Wendell-Holmes,³⁹ and bears the name ‘the marketplace of ideas’ theory, even though Holmes J did not coin that phrase. This formulation of the argument has found particular favour with the American judiciary.⁴⁰

The first argument is that truth is most likely to emerge from free debate. This is the argument often ascribed to Mill, but it is not one on which his argument relies to any great extent. It is an argument better attributed to Milton, who wrote: ‘[I]et [truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open

³⁷ Fenwick and Phillipson (n 7) 14; Oster (n 2) 70.

³⁸ Mill (n 28). Indeed, it is not clear that Mill’s argument is, as is commonly assumed, that free speech is an exception to the harm principle, or is even fundamentally about truth, as freedom of speech for Mill, even if in the short term harmful, has long-term beneficial consequences for human development. Indeed, on occasion Mill seems to suggest that liberty itself is an instrumental good as it maximises diversity (below, n 57). This increases the complication for any application of the free speech values thesis that attempts to found special treatment based on Mill’s theories.

³⁹ An origin being his dissenting judgment in *Abrams v US* 250 US 616 (1919), 630.

⁴⁰ C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) 7-12.

encounter?’⁴¹ Mill’s support for this view is at the least tentative, as he thought it ‘a piece of idle sentimentality’ that truth will necessarily prevail against the ‘dungeon and the stake’, and the highest he put it was: ‘...when an opinion is true, it may be extinguished once... but in the course of ages there will generally be found persons to rediscover it’.⁴² Mill’s case, which I will call the second truth argument, is more complex, and is better considered to be part of a larger argument that involves the relationship of free expression to self-fulfilment and autonomy. It is based on three distinct scenarios, each of which provides reasons why one should permit free speech. (Although as Haworth notes,⁴³ and indeed Mill implicitly acknowledges⁴⁴ Milton had already expressed many of his arguments.⁴⁵) First, he assumes the speech that might be suppressed is likely to be true. Second, he assumes the suppressed speech may be false. Third, he assumes the speech may be truth mixed with falsity. Under each assumption, suppression of speech is wrong. Suppression of speech in the first class is wrong, he argues, because it rests on an ‘assumption of infallibility’. History provides many examples of suppressions that were thought obviously justified at the time but have since been shown to be erroneous, and so it is clear that only by permitting speech that may be false can we be sure that we are not committing the same error. Permitting our opinions to be disproved is the only way we

⁴¹ John Milton, *Areopagitica: and Other Political Writings of John Milton* (Liberty Fund 1999) 45.

⁴² Mill (n 28) 90; this interpretation of Mill is shared by Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 8) 46.

⁴³ Haworth (n 4) ch 7 and app.

⁴⁴ Mill (n 28) 75.

⁴⁵ Milton (n 41).

can have ‘any rational assurance of being right,’⁴⁶ because only then can we be sure that ‘we have neglected nothing that could give the truth a chance of reaching us’.⁴⁷

Suppression of speech in the second class is wrong, he argues, because proving it to be wrong is of benefit by virtue of, as Haworth describes it, ‘mental gymnastics’.⁴⁸ One’s intellectual life is developed by engagement with falsity. It is also the case that unless you can prove and argue that your position is correct in the face of falsity, your position is less knowledge so much as ‘dead dogma’.⁴⁹ As for the third position, suppressing truth mixed with falsity suppresses, by definition, some truth, which is to be deprecated.

Many writers have challenged Mill. Those who doubt the objective nature of truth and our capacity to know it will obviously find fault in his argument. But even if one is not suspicious of there being some meaning to the concept of objective truth in some language games, there are still reasons to be wary of Mill. A substantial criticism observes that Mill has failed to explain why reasonable and rational restrictions on speech that bring about good results, but which are not necessarily assumptions of infallibility, should be forbidden. One may censor the expression of a view not because one believes it to be wrong, but rather because it may cause substantial and undesired damage. But to some extent Mill has a reply to this, asserting that the calculation that the

⁴⁶ Mill (n 28) 79.

⁴⁷ Id (n 28) 81.

⁴⁸ Id (n 28) 95; Haworth (n 4) 128.

⁴⁹ Id (n 28) 97; Milton (n 41) makes a similar point 28-29.

restriction will bring about good results is itself an assumption of infallibility, but it is beyond the scope of this work to describe these and other arguments in full.⁵⁰

Some of the criticisms of Mill are resolved by the ‘marketplace of ideas’ thesis of Oliver Wendell-Holmes: ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.’⁵¹ But this argument presents its own difficulties. A significant problem is that even if the metaphor of the market is accurate, which is not obviously the case, it ignores the observation that many markets need regulating when there are players with disproportionate power. The market in information is one such example, as institutional structures, both commercial and political, pay vast amounts of money to persuade people of the validity of a certain world-view.⁵² Schauer observes that an answer to these criticisms may be the adoption of the consensus theory of truth,⁵³ but as he recognises, at the very least such a theory is controversial.⁵⁴ A more fundamental problem, though, may be that, as Williams observes, even in:

[i]nstitutions that are expressly dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated. People cannot come in from outside, speak when they feel like it, make endless, irrelevant or insulting interventions.⁵⁵

⁵⁰ Mill (n 28) 82. Fuller criticisms of Mill can be found in Haworth (n 4) part 1 and Baker, *Human Liberty and Freedom of Speech* (n 40) chs 1 and 2.

⁵¹ N 39.

⁵² Barendt, *Freedom of speech* (n 6) 12-13; Williams (n 25) 213 - 219.

⁵³ Schauer, *Free Speech: a Philosophical Enquiry* (n 6) 19.

⁵⁴ Susan Haack, *Philosophy of Logics* (Cambridge University Press 1978) ch 7, has a taxonomy of at least five different theories of truth current in philosophy, none of which include the consensus theory, viz: coherence, pragmatic, semantic, correspondence and redundancy.

⁵⁵ Williams (n 25) 217.

Others have re-cast the Holmes's view away from its pursuit of truth, and linked it to other desired ends. In the view of Blasi, the insight in Holmes J's account of the value of freedom of expression is that it contributes to the provision of a diversity of views. Diversity is in itself, irrespective of the content of the views, *prima facie* of value.⁵⁶ Mill made similar arguments,⁵⁷ and his critic Stephen eloquently pointed out their limitations:

‘Though goodness is various, variety is not of itself good... A nation in which everybody was sober would be a happier, better and more progressive, though a less diversified, nation than one in which half the members were sober and the other half habitual drunkards.’⁵⁸

Using truth as a reference for the free speech values thesis

The complexity of truth theories causes problems for the application of the free speech values thesis, because such complexity makes it difficult to determine the propriety of an instance of special treatment. Take, as an example, the question of whether an article that denies that man-made climate change is a real phenomenon should be afforded a particular instance of beneficial special treatment that permits it to be published. For the sake of argument, let us assume that man-made climate change is indeed a real phenomenon. Consideration reveals that different aspects of the truth theories of free speech leads to different conclusions as to whether this instance of special treatment should be afforded or not. If one takes the first, Miltonian, truth theory as a basis of an

⁵⁶ Blasi 548.

⁵⁷ Mill (n 28) 111. Mill chooses as his epigram *On Liberty* a maxim that emphasises: ‘[t]he grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.’ (57, citing Wilhelm Humboldt, *The Sphere and Duties of Government* (Joseph Coulthard tr, Chapman 1854), translation Mill's own).

⁵⁸ James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Cambridge University Press 1967) 80 cited in Gertrude Himmelfarb's introduction to Mill (n 28) 39-40.

evaluation of the propriety of the article, one would be led to the conclusion that it was appropriate for special treatment to be afforded for the article on the grounds that unrestrained debate contributes to the attainment of truth, and restraining the article inhibits the attainment of truth. However, if one agreed with Mill that this view of the relationship between free expression and truth is overly optimistic, one might on these grounds deny the article the special treatment in question. If, instead of the Miltonian theory about the relationship between truth and free speech one took cognisance of Mill's argument about mental gymnastics, then once again we might afford the article in question special treatment on the grounds that in not conferring special treatment we risk making climate change a dead dogma. However, one might agree with some of Mill's critics, notably Howarth, that the mental gymnastics theory is unconvincing outside of certain contexts, and it only holds good in situations where discussants share the same aspirations to develop themselves mentally. It does not hold true where speech is uttered for political propaganda, or people approach debate in bad faith, or have fixed ideas.⁵⁹ One might hold that this is the case in relation to the debate about climate change, and on these grounds withhold special treatment. But, alternatively, instead of the mental gymnastics argument, one might rely on Mill's argument about assumptions of infallibility, and afford special treatment to the article denying climate change on the grounds that we should be wary about how rational we are in our assurance about being correct in withholding special treatment. But this argument, too, can be challenged, as has been described above.

⁵⁹ Haworth (n 4) ch 2, 3.

Thus it can be seen how the free speech values thesis, when applied with reference to truth theories, can both mandate and reject special treatment, because of the complexity of the theories that explain the relationship between free speech and truth. This complexity makes the free speech values thesis indeterminate in application, as it becomes difficult to determine what instances of special treatment are appropriate, and whether special treatment itself is appropriate, without first resolving these doubts and debates about how best to conceive the relationship between free speech and truth. Here, this weakness of the free speech values thesis was argued in respect of theories that explain free speech with reference to truth, but the point holds true for other theories. The next chapter, as has been mentioned, will demonstrate it to be the case in respect of democracy theories of free speech, and will show one aspect of how the complexity of the theories that explain free speech with reference to democracy lead to similar indeterminacy as to complicate whether special treatment is appropriate, and which instances are appropriate.

The thesis does not provide a complete test

The second problem is that of incompleteness. The issue here is that there appear to be other considerations involved in the decision to afford special treatment that the thesis does not capture. This can be appreciated when one considers two points: first, that both act-based and rule-based interpretations of the thesis are incomplete, and second how the thesis is too strict, broad or vague to be complete in itself in a variety of possible interpretations. One needs to look beyond the thesis in each case to establish the propriety of instances of special treatment.

Incompleteness of acts and rules

The first point is that the thesis, whether it is conceived as a rule-based or act-based test, fails to encapsulate the full extent of our views as to the propriety of affording special treatment to institutional journalists. Of the two, the flaws of a rule-based approach are somewhat easier to see: a rule-based interpretation of the thesis seems to fall into the trap of over-protecting institutional journalism, or at least of being too ready to afford it special treatment. This is because a rule-based interpretation of the thesis would protect journalism in general, and so, for example, provide special rights to reprehensible journalism in particular.⁶⁰ This, of course, is the mischief that the incoherence arguments complain about: how can the provision of special treatment to dubious institutional journalists to visit prisoners for the purposes of investigating miscarriages of justice, for example, be appropriate when it is denied to someone such as Solzhenitsyn?⁶¹ At the least, it appears a rule-based approach incompletely encapsulates the range of situations when we feel special treatment is and is not appropriate.

A similar concern also affects the act-based interpretation, but for the opposite reason. This is somewhat less patent, but remains a problem.⁶² The problem here is that an act based interpretation leads to the risk of under-protecting journalism, as each individual judgment about whether or not to afford special treatment to institutional

⁶⁰ It would also risk imposing inappropriate special liabilities. The examples in the discussion that follows emphasize the problems of affording special rights to the institutional Press in the situations described, but equally there are equivalent problems in imposing inappropriate liabilities on the Press.

⁶¹ Chapter one n 76.

⁶² Concerns similar to those raised by act-based interpretations are similar to those of ad-hoc balancing of speech set out, for example, in Melville Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 California Law Review 935, 940, and summarised in Frederick Schauer, 'Towards an institutional first amendment' (2005) 89 Minneapolis Law Review 1256, 1267-68.

journalism might not take account of the wider picture of the value in affording journalism in general with special treatment. One can refuse to permit an institutional journalist access to visit a prisoner because one doubts the motives of that particular journalist, but even if appropriate in these particular circumstances, such a decision may lay an undesirable precedent, may overlook the benefits that may accrue from permitting journalists in general the ability to visit prisons, and may dissuade other meritorious complaints from being raised or investigated. And this is leaving aside the point that the decision not to provide special treatment may not be appropriate after all, as this particular decision, like all act-based decisions, bears a risk of error pursuant on the vagaries of the particular tribunal seized with deciding a matter. These sorts of concern have been recognised judicially.⁶³ Again, the point is that an act-based interpretation of the thesis fails fully to encapsulate the range of situations when we feel special treatment is appropriate.

There are, in addition, other matters specific to the rule-based and act-based thesis that will be canvassed later, but at this stage it is sufficient to note how each reading of the thesis presents difficulties. Such concerns aren't, of course, fatal to the thesis. Nor are they problems particular to the free speech values thesis for, as Schauer observes, they are inherent in many act-and rule-based doctrines. Rule-based approaches will always over-protect, because an undesirable result will arise on some occasions where the rule is followed. Legal professional privilege, for example, is recognised as a rule because of the benefits that arise from such a doctrine in general, irrespective of the fact that it might

⁶³ *Hunt v Times Newspapers Ltd* [2012] EWHC 1220 (QB) [14] (Eady J)

protect indefensible speech between, for example, a mafia don and his lawyer.⁶⁴ And act-based approaches, by contrast, risk under-protecting, a view emphasised by the maxim that hard cases make bad law. This is because there are significant risks in deciding a case merely on the perception of merits of the acts involved, without paying sufficient regard to a rule that may emerge from such a decision. However even if this lack of completeness is a facet of a wider phenomenon, and even if it is not fatal to the thesis, that does not undermine the conclusion that the thesis is incomplete as it does not encapsulate the entirety of our views about the appropriateness of providing special treatment to institutional journalists.

Different interpretations of the thesis all lead to unpalatable conclusions

The second point reinforces this conclusion. The problem here is that the thesis (whether act- or rule-based) is too vague, too strict or too lenient to afford a complete account of why special treatment may be appropriate, and we need to look beyond it to resolve the question of whether special treatment is appropriate.

One needs to consider the potential ways the thesis can be interpreted to see that this is so. The first consideration is whether the thesis entails that special treatment is proffered to institutional journalism if but only if journalism can be demonstrated to contribute to particular values of free speech, or whether, by contrast, special treatment can additionally be merited on other occasions. If the thesis is interpreted as holding that journalism is protected if, but not only if, such activity contributes to free speech values, it evidently does not propose a complete test. This is because, on this interpretation, there

⁶⁴ Raz, *The Morality of Freedom* (n 5) 179.

are other situations when special treatment may be merited. Of course, this is not the only way that the thesis can be interpreted. It may be read as holding that special treatment is appropriate only when the conditions set out in the thesis are met. In other words, special treatment is appropriate if, and only if, such activity promotes the values at the heart of our interest in free speech. When interpreted in this way the thesis might be thought complete, but still it is not. To show this, one must first parse out some further ambiguities.

There are two elements involved in this parsing. The first is the question of the connection between journalism and free speech values. The thesis described holds that special treatment is appropriate if free speech values are promoted by institutional journalism, but this can be flipped around: it can be argued that special treatment might be appropriate if free speech values are not damaged by institutional journalism. The promotion of free speech values may provide a rationale for the provision of beneficial special treatment, but special treatment that imposes liabilities may be more appropriate when free speech values are harmed by institutional journalism. The second element involves asking about the extent to which free speech values are promoted (or detracted from) by institutional journalism. There are three essential options: institutional journalism can promote or detract from all the free speech values, some of them, or at least one of them. Combining these two elements, one can arrive at six different interpretations of the free speech values thesis.

- 1) Special treatment is appropriate if and only if there is a contribution to all free speech values

- 2) Special treatment is appropriate if and only if there is a contribution to some free speech values
- 3) Special treatment is appropriate if and only if there is a contribution to at least one free speech value.
- 4) Special treatment is appropriate unless there is detriment to all free speech values
- 5) Special treatment is appropriate unless there is detriment to some free speech values
- 6) Special treatment is appropriate unless there is detriment to at least one free speech value.

Consideration shows how in each case, the thesis incompletely accounts for the reasons why one provides special treatment to institutional journalism. I will take each interpretation in turn, referring to them by their number. I will mainly consider beneficial special treatment in the discussion that follows, rather than special treatment that imposes liabilities on the Press, for ease of explanation, but the arguments can be seen to transfer (with suitable alterations) to either category of special treatment.

If the thesis is interpreted in meaning ‘1’, as holding that institutional journalism is protected if and only if such activity contributes to all free speech values, then the thesis results in a threshold too high for much, if any, institutional journalism to achieve. Indeed, hardly any speech of any sort will be capable of surmounting the hurdle of contributing to all free speech values, let alone journalistic activity. If this is how the free speech values thesis is to be construed, then it is likely to exclude from special treatment a large swathe of material that one might otherwise wish to be afforded such treatment: it could exclude, for example protections in libel for defamatory reports about allegedly

corrupt politicians, on the grounds that such reports detract from the autonomy of the politician in question. To find out what material should be included, and what excluded, we have to look beyond the thesis, hence it is incomplete.

If one takes the thesis as the meaning '2' suggests it should be taken, this does not advance matters. True, '2' is more attractive than meaning '1', as the stringency has been lessened, and more journalistic activity capable of being afforded special treatment. However, the problem now is that the thesis is too vague, as it is not clear how many speech values and which values are required to be contributed to merit journalism being afforded special treatment. Of course, it may not be too difficult to establish what these are, but to do so one needs to look beyond the thesis itself, and if one has to look beyond the thesis, one must again concede that it is incomplete by itself.

Descending the scale of stringency one more notch to meaning '3', one might hold that special treatment is appropriate if and only if such activity contributes to at least one free speech value. This seems to resolve some difficulties of vagueness and stringency, but this time the problems are on the other side, as such an interpretation is overly broad. The diversity of conduct that might promote at least one free speech value is so wide that now the problem is that too much journalistic speech would be afforded special treatment. It might merit, for example, special protection for the intrusive reporting of a hospitalised celebrity on the grounds that this promotes the audience's autonomy, at least conceived with reference to the audience's desire to read such reports, evidenced by their purchasing of the newspapers that contain it.⁶⁵ As this lets too much in, we must look outside the thesis to discern when special treatment is appropriate. If we

⁶⁵ *Kaye v Robertson* [1991] FSR 62.

look outside the thesis, again we must accept that it does not provide us with a full set of criteria against which to judge the propriety of affording special treatment to institutional journalism.

Concentration so far has been on interpreting the thesis as determining special treatment by reference to whether institutional journalism contributes to free speech values. The approach, reflected in meanings 4, 5 and 6, is to evaluate the extent to which harm is caused to such values. Unfortunately, these interpretations are no more complete than meanings 1, 2 and 3. Meaning '4' considers the thesis to hold that special treatment is acceptable if but only if institutional journalism does not harm all free speech values. This, as was the case with meaning '3' is too lax, for hardly any journalistic activity will now escape special treatment, and too much material will be afforded special treatment, as not much journalism could be said to harm *all* free speech values. To determine which should and should not be treated specially, we need to look beyond the thesis.

Meaning '5', which holds special treatment appropriate when some free speech values are harmed resembles meaning '2'. As was the case with meaning 2, meaning 5 is too vague to be useful. Again, we need to look beyond the thesis to find out when special treatment is appropriate. This leaves meaning '6'. The problem here will have become evident. Affording special treatment to journalism save where at least one free speech value is harmed is as restrictive as meaning '1'. That is because it will entail that harming at least one free speech value will become a sufficient condition for the withholding of special treatment. Yet such a result is unsatisfactory, as we may wish to afford beneficial special treatment, for example, to some journalism that impairs one or some free speech values: one might legitimately wish to permit reporting of a scandal of serious public

import in Parliament, even though such reporting damages the autonomy of an MP at the centre of the scandal.

The thesis, then, under each of these interpretations, is incomplete as it does not encapsulate all the reasons that we consider it appropriate to afford special treatment to institutional journalism.

The thesis does not amount to a necessary test

The third criticism of the thesis is related to its incompleteness, and is the observation that the thesis does not amount to a necessary test for the provision of special treatment to institutional journalism. To be a necessary test, the thesis would set out conditions that would have to be met for there to be special treatment, even if there were additional tests to be satisfied beyond the thesis. Yet there are circumstances when the conditions set out in the thesis are not satisfied, in that institutional journalism can not be shown to contribute to free speech values, but where one might still appropriately afford special treatment to institutional journalists. This can be illustrated with three examples of arguments for special treatment derived from three non-consequentialist accounts for why speech should be free: scepticism of the state, the frequent ineffectiveness of suppression, and deontology. In each case, the point is not that one needs to be convinced of the need to provide special treatment on these grounds, but rather that one recognises the plausibility of the arguments – as if it is conceded that each argument provides plausible grounds for special treatment, then the free speech thesis is unlikely to provide a necessary test for special treatment. However, these arguments need to be defended against the charge that they fail to establish the free speech values thesis as deficient, because deeper analysis reveals that in each case we do ultimately permit free speech – or

grant special treatment –to promote free speech values. But on reflexion this charge can be dismissed, for while it is true as far as it goes, it does not lead to such a conclusion.

The lack of necessity of the thesis presents a problem in relation to the extent to which the thesis answers the incoherence arguments. The thesis explains that providing special treatment is not incoherent if such treatment is afforded when institutional journalism contributes to free speech values. Yet if, as will be argued, the thesis is not necessary, then special treatment may be afforded to the institutional Press even when it does not contribute to free speech values. If this is so, then the charge of incoherence is not fully answered, and we still need to find an explanation as to why special treatment can be appropriate in such circumstances. As has been mentioned, this is a task that will be taken up in chapters six to eight.

Scepticism of the state

The first reason why one might provide special treatment to institutional journalism even though it does not contribute to free speech values is because we may be sceptical of the state. Such scepticism is widely recognised in the literature as providing a rationale for free speech, and it is from these that the argument for special treatment can be derived. The scepticism of the state arguments for free speech include Schauer's observation that society should be wary of censorship by governments, because governments have interests in circumscribing speech and are therefore partial and unreliable judges.⁶⁶ This is particularly true of political speech, and history illustrates that they have a bad record

⁶⁶ Schauer, *Free Speech: a Philosophical Enquiry* (n 6) 80-85.

(although not, perhaps, uniquely bad)⁶⁷ of making censorship decisions of which we now approve. There are other reasons, too, for being sceptical of permitting government, in particular, to restrict speech, one of which is summarised by Cram: ‘[o]nce a society confers on government the power to restrict individuals’ speech which is generally recognised to be harmful, the fear is that the power might next be used against less obviously harmful types of speech.’⁶⁸

These arguments may also provide a rationale for special treatment for institutional journalism because one may wish, for example, to provide some institutional journalistic speech with special protection from government curtailment on the grounds that the government is not a good judge of what political speech should be disseminated, and journalism is a central element in the dissemination of political speech in a democracy: we may be chary of handing the fox the keys to the hen-house. This may be supported by, it will be seen in the next chapter, the Fourth Estate theory of the way the Press contributes to democracy, which suggests the Press provides a means by which the state (amongst other entities) is held to account. Further, or alternatively, one may be concerned about Cram’s slippery slope argument, and be wary of permitting the government to regulate the Press today in a way equivalent to regulating public utilities, perhaps, on the grounds that in the future, governments may not be able to resist exploiting such regulatory power for political purposes.⁶⁹ We might therefore afford the

⁶⁷ Barendt, *Freedom of speech* (n 6) 22-23; Frederick Schauer, ‘Who Decides?’ in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 213.

⁶⁸ Ian Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart, Oxford 2002) 45.

⁶⁹ Similarly, there are reasons to be wary of a political majority being tyrannical or intolerant of free speech, and hence we may permit free speech not because it contributes to a value *per se*, but because one is wary of the consequences of majoritarianism: Bollinger, *Uninhibited, Robust, and Wide Open : a Free*

Press special exemption from government regulation, such exemption being a form of special treatment.

There are, of course, weaknesses with the scepticism of the state argument for free speech, and likewise there are weaknesses with the analogous argument for special treatment. One may, for example, shy away from providing special treatment under this rationale because in practice one is more concerned about private power than one is about governmental power.⁷⁰ But, as mentioned, this weakness does not undermine the argument being advanced, for as long as one acknowledges the concern about government power is a plausible ground for special treatment, the free speech values thesis does not provide a set of necessary conditions that need to be met for special treatment to be appropriate.

Suppression is often ineffective

A second set of reasons for providing special treatment to institutional journalists not on the grounds that such an action will promote free speech values is that curtailing special treatment is often ineffective, and can sometimes be counter-productive. Again, the argument for special treatment derives from established arguments for free speech.

Authors as diverse as Milton and Raz propose arguments against the curtailment of speech on these grounds.⁷¹ One may not wish to curtail dangerous speech because it can

Press for a New Century (n 8) 48; Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (n 19); Mill (n 28) 62.

⁷⁰ Owen Fiss, 'Why the State?' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP 1990).

⁷¹ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 3) 161. Many of the arguments in this paragraph are set forth by Sir James Munby P as arguments for opening family courts to journalists (chapter two text to n 34) in *Re J (A Child)* [2013] EWHC 2694 (Fam) [23] to [36].

act as a safety valve, for example, allowing dissent to express itself in verbal rather than physical ways.⁷² Alternatively, suppression can have the opposite effect to the one intended, as suppression of ideas can invigorate rather than destroy,⁷³ as official restrictions can invigorate the speech we wish to curtail by affording it the glamour of suppression. And, in Milton's day as in ours, conspiracy theories thrive on the fertile ground of suppression: 'the punishing of wits enhances their authority ... and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them who seek to tread it out.'⁷⁴ Further, the Miltonian argument that suppression may prove futile is acute in contemporary times characterised by the effect of the Internet. Milton's metaphor is as apt today as it was over three centuries ago, when he likened the attempt at restricting 'evil doctrine' by licensing to: 'the exploit[s] of that gallant man who thought to pound up the crows by shutting his parkgate'.⁷⁵

These arguments can also provide a rationale for the provision of special treatment to institutional journalism. For example, and sticking with special benefits, failing to permit an institutional journalist access to a prison,⁷⁶ to use an example employed above, might result in an increase in scepticism about what happens in prisons in wider society. Or, not providing a tabloid newspaper particular leeway in publishing

⁷² Schauer, *Free Speech: a Philosophical Enquiry* (n 6) 78.

⁷³ *Id* (n 6) 75.

⁷⁴ Milton (n 41) 34; also, as Lange observes, identified by Tacitus as a counter-productive consequence of Nero's suppressions: Lange n 89.

⁷⁵ Milton (n 41) 20; again, this phenomenon was recognised in classical times: see, for example Socrates' last speech to the jury. Plato, *The Last Days of Socrates* (Hugh Tredennick tr, Penguin Books 1969) 73 (*Apology* 39D).

⁷⁶ *R v Home Secretary, ex p Simms* [2000] 2 AC 115 HL.

particular incendiary opinions may make some people in society believe that these opinions are being suppressed. Brandeis' famous observation that sunlight disinfects applies,⁷⁷ as there is a risk that suppression can encourage conspiracy theories. If these arguments are plausible grounds for the affording of special treatment, then it can be seen that the free speech values thesis does not provide a necessary test for special treatment.

Deontology

A third set of reasons for providing special treatment not on the grounds of the promotion of free speech values derives from the deontological arguments for permitting free speech. These reasons provide valid rationales to permit speech, not linked to the achievement of particular values, and arguments of a similar form can be advanced for special treatment. At least two deontological free speech theories can be taken as a model for the special treatment arguments. The first is expounded by Kelley and Donway, based on a Nozickian approach – though derived from Ayn Rand and von Hayek – that the state has limited powers to operate, given its nature and its relationship to individuals' autonomy.⁷⁸ This limitation creates a free speech principle in that the limitations of the state extend to its power to govern speech. The state, argue Kelley and Donway, is an organisation that exists to protect certain core individual negative rights, one of which is freedom of speech. The authors aver that: 'The system of rights is the *only* value that must inherently be pursued as a collective value by society as a whole.' Freedom of speech is hence not valued because of its consequences, according to this theory, but is of

⁷⁷ Louis Brandeis, *Other People's Money, and How the Bankers Use it* (A M Kelley 1971) ch 5, cited in (for example) *A v Ward* [2010] EWHC 16 (Fam) [2010] 1FLR 1497 [133] (Munby LJ).

⁷⁸ David Kelley and Roger Donway, 'Liberalism and Free Speech' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990).

fundamental value in itself as one of a parcel of rights inherent to the prime unit of political value, the individual. Freedom of speech is not something that creates value, it is something that is valuable.⁷⁹ A second deontological argument is that advanced by Dworkin. Dworkin's theory of freedom of speech is predicated on the need to treat people as political equals. This arises partly from the contingent nature of our democratic states, partly as an essential part of the utilitarianism that in the main governs such states, and partly (though this is not explicit) in the inherent value that equality of political opportunity has to acceptable political morality. A derivative aspect of treating people as political equals is the need to permit them to speak, particularly about political matters (but also about other matters too), and to listen to material that is politically significant, and relevant to their government of themselves. So freedom of speech is not valued for the benefits that arise from it, which Dworkin describes as a policy argument, but rather as a matter of principle.⁸⁰

These deontological free speech arguments can provide analogous arguments for special treatment for institutional journalists. One may hold, following Kelley and Donway, that control by the state over the speech uttered by an individual private Press owner is illegitimate, and that regulation of this nature should not be permitted for the private Press. ('Private' as Kelley and Donway's argument about the illegitimacy of state action in relation to individuals does not extend to make state action illegitimate in respect of publicly-owned journalistic institutions like the BBC.) Hence a limited special

⁷⁹ Nozick's conception of rights has been challenged, not least by Raz, *The Morality of Freedom* (n 5) ch 5, 6. But I need not evaluate the extent to which Nozick survives assaults such as these, given that my point at the moment is to establish the existence of possible lacuna in the free speech values theory, not to defend Nozick's analysis *per se*.

⁸⁰ This will be discussed further in chapter seven text to n 22.

treatment emerges, in a relative immunity for private Press owners from curtailment of the speech that emanates through the institutions that they own. Similarly, Dworkin's methodology can provide a rationale for special treatment, even though he himself denies that his deontological approach can constitute a reason for treating the Press in a special way. This argument will be advanced and examined in chapter eight, and this analysis will not be prefigured here. Suffice to say, though, that the core element of the argument is that the Press amounts to a central feature of a liberal democracy, and to deny the Press freedom – some elements of which will amount to special treatment – is to do violence to the conceptual scheme of a liberal democracy. This, as was the case with the Kelly and Donway-inspired account, is an argument for special treatment that doesn't rest on the beneficial consequences that flow from freedom of speech. Both of these arguments make the case for special treatment without making reference to free speech values.

Again, it should be conceded that there are problems with these arguments, even leaving aside more fundamental questions about the extent to which the underlying theories are convincing. The Nozikian argument for example, is subject to the observations that the special treatment it applies is only 'special' in a limited sense (class 4 to use the taxonomy in chapter two),⁸¹ as it applies to all individuals. Further, the proposal that there should be special beneficial treatment for private Press owners is currently unattractive in the UK, as the conceptual environment is dominated by the concerns about the ethics and practices of the print press that led to the Leveson Inquiry: providing special benefits to those who have acted in a reprehensible way would seem to be foolish at best, and to be rewarding bad behaviour at worst. However, it is sufficient to

⁸¹ Chapter two, text following n 31.

concede that these arguments are plausible to establish that the free speech theory does not set out necessary conditions for special treatment, given that such plausibility shows that there may be situations when special treatment may be justified, even though free speech values are not promoted.

A counter-argument: the ultimate importance of free speech values

This brings me to the counter-argument. This observes that free speech values are indeed involved in all the examples put forward here, on the basis that the ultimate reason we permit speech in the situations described is because of the values of free speech. We are sceptical about government because government can act in ways that restrict our autonomy; or we are wary of garnishing a lie with the allure of official censorship because of our concern with truth. Plausibly, perhaps, we are concerned about the unwanted consequences of suppression because these consequences damage democracy. And do not the deontological arguments only have persuasive force because they contribute to the attainment, in the end, of free speech values?⁸² If this is the case and free speech values are indeed engaged, and lie behind the three examples provided, I have not managed to indicate concerns with speech that are distinct from free speech values. Hence I have not established that the free speech values thesis for special treatment is absent from the calculus of the propriety of affording special treatment, and hence have not established that it fails to amount to a necessary condition for the provision of special treatment.

⁸² This will be discussed in more detail in chapter seven text above n 32.

This argument is true, but misleading for at least three reasons. First, it is not clear that the deontological arguments are explicable in terms of free speech values as suggested. Indeed, non-consequentialist theorists would contest such an assertion and seek to distinguish the two modes of argument, not least on the grounds that an attraction of deontology is that it does not manifest the weaknesses of consequentialism,⁸³ and reducing deontology to consequentialist reasoning extinguishes this benefit. Second, even if one can explain the scepticism of government or other non-consequentialist reasons for free speech with reference to the ultimate objective of attaining free speech values, that does not mean that free speech values provide the only or even the correct explanation for such rationales. Other values of political philosophy may be in play: and if such values are in play, then the free speech values thesis, by referring only to free speech values, does not set down necessary conditions which need to be met for special treatment to be appropriate. However, there is a more fundamental difficulty with the counter-argument. This is that one cannot take the *ultimate* promotion of free speech values to be the focus of our concern without losing much that is important. This is because if one takes the promotion of ultimate objectives to be the litmus test of appropriate action, the focus of our concern risks becoming too diffuse. That this leads to difficulty can be appreciated by considering the free speech values thesis itself. If the thesis is construed as being a thesis about ultimate objectives, and is construed as holding that special treatment is appropriate when ultimately a free speech value can be promoted by special treatment, it becomes so wide as to be uninformative. This is because an

⁸³ Such a critique of consequentialism has been made by, for example, Dworkin, *A Matter of Principle* (n 4) 387, and O'Neill n 112 below.

enormous amount of journalistic activity might be argued to ultimately contribute to free speech values, even if it may not do so in the short or medium term. The thesis, when interpreted in this way, may become necessary, but it only achieves necessity at too great a cost.

In short, then, it is true that even if the examples raised here of non-consequentialist reasons for providing special treatment *may* be ultimately explained with reference to free speech values, that does not mean that they have to be, nor even that they ought to be. It should be borne in mind that to show that the free speech values thesis is not necessary, one has to show that there are plausible instances where the thesis doesn't apply, rather than have to show that it never or seldom applies. Hence, this counter-argument fails to establish that the free speech values sets out necessary conditions for special treatment. But indeed, the lack of necessity of the thesis is more extensive than this. This is because, in contradiction to the thesis, it may be that in some situations journalistic activity ought to be permitted (or special privileges granted to it) even though, in the view of some, it undermines some free speech values. This will be discussed next.

Collapse into the harm principle

The fourth problem with the free speech values thesis is that it is very difficult to prevent the act-based thesis collapsing into the harm principle, because it is so hard to distinguish between generic harms and those that link in to the claim that the aims of free speech are not being achieved. This creates practical and theoretical concerns.

The practical concern is that if the thesis collapses into the harm principle, then any special treatment designed to protect free speech will have little or no strength. This

is because the thesis can be interpreted as holding that it is acceptable to curtail speech when it causes harm, or to be more exact, that the causing of harm to a free speech value can be a sufficient condition for the withholding of instances of special treatment that protect speech. The weakness arises because ‘harm’ can be defined widely⁸⁴ and so any protection afforded by the harm principle is slender: as Dworkin observes, ‘everything turns on what ‘harm’ is taken to be’.⁸⁵ This can be illustrated by assuming that the harm principle is used to describe the ambit of legitimate restrictions on speech, or conduct, or, as Mill uses as an example, culinary preference.⁸⁶ The principle provides that speech, or conduct, or culinary preference is legitimate unless it harms others. Assume, then, one recognises that ‘harm to others’ includes making people feel mildly perturbed, and it becomes evident that the harm principle does not create any strong protection. In the same way, special treatment proffered by the free speech values thesis protection is likely to be slender. Of course, no one in practice is likely to set the threshold for the harm principle that low, but this is a practical problem, as can be seen when one considers how many repressive countries have, and have had, constitutions that protect, or protected, free speech and a free Press, yet provide minimal *de facto* protection to either: for example China,⁸⁷ and the Soviet Union.⁸⁸ And the Iranian Constitution is also instructive,

⁸⁴ Baker, *Human Liberty and Freedom of Speech* (n 40) 73.

⁸⁵ Dworkin, *A Matter of Principle* (n 4) 336.

⁸⁶ Mill (n 28) 152.

⁸⁷ Constitution of People's Republic of China 1982 (Amended 1988, 1993, 1999, 2004) art 35: ‘Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration’; discussed in D Weisenhaus, *Hong Kong Media Law* (HKUP 2007) 166.

⁸⁸ Constitution of the USSR 1936 art 50 ‘In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations’; discussed in Geoffrey Marshall,

as while it does not recognise Press freedom *per se*, it contains provisions similar in form to the free speech values thesis, as it provides that: ‘the media should be used as a forum for healthy encounter of different ideas, but they must strictly refrain from diffusion and propagation of destructive and anti-Islamic practices.’⁸⁹ The problem can be seen that under these provisions, the conditions for legitimate suppression of speech and Press freedom are so wide that they afford minimal *de facto* protection. In the case of the Iranian constitution, far too much activity could be characterised as not promoting Islamic values for the Islamic constitution to amount to much protection for Press or speech. The problem is not that one may disapprove of any particular decision made by an Iranian decision-maker as to what to permit or restrict, but that the weakness of the harm inherent in the ambiguity as to what ‘harm’ consists of is such that almost anything is restrictable, even matters that one would otherwise wish to permit. This poses a problem for the free speech values thesis, as far too much activity could be characterised as not promoting the values at the core of our interest in free speech for the free speech values thesis to amount to much protection.⁹⁰ This is at odds with the result one might

‘Press Freedom and Free Speech Theory’ [1992] PL 40, 40; and David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 18.

⁸⁹ Constitution of the Islamic Republic of Iran 1979, Preamble (quoted in the text above) and article 3 (2) ‘In order to attain the objectives specified in Article 2 [the foundational principles of an Islamic Republic], the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals ... raising the level of public awareness in all areas, through the proper use of the press, mass media, and other means’; University of Bern, ‘Iran - Constitution’ (2010) <http://www.servat.unibe.ch/icl/ir00000_.html> accessed 1/10/13; discussed in Robert Trager and Donna Lee Dickerson, *Freedom of Expression in the 21st Century* (Pine Forge Press 1999) 94 – 95.

⁹⁰ This is discussed in the text to n 65.

expect from a thesis that determines the propriety of special treatment for institutional journalism.⁹¹

The theoretical concern is that any theory of free speech needs to protect harmful speech, and if the free speech thesis collapses into the harm principle, it does not seem to afford this protection. If this is the case, then, curiously, the free speech thesis is deficient, as it does not satisfy the conditions required of a free speech theory. True, the free speech values thesis only rules out of court material that harms free speech values, and so permits speech that harms other values: hence it might be argued that it is resistant to collapsing into the harm principle. However, this risk still pertains, not least because it will be difficult in practice to discern the difference between harm to free speech values and other harms, and so there is a significant risk that the thesis, at least in a broad interpretation, will be extended to encompass almost any harmful activity.

The assertion that a theory of free speech needs to protect harmful speech is so widely attested in the literature, and – though to a lesser extent – the law, that perhaps it doesn't need much argument to establish it.⁹² It is evident from the first days of free speech theories, and can be found in Milton's *Areopagitica*. This work provides a useful example of the point as the *Areopagitica* is predicated on an explicit recognition that

⁹¹ This is not to say that the bounds of free speech are unlimited. It may be appropriate to restrict free speech that challenges democracy, for example, but such an argument can advance on a different basis. For example, it may say that free speech should exist because it is inherent to democracy, and free speech that damages democracy can be restricted because it undermines the rationale that explains and grounds its existence.

⁹² *Redmond-Bate v DPP* [1999] EWHC Admin 732 (1999) 7 BHRC 375 QB (Sedley LJ); *R v Central Independent Television plc* [1994] Fam 192 CA 202-203 (Lord Hoffmann), adopted by Laws LJ in the Court of Appeal in *ProLife* (n 40) [35], though the decision of the court was overturned by the House of Lords. Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 3) 60 – 164; Schauer, *Free Speech: a Philosophical Enquiry* (n 6) 7; Thomas Scanlon, 'A Theory of Freedom of Expression' in Ronald M Dworkin (ed), *The Philosophy of Law* (Oxford University Press 1977) 153; Dworkin, *A Matter of Principle* (n 4) 387;

harm can result from freedom of speech and Press. It is only on this basis that the arguments in the work are necessary or make sense. To make the point about harm, Milton employs the striking metaphor that books can be like ‘dragon’s teeth’. Milton’s case is that, just as in Greek myth dragon’s teeth grew, when planted, into fully armed warriors, so too can books after having been published spring into dangerous ideas and cause dangerous actions. *Areopagitica* is an attempt to explain why the planting of dragon’s teeth should be permitted, or why potentially dangerous books should be allowed to be published. Free speech theories since Milton’s time have endeavoured to provide equivalent accounts, struggling with the same problem. Yet the free speech values thesis does not provide such an account, but is rather prepared to countenance the occasioning of harm as being of itself a sufficient condition for the curtailment of journalistic activity, or for the rejection of particular special treatment.⁹³ These arguments transfer, *mutatis mutandis* to the Press, a point pithily expressed by Lord Oliver in *Attorney General v Guardian Ltd*

The liberty of the press is essential to the nature of a free state. The price that we pay is that liberty may be and sometimes is harnessed to the carriage of liars and charlatans, but that cannot be avoided if the liberty is to be preserved.⁹⁴

Problems with the rule based, and the act-based interpretations of the thesis

I will now note the problems that arise in particular to the rule-based and act-based interpretations of the thesis. It has already been described how the rule-based interpretation leads to over-protection, and the flaws of the act-based interpretation

⁹³ Schauer, ‘Who Decides?’ (n 67) 208.

⁹⁴ *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, 1320.

include under-protection. A little more discussion of each interpretation is necessary, not least because the act-based interpretation is the preferred interpretation for Fenwick & Phillipson's variable geometry of media freedom.⁹⁵

The rule based thesis and over-protection

The rule-based interpretation of the thesis, as described earlier, suggests that institutional journalism be afforded special treatment as a rule, given the good that derives from doing so. Yet, those who are concerned that the provision of special treatment to institutional journalism as a whole is incoherent because (to select one example of special treatment) it protects scurrilous journalism are unlikely to be convinced that the protection of all institutional journalism is legitimate on the basis that there are benefits that arise from protecting all institutional journalism in general. They are more likely to focus on the undesirable results that follow from a general application of the rule as proof that following the rule is the wrong thing to do. If institutional journalism is protected as a rule, despite the damage that some journalism does, and despite the good that some other similar activities do, this is exactly the problem emphasised by the incoherence arguments. It is not an answer to them.

Even so, the rule-based contingency thesis can be defended. Indeed, this debate is not a new one, and it was a source of discussion about the time of the drafting of the US Constitution and the Bill of Rights. (I refer to this not in an attempt to seek doctrinal support from US Constitutional Law for the current discussion, but to illustrate the pedigree of this debate.) A defence of the rule-based approach to the preferential

⁹⁵ Nn 7, 105.

treatment of the Press can be derived from the arguments of Madison who observed: ‘[s]ome degree of abuse is inseparable from the proper use of every thing: and in no instance is this more true than that of the press’,⁹⁶ the point being that undesirable specific results do not militate against following a rule in general. Schauer makes a similar point when arguing that the interpretation of the First Amendment should protect institutional speech (though the reference to the First Amendment is not germane to the current discussion):

Treating unlikes alike is simply what rules do, and at the heart of a strongly rule-based First Amendment is the necessary and desirable suppression of factors and distinctions that would in other contexts be highly politically, morally, or otherwise relevant.⁹⁷

There is some truth to Madison and Cato’s argument. Just as one cannot write off an activity due to its potential abuse, so equally one cannot say that the flaws of over-protection militate against the affording of protection in general. Equally, one cannot argue that the flaws of affording special treatment in some instances militate against the affording of special treatment generally. If this were not the case, then the potential misuse or miscarriage of many processes or activities would disbar them from special treatment. History shows that the law, for example, regularly miscarries in its pursuit of justice, yet it would be absurd to argue that this necessarily leads to a conclusion that the law should lose its privileges. Yet such an approach remains unsatisfactory, as it is

⁹⁶ James Madison, ‘James Madison Argues for Freedom of the Press (Report on the Virginia Resolutions)’ in Leonard Levy (ed), *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Co Inc 1800) at 216; quoted as an epigram in Cram (n 68) and cited by the Supreme Court in *Application by Guardian News and Media Ltd in Ahmed v Her Majesty’s Treasury* [2010] UKSC 1 [72] (Lord Rodger). Arguments along similar lines can be found in contemporary writings, notably John Trenchard, Thomas Gordon and Ronald Hamowy, *Cato’s Letters* (Liberty Fund 1995), letters 32 and 100.

⁹⁷ Schauer (n 62) 1270.

insufficiently discriminating: for while it may be true that there is an inherent risk of misuse in every tool, and a risk that those in a supervisory position may misuse their supervisory power, this does not provide an argument against taking prudential and reasonable steps to minimise the risk of misuse, or taking steps to minimise the harm should such misuse occur. Simply because a chainsaw is designed to cut down trees but can be misused to cut off limbs, does not mean it is inadvisable to provide such a tool with safety devices designed to prevent misuse. Or, to be more pertinent, simply because a gun can be used to protect as well as to kill, this does not necessarily mean there should be no gun control.⁹⁸ It is true, as Madison observes, that a degree of abuse is inseparable from the proper use of everything, but that should not mean we refrain from attempting to prevent abuse, or minimise its consequences should it occur. These conclusions lead us away from the rule-based interpretation of the thesis. At the least, some further argument is required as to why one should recognise it. At best, some way of ameliorating these concerns is required. Chapter eight will seek to provide these, by reference to rights theories and the rule-based consequentialist account of rights proposed by Raz.

Problems with the act based interpretation of the thesis

The flaws in the rule-based thesis leads us to consider the act-based interpretation of the thesis, as – has been seen – it avoids some of these problems and does engage more closely with the concerns expressed in the incoherence argument. Indeed, this is the approach adopted by Fenwick and Phillipson, who use the act-based conception as the foundation of their ‘variable geometry of media freedom’,⁹⁹ and the application of this

⁹⁸ Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) 173.

⁹⁹ Fenwick and Phillipson (n 7) 16-18, 27.

test provides the critical backbone of their book.¹⁰⁰ And yet, as noted above, an act-based test presents its own difficulties,¹⁰¹ and two in particular will be described. First, an instance of under-protection will be described, which leads to the conclusion that the thesis in its act-based interpretation incompletely describes the appropriate conditions for affording special treatment, and second some incidents of the indeterminacy identified with the thesis in general will be described that are particularly pertinent to the act-based thesis. Finally, an account will be given of how the act-based thesis manifests structural deficiencies.

Incompleteness: offensive pre-speech privileges

The incompleteness of the act-based theory can be demonstrated with an instance where the thesis appears to under-provide special treatment. I need to rely on Baker's categorisation of special privileges as offensive and defensive, pre-speech and post-speech to explain it.¹⁰² The problem is that the act-based thesis cannot authorise the provision of certain pre-speech offensive special privileges. The best example of this is the privilege provided by *R v Home Secretary ex p Simms*, where the privilege of access to a prison is afforded to a journalist to investigate allegations of miscarriages of

¹⁰⁰ Id (n 7) summarised at 1113.

¹⁰¹ Text to n 62. Fenwick and Phillipson go further than proposing the free speech values thesis as a means for determining what special treatment is appropriate, venturing that it should be a test of the propriety of all instances of media speech. Yet, this presents problems for the reasons described above when discussing the risk of the free speech values thesis collapsing into the harm principle (text to n 92). For, as Schauer observes: '[T]o allow the harmful falsity of speech to be a sufficient condition for its lack of (comparative) immunity from official control is to deny the existence of a principle of free speech' Schauer, 'Who Decides?' (n 14) 208. In short, for speech to be free, the causing of harm must be permissible, and this is no less true of the Press as it is of speech in general.

¹⁰² Baker, *Human Liberty and Freedom of Speech* (n 40) 234; chapter five text to n 19.

justice.¹⁰³ It is likely that a responsible journalist will need to visit the prison to see whether there is a case worth taking up and the privilege is therefore important for the journalist's research. It is on the basis of this research the speech act by the journalist will be performed, yet it will never be known in advance whether the specific speech that will result from this particular privilege: 'will promote values at the core of our interest in free speech', because the speech act is unlikely to be performed unless the privilege is granted. Hence the thesis, interpreted as an act-by-act test, can never justify granting this type of pre-speech offensive access. Against this argument, it might be suggested that such pre-speech offensive access is never legitimate. Baker, for one, holds such a view.¹⁰⁴ But, without attempting to resolve whether they are or are not, the point is that the thesis under this interpretation excludes such privileges from the start without further consideration, and it is not *prima facie* clear that such a position is legitimate. And in practice, of course, such problems are ameliorated by the common law taking into account the likelihood of such benefits arising from special treatment, as it frequently does in ex-ante applications. However, while this affords a practical answer to the difficulty, it does not amount to a satisfactory theoretical explanation for why such treatment can be appropriate within the ambit of an act-based interpretation of the thesis.

Indeterminacy

The second problem that arises is one of indeterminacy. Two incidents of this lack of clarity will be described, that draw on the earlier discussion. First is the problem that the

¹⁰³ *ex p Simms* (n 76).

¹⁰⁴ Baker, *Human Liberty and Freedom of Speech* (n 40) 240.

act-based thesis is indeterminate as the answers to the question of whether a specific journalistic act contributes to a free speech value are contestable, and second it is indeterminate because the values of free speech can conflict. To illustrate the first point, take as an example an act that engages the value of democracy. When discussing the legal provisions designed to protect journalists' sources, Fenwick and Phillipson argue that the journalist Judith Miller's protection of her (pro-Iraq war) White House source was a specific action that opposed, rather than supported, the public interest and therefore democracy.¹⁰⁵ A conclusion for the purposes of the current discussion would clearly be, then, that this instance of special treatment is inappropriate, as Miller's action was one that subverted rather than promoted a free speech value. Indeed, this is Fenwick and Phillipson's conclusion (leaving aside the fact that they observe there may have been a beneficial – rule-based – precedent set by Miller's refusal to name her source as a generic example of the importance of source protection).

However, such a conclusion about the extent to which Miller's action subverted democracy is patently contestable. Without going too much into the merits of otherwise of the war in Iraq and the case of the British and the American governments about Iraqi Weapons of Mass Destruction, the point to make here is that the merits of the war are deeply contested, the merits of the leaking of the information to Miller is deeply contested, and whether a specific contribution was made to democracy by Miller's refusal to name her source is also deeply contested. Fenwick and Phillipson's conclusion about whether the journalistic act contributed to or detracted from democracy is highly unlikely

¹⁰⁵ Fenwick and Phillipson (n 7) 312.

to be shared by many on the political right who thought the war legitimate.¹⁰⁶ This is an uncomfortable position for the act-based contingency thesis to find itself, as the decision of whether or not to afford special treatment to institutional journalists seems to have become reduced to a political question that is, as political questions naturally are, a bit of a quagmire. It is to be hoped that the question of the propriety of affording special treatment to institutional journalism can be resolved in a way that does not ultimately turn on one's political preferences.

The second point is that, as discussed above in the abstract, the values of free speech themselves can be contradictory between each other, and a single act can be said to lead to promote one value, but detract from another. This leads to particular problems for the act-based thesis, as questions about the propriety of special treatment will remain elusive for an act-based interpretation of the thesis. To take as a specific example the outing of the then cabinet minister Lord Mandelson as gay by the journalist Matthew Parris on *Newsnight* on the 27th October 1999. This, on the one hand, patently harmed Mandelson's autonomy, as he was outed without his consent, and such an act breached his autonomy over his personal sexual information. Such an interpretation would lead to the conclusion that this instance of journalistic speech should not be protected, as it violates one of the values we consider important in free speech. However, on the other hand, given that Mandelson was a cabinet minister, his outing promoted self-fulfilment according to Raz's self-fulfilment theory,¹⁰⁷ as the revelation of his homosexuality might

¹⁰⁶ Such a disagreement about exactly this question is related in Susan Gilles, 'The Image of 'Good Journalism' in Privilege, Tort Law, and Constitutional Law' (2006) 32 Ohio Northern University Law Review 485.

¹⁰⁷ This will be discussed in chapter seven text to n 50.

have increased the validation of some people's lifestyles: if there are gays in the cabinet at the heart of the British establishment, it may encourage people who are timid about the public acceptability of their sexual preference to take courage. (Raz's theory supports the argument that eminent people in various fields – in the past the Conservative party, currently the Premier League¹⁰⁸ – should be public about their sexuality.)

Chilling effect and theoretical impasse

A consequence of the indeterminacy entailed by the act-based thesis is that the inability to predict (or the uncertainty about the result of a prediction about) whether special treatment will be granted, risks creating a chilling force on journalistic activity. If journalists' lawyers are unsure as to whether they will have the ability to undertake an activity, the lawyers – being risk averse – are unlikely to condone that activity. The journalist David Leigh has identified a key mechanism, albeit in rather stark terms: 'Lawyers get paid for ... guesses; if they guess cautiously, no one ever proves them wrong'.¹⁰⁹ So, for example, not knowing in advance whether a particular piece of potentially defamatory journalistic speech will be considered 'as promoting the values of speech' in a sufficient manner as to merit special protection in defamation, is likely to make media lawyers cautious in the advice they give their clients. This may result in a chilling effect on journalistic speech.¹¹⁰

¹⁰⁸ John Cross, 'It's shameful that two top Premier League players have been unable to admit to being gay in 2010' *Daily Mirror* (24/12/09) <<http://www.mirrorfootball.co.uk/opinion/columnists/john-cross/It-s-shameful-that-two-top-Premier-League-players-have-been-unable-to-admit-to-being-gay-in-2010-article267249.html>> accessed 29 02 12.

¹⁰⁹ David Leigh, *The Frontiers of Secrecy* (Junction Books 1980), 142.

¹¹⁰ Barendt observes this to be a consequence of the current state of indeterminacy of the *Reynolds* privilege (discussed *inter alia*, in chapter eight) in defamation: Eric Barendt, 'Reynolds Privilege and Reports of Police Investigations' (2012) 4(1) *Journal of Media Law* 1 10.

This point may be countered by the observation that this is but one manifestation of a wider problem of predictability in a legal system like the common law. Further, it is within the capacity of such a system to create, over time, sufficient certainty to draw the sting from this problem. However, given the concerns about the complexity of the free speech values described above, there must remain reservations about the extent to which an act based interpretation of the thesis is convincing on a theoretical level, as the certainty arrived at by the case law is likely to be in tension with the uncertainty consequent on the theoretical complexity of free speech values and theories. In short, it may be impossible to say whether special treatment should be afforded given the plurality of views about the ways in which institutional journalism can promote a particular free speech value. This is in essence the concern about free speech and democracy that will be examined more fully in the next chapter.

Conclusion

What emerges from this discussion is that the free speech values thesis provides a convincing explanation as to why providing special treatment to institutional journalism may be coherent. However, it is unsatisfactory as a test for the propriety of special treatment, as it is indeterminate given the nature of free speech values and the theories that explain their connection with free speech, it is neither a complete nor a necessary test, and it risks collapsing into the harm principle. Further, in its rule-based interpretation, the thesis over-protects, and in the act-based interpretation it under-protects. In short, it should not be our sole guiding principle in deciding whether to grant special privileges to institutional journalism.

The arguments against the thesis described here have emphasised some practical difficulties, but it may well be that the problems are more fundamental. This is because the thesis is a consequentialist theory, and consequentialist theories provide only weak protections of liberal values in general.¹¹¹ These flaws arise in consequentialist theories because such theories suggest the reason for acting in a certain way is that it brings about the achievement of a desired end. Such theories have an inherent weakness because the reason for acting in a certain way can be short-circuited if the end result can be achieved by other, preferable action. This means that those elements of liberal values that special treatment seeks to promote are not protected in a particularly strong manner by the thesis, given its consequentialist nature. As O'Neill notes:

If we are utilitarians before we are liberals, we are likely to find many cases where speech and expression should *not* be protected. In a way it is a curiosity of our intellectual history that Mill was so firmly convinced that utilitarian arguments would yield liberal conclusions. If the facts fall out in ways that are not ruled out, utilitarian reasoning will endorse forms of paternalism, restraint, and censorship.¹¹²

Hence the thesis is conceptually as likely to lead to repression of the Press as it is to promotion of it. This flaw is not of great practical significance in a society where such repression is politically unlikely or unfeasible, but it does show that the thesis is inappropriate as a general conceptual basis for the provision of special treatment to institutional journalism.

This weakness can be avoided when the consequentialist argument that is proposed for special treatment is a rule-based consequentialist argument. This is because

¹¹¹ Oster (n 2) 73.

¹¹² Onora O'Neill, 'Practices of Toleration' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990), 158.

a rule-based consequentialist argument recognises that the ends by which special treatment is justified can also be achieved by the following of rules in general. This provides a measure of immunity from the weakness being described because even if particular better ways of attaining the ends can be found, they may not amount to a better way of attaining the ends than following a rule, either because following the rule may on the whole achieve a better outcome, or because of other advantages that arise from following a rule, such as clarity and simplicity. This means that even though particular better ways of attaining the ends of special treatment may be found than the affording to the Press of special treatment, these particular ways do not short-circuit the wider case for special treatment. Special treatment may remain appropriate because affording special treatment to institutional journalism as a rule may in general better attain these results in question.

However, as discussed earlier, there are limitations with the rule-based free speech theory. Chapter eight will attempt to deal with these, when it proposes a rule-based consequentialist approach, but not one based on free speech values, but rather one based on Raz's concept of rights.

Chapter 5: Democracy: the most significant free speech

argument for special treatment

This chapter aims to build on previous chapters and establish that it can be coherent to afford special treatment to institutional journalists, but also how the free speech values thesis that seeks to establish that this is so has limitations. The case currently being considered that special treatment of institutional journalists can be appropriate rests on the argument advanced in chapter three that journalism bears qualities that distinguish it from other activities, and the argument in chapter four that special treatment can be appropriate where the Press (or because the Press)¹ contributes to the promotion of the values at the core of our interest in free speech – the ‘free speech values’ thesis. While chapter four evaluated some of the attractions and deficiencies of the free speech values thesis, it did not apply the thesis to establish a case for special treatment. The current chapter applies the thesis by considering some of the theories that seek to explain how the Press contributes to democracy. It will be shown that these theories can dovetail, complementing each other by discerning different mechanisms by which the institutional Press can promote democracy and therefore combining to provide different reasons why special treatment can be afforded to the Press. And indeed, a brief survey of the case law will show that they have been recognised as significant, and on occasion adopted as a rationale for the provision of special treatment of one sort or another for the Press.

However, there are difficulties with this argument, and two will be explored here. The

¹ The current analysis applies to either the act-based or rule-based interpretation of the thesis: chapter four text following n 60.

first arises from the fact that the theories that explain how the Press contributes to democracy can be challenged, and the second from the fact that such theories can conflict with each other in their accounts of how the Press contributes to democracy. Both difficulties highlight weaknesses in the free speech values thesis discussed in the last chapter. The first shows that the thesis provides only a somewhat weak rationale for special treatment; and the second, as was argued in chapter four, shows how the complexity of the theories that explain our interest in free speech – on which the free speech thesis relies – can make the thesis indeterminate when applied.

Elements of this analysis are not new. The suggestion that special treatment of the Press can be justified with reference to the contribution it makes to democracy is not novel,² nor is the fact that the theories as to how this may occur can be distinguished into at least two camps,³ such distinctions having been emphasised within the context of the argument about the propriety of differential regulation of those sectors of the Press historically involved in broadcast and print.⁴ Similarly, the fact that, despite significant areas where they overlap, theories of these types can conflict has been noted.⁵ But the

² For example *Wason v Walter* (1868) LR 4 QB 73; the ECtHR judgments noted in chapter two text to n 79ff and *Lingens v Austria* (1986) 8 EHRR 407, 41; Eric Barendt, *Freedom of speech* (2nd edn, Oxford University Press 2007) 422; Judith Lichtenberg (ed), *Democracy and the Mass Media: a Collection of Essays* (Cambridge University Press 1990).

³ The distinction is recognised, for example, in Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012) vol 1 pt B ch 4; Rachael Craufurd Smith, *Broadcasting law and fundamental rights* (Clarendon Press 1997) pt 1; and more recently Jacob Rowbottom, 'Leveson, Press Freedom and the Watchdogs' (2013) 21 *Renewal* 57.

⁴ This is discussed below in the text to n 85 and n 101.

⁵ Smith, *Broadcasting Law and Fundamental Rights* (n 3) at part I and chapter 7 is a comparative and historical evaluation of the ideas; Curran and Seaton compare and contrast the predominant print model and broadcast model of Press freedom at Part I, broadcast at Part II, and these are contrasted in chapters 21, 22, and 24. In the US, Lucas A Powe, *The Fourth Estate and the Constitution : Freedom of the Press in America* (University of California Press 1991) discusses the conflict implicit in the evolution of the reasoning of the Supreme Court, chapters 8 and 9.

implications of this conflict for the free speech thesis have not been explored in detail. The two different categories of theories of how the Press can contribute to democracy will be referred to as the 'Fourth Estate' and 'Public Sphere' theories.

Fourth Estate theories

Fourth Estate theories are based on the claim⁶ that one of the ways the Press contributes to democracy is by operating as a check on state power.⁷ This checking occurs, the theories hold, because of a variety of qualities possessed by the Press and the state: four will be identified here.

First, the theories note that the Press is independent of the state, a fact that is significant as separateness reduces the danger of, or at least the perception of, conflicts of interest that can arise when parts of the state investigates itself. A second significant quality emphasised in some theories is the fact that the Press is a well-funded and skilled body possessed of resources and abilities to investigate and assess state actions. A third quality is the fact that a central function of the Press is to report to the public, a quality that obviously distinguishes it from many other investigatory agencies. This is significant for practical and theoretical reasons: practical, as it reduces the danger of, or at least the perception of, state suppression of information that ought to be known;⁸ and theoretical

⁶ The fact that Fourth Estate theories are based on this contingent empirical claim, and that sometimes – perhaps often – this claim is refuted by experience, will be examined further below in the text to n 73.

⁷ The Press can also operate as a check on other forms of power, both private and in a non-democratic state. This, too, will be examined further below text to n 70.

⁸ Bernard Williams, *Truth and Truthfulness : an Essay in Genealogy* (Princeton University Press 2002) 207.

because disseminating information to the citizenry is very likely⁹ to promote the autonomy of individual citizens who, in many theories of democracy, are conceived of as ultimately holding valid power, or the power to validate the state. Finally, and related to the question of independence, Fourth Estate theories often emphasise that the editorial autonomy of the Press is an important reason why it can effectively check the state. This conceives the Press as an active, rather than a passive agent. Obviously some elements of this analysis are contentious, but discussion of the flaws in the theories will be deferred until later.

These qualities are not identified in all Fourth Estate theories: such theories are not new – an origin of them can plausibly be traced back to the eighteenth century¹⁰ — and hence they are quite extensive in number and diverse in content. However, the

⁹ However, this may not always be the case, for as Williams has observed: ‘[t]he best results with regard to truth-management are not likely to follow from unlimited intrusiveness combined with unlimited righteousness (no doubt, on the part of the media, feigned) about how government can be expected to behave’. It is not the case that all disseminations of information to citizens will necessarily promote their autonomy: some secrets, if kept, are just as likely to achieve such an end. Id (n 8) 213.

¹⁰ There is an argument that the early writers were concerned with publications by individuals not the institutional Press. The American Supreme Court provides judicial authority for this view: *First National Bank of Boston v Bellotti* 435 US 765 (1978), which is relevant as the nature of eighteenth century Anglo-American conceptions of Press freedom are important in US constitutional law determinations of what the First Amendment meant at the time of its drafting. *Bellotti* cites and endorses the arguments of Lange pt II, and others support his view: Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press 1982) 106; Judith Lichtenberg, ‘Foundations and Limits of Freedom of the Press’ in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 106. Nevertheless, such a claim about intellectual history is contentious: Anderson asserts a distinct historical meaning for ‘Press freedom’ – D A Anderson, ‘The Origins of the Press Clause’ (1983) 30 *UCLA Law Review* 455 – and the early Press was institutional in ways similar to the modern Press. Uses of the term in an institutional sense appear in England in the early 18th century, famously in John Trenchard, Thomas Gordon and Ronald Hamowy, *Cato's letters, or, Essays on liberty, civil and religious, and other important subjects* (Liberty Fund 1995) and less famously in other papers: Editorial, *Gloucester Journal* (28/2/1738), and Editorial, *Gloucester Journal* (4/7/1757). (Robert Raikes, the editor of the 1738 *Gloucester Journal* had reason to write about the freedom in its institutional sense, as he was committed to prison for contempt of court for the reporting in his paper of the proceedings of tribunal: *Roach v Garvan* (1742) 2 Atk 469, 26 ER 683.) Indeed, Marjorie Jones, *Justice and Journalism : a study of the influence of newspaper reporting upon the administration of justice by magistrates* (Barry Rose 1974) , 9 discerns newspapers acting in Fourth Estate manner in a way that individuals could not, reporting Magistrates’ Courts, from around 1789. This is also discussed in chapter one n 16.

approach described here is relatively common in contemporary Fourth Estate theories, a fact that will be demonstrated by considering the work of Blasi, Baker, Bezanson, Bollinger and Gibbons.¹¹ Indeed, the first three qualities can be found in Blasi,¹² one of the earliest extensive contemporary Fourth Estate theories. Blasi starts from the premise that free *speech* can be valuable as it can contribute to or constitute a check or veto on government power in situations where the government is acting badly, and that the Press is an important aspect of this. He observes that certain contingent factors about modern Government mean that the Press is particularly important:

[t]he inevitable size and complexity of modern government is related to another premise that underlies my understanding of the contemporary significance of the checking value. This is the need for well organized, well-financed, professional critics to serve as a counterforce to government- critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public.¹³

This, it can be seen, emphasises the first, second and third elements of Fourth Estate theories. These elements combine in Fourth Estate arguments to provide a rationale for the provision of some special treatment to the Press, on the basis that together they describe tasks that the Press performs *in toto* that others may only perform individually. Other institutions that investigate the state, for example, may lack the seminal feature of primarily communicating to the people who are often considered to be the source of political authority. Or, institutions that communicate to the people do not investigate to

¹¹ This is not to deny that there remain important differences between the approaches of these authors, nor that the analysis of some of these writers overlaps with the Public Sphere conception of the Press: these will be discussed in the text to n 89.

¹² Vincent Blasi, 'The Checking Value of the First Amendment' (1977) American Bar Foundation Research Journal 521.

¹³ Id (n 12) 541.

the same extent or with the same resources as the Press. So the Opposition, ombudsmen, the police, the judiciary, academic investigators, NGOs or other people that check the state do not operate in the same way or with the same resources as the Press, and/or are part of the state itself, and/or are not primarily focussed on communicating with the public. Given that the institutional Press are the body that predominantly performs these tasks as a group, the argument is that institutional journalists should be afforded special treatment not necessarily afforded others who perform apparently similar activities.¹⁴ Nor do Fourth Estate theorists necessarily accept that the Internet, which has multiplied the amount of individuals who can and do investigate the state, necessarily undermines this argument. Bollinger argues:

[i]t is a serious mistake to assume that a multitude of individual or small-scale Web sites would serve the same purpose as the traditional press, just as it would be a mistake to assume that Universities could be replaced by many individual Web sites, each offering specialized knowledge in an atomised manner. The way in which knowledge is organised, developed and conveyed in the context of a large ... institution devoted to journalistic ... values is radically different from the way knowledge would be transmitted and understood in a highly dispersed system,. Myriad Web sites can enhance public debate, but they cannot replace the role of the institutional press¹⁵

The fourth quality of the Press commonly identified in Fourth Estate theories, that of editorial autonomy, is not so evident in Blasi's work, but it is emphasised by Baker, Bezanson and Gibbons. Baker,¹⁶ while agreeing with much of Blasi's analysis, differs

¹⁴ The argument that the institutional Press merit special treatment does not preclude the affording of different types of special treatment for different reasons to such people. But such treatment would have a different grounding than the free speech values thesis in its instant formulation.

¹⁵ Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010) 110: cf chapter three n 1.

¹⁶ C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) chapters 10 and 11. A useful comparative law analysis is made by Barendt, *Freedom of speech* (n 2) 441-44.

from Blasi in that he places less emphasis on the fact that non Press speakers significantly also serve the checking function, observing that ‘in our society, the role of the press in exposing abuses of power is likely to be central: think of Watergate, or the Pentagon Papers.’¹⁷ This provides an impetus for Baker to take a theoretical step that Blasi does not, developing the idea that the Press have a quality analogous to the individual autonomy, on which he feels freedom of speech primarily rests. This analogue of individual autonomy is editorial autonomy, which Baker argues provides a rationale for a limited special constitutional protection for the Press. He calls this the ‘Fourth Estate theory’

my hypothesis is that individual speech rights are based on respect for the individual’s autonomy or liberty as an actor. In contrast, the press’s rights are related to its instrumental role as a fundamental institution of a free and democratic society. Most obviously this encompasses its Fourth Estate role ...¹⁸

On the strength of this institutional analogue of the individual autonomy and liberty-based rationale for free speech, Baker argues that some aspects of special beneficial treatment for the Press are appropriate, for example special protection against state search and seizure of journalistic material, and perhaps protection of sources.¹⁹ Bezanson echoes aspects of this analysis, importantly the centrality of ‘editorial judgment’, which he describes as:

¹⁷ Baker, *Human Liberty and Freedom of Speech* (n 16) 234; cf n 15 and chapter one n 18.

¹⁸ Baker, ‘The Independent Significance of the Press Clause under Existing Law’, 959-960. Elsewhere he makes clear: ‘the focus of the fourth estate theory is a *source* that the government does not control. Its basis is more a distrust of power than a faith in truth or rationality.’ (original emphasis) Baker, *Human Liberty and Freedom of Speech* (n 16) 233.

¹⁹ Baker, *Human Liberty and Freedom of Speech* (n 16) 234-42; chapter two text to n 102ff.

a product of a process of judgment that is independent, audience oriented, and grounded in a reasoned effort to publish information (typically current or currently relevant) judged useful and important for the maintenance of freedom in a self governing society²⁰

He also holds that it should, and to some extent already does, provide instances of special treatment to the Press.

One preliminary argument against the Fourth Estate should be addressed before I move on to describe Public Sphere theories. This is the concern that Fourth Estate theories are peculiarly American and hence parochial, because they may be at worst merely the interpretation of a domestic legal clause, albeit a rather important one, and at best a constitutional theory limited to the constitutional framework of the US. For example, as evidence in support of the validity of his approach, Bezanson analyses contemporary decisions of the US Supreme Court, discerning an evolving corpus of law that provides elements of special treatment to the Press, founded on a recognition of this editorial judgment. This, of course, is of limited utility in proving the viability of this idea in the UK. And indeed many proponents of Fourth Estate theories, including all those mentioned so far, make at least part of their arguments about the relationship between the Press and democracy while construing the wording of the First Amendment. This is prompted by the peculiar drafting of the clause which, as is notorious, is worded in a way that appears to distinguish between speech and Press freedom,²¹ and hence raises the question of whether the Press should receive particular protection under the US

²⁰ Randall Bezanson, 'The Developing Law of Editorial Judgment' (1999) 78 Nebraska Law Rev 754, 760.

²¹ 'Congress shall make no law ... abridging the freedom of speech, or of the press' Bill of Rights, 1791, First Amendment.

constitution. This raises the issue of parochialism, given that patently the remit of the First Amendment extends no further than the jurisdiction of the United States.²²

However, it is not the case that Fourth Estate theories are of relevance only in the context of American constitutional law. Press investigations into governments and checks on power in other political structures can be of benefit in political contexts outside the US, and in constitutional schemes not governed by the First Amendment. Indeed, and perhaps ironically, having the Press performing a checking function on the state can be rather more important in the UK than it is in the US, given the relative absence of legal checks and balances found in UK constitutional doctrine: Fourth Estate theories may be more potent in a country governed under a political constitution than they are in one that operates under a legal constitution. For example, many of the rules that restrict the operation of power in Britain are not directly legally enforceable, taking the form of constitutional conventions. The importance of this observation is that institutional journalistic expression is a significant way in which breaches of these conventions are enforced and policed, as Jennings noted: ‘conventions are observed because of the political difficulties which arise if they are not.’²³ While there are no doubt other mechanisms too,²⁴ journalistic expression is a significant way in which these political difficulties arise, are communicated and exert pressure. One example will suffice to illustrate the point, described by Bradley and Ewing. ‘The force of public opinion may compel [someone who breaches constitutional conventions] to think again: thus the

²² This issue is also discussed in chapter one text to n 85, and the cross-references indicated there.

²³ Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 134.

²⁴ Joseph Jaconelli, ‘Do Constitutional Conventions bind?’ (2005) 64 CLJ 149 .

Scottish judge who in 1968 joined a committee established by the Conservative Party resigned rather than prejudice the work of the committee.’²⁵

Further, the provisions of the Human Rights Act 1988 enhance this important way that journalistic expression contributes to a political constitution. It is well known that the Act provides the courts with no power to strike down legislation, but rather, if they conclude that legislation is inconsistent with the Convention, and it is not possible for the courts to read the legislation in a way that gives effect to the legislation in a Convention-compatible manner,²⁶ the Act provides that the High Court and above can issue a declaration of incompatibility.²⁷ This creates no legal obligation on the legislature to repeal or amend the offending legislation, but, as Nicol *et al* note: ‘in practice, the government would be under considerable political pressure to bring UK law into conformity with what our courts have said the Convention requires.’ If that pressure fails to bring about change, there is no formal obstacle to a government choosing to be obdurate.²⁸ It can be seen that journalistic expression is a significant way in which pressure is brought to bear on a government to act on a declaration of incompatibility. Should this fail, such expression is also an important bulwark against, and possible remedy for, an obdurate Executive.

²⁵ Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (14th edn, Longman 2007), 27. A similar point is made in Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, Cambridge University Press 2007) 581 on the media’s involvement in the convention about ministerial resignations for errors or maladministration.

²⁶ Human Rights Act 1998, s 3(1).

²⁷ *Id* s 4

²⁸ *Id* s 4(6); Andrew Nicol, Gavin Millar and Andrew Sharland, *Media Law and Human Rights* (2nd edn, Oxford University Press 2009) 3.22 – 3.25.

Indeed, the applicability of the Fourth Estate conception of the Press to England is a point that has been recognised for some time, even though this is sometimes overlooked. The Fourth Estate concept was not only a republican idea, and Hume provides an explanation of how it can benefit a constitutional monarchy:

These principles account for the great liberty of the press in these kingdoms, beyond what is indulged in any other government. It is apprehended, that arbitrary power would steal in upon us, were we not careful to prevent its progress, and were there not an easy method of conveying the alarm from one end of the kingdom to the other. The spirit of the people must frequently be roused, in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition.²⁹

Moreover, in more recent times, Fourth Estate reasoning can be found in the work of contemporary scholars working outside the framework of the US constitution. Gibbons, for example, employs Fourth Estate notions of editorial autonomy, while making a normative case for special treatment within the context of UK constitutional law. He raises the idea of editorial autonomy to explain how both special benefits and special liabilities can be appropriate, as he proposes that individual journalists should be afforded some protection against the influence of their bosses. Hence, there should be particular benefits afforded to institutional journalists that entail the imposing of special liabilities on the owners and controllers of institutional journalistic outlets. Editorial autonomy is central to this argument:

[i]f freedom of the press has any significance, other than the owner's economic right to start a newspaper or his liberty to speak, it is in its

²⁹ David Hume, 'Of the Liberty of the Press (1741)' in Knud Haakonssen (ed), *Hume, Political Essays* (Cambridge University Press 2006) 3. Hume's argument was based on the tension he perceived between the monarchical and republican aspects of Britain's constitutional monarchy. It is true, though, that Hume's enthusiasm for Press freedom waned, and he edited a later edition of this essay to be less supportive of the idea: id 261-63.

identity with editorial autonomy conceived in this sense of serving a public interest in communication.³⁰

Legal recognition of Fourth Estate arguments

The law frequently recognises the Fourth Estate theories of the Press's importance in a democracy, and uses these theories as part of the rationales deployed to justify the affording of special treatment, of one form or another,³¹ to the Press. Space precludes a full survey of relevant case law and Parliamentary debate to demonstrate that this is so, and it is hoped that a few representative examples will be sufficient to demonstrate the plausibility of the claim: some from domestic law, one from the ECtHR, and one – admittedly extra-judicial, but significant nonetheless – from Lord Leveson's Inquiry.

The domestic examples start with *Reynolds v Times Newspapers Ltd*,³² where the Fourth Estate theory is prominent in Lord Nicholls's leading speech, which established a libel defence of particular utility³³ to institutional journalists. While Lord Nicholls does not expressly use Fourth Estate terminology, in explaining the reasoning behind the development of the defence he emphasises the fact that journalists actively investigate, and such investigations are part and parcel of the Fourth Estate notion of the way the Press can contribute to a democracy. And, significantly, Lord Nicholls explicitly acknowledges the difference between this type of Fourth Estate activity and mere reporting, a traditional Public Sphere Press activity.

³⁰ Thomas Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] PL 279, 289.

³¹ Chapter 2 text following n 31

³² *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL.

³³ This is a beneficial special privilege for individual institutional journalists of class 4, according to the taxonomy of special treatment laid out in chapter 2 text following n 31: it is discussed in more length in chapter eight.

it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.³⁴

There are other cases that more clearly adopt Fourth Estate reasoning, though sometimes without accepting that this is sufficient to merit the conferring of special rights. In *R v Shayler*, for example, Lord Bingham uses Fourth Estate notions when observing that: ‘the role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one’,³⁵ yet the case did not result in the affording to the Press of special treatment. In contrast, other cases use Fourth Estate reasoning and do recognise special treatment. A clear example of this is *R v Home Secretary, ex p Simms*,³⁶ where the recognition that there should be a special benefit³⁷ for the Press of access to prison to investigate allegations of miscarriages of justice is in part explained by reference to the ability of the Press to check and remedy failures by the legal system – a classic Fourth Estate rationale:

The criminal justice system has been shown to be fallible. Yet the effect of the judgment of the Court of Appeal is to outlaw the safety valve of effective investigative journalism. In my judgment the conclusions and reasoning of the Court of Appeal were wrong.³⁸

³⁴ *Reynolds* (n 32) 622.

³⁵ *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 [21] (Lord Bingham).

³⁶ *R v Home Secretary, ex p Simms* [2000] 2 AC 115 HL.

³⁷ Likely to be of class 2, according to the taxonomy in Chapter 2.

³⁸ *ex p Simms* (n 36) 131 (Lord Steyn): observations to similar effect can be found at 127, 129. Similar observations emphasising the importance of investigative journalism can be found in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898A (Lord Donaldson MR); *R v Central Criminal Court ex p Bright* [2001] 1 WLR 662, (2001) 2 All ER 244; *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359 [51] (Lord Hoffmann); *Mersey Care NHS Trust v Ackroyd (No 2)* [32] (Sir Anthony Clarke MR). *Charman v Orion Publishing Group* [2007] EWCA Civ 972, [2008] EMLR 16 [85] (Ward LJ) provides similar authority, and also emphasises the importance of editorial autonomy to which there should be some judicial deference at [5]; which is endorsed by House of Lords and Supreme Court *Re BBC (Attorney General's Reference No 3 of 1999)* [2009] UKHL 34, [2009] 3 WLR 142 [25]; *Application by Guardian*

Another is the analysis of Sir James Munby J, who relies *inter alia* on Fourth Estate rationales in explaining why family courts should be open to journalists:³⁹

[t]he jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice.⁴⁰

And indeed, of course, the foundation of the traditional common law approach to open justice according to *Scott v Scott* is the Fourth Estate notion of keeping the judges, while judging, under trial, as articulated by Bentham. Lord Shaw's famous quotation from Bentham is worth repeating in full, rather than its more usual eclipsed form, to illustrate that the point of media reporting of the process of justice is to provide a check on the operation of this part of the state.

In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial.⁴¹

Fourth Estate theories are also to be found in the jurisprudence of the ECtHR. The court frequently attests to the importance of the watchdog role of the Press in a democracy, a Fourth Estate notion when it refers to investigatory activity by the Press, and this is part

News and Media Ltd in Ahmed v Her Majesty's Treasury [2010] UKSC 1 and *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 [137] (Lord Mance) , [199] (Lord Dyson); [63]; and the authorities cited at n 117. However such judicial deference to editorial autonomy is measured, as is discussed in the text to chapter four n 31. For endorsement of similar views in the ECtHR, see chapter two text to and n 84.

³⁹ Chapter two text to n 34

⁴⁰ *Re J (A Child)* [2013] EWHC 2694 (Fam) [29]

⁴¹ *Scott v Scott* [1913] AC 417 HL 477; *Re Trinity Mirror Plc* [2008] EWCA Crim 50, [2008] QB 770 [32]; also discussed in chapter one n 96. The approach in *Scott* was resoundingly endorsed by the Court of Appeal in *Global Torch v Apex Global Management*. [2013] EWCA Civ 819, [2013] WLR (D) 276.

of the rationale on which the court rests its exhortation that courts should be particularly wary – arguably a species of special treatment⁴² – of constraining the Press. One example of this approach can be found in *Tarsasag a Szabadsagjogokert v Hungary*, a case that concerned the right of access to material held by the state:

the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s ‘watchdogs’, in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome’.⁴³

This case has been chosen out of the many that use this sort of language because it was brought by a non-Press body. This is significant, as while the court repeated the language it usually uses to note the relatively privileged position of the Press in Strasbourg jurisprudence, on this occasion it extended special treatment otherwise afforded to the Press to a non-Press body. This makes this an instance of class 2 special treatment, as described in chapter two.⁴⁴

The final example of Fourth Estate logic being used as a foundation for the provision of special treatment to the Press – perhaps even class 1 special treatment, for which membership of the Press is both necessary and sufficient – can be found in Lord Justice Leveson’s report:

A free press is able to perform valuable functions which individual free speech cannot. It is because of the position of the press as an institution of power that it is able to stand up to and speak truth to power. The professional

⁴² Chapter two n 79ff.

⁴³ *Tarsasag a Szabadsagjogokert v Hungary* [2009] ECHR 37374/05, para 26. Another case taking a similar approach is *Cumpăna v Romania* (2005) 41 EHRR 14, 113 where penal sanctions were deprecated for potentially chilling investigative journalism. Similar observations can be found in *Mahmudov v Azerbaijan* [2008] ECHR 35877/04, para 49, and the authorities cited therein.

⁴⁴ Chapter two, text following n 31.

skills and resources at its disposal enable the press as an institution to carry out ground-breaking investigations in the public interest. It is these considerations and functions which have resulted in the press as an institution being afforded certain privileges going beyond those protected by freedom of speech.⁴⁵

Public Sphere

The second category of theories describe the contribution that the Press can make to democracy with the idea that the Press provides a conduit for the plurality of voices that express themselves and are heard by the body politic. These theories can be termed ‘Public Sphere’ theories, to use Habermas’ influential term.⁴⁶ Habermas’ own ideas are detailed and complex, and space precludes their full consideration here. However, Hitchens provides a useful short summary of the relevant and less contentious⁴⁷ parts of his theory:

The public sphere, then, provides an important space for the generation, consideration, and formation of public opinion, which in turn facilitates the democratic process. ...it would be difficult to envisage today the Public sphere operating without the media participating.⁴⁸

As was the case with Fourth Estate theories, this is not a new idea. It can be found, in part at least, expressed in the work of Madison, who recognised that it is important for a society to have an open channel for information distribution and the discussion and formation of ideas, particularly in a self-governing state. He famously observed that:

⁴⁵ Leveson LJ (n 3) vol 1 pt B ch 2 para 6.1 68.

⁴⁶ Jürgen Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Polity 1989) .

⁴⁷ Text to n 74ff.

⁴⁸ Lesley Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing 2006) 58.

a popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both... a people who mean to be their own governors, must arm themselves with the power knowledge gives⁴⁹

Other writers have also propounded ideas that are closely related to this. It is useful to compare the idea of the 'Public Sphere' with one in particular argument, suggested by Meiklejohn, because such a comparison will highlight one important aspect of Public Sphere theories. To explain this, one needs to provide a little background on Meiklejohn's theory.

Meiklejohn viewed democracy to be legitimate as he considered it the form of political organisation that maximises the capacity for individuals to be autonomous.⁵⁰ He stressed the importance of speech in promoting this system of government because speech helps people form and discuss political principles and opinions, and it helps them turn these into action. This leads to recognition of the importance of freedom of speech, as this freedom facilitates autonomous self-governance by the citizens of a democratic state – curtailing an individual's speech curtails their autonomy and thereby deprives democracy, for Meiklejohn, of its normative justification in relation to that individual. Freedom of speech can be seen, therefore, as the engine of the ideas and thoughts of the individuals who comprise a democracy, without which a democracy would not be valuable as it would not recognise and promote the autonomy of its individual members. Freedom of the Press rises to the fore, as the predominant means by which the engine of ideas and thoughts operates.

⁴⁹ James Madison, 'James Madison to W T Barry (1822)' in *The Writings of James Madison*, vol 1 (Putnam's Sons 1900-1910) ch 18 document 35.

⁵⁰ Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) Sup Ct rev 245.

It is clear that there is some overlap between Meiklejohn's idea and the Public Sphere conception, particularly in relation to the media's function in a democracy, as they both provide resistance to any move to restrict the Press' carriage of the democratic dialectic. However, there are differences, and the Public sphere idea is wider. This is because central to Meiklejohn's theory is the idea that relatively unrestricted speech is necessary and advisable in a participatory democracy, given that such a form of political organisation maximises the capacity for individuals to be autonomous. This can be considered a source of weakness, as it is not clear that a state or a people are deficient if they are not as politically engaged as Meiklejohn considers they ought to be. Further, his argument can be challenged on the grounds that it provides undue focus on political speech, as the speech that Meiklejohn seeks to protect is that which has an effect on democratic choices. This is troublesome as there are patent difficulties in defining what is political speech and what is not, and hence what should be afforded protection and what should not; and in any event, speech other than political speech can be very important and intuitively more worthy of protection than some political speech. For example, Raz makes a compelling argument for the importance of protecting speech that potentially validates people's lifestyle choices, speech which is not necessarily political, when the word is construed narrowly.⁵¹ So, speech that might validate the choice of a group of people to express their homosexuality, by its positive portrayal in a mainstream sitcom for example, may be as worthy of protection as detailed speech relating to some minutiae of taxation policy.

⁵¹ Joseph Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Rev. edn, Clarendon 1995) 156- 60. This will be discussed in chapter seven, text to n 51ff.

The Public Sphere conception, while of a similar nature to Meiklejohn's argument, side-steps some of these problems, as the idea of the Public Sphere encompasses discussion and ideas beyond the merely political, and it is not wedded to the idea that democracy should be a participatory democracy. The Public Sphere contains the dissemination and formation of opinions and beliefs, whether or not these result in political choices, and whether or not the underlying democracy is as participatory as Meiklejohn would wish. The ambit of material and actions that may merit special treatment under the Public sphere principle is therefore very wide, and in any event wider than that which would be protected by Meiklejohn (at least in his early statements).

Special treatment for the Press can arise from the Public Sphere conception because of the centrality of institutional journalism to the existence and maintenance of the Public sphere. Public sphere theorists assert, as does Hitchens in the quotation above, that institutional journalists are particularly important in creating and influencing public opinion, the dissemination of such opinion, the dissemination of information, and indeed of the mechanisms and structures by which such influence and dissemination takes place. Given this, it is important to afford institutional journalists special treatment to preserve the place where democracy happens, or where members of a society communicate with each other and form ideas. Often, this special treatment will amount to imposing liabilities on institutional journalists, to ensure that the streams of public communication are clean and pure, given that institutional journalists form the Public sphere more than other people or other institutions and can pollute the streams with their opinions and bias. Common examples include right to reply provisions, but the Public Sphere may also mandate special regulation for quotas to nudge the public discourse, or at least some of

the variables about the source of public discourse, in a way that law-makers find attractive.⁵² Additionally, though, Public Sphere theories can also provide a rationale for special benefits, particularly – for example – freedom of information rights. Moreover, as was the case in relation to the Fourth Estate, public sphere theorists are not convinced that the Internet, despite its obvious capacity for extending the scope of the Public Sphere, means that there is no longer a Public Sphere rationale for providing the Press with special treatment. Sunstein argues:

Society's general-interest intermediaries [institutional journalists], even without legal compulsion, serve many of the functions of public forums. They promote shared experiences; they expose people to information and views that would not have been selected in advance.⁵³

In contrast, the Internet creates risks:

The Internet is hardly an enemy here. It holds out far more promise than risk. Indeed, it holds out great promise from the republican point of view, especially insofar as it makes it so much easier for ordinary people to learn about countless topics, and to seek out endlessly diverse opinions. But to the extent that people are using the Internet to create echo chambers, and to wall themselves off from topics and opinions that they would prefer to avoid, they are creating serious dangers.⁵⁴

Legal recognition of Public Sphere arguments

Just as was the case with the Fourth Estate, the Public Sphere account of how the Press can contribute to democracy, and therefore be afforded special treatment, has influenced and been adopted by the law. It can frequently be found alongside Fourth Estate theories but is distinguishable from them. The fact that the theory often accompanies Fourth

⁵² Chapter two, text to n 58ff.

⁵³ Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) 32.

⁵⁴ *Id.* (n 53) 222-23.

Estate theories can be seen from the fact that Lord Leveson, as well as relying on Fourth Estate theories as noted above, also employs Public Sphere theories when explaining the importance of the Press in a democracy:

a free press serves democracy by enabling public deliberation. Citizens need information to make intelligent political choices. To this end, the press serves both as a conduit for the dissemination of information as well as a forum for public debate.⁵⁵

Indeed, as indicated above, the two theories are also both attested to in *Reynolds*, when Lord Nicholls acknowledges the Public Sphere rationale as well as the Fourth Estate when developing an – at that stage – novel defence in libel:

[i]t is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept.⁵⁶

In the terms being used here, this argument acknowledges the prominence of the position the media occupy in the Public Sphere, and proposes this as part of the reason that they might be afforded the relative immunity from restriction contained in the *Reynolds* defence.

However, the two theories are not only distinguished in the case law, but also provide the foundations for different types of special treatment. This is evident from Lord Bingham's judgment, for example, in *McCartan Turkington Breen v Times*,⁵⁷ a case that

⁵⁵ Leveson LJ (n 3) vol 1 pt B ch 2 para 4.2 64.

⁵⁶ *Reynolds* (n 32) 622. Lord Hobhouse, to a similar end, opined 'Journalists very often have no personal knowledge of the truth or falsity of the facts which they report and publish. Typically they are reporters of material derived from others.' 658. Similar observations about the Public Sphere function of the Press include: *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634, [2002] EMLR 215; *R (Animal Defenders) v Culture Secretary* [2008] UKHL 15, [2004] 1 AC 185 [28] (Lord Bingham); *R v B* [2006] EWCA Crim 2692, [2007] EMLR 145 [19]; *R (BBC) v Justice Secretary* [2012] EWHC 13 (Admin), [2013] 1 WLR 964 [97] (Singh J).

⁵⁷ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 HL.

established that qualified privilege extends to the reporting of press conferences (a type of beneficial special treatment for the Press, but one also afforded to others).⁵⁸ In his judgment, Lord Bingham recognises that there are two different ways in which journalism can contribute to democracy, and these largely map onto the two theories. On the one hand, the Press reports information, a Public Sphere conception of the Press, and it is on this that the basis for a defence of qualified privilege for press conferences is established. This is distinct from the Fourth Estate arguments that were adopted by Lord Nicholls in *Reynolds* to protect investigative journalism:

Sometimes the press takes the initiative in exploring factual situations and reporting the outcome of such investigations. In doing so it may, if certain conditions are met, enjoy qualified privilege at common law, as recently explained by this House in [*Reynolds*]. In the present case the role of the press is different. It is that of reporter. The press then acts, in a very literal sense, as a medium of communication.⁵⁹

And Ward LJ also provides a pithy account of how the two theories differ in *Charman v*

Orion Publishing:

This was a piece of investigative journalism where McLagan was acting as the bloodhound sniffing out bits of the story from here and there, from published material and unpublished material, not as the watchdog barking to wake us up to the story already out there.⁶⁰

Charman is a useful case to consider in more detail, as it put on a firmer footing the relatively novel defence in defamation of reportage, and this is a useful example of an instance of special treatment⁶¹ based predominantly on a Public Sphere conception of the

⁵⁸ Hence probably a class 2 special treatment, as identified in chapter two text following n 31.

⁵⁹ *McCartan Turkington Breen v Times Newspapers Ltd* (n 57) [2].

⁶⁰ *Charman v Orion Publishing Group* (n 38) [49].

⁶¹ It is likely to be a class 3 or 4 special treatment, to use the taxonomy in chapter two, text following n 31.

Press, as the defence is grounded in the perceived need neutrally to disseminate information. This is evident from the word reportage itself, which Simon Brown LJ describes as ‘a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper’.⁶² The defence is ‘a class designed only to protect the factual reporting in the public interest of a dispute containing defamatory matter’.⁶³ It is likely to be distinct from the *Reynolds* defence,⁶⁴ as *Reynolds* is founded, in part, on the establishment that the transmission of defamatory *information* in a report is in the public interest. Reportage, by contrast, is founded in part on the establishment that transmission of the fact that a defamatory statement *has been made* is in the public interest. The iconic situation in which a defence of reportage is available is where there is a political dispute between two sides, with each side making allegations against the other. If the dispute is in the public interest, and if the fact of the allegations – as opposed to the content of the allegations – is what is in the public interest, then the defence may be available. However, it is only ‘established where, judging the thrust of the report as a whole, the effect of the report is not to adopt the truth of what is being said but to record the fact that the statements which were defamatory were made.’⁶⁵ The rationale for this defence is the free flowing of political information, and this concept is integral to the

⁶² *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* (n 56) [6]. It is likely that Simon Brown LJ was not using the expression ‘the newspaper’ with the intention of restricting the availability of the defence to the print media.

⁶³ *Charman v Orion Publishing Group* (n 37) [88] (Sedley LJ).

⁶⁴ *Reynolds* (n 32); *Charman v Orion Publishing Group* (n 63) [90] (Sedley LJ).

⁶⁵ *Charman v Orion Publishing Group* (n 37) [48] (Ward LJ).

theory of the Public Sphere: it is less easy to see reportage being grounded in Fourth Estate arguments.⁶⁶

The ECtHR also frequently relies on Public Sphere arguments in media law cases, often – arguably – using them as a basis for the provision of special treatment to the Press. So, for example, in *Jersild v Denmark*, the court relied on Public Sphere reasoning, emphasising the importance of the Press as a means of disseminating views that were prevalent in society rather than as a discoverer of facts, as a rationale for not restricting the Press unless there were *particularly* strong reasons to do so. The case involved an institutional journalist reporting, but not adopting, racist language of others. The journalist was acting merely as a conduit for other views, and not as an investigator and adopter of views of their own.

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁶⁷

The Public Sphere can also be found providing the rationale for other law. It is commonly the predominant rationale behind many of the special liabilities imposed on the Press, whether individuals or institutions. It is particularly evident in the imposition of a requirement of due impartiality for broadcast news, and on those who present it, as the Public Sphere indicates that there is a need to reduce the influence that institutional

⁶⁶ But such an interpretation is possible: the relationship between the two theories is discussed below, in the text to n 91ff.

⁶⁷ *Jersild v Denmark* (1994) 19 EHRR 1. Similar dicta can be found, for example, in *Informationsverein Lentia v Austria* (1993) 17 EHRR 93, para 39; *Bergens Tidende v Norway* (2001) EHRR 16 (discussed in Nicol, Millar and Sharland (n 28) 2.18 and 5.32; *Ozturk v Turkey* (App no 17095/03) ECHR 9 June 2009, paras 27, 28; *Romanenko v Russia* App no 11751/03 (ECtHR, 8 October 2009), paras 42 – 44.

journalists have on the information that they disseminate.⁶⁸ At an institutional level, it is evident in the sector-specific merger regulations, that exist in part to ensure a plurality of voices in the Public Sphere: again, the rationale is that there should be wide open conduits for the dissemination of information and debate. Such regulations can be found both in EU and UK law.⁶⁹ However, as well as providing a rationale for liabilities, the Public Sphere can also provide a rationale for the provision of benefits for the Press, as the example of reportage shows. Indeed, the example of reportage also shows that, while the Public Sphere is frequently the prime rationale for imposing liabilities on the broadcast media, it can also affect the sectors of the industry that historically disseminated their journalism by print. In each case, the special liabilities and benefits are based on the Public Sphere idea, as they are predicated on the need to keep the conduit of information and discussion relatively clear and unimpeded.

Difficulties with this case for special treatment

It can be seen how the two theories describe distinguishable mechanisms of how the Press can contribute to democracy, even if they overlap in some respects. The Fourth Estate theory suggests that the Press stands – to an extent, at least – outside the state and acts as an investigator, and the Public Sphere suggests that it stands within society and acts as a means of transmission of discourse. These mechanisms can clearly dovetail, and provide a combined argument for the provision of special treatment to the Press.

However, equally clearly, there are problems. Consideration of these reveals more

⁶⁸ Chapter two text to n 55.

⁶⁹ Chapter two, text to n 63.

fundamental problems with the thesis itself. Two will be described. The first derives from the criticisms that can be made of the theories, and the second from the fact that the theories can conflict.

Criticisms of the theories

Fourth Estate arguments for special treatment can be criticised on a number of fronts. A short summary includes: the strength of the theories largely depends on a particular and controversial conception of democracy in which authority rests with the people; it is not clear why the focus should be on policing the government, when private power can be as dangerous and in equivalent or greater need of checking;⁷⁰ it is not clear whether the Fourth Estate delivers on its promise to be an effective supervisor of the state;⁷¹ it does not pay sufficient regard to the fact that the Press can damage democracy as much as investigate it;⁷² and to some extent it is incoherent, and is unclear as to whether it's a function performed by individuals or institutions.⁷³

Likewise, the Public Sphere argument can also be criticised. The historical account of the nature of the Press as a passive conduit for discussion, on which Habermas' theory is constructed, has been challenged;⁷⁴ it has been suggested that the Public Sphere is wrong to encourage the interference of the state in the private speech

⁷⁰ ⁷⁰ Owen Fiss, 'Why the State?' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP 1990).

⁷¹ Smith, *Broadcasting Law and Fundamental Rights* (n 3) pt 1.

⁷² John Lloyd, *What the Media are Doing to our Politics* (Constable & Robinson 2004).

⁷³ Curran and Seaton (n 5) 350.

⁷⁴ A survey is undertaken by Hitchens (n 48) 49 – 60.

and property rights of Press owners;⁷⁵ and the Public Sphere account of the contribution of the Press to democracy can be challenged as inflexibly monistic, failing to pay sufficient regard to other reasons that we value free Press speech.⁷⁶ The suggestion that the Press contaminate the Public Sphere by voicing opinions and bias could be countered by the evidence of media sociologists who deny a substantial role of the media in forming people's opinions, as there is evidence that people ignore what the Press say.⁷⁷ Inversely, the Public Sphere concept can also be criticised as it puts at jeopardy the editorial autonomy of the Press, which according to Fourth Estate theories, is of value in a democracy. In general, perhaps, it might be said that the Fourth Estate theory is too wary about the risks of state power and too sanguine about the risks of private power, and the Public Sphere is too sanguine about the risks posed by the state, and too sceptical of the benefits that can be afforded by private enterprise.

To some extent these criticisms can be answered. So, for example, criticisms of the historicity of Habermas' Public Sphere conception can be met by the fact that Habermas's descriptive account may be flawed, but his normative account is still valuable; the criticism of the idea that the rights of Press owners should not be compromised by the state can be met by noting that it is not clear that such property rights should be held to be prior to the ability of the state to control the Press.⁷⁸ Similarly, other criticisms may be rebutted. Likewise, some criticisms of the Fourth Estate theory

⁷⁵ David Kelley and Roger Donway, 'Liberalism and Free Speech' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) .

⁷⁶ Chapter four text to n 3.

⁷⁷ Chapter one text to n 93.

⁷⁸ Chapter four text to n 79.

can be answered. For example, it can be observed that, contrary to one line of criticism, there are frequent examples of the Press successfully acting as a check on the state. A range of examples could be chosen to validate this, ranging from the Watergate investigations and reporting by the *Washington Post* and *New York Times*, the Mai Lai and Abu Ghraib investigations and reporting by Seymour Hersh, to, more recently in this country, the *Daily Telegraph*'s expose of MPs using public money to repair their private moats and duck houses are examples of this sort of action by the media. There are also examples of the Press inhibiting as well as uncovering misfeasance. One notorious example can be found in the evidence given to the Scott Inquiry into the Matrix Churchill affair. A civil servant considered the existence of such journalistic speech when evaluating whether to recommend the issuing of a PII certificate. Issuing the certificate would have, notoriously, prevented the defendants from mounting a successful defence, and further would have hidden government complicity in the arms deal that was the source of the prosecution. It was the existence of journalistic expression, in the form of the reach and reputation of the front page of a tabloid newspaper, that dissuaded the civil servant from advocating a course of action that would have been likely to have led to an injustice. It is worth quoting from the evidence at length:

The difficulty of course is not simply that the letter exists but that the writer of the letter no doubt still exists, and even if he has not so far been involved in the proceedings by either the prosecution or the defence he may well make the existence of his letter public. The chances of his doing so will no doubt be all the greater if he is one of those who has already made redundant or will be made redundant next month. It is tempting to suggest that we might claim PII for [the letter], but I fear that doing so in the face of the possibility that the information in it may well appear across the front of the tabloid press

during the course of court proceedings, makes me somewhat diffident about suggesting it.⁷⁹

However, these attempts to meet some of the criticisms of the theories won't be pursued in more detail. This is despite the fact that arguments about the weaknesses and strengths, and relative priority of the Fourth Estate or the Public Sphere theories underlie much theoretical debate in media law. This is particularly evident in discussions over the question of the relative superiority of the Press model of media regulation and the model that covers broadcasting,⁸⁰ a significant aspect of which is based on evaluating the relative priorities of these two theories. But considerable ink has been spilled in attempts to champion one conception over the other without arriving at a consensus: Hitchens, for example, is reticent about the Fourth Estate model⁸¹; yet by contrast Powe argues forcefully against the Public Sphere conception,⁸² but this is the model that Harrison and Woods place at the centre of their analysis of EU broadcasting law,⁸³ as do Gibbons and Humphreys.⁸⁴ Bollinger, famously, emphasises the merits of both approaches, as the deficiencies of one are complemented by the merits of the other.⁸⁵ But this debate won't

⁷⁹ Quoted in BJohn Bowers, *Whistleblowing: Law and Practice* (2nd edn, Oxford University Press 2007) 1.20, 9.

⁸⁰ Chapter one, text to n 46ff.

⁸¹ Hitchens (n 48) 62.

⁸² Lucas Powe, *American Broadcasting and the First Amendment* (University of California Press 1987) 6.

⁸³ Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press 2007), 29-40.

⁸⁴ Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (Routledge 2012) ch 1.

⁸⁵ Lee C Bollinger, 'Freedom of the Press and Public Access: Towards a Thory of Partial Regulation of the Media' (1976) 75 Michigan Law Review.

be pursued further in this thesis, not least because if such extensive discussion has failed to resolve the relative merits of the Fourth Estate and the Public Sphere, it is unlikely that a resolution will be attainable within the scope of a work like the present that does not solely address this question directly.

What is more useful, however, is to consider some aspects of what these debates reveal about the theories themselves, and the free speech values thesis on which the claim for special treatment rests. There are three points that can be drawn out. First, the arguments that the theories may or may not correctly describe the world, and so may or may not be convincing reveals that these are contingent arguments, as the features of the Press that achieve the ends considered worthy by the theories are contingent not necessary. The Press happens to undertake the functions described in these two theories, and society happens to value these functions, but it could be otherwise. But the argument for special treatment is eroded if the Press changes and no longer performs these functions or if society changes and they become no longer important. Hence, the strength of the argument is likely to change as circumstances change. Second, and connected, these are functional arguments: it is the function that the Press carries out that is valuable and the source of special treatment, rather than any value that is inherent in the institutional Press itself. The arguments do not assert that special treatment of the institutional Press rests on the institutional quality of the Press, but rather because of the function of such institutional journalism performs in the state. As a functional argument, these arguments for special treatment can be seen as weak as the function of the Press can change: in the least, they are less strong than arguments for special treatment that are predicated on inherent qualities of an activity. The third related point is that these

arguments are consequentialist arguments for special treatment. This was addressed in the last chapter,⁸⁶ and the point made that, as with all consequentialist arguments, the case for special treatment is undermined if there are activities that more directly achieve the desired consequences.⁸⁷

Together, these points reinforce each other in the conclusion that the argument for special treatment based on the free speech values and the two theories of democracy is weak. This is in part because the Fourth Estate and Public Sphere arguments are contingent, functional and consequentialist, but it is also because the free speech values thesis shares these qualities. There are merits in this weakness – if situations change, and the Press no longer are valuable, it would seem curious in the extreme to argue that it should continue to be afforded special treatment just because it was considered important to have a stronger rationale for such treatment. Indeed, some argue that situations have changed, or are changing as a result of the development of the Internet, and it is in part because of this that chapter three offers some arguments as to why special treatment can continue to be appropriate, because the Press continues to be distinct.⁸⁸ But the weakness also amounts to a deficiency in the free speech values thesis, as it seems all too easy to evade the conclusion that special treatment is appropriate. A government may resist providing the public or the Press with a right of freedom of information, for example, because it avers that widespread dissemination of information on the Internet makes this unnecessary; or a media organisation might argue that special liabilities such as media

⁸⁶ Chapter four, text to n 112.

⁸⁷ Cf chapter three text following n 64.

⁸⁸ Additional arguments are made particular to the Fourth Estate and Public Sphere conceptions respectively: text to n 15 and n 53 above.

sector merger regulations, or impartiality requirements, were likewise unnecessary because of the proliferation of public speech on the Internet supplants the Press' traditional dominance of the Public Sphere. These sorts of results do not seem attractive, and so it would be useful to see if a stronger, but still convincing, reason for special treatment could be discerned. This will be the task of later chapters.

Conflicts between the theories

The second problem with the free speech values thesis arises because the theories can conflict. This makes it difficult to determine what instances of Press action merit special treatment, and which instances of special treatment might be merited. However, a preliminary point needs to be discussed before this can be demonstrated, as it ought to be shown more clearly that the theories are distinct, for if they are not and if, for example, one is reducible to the other, then there is no real conflict. And the view that the theories are distinct has been established so far primarily by stressing the fact that a distinction between them is observed in the case law, but this doctrinal argument could be challenged, and it asserted that they are not as distinct as has been suggested, for at least two reasons. First, because of the fact that many of the authors cited above as proponents of Fourth Estate analysis do, as well, express Public Sphere accounts of the Press, or do link the two theories. Second, and further, it could be argued that the Fourth Estate conception collapses into the Public Sphere.

The first point is true as far as it goes, as many Fourth Estate theorists do not only propound Fourth Estate views. So Baker acknowledges the importance of Public Sphere theories, and in the quotation cited above, after emphasising the importance of the Fourth Estate role of the Press, he continues by attesting to the Public Sphere functions that the

Press also undertakes: '[the Press' fundamental role comprises] more generally its role in developing and presenting information, opinion and vision that is instrumentally valuable to its audience – the people in a free society'.⁸⁹ Further, Gibbons' account has a distinct Public Sphere flavour to it, as he was writing against the perceived evil of commercial Press owners unduly influencing the content of outlets they own. He does pay tribute to the importance of editorial autonomy, but this is because he is particularly concerned to prevent Press owners warping the information disseminated by their journalists – a concern very redolent of the Public Sphere conception of the Press.⁹⁰ The second, more important point is also plausible, as the argument for a unitary theory can be advanced on the view that the Fourth Estate theory is really only an aspect of the Public Sphere account of journalism's place in a democracy. This is because the Fourth Estate theory, while emphasising the media's role in investigating the state, rests on the fact that such information is communicated to the public, in whom political authority (to some extent at least) vests. This act of communication presents information that is evaluated, amongst other information, and acted on by people within the Public sphere. The Fourth Estate merely describes a stream of information that contributes to the Public Sphere, and it does not amount to a different aspect of the media's relationship with the state and the public. In the end, all is information, and in the end the function of the media is as a conduit for information. Given this, it is not the case that these two arguments dovetail to support the case for special treatment, but that rather there is but one argument here.

⁸⁹ Baker, 'The Independent Significance of the Press Clause under Existing Law' (n 18) 959-960.

⁹⁰ N 30. Oster, too, appears to elide the two arguments: Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 69-70.

Yet these observations are not sufficient to establish that there is no significant difference between the two theories. That this is so can be recognised by reflecting on a number of matters, even leaving aside the fact that, as has been mentioned, the tension between the two has been widely acknowledged by media law theorists.⁹¹ The first relates to the difference between the two theories as to the importance that should be placed on the Press having editorial autonomy, manifest (for example) in its being opinionated, or selecting stories to reflect the perspectives of its audience. The Public Sphere places a relatively low importance on this autonomy as it emphasises the importance of the Press as passive conduit; but by contrast the Fourth Estate, which recognises journalism as an active agent, sees these manifestations of autonomy as likely to be of value to society. Indeed the Public Sphere theorist *par excellence*, Habermas, in Hitchens' words, 'seems wary of the media as a participant in the public sphere', on the grounds that it shapes not merely transmits debate,⁹² yet this active participation is a quality considered by Fourth Estate theorists like Bezanson to be at the heart of what is valuable in the Press.⁹³ Second, there are significant differences between the two theories as to the relative importance of different activities of the Press. So the Public Sphere emphasises the importance of those aspects of journalistic activity that report information, while the Fourth Estate emphasises the importance of those aspects of journalistic activity that discover information. Differences such as these are not only of academic importance, as they can translate into different attitudes to the propriety of

⁹¹ N 5.

⁹² Hitchens (n 48) 54-55; Habermas (n 46) 188.

⁹³ Bezanson (n 20) 760.

some sorts of special treatment, particularly content regulation directed at journalism, and the propriety of special treatment when journalists act in certain ways. This is the conflict in question, and indeed, it is a manifestation of the problem of indeterminacy that the last chapter identified in the thesis.

Indeterminacy as to particular instances of special treatment

The first indeterminacy is rather well known, and relates to particular instances of special treatment, and the question of whether the democracy argument in general indicates such instances are appropriate. The Fourth Estate argument tends to one conclusion, and the Public Sphere approach to another. This difference is particularly evident in the difference in attitude of the two theories to the prospect of certain types of content regulation by the state that imposes special liabilities on journalism.⁹⁴ The Public Sphere is much more phlegmatic about the prospect of such regulation, which can be seen as appropriate to keep the conduit of information and debate clear. But the Fourth Estate, setting the Press up as a counterweight to those who would be imposing regulation, is clearly much more antipathetic to such a prospect. This is the concern, mentioned in the last chapter, of giving the fox the keys to the hen house.⁹⁵ This is not to say that the Fourth Estate can never countenance regulation, or that regulation under the Public Sphere theory will always be appropriate. But the differences in the extent to which such regulation is presumed appropriate differs between the two theories, and indeed this may result in different regulatory approaches being adopted based on whether the Fourth

⁹⁴ Here I mean media specific content regulation, not as Sunstein points out, the wider regulation to which all forms of journalism, print, broadcast and online are subject: Sunstein (n 53) 154-5, 160-2.

⁹⁵ Chapter four, text above n 69.

Estate or the Public Sphere is the predominant model of the contribution that the Press can pay to democracy.

An example that helps make the point is the special liability often imposed on the media to provide a right of reply to attacks or comments made by the institutional media. A Public sphere conception of the Press is likely to hold that such a right is not particularly controversial, as the need to disseminate opinion in rebuttal of a point of view, with the same prominence as the original view expressed, is necessary for the balanced formation of public opinion. It is necessary that the Press be regulated and special liabilities imposed on them to ensure that such a rebuttal is carried, particularly as the Press often do not wish it to be carried. In contrast, a Fourth Estate theory argument is likely to suggest that the Press should be protected from governmental influence, as the opinions of institutional journalists should be protected from external influence, and on these grounds a governmentally imposed right of reply becomes deeply troubling, and in any event, the editorial judgment of journalists is something of value, and something that one should be wary of undermining.

The example of a right to reply can be considered in a domestic setting. Such a provision applies to broadcasting, for example, by virtue of chapter IX of the Audio Visual Media Services Directive.⁹⁶ Yet there is no equivalent provision regulating print. Indeed, Lord Justice Leveson details the repeated attempts to get such a provision passed by private members of the House of Commons since 1981, each of which failed.⁹⁷ A

⁹⁶ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD) Audiovisual Media Standards Directive, chapter two text to n58.

⁹⁷ Leveson LJ (n 3) vol 1 pt D ch 1 para 5.9 207.

plausible explanation for the fact that broadcast is governed by such regulations and print is not is the view that broadcasting is predominantly conceived of as contributing to democracy by virtue of the Public Sphere approach, and print conceived in terms of Fourth Estate theories. Support for this view can be gleaned from Craufurd Smith's analysis, which comes to the conclusion that the regulatory scheme adopted by broadcasting is based on its perception as being a Public Sphere, and that of the Press is based – when it is defended – on the conception of newspapers as comprising the Fourth Estate.⁹⁸ Further accounts accord with this: Hitchens grounds audio-visual regulation firmly in the Public Sphere,⁹⁹ as does Harrison and Woods,¹⁰⁰ and Gibbons and Humphreys.¹⁰¹

It is useful to see examples of this tension in some debates in American law, as they make particularly evident how this sort of special liability relating to regulating content is differentially regarded by Fourth Estate and Public Sphere theories. A famous example can be found in the linked judgments of the US Supreme Court of *Red Lion Broadcasting v FCC*¹⁰² and *Tornillo v Miami Herald*.¹⁰³ Both judgments related to the right of reply of a member of the public attacked by the Press, but the cases came to different conclusions, as one related to broadcast journalism, and one print. In *Red Lion*, the Court considered the constitutionality under US law of a right of reply provision

⁹⁸ N 5.

⁹⁹ N 81

¹⁰⁰ N 83.

¹⁰¹ N 84

¹⁰² *Red Lion Broadcasting v FCC* 395 US 367 (1969)

¹⁰³ *Miami Herald v Tornillo* 418 US 241 (1974)

imposed on the broadcast media by the Federal Communications Commission, and decided that such regulations were constitutional.¹⁰⁴ But what is interesting is that in coming to such a conclusion, the Supreme Court used language with a Public Sphere flavour when they observed: 'it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount'.¹⁰⁵ While in *Tornillo*, the Court found that right of reply provisions that restricted the editorial autonomy of newspapers and were unconstitutional, and in that case used Fourth Estate concepts, observing that the unconstitutionality in part arose from '[g]overnmental compulsion on a newspaper to publish that which "reason" tells it should not be published.'¹⁰⁶ Indeed, this tension between Fourth Estate and Public Sphere reasoning also underpins the debate in the 1970s about the propriety of a more general right of public access to the media. Proponents of such a right interpreted the First Amendment as mandating a right of access to the media, and were spearheaded by Barron, who adopted Public Sphere arguments.¹⁰⁷

Tensions such as these show that the two theories are distinct, and also show how indeterminate the thesis can be as a guide to the propriety of instances of special treatment.

¹⁰⁴ Rights of reply were part of a suite of liabilities imposed by the Fairness Doctrine, some of which still remain: these are surveyed in Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 15), and Gibbons and Humphreys, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (n 84) 20-33.

¹⁰⁵ *Red Lion Broadcasting v FCC* (n 102) 389.

¹⁰⁶ *Miami Herald v Tornillo* (n 103) 256. Extensive comparisons of these two judgments have been made, summarized in Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (n 15) Bollinger 53, 258; and Sunstein (n 53) 204.

¹⁰⁷ Chapter 4 n 8; Powe, *The Fourth Estate and the Constitution : Freedom of the Press in America* (n 5) ch 8, 9.

Indeterminacy as to whether particular instances of journalism contribute to democracy

The second indeterminacy arises because the differences between the theories means it can be difficult to say whether a particular media act contributes or does not contribute to the free speech value of democracy. This significantly detracts from the utility of using the argument from democracy as a rationale for providing the institutional Press with particular incidents of special treatment. An example of this, and an illustration of the problems it poses can be found in Fenwick and Phillipson's discussion of the case of *Re S*.¹⁰⁸ This is the leading decision which sets out the approach to be adopted when the media seek to report cases when the reporting might infringe privacy: in other words, it describes how to balance a right to privacy under article 8 of the ECHR with a right to free expression under article 10 of the ECHR when reporting the courts. Lord Steyn said that the competing rights are to be subject to an 'intense focus', an act-based assessment as to whether reporting should be allowed or privacy protected.¹⁰⁹ The case concerned the propriety of reporting restrictions that protected a third party, S, in a murder case. S was the child of the defendant, and identifying the defendant would lead to the identification of S, who was the subject of care proceedings. The victim was S's brother. There was evidence before the court that revealing S's identity would hurt him, and put him at risk of later mental illness. An injunction has been sought prohibiting publication of the identity of the defendant, to protect S. The Press wanted to report on the case, including

¹⁰⁸ *Re (S) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2004] 1 AC 593.

¹⁰⁹ *Id* (n 108) [17]. The downsides of act-based approaches have been discussed in chapter four, namely the risk of under-protection of the long-term interest because a tribunal has resolved a dilemma in a way does immediate justice to the parties at hand: text to n 62.

the identity of the defendant. The injunction was refused at first instance, and on appeal, and came before the House of Lords.

Fenwick and Phillipson's analysis focuses on the appropriate way to resolve the tension between article 8 and 10 of the European Convention on Human Rights.¹¹⁰ They apply the free speech values thesis, in its form as their 'variable geometry of media freedom'. This holds that the Press ought to be able to report the trial – an instance of media freedom, or perhaps special treatment – where this would contribute to the values that lie at the heart of our interest in free speech. In applying their variable geometry approach, Fenwick and Phillipson evaluate what free speech values might be at play, considering which values might be promoted by Press reports of the identities of those involved in the case. They conclude that no values save for democracy are of great significance, and democracy is engaged (by reference to decisions of the European Court of Human Rights), where speech may impart 'information on matters of serious public concern'.¹¹¹

This is an attractive argument, as there seems little merit in permitting speech of matters of trivial public concern to trump the privacy interests of a vulnerable child. However, to digress a little and emphasise a point that was made about the free speech values thesis in the last chapter, it is probably too sweeping a judgment to say that no other values are of great significance, as other values are indeed engaged. Autonomy, for example, might be engaged, in the form of the audience's autonomy expressed in their

¹¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950.

¹¹¹ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006), 844-848.

preferences about what news to consume, because it is plausible that some of the public would like to read about the names of those involved in this story. True, audience autonomy is unlikely of itself to be considered a sufficient reason to permit the reporting, but that emphasises, as discussed in chapter four, that one problem of the free speech values thesis is that one often has to look outside the thesis to determine what instances of special treatment are appropriate.¹¹²

But, be that as it may, it is not the indeterminacy caused by the conflict between the Fourth Estate and Public Sphere theories that I am attempting to demonstrate here. To return to this main thread, Fenwick and Phillipson proceed to analyse the case and evaluate whether the democracy value of speech would be served by reporting the names, the point at issue in *Re S*. If it were served by such reporting, then the free speech values thesis, and the variable geometry approach, would mandate reporting the names, and if it were not, then the thesis would not support the names being reported. The problem arises because the two democracy theories provide different answers to this question. On the one hand is the view, endorsed by Fenwick and Phillipson, that ‘in contrast to the privacy claim in *Re S*, the speech claim was weak’.¹¹³ This is in essence because the Press could make their contribution to democracy on matters of serious public concern related to the case without naming the defendant, whose identity could be protected by a temporary order. The interference with speech that would result from such an order for anonymity and postponement, Fenwick and Phillipson urge, would be minimal. This is a view aligned with a Public Sphere conception of the task of a Press in a democracy, which

¹¹² Chapter four, n 35, and distinct from the commercial argument chapter two n 131.

¹¹³ Fenwick and Phillipson, (n 111) 847.

places greater emphasis on the function of the Press as a conduit to disseminate information, generally passively, which facilitates discussion. Considered in this light, the reporting of a name can be seen to be of less importance than the reporting of the issues of the trial, and any delay in reporting is less likely to be of significance, as long as the matters of political import arising from the trial are ventilated at some point.

Yet a different conclusion is reached as to the extent to which contemporaneous reporting of the names promotes democracy if one adopts a Fourth Estate conception of the Press' function in a democracy. If the action of the Press is viewed through the prism of Fourth Estate theories, and the Press seen as more of an active agent involved in investigation, then the judgments of the Press as to the merits of anonymity should be given greater significance. Further, it is more likely that the Press will be able to undertake its task of investigating crime and the courts if they are able to name defendants in contentious trials, and will be impeded from doing so if sensational trials of the type of *Re S* are routinely anonymised. This, indeed, is closer to the traditional approach adopted by the common law to questions of open justice, where reporting the courts comes into conflict with the privacy of people involved in the legal system, as manifest by the Benthamite logic of *Scott v Scott*, cited above.¹¹⁴ And there is other, more recent authority in the same vein, that the Press should be allowed some leeway in deciding whether to make a report anonymous. This is a view that Lord Roger recognised in *Re Guardian News and Media Ltd*:¹¹⁵

What's in a name? "A lot" the press would answer. This is because stories about particular individuals are simply much more attractive to

¹¹⁴ N 41.

¹¹⁵ *Application by Guardian News and Media Ltd in Ahmed v Her Majesty's Treasury* [2010] UKSC 1.

readers than stories about unidentified people. It is just human nature. [...] This is not just a matter of deference to editorial independence. The judges are recognizing that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on.¹¹⁶

The importance of providing names was also investigated in *Flood v Times*, and *Re BBC (AG ref 3 of 1999)*, cases which, while different to *Re S*, both showed that concealing identity can be a cause of great concern.¹¹⁷

I should emphasise that my intention here is not to argue the merits of anonymity or otherwise in *Re S*, nor to criticise Fenwick & Phillipson's conclusion about where the balance should lie between the Press' right to report and the privacy of the child, but rather to draw attention to the limitations of the free speech values thesis as a way of determining dilemmas such as this one. This is because the thesis, and indeed a variable geometry of media freedom based on the thesis, does not lead to determinate conclusions as to the propriety of a specific incidence of special treatment, given the differences that exist between the Fourth Estate and the Public Sphere conceptions of how the Press contributes to democracy.

It should be conceded that might be possible to mount the opposite case to the one being suggested here. So, it could be said, for example, that the Public Sphere might support the need to name a defendant in a case like *Re S* and without delay, given that

¹¹⁶ Id (n 115) [24], [25], [67]

¹¹⁷ *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 [28], affd *Flood v Times Newspapers Ltd* [2012] UKSC 11; and *Re BBC (Attorney General's Reference No 3 of 1999)* [19]. The ECtHR is more wary of deferring to editorial judgments in respect of how securing readers' attention, which supports Fenwick and Phillipson's doctrinal analysis: text to n 111; *Kurier Zeitungsverlag Und Druckerei GmbH v Austria* App no 3401/07 (ECtHR, 17 January 2012), 56.

this might enhance the discussion of ideas of interest to the public. Inversely, it could be argued that the Fourth Estate theory could be satisfied by an order for delay and anonymity. But even if these arguments are valid, which is not necessarily admitted, that does not undermine the essential point being made. This is because the argument being propounded is not that these theories necessarily lead to certain conclusions, but rather that these theories are more likely to lead to conclusions that one course of action is preferable over another, and so – and this is the important aspect – the free speech values thesis that applies them is ambiguous as to the conclusions it supports about the propriety of special treatment in certain instances. So if the Fourth Estate can indeed be used to argue to the opposite conclusion to the one I set out here, and likewise the Public Sphere, then the fact that the free speech values thesis leads to indeterminate results is reinforced, not undermined. Further, it might be argued against this, that any flaw of indeterminacy in the free speech values thesis may be resolvable in practice on a case-by-case basis, but this does not deal with the problem either. This is because the fact that the two theories provide differing accounts of the way that the Press may contribute to democracy is likely, on occasion, to lead to a conceptual indeterminacy about what instances of Press action are appropriate, or should receive special treatment. The problem is – again – that one has to reach outside of the theory for reasons to determine what course of action is appropriate.

In summary, therefore, there is a tension between two theories as regards how the Press contributes to a democracy, and this amounts to a limitation of the free speech values thesis of the sort described in the last chapter, as it becomes indeterminate as to the propriety of particular instances of special treatment, and whether particular

journalistic acts merit special treatment. Such problems are resolvable, but only by looking beyond the thesis. It would be better if a theory could be advanced that provides a more complete explanation for the propriety of providing special treatment to the institutional Press.

Conclusion

This chapter attempted to describe how special treatment for institutional journalism could be appropriate, by applying the free speech values thesis, and examining some of the theories that explain how the Press can contribute to democracy might mandate such treatment. It distinguished between Fourth Estate theories, and Public Sphere theories, demonstrated that these are recognised in the law, and can dovetail to provide a rationale for special treatment. However, the chapter also indicated that there were some problems with the thesis as applied to democracy that flow from these theories. First, the theories can be criticised, and this highlights the weakness of the thesis as a contingent, functional and consequentialist theory. This weakness may not be a problem of itself, but it can amount to a deficiency, and so it is worthwhile considering alternative ways of explaining how special treatment can be appropriate. Second, the difference between the democracy theories means that the thesis can be indeterminate in application, both in respect of whether particular journalistic acts merit special treatment, and in respect of whether particular instances of special treatment are merited. These questions can be answered, but only by looking beyond the thesis. Again, this leads to the conclusion that it is useful to investigate another way of mandating special treatment. Chapters 6, 7 and 8 will attempt to provide such an explanation.

Chapter 6: Rights theory and special treatment part 1: Freedoms of speech and the Press

The current and next chapter seek to develop an explanation complementary to the free speech values thesis as to why it can be coherent to afford special treatment to institutional journalism. This explanation is based on rights theory, rather than free speech theory, and aims to establish that the special treatment of the institutional Press can be pursuant to a constitutional right of Press freedom. Such an approach is likely to meet two of the problems of the free speech values thesis adverted to in the last chapter. The first deficiency, that of weakness, is unlikely to be present in a rights-based explanation for special treatment because a rights-based justification does not so readily collapse into the harm principle, as rights (amongst other things) often seek to explain why acts can be permitted despite the fact that they can cause harm.¹ The second weakness is likely to be less evident because rights-based theories for special treatment are able to explain how special treatment can be appropriate in ways not limited to explanations based on the contribution such treatment may make to the of values at the heart of our interest in free speech.² However, it should be conceded that a rights-based account will not remove all the difficulties of explaining why special treatment can be coherent, and the problem of indeterminacy that was identified as a difficulty with the

¹ Chapter four, text to n 84ff; for example, chapter seven text to n 6 and n 67.

² Chapter four, text before and after 65.

free speech values thesis also presents problems for a rights-based account of such treatment.

It should also be conceded that it is contentious to claim that a rights based justification for special treatment is indeed complementary to the free speech values thesis. Barendt prefers to elide the two approaches, proposing that claims for constitutional rights for the Press are best understood in terms of the free speech values thesis, essentially on the grounds that such an elision avoids the undesired outcome of the over-protection of the Press that can result from claims for constitutional rights for the Press.³ However, claims about rights are distinct from those about free speech values, for at least three reasons. The foregoing paragraph gives two examples of why this is so: if one can establish a case for special treatment based on constitutional rights then this may well provide a stronger case for special treatment than one founded in free speech theory; and the two approaches are capable of engaging different sets of values. Furthermore, rights arguments are distinguishable from free speech values arguments as they may, on occasion, condone Press action that does not promote free speech values.⁴ Moreover, even if Barendt is correct and a rights-based argument carries the risk of over-protecting the Press, the free speech values thesis entails the opposite risk of under-protecting the Press, as chapter four argued.⁵ The risk of over-protection inherent to a rights-based approach may be a reason to consider only the free speech values thesis, but equally the risk of under-protection inherent to the free speech values thesis may be a reason to

³ Eric Barendt, *Freedom of speech* (2nd edn, Oxford University Press 2007) 424.

⁴ This may be something we wish to countenance: chapter four text between nn 64 and 65.

⁵ Chapter four, text to n 66ff.

consider distinctly a rights-based approach. It can be seen that while over-protection and under-protection of the Press are unattractive, such risks should not, of themselves, be seen as sufficient reasons to reject the separate consideration of rights and free speech values as explanations for special treatment. This is because the standard from which to gauge the appropriate level of protection, and hence the answer to the question of whether journalism is over-protected or under-protected by rights-based theories and the free speech values theory, is difficult to ascertain in objective terms.

The rights argument for special treatment advances in two parts: in this chapter, it is argued that freedom of the Press is distinct from freedom of speech. It is necessary to establish this because if it were not so, then any right of Press freedom would risk collapsing into a right of speech freedom, and any argument for treatment for the Press that was special in nature would likely suffer. The next chapter, chapter seven, will advance and consider two distinct arguments that a right of Press freedom should actually be recognised, which will amount to an account of why special treatment can be appropriate.

Distinguishing freedoms of speech and the Press

The idea that the freedoms of speech and the Press are distinct is not a novel proposal, but such a view sets its face against much twentieth century doctrine,⁶ associated with Dicey's scepticism that it is 'hardly an exaggeration to say ... that liberty of the Press is

⁶ For example, *Amard v Attorney General for Trinidad and Tobago* [1936] AC 322 PC 337; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 HL 183; and discussed in chapter two, text to n 5ff

not recognised in England',⁷ a view that still finds a measure of support.⁸ Pursuant to this traditional conception, when a journalist speaks they are merely exercising a freedom of speech that is available to everyone. Freedom of speech is the general freedom, and Press freedom is a specific instance of this general freedom. Journalists may employ freedom of speech, but so may academics, barmen, taxi drivers or teachers, and the profession or activity of journalism confers no extra or distinct qualities to freedom of speech, just as no extra quality is added to it by the activity of academics, barmen, taxi drivers or teachers. Yet the traditional view is not the only possible way of conceiving the relationship between freedom of speech and the Press, and significant arguments have been advanced that the two freedoms are distinct, in theory if not in doctrine, by, amongst others, O'Neill,⁹ Lichtenberg,¹⁰ Sadurski,¹¹ Barendt,¹² Gibbons,¹³ Marshall,¹⁴ Smith,¹⁵ Fenwick and Phillipson,¹⁶ and Leveson,¹⁷ on much of whose work my analysis relies.

⁷ Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Emlyn Wade ed, 10 edn, Macmillan & Co Ltd 1961) 247; cf chapter one text to n 34 and chapter seven text to n 56.

⁸ Discussed in chapter two, text to n 3ff.

⁹ Onora O'Neill, 'The Limits of Press Freedom' *Independent* (London, 25/3/02) <<http://www.independent.co.uk/opinion/commentators/onora-oneill-freedom-of-the-press-cannot-be-unrestricted-655228.html>> accessed 07/10/09; Onora O'Neill, 'Conceptions of Press Freedom' (*Cambridge University*, 2008) <<http://www.admin.cam.ac.uk/offices/communications/community/ideasfestival/reports/conceptions-of-press-freedom-transcript.pdf>> accessed 6/10/09; Leveson LJ vol 1 pt B ch 4 para 4.15 87; chapter three text to n 34ff.

¹⁰ Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 105-106.

¹¹ Wojciech Sadurski, 'Freedom of the Press and General Theory of Freedom of Speech' (2011) Sydney Law School Legal Studies Research Paper 11/57.

¹² Eric Barendt, 'Press and Broadcasting Freedom: Does anyone have any rights to free speech?' (1991) 44 CLP 63; a similar critique is advanced by Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 5773.

¹³ Thomas Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] PL 279.

Indeed, the fact that some constitutional documents in some jurisdictions recognise a distinction between freedoms of speech and Press provides a *prima facie* argument that the two freedoms are distinct in theory and in some doctrine. A notable example of such a distinction is the First Amendment,¹⁸ but the distinction also appears in many other constitutional documents. It can be found, to choose some diverse examples, in the Swedish,¹⁹ Albanian,²⁰ Chinese,²¹ and (Sadurski maintains) the Polish constitution,²² as well as in the EU Charter of Fundamental Rights.²³ It cannot, however, be concluded from the existence of such documents that the two freedoms are indeed distinct, as merely because different constitutional systems have recognised the two as distinct does not necessarily mean that there are good reasons to do so. This is especially because some judicial interpretations reject the argument that a disjunctive reference to the right of freedom of expression and the freedom of the Press requires the court to find

¹⁴ Geoffrey Marshall, 'Press Freedom and Free Speech Theory' [1992] PL 40.

¹⁵ Anthony Smith, 'The Press, the Courts and the Constitution' (1999) 52 CLP 126.

¹⁶ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) chapter 1.

¹⁷ Leveson LJ (n 9) vol 1 pt B ch 3 para 2.1 71.

¹⁸ See chapter five n 21.

¹⁹ Instrument of Government (SFS nr: 1974:152) (Sweden) ch 2 art 1, in which freedom of expression is mentioned in a separate clause to freedom of the Press: 'and the corresponding freedom of expression on sound radio, television and certain like transmissions and films [...]'; Council of Europe, *Constitutions of Europe. Texts collected by the Council of Europe Venice Commission* (Martinus Nijhoff Publishers 2004) 1714.

²⁰ Constitution of Albania (21/10/98) art 22: '1) Freedom of expression is guaranteed. 2) The freedom of the Press, radio and television are guaranteed.' Council of Europe (n 19) 6.

²¹ See chapter four n 87.

²² Sadurski (n 11) 1; citing art 14 Constitution of Poland (2/4/87).

²³ Charter of the Fundamental Rights of the European Union [2000] OJ C364/1 art 11(1) and 11(2).

substantive constitutional differences between these two rights. (A famous example of such is the US Supreme Court's decision in *First National Bank of Boston v Bellotti*, in which the Court declined to find that the disjunctive Press and speech clauses of the First Amendment confer substantive constitutional differences.²⁴) Nevertheless, some constitutional courts have indeed interpreted the drafting distinction as a legal distinction, and Barendt reports that in Germany, for example, the Constitutional Court has judged that this drafting distinction leads to a substantive conclusion that Press and speech freedoms are indeed distinct.²⁵ At the least, therefore, judicial interpretations of some documents provides some credence to the argument that the two freedoms may well be distinct, and suggests that further investigation into their relationship is required.

I will advance two types of arguments why the two freedoms should be distinguished. First, because they engage the values behind free speech in different ways; and second because assuming the two freedoms to be equivalent gives both too much and too little to the institutional Press. Common to both arguments, it will emerge, is the idea that Press freedom more predominantly engages the interests of the audience, while speech freedom – which admittedly also engages audience interests – also significantly engages the interests of the speaker.²⁶ Hence the difference between the freedoms lies in the relative importance of speaker and audience interests, and in the fact that the speaker

²⁴ *First National Bank of Boston v Bellotti* 435 US 765 (1978) 797-799 (Burger CJ): discussed in chapter two text to and n 29 and cross-references indicated there.

²⁵ Eric Barendt, *Broadcasting Law: a Comparative Study* (Clarendon Press 1993) 19 – 24; Barendt, *Freedom of speech* (n 3) 423, citing for example *First Television Case* 12 BVerfGE 205, 260 (1961) ; Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation under Pressure : Comparative Cases from North America and Europe* (Routledge 2012) 114.

²⁶ The differences between audience and speaker interests is one that Dworkin, amongst others, highlights Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) ch 19, and are discussed in chapter seven, text to n 28.

interest in freedom of the Press is of a different type to the speaker interest in freedom of speech.

Differences relating to free speech values

The first limb of the argument that freedom of speech and the Press ought to be distinguished is based on the observation that the freedoms invoke and engage in a distinct way the arguments that establish why free speech is valuable. Consideration shows that this can be the case with both deontological and consequentialist theories. The deontological theories that will be discussed to illustrate this point are Baker's liberty theory of free speech, O'Neill's observations about speech and self-expression, and Dworkin's ideas of policy and principle-based rights; and the consequentialist theory will be derived from the work of Mill.

Deontological theories

To start with the deontological theories, Baker's liberty theory and O'Neill observations about self-expression advance on rather similar lines, and provide related accounts of why Press and speech freedoms should be considered to be distinct, but I will focus predominantly on Baker, as he usefully distinguishes two limbs to the argument. The first element is based on the extent to which the liberty and self-expression of speakers are engaged when an individual speaks and when the institutional Press speaks. The second element examines the interests of the audience, and notes the relative strength that adheres to the speaker's and the audience's interest is different in the cases of Press speech and non-Press speech. These are related points, but the second is the stronger of the two.

The liberty of speakers

The first element of Baker's case starts with an analysis of what the interest is that freedom of speech protects. He draws on the importance of liberty to explanations about why we value free speech, founded on his 'liberty theory of free speech', the view that speech can be a manifestation of an individual's liberty, and that such expression is a necessary aspect of an individual's self-fulfilment.²⁷ The doctrine of freedom of speech can be explained, at least in part, as a recognition of the importance of protecting this aspect of what it is to be human. (This is a view with which O'Neill agrees, but placing more emphasis on the importance of free speech as a means for individual self-expression and less on liberty.²⁸) Now, while individuals, because they are individuals, can express themselves and manifest individual liberty, their speech can qualify for protection, when the doctrine of freedom of speech is seen as being justified (at least in part) by a need to protect these qualities. But Press speech, in contrast has an institutional rather than an individual provenance, and it is not predominantly a manifestation of individual self-expression, or a manifestation of an individual's liberty.²⁹ Press speech, rather, is prompted by other concerns: often – but not always – the desire to make a profit,³⁰ and in any event has a different relationship with the entity uttering it. The liberty and self-expression of the individuals who utter the speech of the institutional

²⁷C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989) 41.

²⁸O'Neill, 'Conceptions of Press Freedom' (n 9) 2.

²⁹ An exception is situations where there are mixed Press and speech interests, for example the op-ed and letters pages of newspapers, where the individual speaker interests as well as other, Press-related interests are both involved. But even here the speech has predominantly Press-like qualities, as it has been selected and is being disseminated for Press reasons: this is discussed in chapter three text following n 34.

³⁰ Baker, *Human Liberty and Freedom of Speech* (n 27) 225.

Press can be discounted, as they are not primarily expressing themselves, nor primarily expressing their liberty, but are speaking as representatives and mouthpieces. Hence, to the extent that a doctrine freedom of speech rests on the protection of individual liberty and individual self-expression, Press speech does not qualify to be protected.³¹ For this reason, Press freedom should be distinguished from speech freedom. This is a view that Lord Leveson has endorsed:

the rights of individuals to freedom of expression have different origins from the public interest in the free speech of the Press. Thus, freedom of expression or speech has value for individuals because of its ability to contribute to individual self-expression and self-realisation³²

There are some weaknesses with this argument, one of which will be highlighted as it relates to an argument earlier in this thesis, in chapter three: it is not clear that there can never be a self-expression rationale for institutional Press speech, nor that liberty cannot be engaged. Leaving aside the point that institutions are collections of individuals, who may have collective self-expression and liberty interests at play, institutions themselves may indeed have a 'self' that can be expressed, and a liberty that can be engaged. This 'self' can be found in the recognisable characters that individual institutions of the Press possess: *The Daily Mail*, for example has a different character to *Private Eye*, which likewise has a different character to *ITV News at 10*. Such characters of the institutional media are of great importance: for one because they are to some extent necessary to the Press' very existence, given that it is due to their having distinct characters such

³¹ Id (n 27) 255, although Baker does present an argument that the Press should be protected primarily on Fourth Estate grounds, discussed in chapter five text to n 89.

³² Leveson LJ (n 9) vol 1 pt B ch2 para 2.1 71; this view is endorsed in Rowbottom, 'Leveson, Press Freedom and the Watchdogs' 2; Jan Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 73.

institutions draw an audience, and for another because, as was argued in chapter three, the fact that the Press possess individual characters is a factor that explains why Press speech is viable as distinct from other speech in the first place.³³ If this self exists, and if it can be expressed, and if its existence incurs questions of institutional liberty, then problems arise for O'Neill and Baker's argument. This is because it is no longer clear that speech freedom, when envisaged as a protection for self-expression and liberty, can never apply to Press speech.

That said, this counter argument is not clear-cut. It may be that the 'self' of the Press is not on all fours with the self of individuals. This may be because of the nature of the self in question, or because of its value. It may be different in nature, perhaps, because of the difference between expression and communication. Self-expression for individuals may be of a different quality to that of institutions, as self-expression for individuals can be bereft of any desire to communicate: playing music to oneself is self-expression of this sort, or writing a private diary, or private poetry. In contrast, it is difficult to think of institutional self-expression of the Press as ever not involving communication to others. The 'self' in question may also be different in value, because while self-expression by individuals can plausibly be considered to merit protection irrespective of any consequences that may result, it is difficult to accept an argument that the institutional Press' self-expression and liberty should be protected in and of itself. In other words, it is plausible to consider the self-expression of individuals as being

³³ The possession of 'characters' is the consequence of the credibility and assessability of the Press that chapter three argued were characteristics of such an activity.

deontologically good, but much easier to see the self-expression of institutions only as being good because of the consequences it brings about.

Indeed, this difference between inherent and instrumental value is the basis of Dworkin's argument that there is a difference between freedoms of speech and the Press. Dworkin deploys the distinction between the two types of value to explain how policy and principle-based arguments for rights are different. Principle-based arguments for rights suggest that an action should be protected whether or not it causes damage, while policy based arguments suggest that an action should be protected only if, in the long term, the damage it may cause is outweighed by other benefits. The former are based on activities that are valuable inherently, the latter on activities that are valuable consequentially. Dworkin holds that speech can be inherently valuable, and so speech freedom is a freedom that should be protected for reasons of principle, even if its practice may cause damage. In contrast, Press speech is valuable instrumentally, so Press freedom can only be protected for reasons of policy, on the grounds that whatever the harm it does in the short term, it provides benefits in the longer term.³⁴ If this is the case, then it provides a cogent reason to distinguish between speech and Press freedom.

Nevertheless, this too – as chapter seven will show – can also be challenged.³⁵ (And challenging aspects of Dworkin's analysis is a necessary step for this thesis, not least because Dworkin's ultimate view is counter to the one that will be advanced in that chapter, as he holds that Press freedom should not be considered a right, nor should the Press be provided with special rights.) However, such a challenge can be deferred for the

³⁴ Dworkin, *A Matter of Principle* (n 26) 375-376.

³⁵ Chapter seven, n 22ff.

present, as for the moment perhaps it is sufficient to make the suggestion that even if the arguments are not clear-cut, the deontological theories described here tend to support the case that freedoms of the Press and speech should be distinguished on the grounds that deontological theories to explain the freedoms that rely on speaker interests seem more readily applicable to speech freedom than to Press freedom, while arguments for Press freedom based on the Press as speaker have a distinctly consequentialist hue. The difference here is the role that the speaker's liberty, autonomy or self-fulfilment play in the argument for protection: the more important that role, the more likely there is to be a distinction between freedom of speech and freedom of the Press.

The interests of audiences

The second element of Baker's case emphasises that explanations as to why speech freedom should be protected often rely on both the interests of audiences and speakers, while explanations of why Press freedom is important engage disproportionately the interests of audiences. To illustrate this point Baker cites two US Supreme Court judgments, contrasting *West Virginia Board of Education v Barnette*,³⁶ with *Red Lion v FCC*³⁷. *Barnette* was a case where a child at a state-funded school refused to salute the flag on grounds of conscience. The Supreme Court considered it to be a breach of a child's First Amendment rights to freedom of speech to compel her to salute the flag. One point here was that the problem with compelling the child to make a communicative act was that it was a breach of her liberty as a speaker. This approach contrasts with that taken in *Red Lion*, a Press speech case, in which the Supreme Court considered the

³⁶*West Virginia Board of Education v. Barnette* 319 US 624 (1943)

³⁷*Red Lion Broadcasting v FCC* 395 US 367 (1969)

propriety of the Fairness Doctrine, a statutory provision that provided those attacked on the airwaves with a right of reply.³⁸ In this case, the Court analysed the interest that was predominantly engaged in Press broadcasting, and the judges observed, famously, that: ‘[i]t is the right of the viewers and listeners . . . which is paramount.’³⁹

The positions of the individual and the Press broadcaster can be usefully contrasted. If the rights of the speaker were paramount in the *Red Lion* case, as they were in *Barnette*, then the Press broadcaster would have a strong case to resist being compelled to utter speech that it would prefer not to utter. This is because to compel the broadcaster to say things it did not wish to say would have been an intolerable interference with the liberty of the broadcaster as a speaker. Conversely, if the rights of the audience were paramount in *Barnette*, as they were in *Red Lion*, then the compelled saluting of the flag would have been less likely to breach the First Amendment. This is because the audience – be it the rest of the class, who did not, it appears, object to being told to salute the flag, or indeed the rest of society who considered such an action to be valuable – would have had a forceful interest in seeing the flag saluted, for reasons of social or national cohesion in a time of crisis. (The case took place against the background of the Second World War.) But in neither case did the court adopt such an analysis. Rather, in *Red Lion* the interests of the audience predominated over the interests of the speaker, and in *Barnette* the interests of the speaker predominated over the interests of the audience. What is of particular interest is how curious it would have been for the court not to have taken such an approach in relation to the Press speech in *Red*

³⁸ See chapter five n 104.

³⁹ *Red Lion Broadcasting v FCC* (n 37) 390.

Lion: any assertion that the interests of the Press as a speaker was of great importance *in itself* would have been a strange one to make. In contrast, such an assertion is not a strange one to make about an individual such as the child in *Barnette*.

It does not undermine this analysis to observe that the Press does indeed have an interest as a speaker that is relevant and should be considered, a fact emphasized in – for example – *Miami Herald v Tornillo*,⁴⁰ and emphasized in chapters three and five: three, mentioned above,⁴¹ where I described the importance of the reputation of individual Press institutions, and five when I emphasized the importance of editorial autonomy to the Fourth Estate explanation of the Press’s function in a democracy.⁴² Such a speaker interest of the Press can indeed be violated when the Press is forced to speak, and that is something that can be deprecated.⁴³ However, there remains a distinction between the situation in *Barnette* and *Red Lion* because the most plausible reason for deprecating forced Press speech is not because of the speaker interest of the Press *in itself*, but rather because there is an audience interest in the speaker interest of the Press. Moreover, one doesn’t have to have a legal system that recognizes the First Amendment to appreciate the distinction to which Baker is drawing attention. Irrespective of doctrinal context, these cases help illustrate a significant difference that exists between theories that seek to

⁴⁰ *Miami Herald v Tornillo* 418 US 241 (1974).

⁴¹ N 33

⁴² Chapter five, text to n 16.

⁴³ The reluctance to permit forced speech is also a rationale behind the US Supreme Court’s drawing a distinction between the extent to which speech can be curtailed in public and private places. In private places – such as shopping malls – speech is curtailable as protecting the speech of third parties on private property approximates to forcing the owner of the property to endorse speech over which he has no control. An early case that established the public forum idea was *Hague v CIO* 307 US 496 (1939): a short summary of the doctrine is in Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) 22 – 29.

explain why we permit Press freedom and speech freedom: speech freedom can significantly engage the interests of speakers and audiences, while Press freedom predominantly engages the interests of the audience.⁴⁴

A consequentialist theory

This view is reinforced when one considers a consequentialist theory of free speech. The theory in question is Mill's account of how the discernment of truth from error can be useful in building up the intellectual acuity of speakers and listeners, called, by Haworth, the 'mental gymnastics' theory.⁴⁵ The point here is that, when conceived as a speaker-based justification for free Press activity, this theory is not particularly plausible, as the assumptions underpinning the theory are less persuasive in the case of the Press than they are of general speech. In contrast, when conceived as an audience-based justification, Mill's argument is more compelling.

The reason that the argument is not compelling as a Press-as-speaker-based justification is that the psychological processes that it assumes are more clearly evident in individuals than in the Press. This is because it is more plausible that individuals can learn to become better at discerning truth through being exposed to lies, and more difficult to see how this can be said to occur in the institutional Press. True, such an assertion is not uncontroversial, and counter arguments can be made emphasising how institutions, just as individuals can learn from their mistakes, and newspapers – for

⁴⁴ This is also a factor to which Dworkin also draws attention: Dworkin, *A Matter of Principle* (n 26) 376.

⁴⁵ John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1985). The theory is discussed in chapter four, text to n 47. As is so often the case, this theory is prefigured by Milton: John Milton, *Areopagitica: and Other Political Writings of John Milton* (Liberty Fund 1999) 11 – 13.

example - can learn from past errors and untruths.⁴⁶ But it is not clear how convincing such counter arguments are, as the differences between individuals who speak and the Press are such that the possibility of such a process occurring is more difficult to assume in the Press than it is in individuals. This may be because of the fact that the Press is made up of a transient staff that pass through its ranks, frequently leaving little or insufficient institutional memory on which the mental gymnastics theory depends: they come and go, they may learn, but that is insufficient to prevent the institution forgetting. Or, equally, it may be because the institution may not even be organised in such a way that learning truth from error is something it is set up to do, nor to value: indeed, it would be naïve to assert that this is how some tabloid newspapers are constituted. However, when seen as an audience-based argument for free Press speech, Mill's argument has more purchase. This is because, when seen from this perspective, arguments about whether or not the Press as speaker can and in fact does have the psychological apparatus and intention to learn from uttering falsehoods no longer matter so much, nor do questions about the extent to which the Press does in fact learn from its mistakes. When conceived as an audience-based argument for Press freedom, the emphasis is not on the Press as speaker, but on the question of whether the audience may learn from and amend its conduct when it hears falsehoods uttered by the Press. Conceived in this way, Mill's argument is that permitting the Press to utter falsehoods may be justifiable on the grounds that such utterances may assist the audience better to discern falsity from truth.

⁴⁶ Arguably, there are examples of even the tabloid Press learning from its mistakes. *The Sun's* retreat from its allegations about the involvement of fans of Liverpool Football Club in the Hillsborough disaster might be an example of this.

Hence, as was the case with the deontological theories of Baker, O'Neill and Dworkin, the differences between the way Mill's theory explains Press and speech freedoms with reference to audience and speaker interests bolsters the suggestion that freedom of the Press should be distinguished from freedom of speech. In this case, again the argument is based on the observation that speech freedom engages both speaker and audience interests in a way distinct to Press freedom, and Press freedom is much more convincing when explained in terms of the interests of the audience.

Over- and under-privileging the Press

A different way of establishing the distinctness of Press and speech freedoms is to consider that unattractive consequences arise from assuming that they are equivalent. There are three points that can be developed here. The first, emphasised by Fenwick and Phillipson, is that assuming that speech and Press freedoms are equivalent risks over-privileging the institutional Press.⁴⁷ The second is the converse point (which Fenwick and Phillipson also note,⁴⁸ but which is more developed by Barendt)⁴⁹ that assuming Press and speech freedoms to be equivalent risks under-privileging the institutional Press. The third, identified by Baker,⁵⁰ is that assuming equivalence risks under-protecting individual speech. Each, it will be argued, provide cogent reasons for distinguishing freedoms of speech and the Press, and a thread underlying each is the observation

⁴⁷Fenwick and Phillipson (n 16) 22.

⁴⁸Id (n 16) 24.

⁴⁹Barendt, *Freedom of speech* (n 3) 418, 420.

⁵⁰C. Edwin Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955.

developed above that Press speech and Press freedom more significantly engages audience interests than non-Press speech and speech freedom.

The risk of over-privileging the Press

The first aspect of this argument is that there is a risk, if Press and speech freedom are assumed to be equivalent, of providing too much benefit to the institutional Press, benefit to which it is not entitled. Fenwick and Phillipson present a theoretical and a historical argument to this end,⁵¹ of which the theoretical argument is the stronger, identifying the risk of over-privilege from the likelihood that the Press will be inappropriately afforded some protection or treatment that should rather be justified on the basis of certain theories of free speech that pertain more appropriately to freedom of speech than the Press. This risk can be avoided by rejecting the assumption that Press and speech freedoms are equivalent. (This is the other side of the coin of the argument advanced earlier, but there it was emphasised how these theories provide a bad fit for justifying freedom of the Press, while here the deleterious consequences of assuming equivalence are being drawn out.) This, of course, may lead to the conclusion that the Press should receive fewer rights than individuals in some cases, and sometimes have greater liabilities imposed on them. Fenwick and Phillipson put the point, citing Barendt's observation that 'a lot of nonsense is written about media speech claims'⁵², that 'finding an equivalence between the speech claim of, say, the lone black protestor entering a whites-only library, and the current Murdoch media empire, falls into that category'.⁵³

⁵¹Fenwick and Phillipson (n 16) 1112.

⁵²Barendt, *Freedom of speech* (n 3) 449; chapter one n 62.

⁵³Fenwick and Phillipson (n 16) 23.

An example might help make this point more clearly. I will chose a rather extreme example, not because this should be considered a model of the difference between Press and non-Press speech, but rather because it emphasises clearly the differences that can be manifested between the two types of speech in terms of the way that they differentially engage theories of speech: the example is of the hate speech that was uttered by Hutus on Rwandan radio before the genocide of the Tutsi. Hutu radio called for the extermination of Tutsi ‘cockroaches’, and is likely to have contributed to the 1994 genocide.⁵⁴ Assume for a moment that this speech is at issue now, some years after the genocide. There may be an argument for the protection of such speech based on some free speech rationales. Such theories could include, as described, Baker and O’Neill’s self-expression rationales, and the Millian ‘seminar group’ and ‘mental gymnastics’ arguments. Mill’s argument, for example, could be deployed to justify the uttering of such speech intended to address the hate and distrust that prompted the Rwandan genocide in the first place. An individual uttering such speech might be protected if they were attending the group in good faith, discussing their political views with a laudable goal of reconciliation in mind, or as part of a didactic process by which their mental abilities to determine truth from falsity could be improved. It is less easy to conceive of such justifications for the institutional media to utter such speech. It is difficult to think of the seminar group rationale, for example, as being appropriate to employ to permit the Press to describe the Tutsi as cockroaches, or how such speech could be sanctioned by the mental gymnastics idea, when conceived as a Press-as-

⁵⁴Nicol, Millar and Sharland 137 n 42; Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010) 95.

speaker rationale. And while it is possible to mount such arguments, it is even less easy to conceive of a situation where such speech could be defended by virtue of deontological theories that stress the importance of preserving free speech for reasons of liberty, or self-development, or equality (save insofar as these apply to individual speakers, not speakers who are uttering the speech of the institutional Press). An individual might conceivably be entitled to call a Tutsi a cockroach as an instance of their liberty, but it is more difficult to conceive that such a rationale could defend the same utterance made by an institution of the Press.

Though the current argument is being on a theoretical basis, a measure of support for this reasoning can be found from the fact that it is deployed in some judgments of the European Court of Human Rights (ECtHR). The argument can be seen, for example, in *Sürek v Turkey*, as explaining why ‘particular caution’ is sometimes required when considering the speech of the institutional Press.

‘... the ‘duties and responsibilities’ which accompany the exercise of the right of freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence’⁵⁵

The current argument explains why the particular caution described by the court is required, because of the problem that arises when Press speech is considered to be justified by virtue of free speech rationales that do not apply to it, or not apply to it with much force. If one is not aware of these differences and assume Press speech to be

⁵⁵*Sürek v Turkey* App nos 23927/94 and 24277/94, (1999) 7 BHRC 339, para 63. This case is discussed and this issue usefully analysed in Perry Keller, *European and international media law : liberal democracy, trade, and the new media* (Oxford University Press 2011) 277.

equivalent to other speech, then one might erroneously afford it benefits (or treatment) to which it is not entitled. One might feel that because it is acceptable for an individual to call a Tutsi a cockroach, that this makes the same speech acceptable when uttered by the Press. This potential over-protection of the Press can be avoided by considering freedom of speech and the Press to be distinct.

One point that can be drawn from this discussion that finds an echo in the earlier analysis is that the risk of over-privileging the Press arises when one confuses the limited speaker interest *in itself* of Press speech with the significant speaker interests involved in non-Press speech. This is not surprising, as the differential involvement of speaker and audience interests was earlier identified as a distinguishing feature in the theories that explain why Press and speech freedom should be protected. It can be seen again how, as was indicated earlier, this difference between the engagement of audience and speaker interests appears to be a common thread in the arguments that the two freedoms should be considered distinct.

The risk of under-privileging the Press

The second aspect of this limb of the argument that Press and speech freedoms ought to be distinguished is the inverse of the first, and observes that if the two freedoms are assumed to be equivalent then there is a risk of under-privileging the Press. This is also recognised by Fenwick and Phillipson, though they spend less time developing the point, noting that Barendt has undertaken a more thorough exposition. Barendt's case is that the: 'the traditional perspective [that Press freedom is equivalent to speech freedom] does not meet the powerful argument that the Press is entitled to some legal privileges because

it performs a vital constitutional role'.⁵⁶ As to what this role might be, Barendt notes that: 'the media perform a vital role as the 'public watchdog', and observes that as the 'eyes and ears of the general public' they investigate and report the abuse of power',⁵⁷ and observes: 'the underlying rationale for extending free speech guarantees to mass media speech [is] the essential role of the media in disseminating ideas and information to the public.'⁵⁸ It will be seen that the arguments Barendt is summarising are the ones that were discussed in chapter five when the democratic case for Press freedom was examined, and both the Fourth Estate and the Public Sphere accounts of the function of the Press in a democracy can be discerned. Assuming that the freedoms of Press and speech are equivalent carries the risk of rejecting any claim for special treatment predicated on such arguments, and hence carries the risk of under-privileging the Press. This is a line of reasoning that can also be discerned in Lord Justice Leveson's report.

A free press is able to perform valuable functions which individual free speech cannot. It is because of the position of the press as an institution of power that it is able to stand up to and speak truth to power. The professional skills and resources at its disposal enable the press as an institution to carry out ground-breaking investigations in the public interest. It is these considerations and functions which have resulted in the press as an institution being afforded certain privileges going beyond those protected by freedom of speech.⁵⁹

⁵⁶Barendt, *Freedom of speech* (n 3) 420.

⁵⁷Id (n 3) 418, citing *AG v Guardian (No 2)* (n 6) 183 (Sir John Donaldson). The phrase is frequently associated with the idea of Public Sphere journalism, and other authorities that make similar observations are set out in chapter five n 53.

⁵⁸ Barendt, *Freedom of speech* (n 3) 422.

⁵⁹Leveson LJ (n 9) vol 1 pt B ch 2 para 6.1 68.

There may be some that are unconvinced by this argument, on the grounds that any special privileges that exist are inappropriate or anomalous.⁶⁰ They might argue that if Press privileges are not appropriate in the first place, then the risk of such privileges being denied to the Press should not amount to a concern, but rather be something to applaud. Moreover, if assuming the freedoms of speech and the Press to be equivalent avoids such privileges, this is a reason to adopt such a course of action, not to spurn it. This view cannot be gainsaid quickly, and indeed it is the thrust of the thesis as a whole that it is mistaken. But perhaps one aspect of my argument against assuming that Press and speech freedoms are equivalent can be highlighted at this point to illustrate one aspect of the risk at issue. This is the idea that the Press operate in a different way in society to individual speech, and the way that the Press operate is – on balance – ultimately beneficial to society. Asserting that Press and speech freedoms are equivalent under-emphasises this difference and puts at risk the benefits that flow from it, which might not be appropriate to afford to individual speech.

A way of emphasising the point is to re-phrase the epithet of Fenwick and Phillipson about the silliness of equating the lone black protestor with Murdoch's media empire thus: 'it is a lot of nonsense to equate the speech claim of a cross-burning Klu Klux Klansman with the Watergate investigations of the *Washington Post*.' Leaving aside the potentially misleading point about the relative merits of the content of such speech, the point is that one may grant to a *Washington Post* reporter some lassitude or facility that one may wish to withhold from a Klu Klux Klansman. Such lassitude or facility would derive from the fact that the reporter was a member of the institutional media, not

⁶⁰ See chapter two, text to n 3ff.

necessarily from any personal qualities she may have. To withhold such lassitude or facilities from the reporter on the grounds that they might be inappropriate to afford to the Klu Klux Klansman would be to deprive the *Washington Post* reporter of something of importance to society.⁶¹ Recognising that there is a difference between freedoms of speech and the Press is a way of avoiding such an undesired outcome.

A concrete example can be found in the jurisprudence of the ECtHR. (Again, the argument being advanced is theoretical not doctrinal, so the case is relied on not for its law but its reasoning.) *Jersild v Denmark*,⁶² which was also discussed in chapter five,⁶³ provides an illustration of the ECtHR providing institutional journalism with special protection which would not – all things being equal – have been appropriate to provide to an individual speaker. In this case a journalist witnessed, recorded, reported and transmitted the speech of a racist gang. The journalist himself was convicted under hate speech laws for uttering the speech, but on appeal, the Court held that this conviction was in breach of article 10 of the European Convention on Human Rights.⁶⁴ The court held it would be wrong to restrict an institutional journalist who was reporting harmful, racist speech, given that such reporting was a useful and necessary portrayal to the public of what was going on in his country. It is implicit in the court's judgment that had the disseminator of the racist speech at issue not been an institutional journalist then

⁶¹ Frederick Schauer, 'Towards an institutional first amendment' (2005) 89 *Minneapolis Law Review* 1256, 1271. The instrumentality of the interests of reporters such as this will be discussed in more detail in chapter seven, text to n 42.

⁶² *Jersild v Denmark* (App no 15890/89) (1994) 19 EHRR 1; this discussion draws on Barendt, *Freedom of speech* (n 3) 424, and Keller (n 55) 277.

⁶³ Chapter five text to n 67.

⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950.

restricting the dissemination of the speech would have been more likely to be appropriate. It is not the case that it would never have been appropriate, but the institutional quality of Press speech adds an important facet to such speech, and to assume equivalence between Press and non-Press speech bears the risk of closing one's eyes to this important variable. The facet is valuable because it is linked to the function of a Press in a democracy, as described by Barendt, for example as a conduit for the Public Sphere. If one's eyes are shut to this difference, then there is a risk that certain privileges, appropriately afforded to the Press by virtue of them, will not be afforded to the Press, and hence there is a risk that the Press will be under-protected.

Of course, it is not the case that a non-journalist should never be afforded the protection provided to Mr Jersild –hence the caveat in the way I formulated the example, using the words ‘all things being equal’. An academic reporting hate speech might also be likewise, appropriately protected from the operation of hate speech laws by article 10. Nor is it the case that an institutional journalist can always be permitted to disseminate hate speech, merely because they happen to be an institutional journalist. Indeed, the example of the hate speech disseminated by the institutional media in Rwanda, mentioned earlier, is a good illustration of both points. But the difference is that individuals may be permitted to utter hate speech as part of their liberty, for example, but it is less easy to see how the Press should be able to do so as part of their liberty *per se*, as opposed to an aspect of their liberty which is justified by virtue of the wider effect of Press liberty on a society. Once again, it can be seen, that the difference between the extent to which Press freedom ultimately engages audience interests, and speech freedom can engage both speaker and audience interests emerges to the fore.

The risk of under-protecting non-Press speech

The third limb of this argument about the dangers that flow from assuming the freedoms of speech and the Press to be equivalent, is that equivalence puts non-Press speech at risk of being under protected. The essential point is that if one assumes Press speech to be equivalent to other forms of speech, then it would seem appropriate to place the same restrictions on all speech that we wish to place on Press speech. Yet to do so leads to curious results, results that appear either bizarre or overly restrictive. Given that these results are unwonted, the assumption that speech and Press freedom are equivalent is to an extent undermined. So far this discussion has concentrated mainly on the privileges that the law affords – or may afford –to the institutional Press, but to consider the case that assuming equivalence risks under protecting non-Press speech one needs to change tack, and think not of privileges, but the liabilities that the law imposes on the Press.

A good example of a bizarre result that comes about from assuming that there is no difference between Press and non-Press speech comes from considering the requirement that broadcasters provide a plurality of voices.⁶⁵ Such a requirement is often imposed on the speech of broadcasters, but it may well be appropriate under a Public Sphere conception of the Press also to impose such a requirement on other Press.⁶⁶ The Public Sphere conception of Press freedom, it will be remembered, assumes that the value of Press speech is in its contribution to the formation of the public's opinions and beliefs, both political and otherwise. Such a process is facilitated by there being a plurality of

⁶⁵ EG chapter two text to n 58ff.

⁶⁶ Lesley Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing 2006) 62.

voices and viewpoints disseminated by Press speech, and placing a requirement that Press speech disseminates a wide range of different viewpoints to the public sphere is an appropriate demand to make of the Press. However, it is difficult to see how it could be acceptable to place an equivalent requirement on the speech of individuals. Craufurd Smith explains why this is so:

there are whole areas of human communication, workplace gossip, or family dinner-table discussion, where state intervention to increase the variety of ideas would not only intrude unduly into the private realm of individual thought, but would also largely misunderstand the nature of the activity in question. We do not think it appropriate to *require* our fellow workers, relations, or friends to provide us with a plurality of voices...⁶⁷

If Press and speech freedoms are considered equivalent, and if it is considered appropriate to place a requirement of plurality on Press speech by virtue of Press freedom, then it would seem to follow that it might also be appropriate to place such a requirement on the speech of individuals. Yet such a conclusion is patently bizarre, and one we should avoid. A way of avoiding such a result is to distinguish between freedoms of speech and the Press, and recognise that such regulation can be pursuant to Press freedom but a violation of speech freedom.

Two more examples help illustrate the point. The first relates to regulations similar to those that ensure plurality, namely the requirements that the broadcast media be impartial.⁶⁸ A Public Sphere argument analogous to the one that established that the maintenance of plurality is in accordance with Press freedom can be mounted to establish that the requirement that the broadcast media be impartial is also in accordance with

⁶⁷Rachael Craufurd Smith, *Broadcasting law and fundamental rights* (Clarendon Press 1997) 159: the emphasis is in the original.

⁶⁸ See chapter two, text following n 51.

Press freedom, but, just as with regulation to ensure viewpoint plurality, it would be bizarre to require individuals in ordinary discourse to speak on controversial matters with impartiality. Again, a way of avoiding such a bizarre result is to assume that there is a difference between freedoms of speech and the Press. If one accepts this, then one can hold that regulations that ensure impartiality can be consonant with one conception of Press freedom, yet remain – as they most likely are – in breach of individual freedom of speech.

A third example also shows how assuming that Press and speech freedom are equivalent might lead to a result that is overly restrictive. The example concerns undeclared advocacy, discussed in chapter three.⁶⁹ ‘Undeclared advocacy’ occurs when someone is paid to recommend a product or viewpoint, yet does not declare that this is what he or she is doing. They act as an advocate, as a hired enthusiast, yet do not explain that the views they are propounding are not necessarily their own, but are rather views that they have been paid to endorse. The attraction, from the point of view of someone hiring an undeclared advocate, is that they can both obscure their own involvement in the fomenting and dissemination of views, and also that they can garner to themselves the benefit of the respect that is paid to the opinions and judgments of another. The reason that undeclared advocacy poses significant problems when it occurs in institutional journalism, and hence why regulating journalism is appropriate to prevent it, is, as chapter three argued, that the audience bring to their consumption of journalistic output knowledge of the reputation, the credibility or at least the assessability of the institutional

⁶⁹ Chapter three, text to n 42ff.

Press.⁷⁰ When the Public Sphere and Fourth Estate theories apply, such output relates to matters pertaining to our society and our democracy. If the Press are paid to advocate a position, then the assessment that the audience makes of the information coming from the Press is likely to change in line with the fact that the position is not the product of the Press' autonomous editorial judgment. Yet if the Press conceal or do not disclose that they are being paid to advocate a position, then the audience will not be aware of the need to change the terms of their assessment of the Press' information, and risk being manipulated. An appropriate response to this concern is to regulate the Press to prevent it happening, but it is less clear how it can be consistent with a more general freedom of speech. Regulation to prevent individuals from prostituting their opinions seems excessive, but that is not clearly the case in respect of regulation to prevent such activity by the Press.⁷¹ However, if one assumes that Press freedom and speech freedom are equivalent, and if one assumes that this sort of regulation is appropriate, then one might be drawn to the curious conclusion that general speech should be regulated in this matter in an equivalent way to the Press.

Again, emerging from these discussions is the distinction between Press and speech freedoms that audience interests are disproportionately greater for the Press than they are for individuals. The risk of under-protecting non-Press speech, as with other aspects of

⁷⁰ A similar point can be made about other people who are members of or are associated with institutions, such as the judiciary or legislature, or research scientists: hence the scandal when it was revealed that the medical researcher, Dr Andrew Wakefield, had a pecuniary interest in establishing a link between autism and the MMR vaccine. People with institutional affiliations such as these are regulated in a way that general speakers are not, which adds support to the idea that the differences of the sort I describe in the text are viable. Brian Deer, 'Revealed: MMR Research scandal' *The Times* (22/2/04) <<http://www.thetimes.co.uk/tto/health/article1879347.ece>> accessed 3/10/13.

⁷¹ Gibbons, 'Freedom of the Press: Ownership and Editorial Values' (n 13); O'Neill's advocacy of journalistic transparency Leveson LJ (n 9) vol 1pt B ch 4 para 4.15 87.

the argument that the two freedoms should be distinguished, derives from failing to take account of this difference.

Conclusion

Keller holds that:

[t]he boundaries that once clearly separated the distinctive category of freedom of the press from the wider sphere of freedom of speech have also largely disappeared,⁷²

a view that is undoubtedly attractive, a result of the dramatic changes in public discourse heralded by the Internet. However, this chapter provides a range of arguments why it remains appropriate to consider speech and Press freedoms to be distinct, based on differences in explanations of why we recognise freedom of speech and the Press, and the risks of over- and under-protection of the Press that arise from failing to recognise a distinction between the freedoms. Common to many of these arguments is the observation that Press freedom is valued because of audiences in a way that differs from speech freedom, because the latter also engages (and engages in a different way) the interests of speakers.

It will be remembered that this chapter was one step in an argument explaining why special treatment for the institutional Press can be appropriate. The chapter that follows will argue that the concept of freedom of the Press can explain that there is reason to recognise such a freedom as a right, and which instances of special treatment, whether beneficial or in terms of liabilities imposed on the Press, can be appropriate.

⁷² Keller (n 55) 21

Chapter 7: Rights theory and special treatment part 2: A right of Press Freedom

The current chapter will build on chapter six to establish a rights-based case for special treatment by examining two arguments that Press freedom ought to be recognised by the law as a right. The aspiration is that these rights-based arguments will complement the free speech values thesis as a way of explaining why special treatment can be appropriate, in that they will be more resistant to collapse into the harm principle than the free speech values thesis, and will provide a broader explanation as to why special treatment can be appropriate, not being constrained to explaining such treatment solely with reference to the values that explain why we are interested in free speech. True, it is not particularly novel to assert that Press freedom is a right, as such a view accords with one traditional liberal conception of what Press freedom should be,¹ but what is novel is the examination of how freedom of the Press – as opposed to speech freedom – may be considered a right by reference to two contrasting modern theories of what a right consists of. The first is based on Dworkin’s theory of rights as trumps, and second is based on Raz’s interest-based theory of rights. These two theories of rights have not been chosen because of an assumption that they are the sole, main or most significant theories of rights that exist, but because they are prominent in terms of their influence and complementary, as one is a deontological theory, and the other has a more

¹ Perry Keller, *European and International Media Law: Liberal Democracy, Trade, and the New Media* (Oxford University Press 2011) Keller’s analysis is informative, placing the freedom in the theoretical context of liberalism as a set of ideas: ch 1.

consequentialist character. The discussion that follows will show why the second is a preferable way of conceiving of a right of Press freedom, and some instances of special treatment that derive from it will be described. Notably it will be argued that such a right can mandate the imposition of liabilities on the Press, as well as the affording of benefits.²

Before I begin, it will be useful to make patent some assumptions and distinguish the argument I will be advancing from other similar arguments. It is apparent that this chapter relies on the argument in the last chapter that freedom of the Press is distinct from freedom of speech, and it also assumes that, as was argued in chapter two, the problem of identifying ‘an institutional journalist’ is not, in practice, insurmountable; and that, as was argued in chapter three, there is a viable difference between institutional journalism and other similar activities to merit its being treated differently. As for the distinctions to be made, first, the case being advanced is not a libertarian argument about a limited state, nor an absolutist case for free speech. Rather, it is an attempt to ground an old concept – that of Press freedom – in modern rights theory. Indeed, the Razian basis for the right, which can be founded on its contribution to autonomous well-being – Razian liberal perfectionism – illustrates that the argument in these pages is a long way from a libertarian’s position.³ Second, the argument is not that when the media causes harm it is a good thing – the nature of a right (at least in the two conceptions I investigate) means that harm is not a good thing, but as was noted in chapter six, one job of a theory of rights is to explain why we permit something that is not all good. Third,

² Chapter one, text following n 62.

³ Text to n 61 n 82.

this chapter will not predominantly be concerned with what Raz describes as the ‘outer boundaries’ of the right,⁴ but in establishing its core, and to this end the chapter will discuss how the different accounts of the right apply to explain (or otherwise) different instances of special treatment. Chapter eight, by contrast, will consider how all the accounts described so far in this work apply to one instance of special treatment.

A deontological argument for a right of Press freedom

The first argument that Press freedom should be recognised as a right derives from the theories of Dworkin, and is essentially that Press freedom is an inherent aspect of a liberal democracy, and consequentially, to an extent, a freedom that necessarily has to be recognised in a liberal democracy. It is a deontological account given that it does not rely on the beneficial consequences that arise from recognising Press freedom as a right, but rather the argument applies Dworkin’s account of what a right is and how one can be determined to exist to establish a right of Press freedom. It does this in a way different to his account of why speech freedom should be conceived as a right.⁵ Indeed, it is not an approach that Dworkin himself advances, for, as was noted in the last chapter, Dworkin rejects the suggestion that Press freedom is a right. However, Dworkin’s arguments to this end are, to an extent at least, answerable, but it is true there are other limitations that make the approach deficient. It remains, nevertheless, useful as it lays the ground for consideration of the consequentialist approach.

⁴ Joseph Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Rev. edn, Clarendon 1995) 148.

⁵ Text to n 8.

Dworkin's account of rights

The foundation for this argument is Dworkin's conception of a right, a famous account of which can be found in *Taking Rights Seriously*: '[i]ndividuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.'⁶ The question patently arises of what reasons Dworkin has in mind that might operate in the way he describes. What reasons, in other words, are so weighty that they can prevent a collective goal from being sufficient reason to deny – for example – that someone can act as they wish? Dworkin holds that such reasons include those that pertain to the conceptual foundations of a particular system. Such foundations have values inherent in them, and Dworkin holds that these should be recognised and protected or the particular system becomes incoherent. Their recognition in such a system is therefore a matter of first importance, and they are more important than the pursuit of other societal goals, or the system within which those societal goals operate ceases to be. This means that protecting these assumptions and recognising these values can provide a reason to override the collective goals of society. When this happens such assumptions can be said, to use Dworkin's famous term, to trump collective goals. Dworkin avers that this is what it means to say that 'a right' protects such an action: these assumptions and values override collective goals.⁷

Applying this system of reasoning to our society, Dworkin analyses the political system of liberal democracy and finds inherent in it a form of utilitarianism. This form of

⁶ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) xi.

⁷ Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984).

utilitarianism is inherent in a democracy that holds that the right political action is determined by considering the preferences of individuals equally. As it is axiomatic in such a system that individuals' preferences should be considered equally, the recognition of equality can be seen to be a conceptual foundation of such a democracy, and the value of equality as inherent in such a system. Given the argument in the last paragraph, equality can therefore be seen as a quality that should trump other collective societal goals in a democracy. Another way of expressing this thought, bearing in mind Dworkin's conception of the nature of a 'right', is to say equality should be protected by a right.

Dworkin's argument for the right of free speech

Dworkin extends this argument to establish that free speech should be considered a right by positing an idea of moral independence.⁸ It is useful to describe this speech freedom argument even though (as has been noted) the deontological argument for Press freedom does not require this step, both to show some differences between the speech and Press arguments, and to help demonstrate some limitations of the Press argument.

Dworkin argues that an idea of moral independence emerges from the idea of utilitarianism inherent in democracy. His argument starts by observing that the feature of utilitarianism that makes it attractive is its egalitarian character, in that it treats preferences as equal. When preferences are treated unequally, not only is such an action inconsistent with utilitarianism, but also it does violence to the reason we consider utilitarianism attractive. The preferences that should be treated equally in a utilitarian

⁸ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) The argument in this paragraph is a précis of an argument contained in chapter 17 'Do We Have a Right to Pornography?'

system include political preferences, for that is what a system of political utilitarianism entails. However, there is no sufficient reason to restrict this equal treatment to the expression of political views, and it should extend into other areas, such as in particular moral areas. The general principle that equality should be able to trump other collective goals therefore extends to the idea that individuals should be afforded moral independence.

The idea of moral independence entails that people should be able to express their moral sentiments, and so a wide-ranging freedom of expression emerges. Such expression should not be capable of restriction for reasons of the collective good alone, because the principle of equality from which it derives should not be capable of restriction for reasons of the collective good. Given Dworkin's conception of what a right is, another way of expressing this thought is to say that freedom of expression should be conceived as being protected by a right. Liberty, for Dworkin, can be derived from equality. This is rather an abstract argument, and somewhat lacking in rhetorical force, but Dworkin remedies this with a striking phrase that pithily sums up his case. He suggests that if government does not permit freedom of speech, and permit speech to trump collective goals, the government insults its citizens.

[Government] insults its citizens and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive opinions. We retain our dignity, as individuals, only by insisting that no-one—no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.⁹

⁹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 200. My analysis over-simplifies Dworkin's position, as he also makes reference to human dignity as a rationale for equal treatment, which may amount to a distinct rationale for recognizing freedom of speech: it appears as such, for example, in Brennan J's argument in the US case of *Herbert v Lando* 441 US 153 (1979) 199 (dissenting in part). However, space precludes investigating in more depth the relationship between founding rights on dignity and founding them on equality.

Three features of Dworkin's free speech right argument

I will not develop in detail the arguments that can be raised against Dworkin's free speech theory nor his concept of rights, as my aim in this section is to use parts of Dworkin's method to posit a theory of Press freedom. These, in any event, are widely rehearsed in the literature.¹⁰ However, three features of his theory should be mentioned, as they usefully highlight features and limitations of this approach that can be found in the Press freedom argument. The first two are positive, and the third is negative.

First, Dworkin's argument explains why speech should be allowed even if it causes harm - or, to be more exact, that harm should not be a sufficient reason of itself to curtail speech. It therefore provides an explanation as to why harmful actions by the Press, who after all utter speech just like other people, can be permissible. Establishing why the Press might be able to cause harm, it will be remembered, is one aspiration of a rights-based theory of Press freedom. Without Dworkin's argument, the prevention of harm might be a particular collective goal sufficient to curtail speech, but when Dworkin's moral independence is brought into play, this provides protection for speech against curtailment on the grounds of harm alone, as moral independence trumps the collective goal of harm prevention.

The second feature to highlight is that Dworkin's argument does not only rely on the extent to which speech contributes to the values that lie at the heart of our interest in

¹⁰ Dworkin's account of rights has been challenged, as have other aspects of his analysis, not least by Raz, the other rights theorist to be considered in this chapter: Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) ch 6, 8 9. Space precludes an evaluation of these arguments, not least because I am attempting to demonstrate the viability of a right of Press freedom in two common alternative conceptions of what a right is, rather than conclusively establish Press freedom to be a right pursuant to one posited concept of a right actually is.

free speech, which it will also be remembered, is a second aspiration of a rights-based theory of Press freedom. Rather, Dworkin's analysis employs a different approach to explaining free speech, not limited to pointing out the beneficial consequences to certain values that arise from its being recognised.

However, the third – negative—feature is that speech isn't special for Dworkin's theory: in other words, it ascribes no particular quality or value to speech from which flows the idea that speech freedom should be protected.¹¹ The protection afforded to speech pursuant to Dworkin's theory is a result of the imperative to maintain respect for equal preferences (moral and otherwise). As there is nothing about speech qua speech from which arises the protection afforded by a Dworkinian right, other activities related to the equal treatment of individuals may be as protected by Dworkin's equality as speech. Given that this is so, the protection of speech by Dworkin's method does not amount to – in Schauer's terminology – an independent principle of free speech.¹² The relevance of this in relation to Press freedom and the impact on the question of special treatment is, as will be shown later, significant.

A deontological argument for a right of Press freedom

The ground having been prepared, we can turn now to the Dworkinian-inspired argument as to why Press freedom should be a right. The argument, in essence, is that Press freedom is a right because it is an integral part of liberal democracy. As has been

¹¹ True, there is a close connection between the expression of these equal preferences and speech, for it is by speech (or other forms of communication, a distinction without a difference for current purposes) that the expression of preferences often takes place. However, it is doubtful that this amounts to a sufficient quality specific to speech to merit special protection for speech qua speech.

¹² Frederick Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press 1982) 5-7, and nn 19 and 69 below.

indicated earlier, the equality principle and the idea of moral independence, which underpin Dworkin's case for a right to free speech, are not involved in this argument.

To establish the Press freedom argument, again one starts with Dworkin's conception of a right as a way of describing the fact that some actions should not be restrained by collective goals because of the presence of certain other factors. The factors that can override collective goals and give rise to the existence of a right can be identified, according to Dworkin's method, by reference to their being inherent in or presupposed by the functioning of a particular system. This reasoning can be used to argue for a right to Press freedom if it can be established that Press freedom is inherent in a liberal democracy. If this is so, then Press freedom can amount to a factor that can override collective goals, and by Dworkin's terminology, be considered to be protected by a right.

The task, then, is to identify a specific system and examine whether Press freedom is inherent in it. Dworkin identified a variety of utilitarianism as inherent to our system of liberal democracy, but it is also plausible to assert that Press freedom is an inherent characteristic in such a system. Such an assertion could be defended in a variety of ways. One that may be feasible but won't be examined here is to attempt to define liberal democracy and show how Press freedom is an essential part of this definition. This will not be attempted because providing a definition of liberal democracy is a difficult task and one unlikely to be achieved without vastly expanding the scope of this thesis: indeed, the task of defending a definition of what a 'liberal democracy' means might constitute a thesis in itself. Moreover, there are reasons to suspect that providing such a definition may be an impossible task. This is because there is no reason to suppose

that liberal democracies share an identifiable set of characteristics that can be completely described. Such states may, rather, be linked to each other in a Wittgensteinian ‘family resemblance’.¹³ If this is the case, then there will be no necessary and complete set of qualities that can be provided to identify what a liberal democracy is, and searching for them, and hence a definition for the term, will prove a fruitless task.

A more promising method for establishing the linkage between Press freedom and the concept of liberal democracy is to look at how one commonly identifies whether a state is or is not a liberal democracy rather than to consider how such a state might be defined.¹⁴ This argument is based on the observation that when one is attempting to identify whether or not a state is a liberal democracy, one of the characteristics searched for is the presence or absence of Press freedom. If Press freedom is present, then the state may be a liberal democracy, although other conditions also need to be present. But if the Press is not free – even admitting for a certain vagueness of what such a freedom may entail – then the state cannot be a liberal democracy. Hence Press freedom is a necessary condition for a state to be a liberal democracy.¹⁵ Considering the inverse position bolsters this conclusion. To assert that a state was a liberal democracy yet to say that it denied Press freedom would seem to be a contradiction. If someone maintained such a position, we would have to examine his or her conception of what Press freedom entailed to

¹³ Ludwig Wittgenstein, *Philosophical Investigations* (Oxford University Press 1988) s 67.

¹⁴ This approach can be seen as pursuant to Wittgenstein’s famous argument that the meaning of a term is its use in a language: id s 43.

¹⁵ Baker’s analysis is similar: C. Edwin Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 Hofstra Law Review 955, 959-960; cf Frederick Schauer, ‘Who Decides?’ in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 214, suggesting the idea that the people are the determinants of political truth is definitional to ‘democracy’.

determine whether there was a dispute over terminology, as such a person might mean something different to us when they use the term. However, if there were no such dispute then we would have to come to the conclusion that they either didn't understand what it was for a state to be a liberal democracy, or that they were using that term in a way different to our usage. It seems reasonable to suggest, therefore, that Press freedom is a constituent part of liberal democracy, and in this sense is integral in such a political system.

There are problems with this argument, but perhaps consideration of these can be deferred for a moment and consideration be given to what follows from this Dworkinian conception of a right of Press freedom. Two points emerge. First, the Dworkinian right suggests that collective goals should be seen as an insufficient rationale for the curtailment of Press activity for reasons equivalent to the reason that harm was insufficient to curtail speech in Dworkin's free speech theory: because as a structural element of a liberal democracy, Press freedom may trump harm-prevention. The right to Press freedom can therefore be seen to be relatively resistant to collapse into the harm principle. Secondly, given the method by which the right of Press freedom is arrived at, such a right can be explained by ways not limited to the values that lie at the heart of our interest in free speech, as reference is made to the concept and structure of a liberal democracy (although, admittedly, as will be discussed, this as an explanation as to why one should recognise such a right remains somewhat unsatisfying). Hence this deontological right of Press freedom is an improvement, in the two ways that were sought, on the free speech values thesis foundation for special treatment.

Special treatment under the Dworkinian argument

The Dworkinian argument can support instances of special treatment being afforded to the institutional Press, both beneficial and in terms of liabilities, but with some reservations. At this point I should re-emphasise that I am not attempting, in describing this theory, to map out exactly which instances of special treatment are and are not appropriate. I won't, for example, argue as to whether the defamation defence of *New York Times v Sullivan*¹⁶ is preferable to that found in *Reynolds v Time Newspapers Limited*.¹⁷ This is because my intention is to explain how a right of Press freedom can be formulated and to sketch out some of the instances of special treatment that it can mandate, rather than to provide a detailed explanation of the propriety of particular benefits or liabilities.

Benefits can arise because harm by the Press is insufficient, in and of itself, to curtail Press action, and also particularly when these benefits are associated with the operation of a liberal democracy, the structural foundation on which the right of Press freedom rests. So – in general terms at least – some sort of defence in defamation akin to that found in the *New York Times* or *Reynolds* cases for the Press when reporting matters that pertain to the functioning of a liberal democracy is appropriate, even though it may cause harm to the reputation and hence the autonomy of some individuals. Likewise, reporting of the process of the court, the subject matter of the doctrine of open justice,¹⁸ could be supported by the Dworkinian argument, even when such reporting harms

¹⁶ *New York Times v Sullivan* 376 US 254 (1964).

¹⁷ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL; discussed more extensively in chapter eight.

¹⁸ See chapter two text to n 33; *Scott v Scott* [1913] AC 417 HL, chapter five n 41.

individuals involved in the court process, either because of the Public Sphere view that information relating to justice is relevant to the health of a liberal democracy, and/or because of the Benthamite Fourth Estate concept that the Press operate as a check on the courts.

Other examples of special treatment could be suggested, but with all there will be a reservation. This is because, just as was the case with Dworkin's freedom of speech, the deontological argument does not support an 'independent'¹⁹ principle of Press freedom, as there is nothing specific in Press action from which flows the relative immunity from harm that a principle of freedom entails. In other words, there is nothing particular about the Press from which arises a right of Press freedom. The deontological right of Press freedom arises from the observation that Press freedom is inherent in the concept of liberal democracy, but this mechanism for deriving a right is not confined to the Press. Many other features are also inherent in the concept of liberal democracy – such as rights of due process, the rule of law, and the election of a government by a system of extended franchise amongst the populace. The same deontological argument that establishes that Press freedom should be a right also establishes that rights should protect these qualities. That means that there is nothing specific about the Press qua the Press from which flows the right of Press freedom. It leads to considerable scepticism as to whether special treatment of class 1 can be appropriate, to use the taxonomy proposed in chapter two, namely special treatment for which membership of the Press is necessary and sufficient.²⁰ Any other feature that is inherent to the concept of democracy may also be afforded such

¹⁹ Schauer, *Free Speech: a Philosophical Enquiry* (n 12) 5-7, n 71

²⁰ Chapter two text following n 31

treatment in an equivalent fashion. That, of course, is not necessarily a problem in itself, and is probably quite consonant with many conceptions of a liberal democracy, but it does pose a difficulty for anyone seeking to establish the propriety of – for example – special access for the Press to the courts.²¹

Turning now to the question of special liabilities, the Dworkinian approach also provides a rationale for the imposition of special liabilities on the institutional Press. It does not do this in the way a consequentialist theory would, by linking the imposition of special liabilities on the Press to the attainment of a certain valued end. Rather, liabilities can be justified by reference to the mechanism by which the right of Press freedom is deduced. The Dworkinian argument supports the imposition of such liabilities on the Press when such liabilities are designed to protect liberal democracy. This is because liberal democracy is the core structure from which the right of Press freedom is deduced, and Press actions that challenge, destroy or undermine the system of liberal democracy undermine the basis by which Press freedom is justified. A way of preserving the legitimacy of Press freedom is to curtail or restrain such activities, and restraining such activities by means of liabilities imposed on the Press thus protects Press freedom. If this were not the case, and if the Press were able to use Press freedom to undermine or destroy a central element of liberal democracy, then it could undermine or destroy the reason one should recognise such freedom as existing in the first place. It is appropriate, in other words, to impose liabilities aimed at restraining the Press from cutting down the ladder on which it stands. Such liabilities would range from restrictions on activities by the Press that undermine the structures of the state, to those that undermine the values

²¹ N 18

that are considered to be inherent to liberal democracy. Hence, the Dworkinian approach could support – again, in general terms at least – a restriction on the Press committing treason or sedition, or to use a less dramatic example, acting in such a way as to undermine the tolerance commonly accepted to be characteristic of a liberal democracy: hate speech could be banned.

Some problems with the deontological argument

There are a number of problems with the deontological argument that can be raised, but rather than attempt a comprehensive analysis of these, it is more useful to mention those that, when considered, help introduce the second argument for a right of Press freedom. It is convenient to split these into two categories of problems: those identified by Dworkin himself and other problems, as Dworkin's own criticisms can be largely met. However other problems with the deontological argument for a right of Press freedom present more formidable difficulties.

Dworkin's critique

Dworkin's objection to a right of Press freedom that he sets out in *A Matter of Principle*, is, at its core, that such a right is weak and if recognised would dilute the protection afforded by a right of speech freedom.²² His argument is based on two distinctions. The first is the distinction between arguments of principle and arguments based on policy. Rights that are established by arguments from principles are rights that are not explained by consequentialist reasoning. These can be contrasted with arguments that establish the case for rights by reference to the beneficial consequences that will arise if they are

²² Dworkin, *A Matter of Principle* (n 8) pt six.

recognised. The second distinction relevant for Dworkin's critique of Press freedom is that between audience interests and speaker interests. These two distinctions are not exclusive, but rather are combined in arguments for rights. An argument for speech or Press freedom may be deontological in form and focus on the right of a speaker to speak freely, or may be a consequentialist argument that justifies such a freedom with reference to the benefits that accrue to an audience from the exercise of a right. The differences between such arguments can be stark, as Dworkin shows when he contrasts a consequentialist audience-based argument and a deontological speaker-based argument for a right of free speech:

[T]he contrast is great: in the former case the community's welfare provides the ground for protection, but in the latter the community's welfare is disregarded in order to provide it.²³

Dworkin recognises that a consequentialist argument can always be short-circuited by another preferable way of arriving at the desired consequence, or out-weighed by another forceful consideration. If this is so, then the freedom preserved by the right thereby justified is not particularly strong.

Dworkin holds that convincing arguments for a right of Press freedom – and in particular for beneficial special treatment of the institutional Press – are consequentialist audience focused arguments. These:

argue ... that a reporter must have certain powers, not because he or anyone else is entitled to special protection, but in order to secure some general benefit to the community as a whole.

Principle-based arguments for special treatment for the Press, Dworkin argues, are based on the outrageous claim that the Press should have special protection not available to

²³Id ch 19 'Is the Press Losing the First Amendment?' 386

others on the basis that they, the Press, as individuals, are more important or worthier of concern than others.²⁴ This outrageousness makes such an argument not very compelling, to say the least, and in any event undermines Dworkin's base line of equal concern and respect.

The upshot of this is that arguments for a right of Press freedom are weak, because they are consequentialist audience-based arguments, and such arguments are inherently weak. This weakness, for Dworkin, presents a problem because of the way the First Amendment has been interpreted. Dworkin observes that, doctrinally, the consensus is that the free Press clause of the First Amendment protects published speech, and does not create a separate right of Press freedom.²⁵ It is a priority for Dworkin to preserve a strong case for freedom of speech, yet such strength will be diluted if the weak policy argument for Press freedom is recognised as legitimate.

If First Amendment protection is limited to the principle that no one who wishes to speak out on matters or in ways he deems important may be censored, then the single theory of the First Amendment will be a theory of individual rights. And this means that the commands of free speech cannot be out-balanced by some argument that the public interest is better served by censorship or regulation on some particular occasion²⁶

Therefore, the principle argument for Press freedom should be rejected to preserve a strong First Amendment.

²⁴ Id (n 23) 386-87.

²⁵ Id (n 23) 385.

²⁶ Id (n 23) 388.

Answering Dworkin's critique

Dworkin's criticisms of a right to Press freedom can be challenged on a number of counts, but two will be canvassed here. The first and obvious point to make is that the First Amendment is central to Dworkin's argument as précised above, and this makes it less compelling outside of the context of American doctrine.²⁷ This is not because of the centrality of the First Amendment *per se*, as evidently many elements of Dworkin's analysis about the nature of Press and speech freedoms are convincing outside the context of the First Amendment: for example, his observations about the relative strength and weakness of consequentialist and deontological arguments for rights, and his analysis of how audience and speaker interests are differentially engaged in Press and speech freedoms.²⁸ The limitation of Dworkin's First Amendment-based critique arises because his case rests, in part, on the singleness of the First Amendment, the consensus view being that the US Supreme Court have interpreted the two clauses of the provision as conferring but one right, that of speech freedom.²⁹ Dworkin's case is that a threat to the strength of speech freedom arises from recognising a weak policy-based right of Press freedom. Even assuming, for the sake of argument, that a strong right of free speech is

²⁷ The problems raised by drawing conclusions from foreign law are noted in chapter one text to n 83 and the places cross-referenced by that note.

²⁸ This is a central element in the argument of chapter six, text to n 26.

²⁹ Dworkin's view of the state of doctrine, cited above, is endorsed with some reservations in Lee C Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010) 9 -11, but others take a different assessment of its practical implications, notably Baker, 'The Independent Significance of the Press Clause under Existing Law' (n 15) and Randall Bezanson, 'The Developing Law of Editorial Judgment' (1999) 78 *Nebraska Law Rev* 754; this is also touched on in chapter two, text to n 29 and the cross-references indicated there.

something to be desired,³⁰ such a threat only exists if speech freedom and Press freedom are considered to be indistinguishable. This is because if speech freedom can be distinguished from Press freedom, then any recognition of an argument for Press freedom will not necessarily have any impact on the other right of speech freedom. In particular, recognising a weak policy-based right for Press freedom will not necessarily weaken any protection afforded by a strong principle-based right of speech freedom. Because the separateness of the freedoms of speech and the Press may be recognised outside the sphere of US doctrine, Dworkin's argument has less force outside such a context.

A more fundamental challenge to Dworkin's critique can also be raised. The challenge concentrates on Dworkin's claim that the argument for a right of Press freedom is an argument based on policy rather than principle, and hence weak. This doesn't have to be the case. Indeed, the deontological argument advanced above is an argument of principle for Press freedom not an argument of policy, as it is predicated on the integral nature of Press freedom to liberal democracies, and not on the consequences that derive from observing a right of Press freedom. As an argument from principle, it does not manifest the weaknesses inherent in arguments from policy that Dworkin strives to avoid, on the grounds that policy arguments undermine the strength of speech freedom. Hence the existence of the Dworkinian argument vitiates his claim that arguments for Press freedom are arguments of policy, and thus reduces the risk of speech freedom becoming weakened. This, on his own terms, reduces in strength his argument against recognising Press freedom as a right.

³⁰ The claim that a strong speech freedom is good has been contentious: one notable critique of the strength of the First Amendment is Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005), and the comparative weakness of other conceptions is noted in chapter four text to n 12.

Other critiques

Nevertheless, there remain substantial problems with the deontological argument. Four will be discussed here, which will lay the basis for the description of the consequentialist argument for a right to Press freedom. A convenient place to start is to question the claim that a right of Press freedom is indeed central to liberal democracy. The challenge to this claim could arise by denying the validity of the method advanced earlier of identifying rather than defining such a political system. Further, or alternatively, it could be argued that history shows there is no necessary link between a right of Press freedom and the concept of a liberal democracy. After all, did not Britain deserve to be called a liberal democracy, yet reject the notion of positive rights in general and the existence of a positive right of Press freedom in particular, for most of the twentieth century? Can it even be said with any confidence to recognise one now? Does that observation not dispatch the assertion that there is a necessary link between a right of Press freedom and the concept of liberal democracy? However, this point may not be easily resolvable without an evaluation of the extent to which the common law does and did recognise positive rights in general before the advent of the Human Rights Act 1998, which is a somewhat contentious point.³¹ And, to an extent, other similar aspects of this argument are also unlikely to be easily resolvable, so perhaps they can be set on one side given there are more fundamental problems with the deontological argument.

A second concern is that, even if a right of Press freedom is necessary in a liberal democracy, such a claim of right is opaque as to the strength it entails or the scope of its

³¹Thomas Poole, 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435.

coverage. This may be true of many arguments that establish the fact of a right, but there are particular problems with regard to the deontological argument for Press freedom. One is that difficulties arise as to whether a failure to recognise small aspects of Press freedom would negate the claim of a state to be a liberal democracy. If the deontological approach claims that there is a binary alternative, where a right to Press freedom is recognised in its entirety or a state does not deserve to be called a liberal democracy, then the approach is unattractive. If it is not binary, these details need to be worked out in a coherent way that are at the moment lacking, and it is not clear how they could be worked out from within the theory.

A third criticism of the deontological argument leads on to the consequentialist argument. This is that the deontological account does not provide a convincing explanation to convince a sceptic of the merits of special treatment. To some extent this is also the case with Dworkin's free speech argument, but he remedies this with his rhetorical claim that a government fails to respect its citizens by not affording them a right to free speech. But no equivalent rhetorical flourish has been advanced for a deontological argument for Press freedom. No convincing account has been given to a sceptic as to why, for example, the Press should be allowed into a court to which others are prohibited, a right which Blom-Cooper, for example, considers illegitimate.³² Nor is it clear why a journalist should have their sources protected when, for example, an academic researcher might not.³³ Merely asserting that this sort of treatment is afforded

³² Louis Blom-Cooper, 'Press Freedom: a Constitutional Right or Cultural Assumption?' [2008] PL 260.

³³ David Edros, 'Freedom of Expression Turned on its Head? Academic Social Research and Journalism in the European Privacy Framework' [2013] PL 52.

because this is the sort of state in which we live, which is the core of the deontological approach, is unconvincing and insufficient.

And this highlights a more fundamental concern with Dworkin's argument in general. Deontological arguments, while efficient at providing strong protection and evading the weakness of consequentialist accounts of rights, may not provide very convincing accounts to sceptics. And, indeed, to become convincing, deontological accounts drift towards employing consequentialist reasoning. It would be more attractive if one could find a consequentialist reason for recognising Press freedom that could provide a compelling explanation to convince the sceptics of the merits of Press freedom, but also one that was resistant to the weaknesses inherent in consequentialist approaches. This, it will be remembered, was noted in the conclusion of chapter four, which discussed the free speech values thesis.³⁴ Such a rule-based consequentialist approach can be found in the Razian-inspired argument I will discuss next.³⁵

A consequentialist argument for Press freedom

The consequentialist argument is Razian, and holds that Press freedom is a public good as it contributes to a common liberal culture, and that living in such a culture affords fundamental benefits to individuals, so there is sufficient reason to afford rights to individual members of the Press.³⁶ Together these reasons are sufficient to recognise a right of Press freedom, and Raz proposes further reasons to explain why such a right

³⁴ Text to n 106.

³⁵ This analysis draws on Frederick Schauer, 'Who Decides?' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge University Press 1990) 208.

³⁶ Raz emphasizes that his argument is intended as supplementary to other arguments for free speech: Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 169.

should be considered to be constitutional. The argument is ‘Razian’ rather than Raz’s because he couches large segments of his argument within arguments for freedom of expression,³⁷ and hence the argument I describe in relation to a distinct right of Press freedom is a development of Raz’s arguments, rather than a mere account of them. However, unlike Dworkin, it is less clear that Raz would repudiate the views set out here, as Raz on occasion describes elements of Press freedom as distinct from speech freedom.³⁸

The consequentialist case for Press freedom to be considered a right provides an explanation as to why Press freedom can be appropriate that is more likely to be persuasive to sceptics than the deontological argument, because it explains in a more satisfactory way why it is acceptable that the Press can cause harm. In this way the consequentialist account is preferable to the deontological account. However, the consequentialist argument retains weaknesses, not least because it does not provide a clear template for determining the scope of a right, and in particular which instances of special treatment pursuant to such a right might be appropriate for the media.

Raz’s account of rights

The explication of the consequentialist argument starts with Raz’s notion of a right. A right for Raz is a process by which our practical reasoning is simplified. The simplification comes from the fact that a right short-circuits the process of evaluating whether or not an action will contribute to an interest worthy of protection, or whether it

³⁷ An example being Raz, *The Morality of Freedom* (n 10): ‘What is true of freedom of the press is also true of many other aspects of freedom of speech.’ 253.

³⁸ Text to n 50.

will not. So a person, according to Raz, ‘has a right if, and only if, his interest is sufficient to hold another duty bound to do something on the grounds that that action respects or promotes that interest’.³⁹

The terms involved require analysis, particularly as it is not apparent how this definition of a right can cover the rights of members of the institutional Press, which together might be taken to constitute a right of Press freedom.⁴⁰ There are at least two concerns. The first relates the interest of an individual member of the Press, and how this can be particularly weighty beyond the value it provides to that particular member of the Press. The answer is that benefits to others should be taken into account when considering the weight of an interest. However, this poses the second problem. The problem is whether the weight of such an interest, even when construed as benefitting others, can be anything other than slender, and consequentially the right derived from such an interest is unimportant, as many may not take much cognisance of, or place much value on, a right of Press freedom. These concerns are manifestations of a wider puzzle that arises from Raz’s conception of rights. This is that this conception does not provide a strong mandate for civil rights, as it is not evident that many set much store by the interests such rights protect, in stark contrast to other more personal rights, such as the

³⁹ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 31: there is a more extended discussion in chapter 7 of Raz, *The Morality of Freedom* (n 4).

⁴⁰ Raz notes that rights can be core or derived rights, and a derived right can be constructed of a set of diverse core rights, just as ownership of an entire street can be constructed from the accumulation of ownership of individual houses in the street: Raz, *The Morality of Freedom* (n 10) ch 7 pt 2. Similarly, a right of Press freedom for the institution of the Press can be derived from instances of rights for individual members of the institutional Press.

right to life. Raz is aware of these concerns, and the arguments he puts forward to address them are central to the case that Press freedom should be considered a right.⁴¹

The instrumentality of interests of members of the Press

The first difficulty is that the interest of individual members of the Press, for example to enter court when others are excluded, may not appear to benefit anyone except himself or herself (or his or her organisation).⁴² This is a difficulty as if the interests to be taken into account when considering the existence or the strength of a right are the interests of individual Press members (or their organisations), then the case for the existence or the strength of a right will be weak, if one exists at all. This is because in the wider scheme of things, the interests of individual members of the Press are not particularly significant.

However, Raz provides an explanation as to why the benefits that count should not be confined to the benefits that accrue to the holders of the interests in question. This is because interests enjoyed by individuals can promote the interests of others, as well as providing benefits to the interest holder themselves: one person's interests, in other words can be instrumental in affording benefits to another. This can clearly be seen in the case of the interest of a pregnant mother in her life, the recognition of which also promotes the interests of the unborn foetus that she carries.⁴³ Less dramatically it also can be seen in

⁴¹ 'Many people judge [civil and political rights] by their contribution to their well being, and it is not much. Their real value is in their contribution to a common liberal culture. That culture serves the interests of the community.' Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 55.

⁴² Chapter two, text to n 31ff.

⁴³ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 50.

the right a person has to child benefit, as the interest served by the payment of such a benefit is both the interest of the parent and the interest of the child.⁴⁴

This insight can be applied to members of the institutional Press. (It can also, likewise, be extended to the interests of lawyers, doctors and priests.) That is not to say that the relationship between the Press and the public should be equated with the relationship between a mother and her child, as there is clearly not the same relationship of dependency involved. But what does transfer is that the evaluation of whether the interest of a member of the Press is sufficiently important to be protected by a right does not solely depend on the importance of the interests of the member of the Press. It can also depend on the benefits that their interest affords to others. So, for example, a journalist's interest in protecting their sources may be considered to be important because the interest served is not only that of the journalist, but also that of the source, and most importantly, that of the wider public.⁴⁵

The reputation of the Press as a source of instrumental benefit

A point worth drawing out of the foregoing discussion is that the interest of members of the Press that is instrumental in promoting the interests of others is that possessed by individuals in their capacity as members of the institutional Press. There is no instrumental benefit that derives from recognising the interests of members of the Press acting on their own capacity. This is because any benefit of their interest only extends to others, and therefore only provides a rationale for the provision of rights,

⁴⁴ Raz, *The Morality of Freedom* (n 10) 177-190.

⁴⁵ Id (n 10) 179.

when they act in their capacity as members of the institutional Press, and not when they act otherwise. The interests of a journalist writing an email to a friend will not have the same instrumental consequences as the same journalist writing a column for a paper: likewise, the interests of a reporter talking to a friend in the pub will not have the same instrumental consequences as he or she will have, under the lights in a studio, reading a news bulletin. This is because, as was discussed in chapter three, when the journalist acts in the course of their duties they bear the reputation and assessability that members of the institutional Press have when they speak.⁴⁶ This reputation and assessability is an important aspect of why the Press should be treated differently, and considered to be distinct in particular from other forms of communication and communicative institutions. It is these characteristics, when combined with the mechanisms described by the democratic arguments for free speech and the rights arguments for speech, on which the difference of the Press rests.

Is the interest of Press members sufficient to hold others under a duty?

The instrumental effect of interests held by members of the institutional Press can therefore be considered when evaluating whether such interests are sufficiently weighty to hold others under a duty, and hence be the basis of the existence of a right. The question arises of whether these interests actually bear much weight. It might be thought that they do not bear much in themselves, but Raz provides two connected arguments why they do. The first relates to the contribution that these

⁴⁶ This is discussed at length in chapter three text to n 32ff..

interests make to the common liberal culture, and the second to Raz's free speech argument about validation and censorship. Both are aspects of Raz's case of how freedom of the Press can contribute to, and comprise, a public good.⁴⁷

The institutional Press and a common liberal culture

The first limb of the consequentialist argument for a right of Press freedom is that the interests of individual journalists can be sufficiently important to hold others under a duty because, even though the interests of individual members of the Press may not be of sufficient importance to hold anyone under a duty, these interests are sufficiently important to recognise as a class as they constitute part of, or contribute to, the common liberal culture which provides benefits to all who live within it. This is an aspect of Raz's answer to the observation that his conception of rights does not immediately provide an explanation for the existence of civil rights. He points out that one can derive a benefit from living in a society, even if one does not take advantage of certain features of such a society. Raz uses as one example the benefits that arise from living in a free market whether or not one significantly utilises the freedoms, such as the freedom to negotiate, that it entails. One does not have to adopt a neo-liberal perspective on the merits of free markets to see the validity of this point. One could just as easily use as an example the National Health Service, and observe that benefits can arise from living in a society with comprehensive medical care, even if one personally relies solely on private medical care.

⁴⁷ Raz, *The Morality of Freedom* (n 10) 179, 247, 253, 256; Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 149-153.

Another way of expressing this is to say that the institution of a free market or health service constitutes a collective good. Similarly, other institutions afford benefits to people, whether or not those people utilise the structures – and in particular the freedoms – that the institutions mandate. One in particular is freedom of speech, and freedom of the Press (though, as mentioned, Raz would have the latter as an aspect of the former). Raz holds that in general terms, the character of a community as an open society affords benefits to individuals who live in it, and this institution benefits all those who are subject to such a political system.⁴⁸ This is the case whether or not such people chose to speak freely, or to read newspapers, watch television, listen to the radio or visit news webpages. Press freedom and speech freedoms are an integral part of such an open society, as an open society is a society that recognises freedom of expression.⁴⁹ Press freedom can be seen as a public good.

This provides an answer to the question of how the interests of individual journalists can provide benefits to wider society. The doctrine of open justice provides an example. Letting a journalist into a courtroom to which other members of the public are barred is recognising the interest of an individual journalist. But the interest of the journalist is recognised not only for the benefits that accrue to that journalist, but also because recognising such an interest contributes benefits to society at large. These benefits accrue whether or not individuals are a party to the legal action in question, or whether or not they read the information that flows from

⁴⁸ Raz, *The Morality of Freedom* (n 10) 253.

⁴⁹ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 52-59. Sunstein also notes the same point, relying on empirical research: Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) 97.

letting that journalist in, and indeed whether or not the journalist makes any report. This is because there are wider benefits that are conferred on every person who lives in a society in which, in general terms, open justice is recognised. It might be observed that this particular case is more relevant to establishing a right of speech freedom than Press freedom, as open justice only occasionally, and some assert anomalously, provides special benefits to the Press. However, as Raz observes, instances of special treatment to the Press are reasonably extensive, whether or not they are doctrinal, and are particular to the Press.

In most liberal democracies the Press enjoys privileges not extended to ordinary individuals. Those include protection against action for libel or breach of privacy, access to information, priority in access to the courts or Parliamentary sessions, special governmental briefings, and so on. They are sometimes enshrined in law, sometimes left to conventions. The justification of the special rights and privileges of the Press are in its service to the community at large. The interest of individuals in living in an open society is not confined to those who desire to benefit from it as producers or consumers of information or opinion. It extends to all who live in that society, for they benefit from the participation of others in the free exchange of information and opinion.⁵⁰

The institutional Press and validation and censorship

The second argument is a development of Raz's argument about how free expression can validate people's life choices, and official censorship of expression relating to certain life choices can be an insult and a withdrawal of these aspects of how a

⁵⁰ Raz, *The Morality of Freedom* (n 10) 253. Similar points are made in Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 152.

person may flourish. This argument is of wider application than merely to the news media – or Press – and applies also to the entertainment media.⁵¹

Raz's case – which he posits is in addition to other arguments for free speech⁵² – is that speech can provide validation to certain life choices, and thereby contribute to the potential well being of people. Censorship of speech can withhold or condemn life choices, and that may limit the acceptable options available from which people may chose, and thereby detract from their possibility of living their lives in such a way as they flourish: it may detract from their well-being. This argument is of particular importance to the media, and provides an argument for media freedom because the institutional media and public communication are significant ways by which life choices can be validated or censored. Raz observes: '[People]... depend on finding themselves reflected in the public media for a sense of their own legitimacy, for a feeling that their problems and experiences are not freak deviations'. He goes on to note that:

[w]e depend more than ever before on a culture which saturates us with images and messages through the public media, which have acquired a great power both to encourage and to stifle and marginalise activities, attitudes and the like.⁵³

An evident example of this relates to homosexuality. Once confined to the margins of the media, and portrayed if portrayed at all with distaste,⁵⁴ it is a lifestyle that is

⁵¹ Raz uses soap operas as an example: Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 154. The relationship between entertainment and journalism is discussed in chapter one, text to n 3ff.

⁵² N 29.

⁵³ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 155.

⁵⁴ A striking indication of this is the 1966 *TIME* magazine on homosexuality which described it as a 'pernicious sickness': to be found in Hendrik Hertzberg, 'Stonewall Plus Forty' *The New Yorker* (New

now endorsed and validated in mainstream writing and broadcasting. Indeed, the power of the media to condone and validate is a factor that can be discerned as recognised by those who seek to restrain indecency in the media, and as a reason behind the existence of codes of media decency. Such codes are instances of special treatment that police the boundaries of what it is acceptable that the institutional media may validate, so that forms of life that are to be deprecated are not encouraged. Raz's argument provides a reason to resist such codes, at least in part, because of the emphasis he places on the importance of recognising autonomously chosen life choices – the liberty or autonomy of the individual is of central importance to his political philosophy, and flourishing is only valuable when it is arrived at by a process of autonomous choice. If the media are restricted from validating some life choices, this curtails the options available to an individual, and this in turn curtails the range of choices available to such an individual, and may hinder their ability to choose a lifestyle that will enable them to flourish. But, that said, this is a nuanced area: autonomy for Raz is not true autonomy unless an individual has the capacity to make an informed choice between valuable options.

The conditions of autonomy ... include the existence of a public culture which maintains and encourages the cultivation of certain tastes and the undertaking of certain pursuits.... Autonomy requires a public culture and is consistent with a tasteful rather than a vulgar and offensive environment.⁵⁵

York, 6/6/09) <http://www.newyorker.com/talk/comment/2009/07/06/090706taco_talk_hertzberg> accessed 17/6/13.

⁵⁵ Raz, *The Morality of Freedom* (n 10) 421, 422. A similar point is made at Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 122.

This leads to the conclusion that some special indecency codes, for example, might be appropriate, to ensure that the conditions of public culture are apposite for the flourishing of autonomy. However, which codes should be resisted and which permitted is not clear, and that is somewhat of an unsatisfactory position, as the line between what should be encouraged and what restrained, between autonomy and paternalism is not clearly drawn. This will be discussed in a moment.

However, the point to emphasise here is that Raz's validation and censorship arguments provide a reason to consider the interests of individual members of the Press to be weighty. This is because the interests of members of the media, acting in the course of their employment, are instrumental in contributing to the interests of others. This instrumental benefit arises because of the capacity for validation or censorship of lifestyles by the speech of individual members of the Press acting in the scope of their duties. The interests of an individual institutional journalist, therefore, can be of greater importance than merely the fact that such an interest benefits the journalist; as such interests can also benefit others by the validation that they can confer. Permitting a journalist, for example, the freedom to report on a particular matter can contribute to the life choices available to part of his or her audience, and can thereby contribute to the options available from which such a person makes choices that may permit them to flourish.

A constitutional right of Press freedom?

A case has therefore been made for Press freedom, according to the Razian conception of rights. Individual members of the institutional Press, because of the reputation and assessability that accrues from their being members of the institutional

Press, have interests that not only provide benefits to the Press members, but are instrumental in the affording of benefits to others. These wider interests to which these particular interest instrumentally contribute are sufficiently weighty to hold others under a duty. They are weighty because of the contribution that the interests make to the validation and censorship inherent in free speech, but also because of the benefits that accrue more widely from living in a liberal culture where instances of Press freedom are recognised. But the existence of such a right does not inevitably lead to the conclusion that it should be a constitutional right, with all the associations that this term has of entrenchment, or being of a higher normative force. However, Raz proposes an argument why this should be so. There are three limbs to this argument: first, that a right of Press freedom is linked to the foundations of political morality, and therefore has a higher normative force; secondly Raz observes there is merit in entrenching – by which he means making relatively more difficult to alter - procedures that are central to the operation of a society: Raz proposes an institutional constitutionality. The third limb of Raz’s argument is that, as the instances of a right of Press freedom involve evaluating competing interests of individuals, courts are the institution best placed to resolve these questions. Against this assertion that Press freedom might be a constitutional right, it can be argued that, doctrinally, the common law has not, in the past, looked favourably on the concept of constitutional rights.⁵⁶ But Raz observes that even without a Bill of Rights, judicial oversight of the legislature, whether or not there is a doctrine of sovereignty of parliament, can in effect give special institutional protection equivalent to a system of constitutional

⁵⁶ Chapter one, text to n 34ff and cross references there indicated.

rights, citing as an example of a technique of judicial oversight the interpretation of legislation, a technique manifest in the judgment of *R v Home Secretary, ex p Simms*.⁵⁷ There are other cases that tend to validate Raz's claim particularly in respect of freedom of speech, and indeed of the Press,⁵⁸ and the operation of mechanisms such as constitutional conventions and sections 3 and 4 of the Human Rights Act 1988 further validate his view.⁵⁹

It should be emphasised that Raz presents his arguments as additional to, and not instead of, other arguments for the constitutionality of speech freedom,⁶⁰ and so the arguments should also be seen as additional to, and not instead of, arguments that exist for the constitutionality of Press freedom. In particular, the mechanisms of the Fourth Estate and Public Sphere arguments for free speech values also contribute to the case for Press freedom to be a constitutional right.

Press freedom and the foundations of political morality

The first limb of Raz's argument is rather more complex than can easily be précised in this work. The short account of his argument is that the importance of Press freedom rests on its importance to the contribution such a freedom makes to a public culture, and that a public culture, in its turn, is important because of the contribution

⁵⁷ *R v Home Secretary, ex p Simms* [2000] 2 AC 115 HL.

⁵⁸ *Redmond-Bate v DPP* [1999] EWHC Admin 732 (1999) 7 BHRC 375 QB [13]; *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105 [34]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL (208); *R (Mohamed) v Foreign Secretary* [2009] EWHC 152 (Admin), [2009] All ER (D) 64 (Feb) Divisional Court [53] affd *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65; *R v Central Independent Television plc* (532); *R v B* [2006] EWCA Crim 2692, [2007] EMLR 145 [19].

⁵⁹ Chapter five, text to n 23ff.

⁶⁰ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 169

it makes to the well-being of members of the community generally, not just to the holders of the right in question. Hence, Press freedom is important because of the contribution it makes to the – for Raz – ultimate political value, the foundation of political morality. This, for Raz, is the aim of politics, to enable people to choose to live, and to live, lives that are fulfilled according to the choices they make. This, in part, underlies Raz’s claim that: ‘the importance of liberal rights is in their service to the public good’.⁶¹ Press freedom, as one of these liberal rights, therefore is of instrumental benefit to the foundations of political morality.⁶² Yet, the fundamentality of a right doesn’t, of itself, provide an indication of the weight of Press freedom. For, as Raz himself observes:

fundamental rights in the sense that they are part of the deepest level of moral thought. It does not follow, of course, that they are either inalienable or of absolute or near absolute weight.⁶³

It may be, therefore, that the linkage between Press freedom and fundamental rights does not amount to sufficient reason to consider it a constitutional right. However, this question will not be considered in more depth, as there is another reason for considering Press freedom to be a constitutional right. And turning from this issue is in any case an advisable course of action, as a full analysis of this argument would necessitate evaluating Raz’s wider theory of political morality. This cannot be attempted in these pages.

⁶¹ Raz, *The Morality of Freedom* (n 10) 256.

⁶² Ibid

⁶³ Id (n 10) 255. Raz is referring to ‘property and consensual rights’ here, but the point transfers to Press freedom, if it is also considered as a fundamental right.

Special institutional treatment of Press freedom

The second limb for Press freedom being a constitutional right revolves around its importance to a liberal culture. In this argument, Raz distinguishes an alternative meaning of ‘constitutional right’ from the one briefly canvassed above that is adopted by writers such as Dworkin, who assert that the term entails that the right protected is fundamental importance to morality.⁶⁴ For Raz, a constitutional right can be more than this, and in particular it can be a right that operates to protect a fundamental feature of an institution that is of instrumental benefit because it contributes to the attainment of a core political value. Such rights are different to moral rights, for example, and Press freedom is one.

A central aspect of constitutional rights, argues Raz, is that they are removed from normal treatment, and to an extent at least removed from the control of the legislature and subject to the purview of the courts, or of special courts. An argument that Press freedom should be such a right needs to establish a case that this should be so for rights regarding the Press. Some constitutional rights protect collective goods, and preserve them from being tinkered with by the state. In the case of Press freedom, as has been demonstrated, there are two collective goods that it contributes – first, the validation and censorship that comes from free expression mediated in the Press, and second the common liberal culture of which Press freedom is an aspect. The higher order protection afforded by a constitutional right derives, in part, from the fact that such rights protect a benefit afforded to everyone, and as Press freedom,

⁶⁴ Id (n 10) 256.

as has been argued, provides such benefits, it has a claim to be considered to be one such right.

A further reason for holding Press freedom to be a constitutional right is that some constitutional rights protect basic elements of the culture of a society, and the reason for this is that these basic elements should be made more difficult to alter than other aspects of society. Raz argues that it is appropriate, and indeed sensible, for institutional arrangements to isolate to some extent such elements from the melee of day-to-day politics, and make them more difficult to alter.⁶⁵ Constitutional rights that protect these features of a society 'are part of the institutional protection of the basic culture of a society'.⁶⁶ It is here that the Dworkinian argument becomes relevant again, as Press freedom, as has been argued in the Dworkinian argument, is one such basic element of a political culture. Raz provides a reason why it should be protected by special institutional protection. The best way to show due respect to these features of a culture is to restrict many people, and some institutions such as the legislature and some courts, from being able to determine questions revolving around them.

Courts as the place to examine individuals' interests

Finally, Raz observes that a notable feature of Press rights is that the interest that is at the core of the right is borne by individuals, albeit members of the Press acting in a representative capacity. He notes that this provides another argument that Press freedom, or the instances of it from which a general principle can derive, should be a matter for the courts to resolve rather than a legislature. This is because courts are set

⁶⁵ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 169.

⁶⁶ Raz, *The Morality of Freedom* (n 4) 260.

up to inquire into matters revolving around individual rights in a way that legislatures are less well equipped, as courts are good arbiters of disputes between individuals. Legislatures are better at legislating, and executives at deciding policy and administrating (or even if they are not better, it is their assigned function). Given that instances of Press freedom involve interests of individuals, including in particular the interests of a member of the institutional Press that can be of wide instrumental benefit to society, then the appropriate forum for determination of their ambit and strength should be courts.

Some attractions of the consequentialist argument

The consequentialist argument has some of the qualities that were being sought in a rights-based account of Press freedom (and hence special treatment), and improves in some respects on the deontological theory. First, it clearly explains why harm by the Press can be permissible: indeed, Raz explicitly recognises the need for a theory of speech to explain why one should protect ‘bad speech’,⁶⁷ and the reasons for this can be applied to Press freedom. Harm is not sufficient in and of itself to curtail Press action,⁶⁸ as it is central to Raz’s idea that where an interest is sufficient to hold someone else under a duty, harm in and of itself cannot be a reason for its curtailment. To put the matter another way, the instrumentality of the interests of members of the institutional Press that contributes to wider interests by virtue of validation and contribution to a common liberal culture mean that these duties exist, and hence the right should be

⁶⁷ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 160 – 164.

⁶⁸ Although if ‘harm’ is taken to mean damage to autonomy, as Raz suggests at one point, then this may not be the case: Raz, *The Morality of Freedom* (n 10) 412-424

recognised, which leads to the conclusion that harm in and of itself should not be a sufficient reason to curtail Press action. To this extent, then, the consequentialist argument is on equal terms with the deontological argument. However, it improves on some of the deficiencies of the deontological approach because the deontological approach was deficient in that it was likely to be insufficiently persuasive to a sceptic of the propriety of permitting the Press to cause harm. In contrast, the consequentialist argument provides an account that may mollify – or at least, is more likely to mollify – such a sceptic, because it justifies such action by reference to other potential gains to individuals.

This leads to the second attractive quality of the consequentialist argument. Unlike the deontological approach, the consequentialist argument for Press freedom does discern specific qualities relating to the institutional Press from which the protection afforded from a right of Press freedom derive, and so in Schauer's terms, the consequentialist argument amounts to an independent principle of Press freedom.⁶⁹ Hence, as argued above, it can in principle condone the affording to the Press of 'class 1'⁷⁰ special treatment, where membership of the Press can be both necessary and sufficient conditions for the affording of the treatment in question. It can, in other words, explain why the Press should have rights to enter courtrooms not available to the general public. There are two aspects to the Razian argument to this end: the common liberal culture limb, and the validation and censorship limb. In the case of the first, the Press play a crucial part in our liberal society, a part not easily replicated by other institutions

⁶⁹ Nn 12 and 19.

⁷⁰ Chapter two, text following n 31.

or forms of communication.⁷¹ And similar points pertain to the second limb, the validation and censorship arguments, as it is the institutional Press that afford the validation or censorship that is the necessary mechanism that causes the psychological effects Raz determines that are central to his theory.

In these ways, then, the consequentialist theory builds on or improves upon the deontological argument and the free speech values thesis. But to what extent does the consequentialist theory improve upon the other perceived incompleteness of the free speech values thesis? It will be remembered that it was hoped that a rights-based theory of Press freedom would provide a more complete explanation as to why we should permit special treatment than the free speech values thesis. In one sense, the consequentialist approach does deliver this, as it is not confined to free speech values in explaining how special treatment may be appropriate. It can draw, when one conceives of the common liberal culture limb, on all those values that contribute to our common liberal culture; and it can draw, when one considers the second limb, on all those actions that validate or censor lives. Hence it appears broader. However, on closer examination, this may not be the case. This is because central to Raz's political philosophy, as will be discussed later, is the importance of autonomously derived human flourishing. These –autonomy and human flourishing – are evidently two of the values that lie at the heart of our interest in free speech, so to this extent at least, the Razian can be seen as relying on similar values to those emphasised as important by the free speech value thesis, at least when it is built upon Raz's conception of the morality of freedom.

⁷¹ This is discussed in chapter three.

Some deficiencies of the consequentialist argument

The consequentialist argument may have attractive characteristics, but it remains flawed. A representative sample of some of the more significant will be explored here, putting to one side more general critiques that can be made of Raz's approach to rights. Three points will be highlighted.

The first point relates to the Internet, which undermines the claim of the Press to be the mechanism central to Raz's argument, of validation, censorship, or contribution to a common liberal culture. People are now able to validate their activity less by referring to the output of the institutional media, and more by searching for like-minded souls on the Internet: finding others of a similar mind to themselves, validates their life choices in a way independent of the institutional Press,⁷² and the institutional Press is no longer central to this process of validation. A similar point can be made in relation to the extent to which the institutional Press contribute to our common liberal culture, as the Internet, at the least, has revolutionised political communication. These developments mean that the interests of individual Press members, while still instrumental in promoting the interests of others, are no longer as weighty as they used to be, given that other mechanisms now exist which achieve such an end. That, in turn, means that such interests may no longer be sufficient to hold others under a duty. Therefore, there is less reason to consider these instances of Press freedom to be a right.

This point can be addressed in three ways. The first two have been canvassed earlier in this thesis: the first point, discussed in chapter three, is that certain qualities of

⁷² Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007) describes the benefits and problems with this phenomenon, discussed in chapter five, text to n 53ff.

the institutional Press, namely its credibility and assessability, remain central to Press communication, qualities that still confer on the interests of individual Press members a weighty instrumental benefit of value to the interests of others. The second, argued in chapter five, is that the Internet has not yet eclipsed the activities of the Press that contribute to a common liberal culture, or validate lifestyles, and so – again – the interests of members of the Press remain weighty. But the ‘yet’ in that sentence is telling, and that leads to the third observation. This is to recognise that any claim for Press freedom to be a right is not a universal one for all time, but a time limited one. It may be that it is viable now, but become unviable in the future with technological change. This is to echo Raz’s observation that:

To my mind political philosophy is time-bound. It is valid- if it is valid at all – for the conditions prevailing here and now....Social situations can change in such a way that the very concepts we employ to understand and analyse them become inapplicable.⁷³

It may be that in the future, even the near future, developments in public communication mean that the right of Press freedom should no longer be recognised. It is at least arguable that this stage has not yet been reached.

A second concern focuses on the extent to which the Press do in fact, as asserted, contribute to common liberal culture, and to the validation of certain forms of life. That they do is a central element of the argument that the interests of individual members of the Press should be sufficient to impose a duty on others, and hence central to the claim that Press freedom should be considered to be a right. The concern arises because it can be argued, particularly in the climate of the Leveson report, that there is a substantial risk

⁷³ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 170 – 171. A similar point is made in an 1858 media law case by Campbell CJ *Lewis v Levy* EB & E 537, 120 ER 617.

that the Press undermine our common liberal culture as much as they promote it, and they evidently can demonise as much as validate potentially rewarding life choices. To what extent do these observations limit or even extinguish the Razian argument for a right of Press freedom? The answer is that, even if these observations are valid, this does not lead to the rejection of a right of Press freedom. This is because of the nature of rights, as Raz describes them. Rights, for Raz, exist to short circuit the evaluation in each particular instance of whether an interest is sufficiently important or not to act in a certain way.⁷⁴ Rights mean that this process is short circuited because they replace the motivation for action that results from an evaluation of particular circumstances with a pre-emptive reason for action predicated on the existence of a right. In other words, where a right exists, we act because the right exists, not because of the underlying reasons that explain why the right exists.⁷⁵ Hence, in the case of Press freedom and other equivalent rights, the existence of the right means that it not appropriate to consider in each case whether a particular interest is sufficient or not to merit a particular action, as the fact that a right exists pre-empts such an investigation. This means that even though the Press can undermine a common liberal culture this should not, of itself, negate the existence of a right of Press freedom. For sure, if, as a whole, the Press no longer contribute to a common liberal culture, or validate lifestyles, then the situation is different, and the right to Press freedom will be extinguished: but it is not clear that, whatever the failings of the Press, this has happened to an extent sufficient for such a conclusion to be appropriate.

⁷⁴ Raz, *The Morality of Freedom* (n 10) 58.

⁷⁵ Id (n 10) chapter 3.

Indeed, the rights-based nature of the Razian theory is one area in which this argument for special treatment is distinguishable from other consequentialist arguments. It will be remembered that in the discussion of the deontological argument and in the conclusion to chapter four, it was observed that it would be good if a consequentialist argument could be found that did not suffer from the inherent weaknesses of consequentialist arguments, namely that they are too easily circumvented if other means are available to achieve the desired consequence.⁷⁶ If the Razian consequentialist approach described here allowed each particular instance of Press action to be evaluated against a template of whether or not it contributed to a particular desired end, then the Razian approach would not be such a theory, as it would manifest this weakness. But it does not, and so it is not, because Raz's account of rights is a rule-based consequentialist theory: consequentialist because it adopts such a method for justifying the existence of a right by referring to the attainment of a particular end, and rule-based because it recognises that rights pre-empt consequentialist evaluations. It therefore avoids the weakness of consequentialist theories in general. This is not to say, of course, that the damage the Press can do to a common culture, for example, should be ignored. Indeed, the existence of a right does not mean that such a right is a trump that always wins.⁷⁷ Conflicts of rights, and consideration whether in a particular case the interest of an individual member of the Press should be determinative of how to resolve a dilemma can still be a matter for the courts to determine. But this is a quite different matter than saying that instances of Press misfeasance should deny the existence of a right of Press freedom.

⁷⁶ Discussed, for example, in the text to n 23.

⁷⁷ Raz, *The Morality of Freedom* (n 10) 186.

A third concern about a consequentialist right of Press freedom is that it still leaves one with a problem of indeterminacy. An instance of this was highlighted in passing when discussing the extent to which Raz's argument supports or resists an indecency code, where it was noted that the consequentialist theory can both mandate and resist such codes. It was noted that, to an extent, a resolution of this problem can come from a clearer understanding that 'autonomy' doesn't mean, for Raz, giving people their head, but placing them in an environment and with tools that allow them to make an educated decision about where their head should lead them. This is true, even if an apparently autonomous person would think otherwise.⁷⁸ In this, Raz's view coincides with Lord Reith's observation:

It is occasionally indicated to us that we are apparently setting out to give the public what we think they need and not what they want. [B]ut few know what they want, and very few what they need.⁷⁹

Hence, the apparent restriction on autonomy manifest in a liability that places content restrictions on the media to (for example) educate, inform and entertain, rather than disseminate material that a significant amount of the audience would prefer to consume⁸⁰ is not necessarily a restriction on autonomy, but is also an attempt to foster autonomy, or at least create an environment where greater autonomy is possible. However, as mentioned, this only resolves the problem only up to a point. Beyond that point, regulation to promote autonomy will cease to be appropriate, and for autonomy to have any meaning, people must be free to make bad choices, and chose to live limiting,

⁷⁸Id (n 10) 148-157, 373.

⁷⁹ Cited in James Curran and Jean Seaton, *Power Without Responsibility : Press, Broadcasting, and the Internet in Britain* (7th edn, Routledge 2009), 143.

⁸⁰ Though, as discussed in chapter four n 33, such regulations can also be justified on the grounds that they promote the autonomy of others who do indeed wish to watch or read such material.

withering lives. Raz accepts that ‘people’s well-being is – ultimately – up to them and them alone.’⁸¹ Where this point lies, the tipping point between paternalism and liberalism, is a question to which Raz’s theory does not have an easy answer. This is because a Razian consequentialist right of free Press does not indicate with certainty which particular instances of special treatment are appropriate, but only establishes general rules. The theory, in other words, can lead to indeterminate conclusions as to the propriety of instances of special treatment.

Raz is not blind to this problem. As already noted, he emphasises that his theory is intended to explain aspects of how our societies work at the moment, and not proposing a theory to explain all human culture over time.⁸² The question of whether a form of life is likely to make someone wither and so should be restricted, or flourish and so should be encouraged, is one that will change in different circumstances in a plural liberal society. Hence, the fact that Raz’s theories support both the enforcing of a code restricting obscenity, and conversely object to such a code, is not an inconsistency that undermines his theory, nor marks any such rules as inappropriate *per se*. It becomes a matter of fact for a particular society as to whether the liability in question is appropriate or not, and does not undermine the theoretical framework on which the liability rests. But it still leads to indeterminacy as to the propriety of certain instances of special treatment.

⁸¹ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 9.

⁸² N 73.

Special treatment under the Razian argument

It remains, then, to consider to what extent the Razian argument for a right of Press freedom (a general right, derived from individual rights of members of the Press)⁸³ mandates the special treatment that is the focus of this thesis, within the context of the indeterminacy that remains.

Special benefits.

Raz's theory provides a ground for the provision of special benefits to the institutional Press, both benefits and liabilities. Two main areas of special benefits will be described: first derived from Raz's conception of Press freedom as a right in itself, and second derived from one argument deployed to reach this conclusion, the idea that Press freedom is beneficial as it promotes a common liberal culture.

The first point is that the aspect of Raz's arguments that stresses that Press freedom should be a right mandates the provision, in general at least, of special benefits to the Press. This is because the concept of a right – particularly a constitutional right – entails, where it is applied, that a particular freedom is subject to a particular form of special institutional protection. As Raz describes, such protection entails the placing beyond the purview of the legislature – in general terms at least – the power to curtail or remove the freedom, or elements of it. In the case of a constitutional right of Press freedom, therefore, the provision of special benefits to the Press can be appropriate, at least insofar as putting determination of many questions about instances of Press freedom beyond the purview of the legislature, and reserving them to the courts.

⁸³ Raz, *The Morality of Freedom* (n 10) 155, 168-170, 179.

The second point can be developed from the argument that special benefits can arise because of the contribution that Press freedom makes (and its inherency in) a common liberal culture. To explain this, one needs briefly to examine Raz's underlying argument about why a common liberal culture is valuable, some aspects of which were canvassed earlier. Such a culture is not an end in itself, but is valuable because it provides people with the environment in which they are most likely to be able to freely choose activities and forms of life that will permit them to flourish. Hence, a common liberal culture is valuable as it recognises people's autonomy, yet at the same time contributes to individuals' well-being – and such a result is for Raz the end to which politics should aspire.⁸⁴ What might the special benefits be that flow from this analysis? Taking autonomy first, some clear examples of special beneficial treatment founded on autonomy can be found in the traditional Fourth Estate argument-derived benefits.⁸⁵ These can contribute to autonomy as they enable people to avoid being manipulated, and have a full awareness of various facts that facilitate their becoming autonomous. Examples of special beneficial treatment of the institutional Press that promotes this autonomy include treatment that assists in the investigation of power, such a right of freedom of information, a right of access to the courts, or a right of source protection.

Turning now to well-being, this value can also found various special rights, though these (as indicated in chapter one)⁸⁶ of pertinence to the wider media. One example is special rights of access to ring-fenced sporting or collective activities, such as

⁸⁴ Id (n 10) pt V.

⁸⁵ Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (n 4) 169.

⁸⁶ Text to n 11.

the FA Cup, the Olympics, or the Wimbledon Tennis Championships, which can be an instance of special beneficial treatment afforded to elements of the Press, and to the media more widely.⁸⁷ The Razian argument based on well-being can mandate such special treatment, on the grounds that the wide dissemination of such activities can bind societies together,⁸⁸ and that is a public good that contributes to the well-being of individuals. Individuals' well-being is thereby promoted because the dissemination of unifying events, such as the sporting events in question, provide opportunities for disparate individuals to identify with a communal societal activity, and feel a full member of society, and Raz argues that being able to identify with one's society is of great importance as it lays the foundations for the potential of autonomously chosen well-being.⁸⁹ The point here is not that everyone should watch these sporting events, but that the special treatment of reserving such sporting events to free-to-air broadcasters, for example, disseminates such events most widely, and this can contribute to the cohesion in societies, which is of benefit to everyone in society even if they do not watch the sporting event in question. This is because living in a society where people feel affiliated and not alienated holds wider benefits to all those who live in a society.

⁸⁷ For example, protected under the Broadcasting Act 1996, as amended, pt IV; analysed in Lesley Hitchens, *Broadcasting Pluralism and Diversity: a Comparative Study of Policy and Regulation* (Hart Publishing 2006), 226; Lorna Woods, 'Beyond *Murphy*, Films and Football: Audiovisual Content in Europe' (2012) 4(2) *Journal of Media Law* 189.

⁸⁸ Putnam's concepts of bridging and bonding social capital are useful ways of conceiving this point, even though Putnam is wary of the media, television entertainment in particular, conceiving it as an atomising force: Robert D. Putnam, *Bowling Alone: the Collapse and Revival of American Community* (Simon & Schuster 2000).

⁸⁹ Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 4) 153-55.

Special liabilities

Raz's theory provides a rationale for the imposition of special liabilities on the institutional Press, being a consequentialist theory, where they act to prevent the Press undermining the chances of validation or censorship of life choices, or where Press action challenges a common liberal culture. Additionally, as was demonstrated in the discussion in the preceding paragraphs, Raz's theory supports the provision of special liabilities on other grounds, given the importance to his political philosophy of well-being and autonomy, which he discerns to be central to political morality. The imposition of liabilities to prevent autonomy being compromised, for example, could be based on recognition that the Press can curtail people's autonomy by misinformation or partial reporting, and mandate Press regulation to ensure impartiality and rights of reply.⁹⁰ Similarly, sector specific media merger regulation could be defended on the grounds that without this there is a heightened risk that media monopolies or near monopolies will adversely affect the plurality of information available to the public, which risks compromising autonomy as a restriction on the flow of disparate information and viewpoints restricts the information on which autonomous people made decisions. Other special liabilities based on the desire to promote Razian autonomy also include regulations that restrict covert advocacy that may manipulate audiences and readers,⁹¹ and regulations that protect the editorial independence of journalists from undue influence from their

⁹⁰ Chapter two text to n 58ff.

⁹¹ Chapter three, text to n 42ff.

editors or proprietors,⁹² as such undisclosed influence may mislead audiences or readers. Turning to well-being, as discussed earlier the Razian approach can support liabilities designed to promote human flourishing, such as – for example – obscenity codes designed to restrict the extolling of lifestyles that cause people to wither rather than flourish, or regulations designed to educate, inform and entertain, such as mandatory quotas for the provision of news and current affairs, or regional material.⁹³ However, it is here that indeterminacies arise, for – as discussed – the Razian approach can also be read as militating against such provisions.

Conclusion

This chapter sought an explanation for why special treatment can be coherent that improved, or at least complemented, the free speech values thesis for special treatment. It considered two rights-based explanations. The attempt met with moderate success, in that such a right can be explained with reference to Dworkin's deontological methodology for establishing a right, and with reference to the rule-based consequentialism of Raz, but difficulties arose in respect of both approaches. It was concluded, however, that of the two, the consequentialist account is preferable not least because it provides a more satisfying explanation as to why it might be permissible for the Press to cause harm, without manifesting the weakness of consequentialist theories. Additionally, it was emphasised how the deontological approach does not provide sufficient explanation as to which incidents of Press freedom should be recognised, and which rejected, as it appears

⁹² Chapter three, text to n 37 and the cross-references indicated there.

⁹³ Chapter two text to n 52ff.

rather all-or-nothing. A danger, therefore, arises that the deontological approach will pay insufficient regard to the harmful individual acts that the Press can do, and undue concentration on the beneficial general consequences: in short, it will pay insufficient regard to the need to prevent the hacking of phones, the profiteering of privacy, and the undue influence of moguls.

In contrast, the consequentialist approach begins to recognise that when we talk of the harm and the media, there are a number of harms that need to be balanced. Evident, of course, are the harms caused to individuals, such as the family of Milly Dowler, the murdered teenager whose phone was hacked, events that prompted the Leveson Inquiry, but these should be considered with other harms, such as the harm caused to public discourse by general breaches of privacy, and the harm caused to public discourse by the curtailment of journalistic investigations and reporting. Additionally, looking at the matter from another perspective, one needs to be aware of the harm caused by acts and weigh against this the harm caused by not following rules, to refer to a distinction made in chapter four.⁹⁴ Moreover, one needs to be aware and balance the harm caused to individuals against the harm caused to the Public Sphere. The Razian consequentialist approach, as a consequentialist approach, while not necessarily providing an explanation of how these competing harms, and competing spheres of harm, are to be resolved, does at least provide a template against which they can be conceived. And as a rule-based consequentialist approach, it does this in such a way as not to demonstrate some of the weaknesses inherent in other consequentialist theories.

⁹⁴ Chapter four, text to n 14.

Chapter 8: Conclusion

This thesis investigates whether institutional journalism should receive special treatment at the hands of the law. Special treatment was clarified as encompassing the affording of benefits and the imposition of liabilities to journalistic institutions and the individuals who work for them. The question of whether institutional journalism should receive such treatment was, it was argued, a question of contemporary importance for at least three reasons: first, the law appears inconsistent in that liabilities are quite readily imposed on institutional journalism but benefits are frequently withheld; second, this inconsistency has become more acute because the Internet may have dissolved the difference between institutional journalism and other similar activities to the extent that special treatment in general can seem inappropriate, whether in terms of liabilities or benefits; and third because contemporary debate about the ethics and practices of print journalism touches on the propriety of special treatment, as it raises (amongst other things) the question of whether the imposition of more liabilities on print can in principle be appropriate.

The arguments against special treatment were divided, in broad brush terms, into the pragmatic and the theoretical, with the pragmatic arguments emphasising, *inter alia*, the difficulty of providing a definition of journalism, and the dangers that pertain to journalism from affording it special treatment, and the theoretical arguments emphasising the difficulty in providing a coherent explanation as to why special treatment can be appropriate, particularly as it is an activity that anyone can undertake. The pragmatic arguments were addressed in chapter two by describing how special treatment is already afforded to institutional journalism, both liabilities and (though to a lesser extent)

benefits, to individuals and institutions, and noting that as special treatment already occurs, some of the problems foreseen by the pragmatic arguments are not as difficult as they appear, and some of the undesirable consequences of affording special treatment to the Press have not crystallised.

The arguments that special treatment is incoherent were more difficult to address. A first difficulty is the question of whether institutional journalism is sufficiently different from other forms of similar activity in ways relevant to the affording of special treatment. In the past, such treatment has frequently been justified on the grounds that journalism is sufficiently distinct because of the integral nature of its involvement in democratic discourse, and because of its reach. However, the claim that institutional journalism is distinguishable on the grounds of the reach of its speech has been undermined by the development of novel means of public speech made possible by the Internet, which in turn undermines the argument that institutional journalism is sufficiently different to merit special treatment. However chapter three argued that in addition to reach, the credibility and assessability of institutional journalism still provide a *prima facie* rationale for special liabilities to be imposed on journalism, and also potentially for special benefits too, irrespective of the rise of public speech on the Internet.

This assessability and credibility provide an argument for special treatment when combined with the integral nature of journalism to democracy. But it is still unclear how exactly this can provide an explanation for special treatment. Two basic arguments were advanced: the free speech values thesis, and a rights-based account. The free speech values argument is a consequentialist account that holds that special treatment is

appropriate when (or because) institutional journalism contributes to free speech values. It was found to be attractive, but as chapters four and five demonstrated it presents difficulties, both when considered in the abstract and when applied to the free speech value of democracy. One particular problem relating to democracy is that there is a tension between the Fourth Estate and the Public Sphere accounts of how the Press contribute to democracy, and this makes application of the thesis difficult. But two problems that arise with the thesis more generally are that first, it provides only a weak argument for special treatment as it risks collapsing into the harm principle, and second it provides only an incomplete account of the reasons that exist for treating the institutional Press differently from individuals and institutions performing similar functions to the institutional Press.

It was concluded that there was merit in attempting to discern another way to explain how special treatment can be coherent. This was the rights-based argument explored in chapters six and seven. Chapter six argued that freedom of speech and of the Press are distinguishable, largely because of differences in the relative importance of speaker interests to each, as these are of a lesser immediate significance to Press freedom. Chapter seven investigated two accounts that can be advanced in contemporary rights theory for holding this distinct freedom of the Press to be a right. These were Dworkin's theory of rights as trumps, and Raz's theory of rights as interests, of which, it was argued, Raz's account is preferable. It complemented the free speech values thesis as an explanation of why special treatment can be coherent in the two ways being sought, because as a rights-based account it provides some resistance from collapsing into the harm principle while at the same time, as a consequentialist account, provides a relatively

persuasive explanation as to why Press actions should be able to cause harm; and also, by not limiting its palette of explanations to the values that explain our interest in free speech, potentially provides a fuller explanation of why special treatment may be appropriate, even though, it is true, when conceived as founded on Raz's fundamental political values of autonomy and well-being, it does indeed begin to resemble the free speech values thesis.

Together, these arguments provide us with the explanation for why special treatment can be appropriate. In relation to the suggestion that there is an inconsistency between the readiness with which the law imposes liabilities to the Press in comparison with the reluctance with which it affords benefits, the arguments in these pages lead to the conclusion that benefits are in principle as appropriate as liabilities. This is the conclusion of the argument that the Press are indeed different because of the matters referred to in chapter three, and because (or to the extent that) the Press contribute to free speech values as described in chapters four and five, and/or there is a right of Press freedom because that promotes the interests of those living in a democracy as described in chapters six and seven. In relation to the question of the challenge posed to differential treatment of the Press by the development of public speech on the Internet, this can be answered when one recognises that the Press remains sufficiently different from other forms of public speech in way relevant to the provision of special treatment to still merit being afforded, for example, sector specific regulation of media organisations, or special rights of access to courtrooms. In relation to the third point about the appropriateness, pursuant to Leveson's recommendations, of imposing liabilities on the print Press, according to both the free speech values thesis and the rights-based approach to Press

freedom there is nothing in principle to argue against the imposition of such liabilities. However, caution is necessary at this point, for as was described in chapter five, the situation is complicated by the fact that under the free speech values thesis, while the Public Sphere conception of the Press is phlegmatic about Press liabilities the Fourth Estate conception of the Press is resistant to such liabilities being imposed.

Illustrating the arguments with reference to an instance of special treatment

While both the rights-based explanation for special treatment and the free speech values thesis explain why special treatment can be appropriate, they share a limitation, in that they are both – to an extent – indeterminate as to which particular instances of special treatment they mandate. It would be useful if an explanation could be provided that provided a test to determine which instances of special treatment were appropriate, but the indeterminacy of the theories canvassed herein means they cannot provide this by themselves. However, they do provide a frame of reference by which questions of the appropriateness of particular instances of special treatment can be approached. It is useful to demonstrate this with reference to an example, to illustrate how it would be regarded by the different theories. The intention here is not to provide a full discussion of the merits of this instance of special treatment, but rather to illustrate how it is regarded by the free speech values thesis and the rights based approach.

Special benefit: a Reynolds-style defence in defamation

The special treatment in question is the idea manifest in cases such as *Reynolds v Times Newspapers*,¹ and in America *New York Times v Sullivan*,² that there should be protection against actions in defamation for speech considered to be particularly important in our democracy. It might protect particular classes of speech, or speech by particular persons, or impose an inability on some – particularly politicians – to sue, or sue effectively.³ It might provide strong protection as manifest in *New York Times*, or weaker (or more nuanced) protection as manifest in *Reynolds*. To discuss the idea of special treatment one need not resolve these details, but can focus on the core idea of an instance of special treatment that protects the Press when engaging in political discourse. How far do the theories described earlier support such an instance of special treatment being afforded to the Press in general? In addition, do they provide an argument for special protection that is exclusive to the Press, an instance of class 1 special treatment as described in chapter two?⁴

Free speech values thesis

The rule-based free speech values thesis would support such treatment where it was determined that journalism as a whole promotes free speech values. The thesis in its act-based form would support such treatment if the journalistic action in question promoted

¹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL. This is due to be replaced by the Defamation Act 2013 s 4.

² *New York Times v Sullivan* 376 US 254 (1964).

³ Institutions of central or local government have no ability to sue in defamation: *Derbyshire CC v Times Newspapers Limited* [1993] AC 534 HL.

⁴ Chapter two, text following n 28.

free speech values. Assuming one takes the free speech value of democracy as the relevant touchstone against which the propriety of this special treatment is to be judged, determination of whether the protection is to be afforded under a rule-based approach depends on one's view about the general place of journalism in a democracy, and under an act-based approach depends on one's view about the promotion of democracy of a particular piece of journalism that seeks the protection of the provision in question. Other free speech values could be taken as the touchstone, which would likely provide other indications of the acceptability of this (and other) instances of special treatment. For example, the free speech values thesis could be applied to the value of autonomy, particularly audience autonomy, and this would, it is likely, provide different answers to the propriety of particular instances of special treatment.

Determining the answer in relation to democracy in turn depends on one's conception of how the Press may promote democracy, and, as was argued in chapter five, there are at least two conceptions that can be in tension. The Fourth Estate conception of the Press affords greater regard to the editorial autonomy of the Press, and to the Press as an independent voice within democratic debate. It recognises the Press as an amplifier and mirror of the views of wider society, and sees these as qualities to be preserved. The Public Sphere conceives the Press more as a neutral conduit for facts and the opinions of others. Hence, under a Fourth Estate conception a *Reynolds*-style defence would likely be an attractive instance of special treatment, as it would preserve the ability of the Press to engage with political debate relatively free from restrictions, such activity by the Press being considered to be important in a democracy. Indeed, a Fourth Estate conception would tend to support the greater benefits afforded to the Press by a *New York Times v*

Sullivan active malice test, rather than the lower (or more nuanced) *Reynolds* test of responsible journalism, given that greater protection increases the capacity of the Press to engage in democratic debate. By contrast, a Public Sphere conception tends to look less favourably on a *Reynolds*-style defence, in the sense that the Public Sphere places less emphasis on the editorial independence of the Press an active agent with views of its own, and places more emphasis on the operation of the Press as a disseminator of the views of others. This conception of the Press as a more neutral passive agent leads to the idea that the active engagement in political debate of the Press facilitated by a *Reynolds*-style defence is not something to be as encouraged, and the Press should rather report the political debate engaged in by others. Hence, the Public Sphere conception of the Press would look less favourably on this instance of special treatment.

The arguments presented here are not definitive. It is possible to mount an argument against a *Reynolds*-style defence acceptable to a Fourth Estate conception of the Press, and conversely it is possible to argue for *Reynolds* using Public Sphere reasoning. For example, it is consistent with a Fourth Estate argument to note that the Press can intimidate others from taking part in democratic debate if the Press is permitted too much leeway in defamation, as decent people wishing to serve the public will be dissuaded from taking part in public life if the Press is permitted excessive leeway to defame. Hence, affording the Press a strong *Reynolds*-style defence carries with it a risk that democracy would be harmed, and as democracy is (by many accounts)⁵ at the heart of the Fourth Estate conception of the Press, and the value by reference to which the

⁵ The Fourth Estate conception of the Press can also be of use in non-democratic countries, as Hartmann J observes in his introduction to D Weisenhaus, *Hong Kong Media Law* (HKUP 2007).

Fourth Estate garners its persuasive power, this amounts to a reason to reject a *Reynolds*-style defence if the risk to democracy is evaluated as serious. This is in essence because the Fourth Estate conception of the Press values the Fourth Estate as a check on government not for its own sake, but because of the benefits that accrue to democracy from such a checking institution being permitted to operate.⁶ Equally, but on the other side of the coin, it is consistent with a Public Sphere argument to welcome a *Reynolds*-style defence. For example, one could hold that the Press should be able to report libels uttered by others with relative impunity, when the Press do not adopt the truth of the libel in question but rather act as a mere conduit, in order that the public may be more fully informed about what is taking place in their society, given the fact that a libel has been uttered can be of democratic importance. Indeed, this is the rationale for the defamation defence of reportage.

The fact that these counter arguments can be mounted should not come as a surprise, as it is an instance of the indeterminacy noted above associated with the free speech values thesis: indeed (as can be seen) such indeterminacy exists not only in the thesis itself, but in the Fourth Estate and Public Sphere theories that govern its application to the free speech value of democracy. That said, it does seem to be the case that in general terms at least, the Fourth Estate is more amenable to a *Reynolds* defence than the Public Sphere. But what of the claim that this treatment should be exclusive to the institutional Press? Here there is more of a difference. The Fourth Estate, conceiving the Press as an important and distinct institution in democracy, would be more likely to

⁶ This is a view on which Dworkin and Raz agree: Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) Dworkin, *A Matter of Principle* 385; ; Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) Raz, *The Morality of Freedom* 253.

see the affording of such a defence exclusively to the Press as appropriate, given the particular importance of the institutional Press to democracy. In contrast the Public Sphere, which conceives the Press predominantly as a conduit that happens to be currently contingently more efficient than others, would be much less likely to see exclusive special treatment as appropriate, given the fact that there are increasingly other conduits available to society.

Rights-based theory

A *Reynolds*-style defence could also be protected under the rights based theory. If one concentrates first on the deontological theory based on Dworkin, this theory supports the provision of a *Reynolds*-style defamation defence in principle. As a free Press is an inherent component of a liberal democratic State, the harm caused by Press should not *per se* be sufficient to curtail the Press. However, as was also indicated in chapter seven, the deontological theory does not go further and determine the scope and strength of such a right. Nor does it provide a convincing explanation to a sceptic as to the merits of recognising such a right of Press action. Falling back on the response that ‘this is what it means to live in a liberal democratic state’, while comprising an element of the picture, is unsatisfying to a sceptic, and in any event unsatisfactory as it is possible to conceive of a liberal democratic state that does not afford this sort of protection to the Press, or does not afford such protection to any great extent. As to the extent to which a deontological rights-based theory supports the *Reynolds*-style defence being exclusive to the institutional Press, the picture is a little complicated. The theory does support the provision of such a benefit to the Press but not, at first glance, to others such as NGOs who also might wish to engage in political discourse, as the freedom of NGOs to

communicate information is not inherent to a liberal democracy in the same manner as the freedom of the Press. To this extent, then, it would appear that there is a good claim that the theory supports exclusive special treatment for the Press. However, on reflection, it can be seen that NGOs and the like are made up of individuals, and as it is indeed part of the concept of a liberal democracy that individuals should have the right to engage in political discourse to a greater extent than the institutional Press, and so as individuals make up organisations like NGOs, *Reynolds*-like benefits cannot and should not be exclusive to the institutional Press.

The Razian conception of rights as interests approaches the question from another perspective. Raz's theory of rights is based on the idea that a right protects an important interest. He allows that recognition of the interests of a right holder can be instrumental in the promotion of the interest of someone other than the right holder. On that basis it can be seen that the recognition of interests of members of the institutional Press can provide an instrumental benefit to other members of society. One such interest could be the ability of a Press member to participate in political debate relatively free from restriction by the libel laws, a state of affairs permitted by a *Reynolds*-style defence in defamation, as this interest of the Press member can benefit other members of society. The question arises as to whether this interest can be sufficiently important to hold others under a duty, and so constitute a right. The answer is that it can, the stronger argument for this being the 'open society' argument described in chapter seven, rather than the 'validation and censorship' argument.⁷ This argument suggests that the ability of a Press member to contribute to political discussion relatively free from restriction by the libel

⁷ Chapter seven, text following n 47.

laws is a valuable element of an open society, and living in an open society provides important interests to members of such a society, whether such people participate in political discussion or not. Therefore, even if a non-Press individual does not consider the benefit that accrues to them from the operation of a *Reynolds* defence to be particularly important, and in any event insufficiently important to hold anyone else under a duty, the fact that it affords benefits to the society in which they live, and that they derive benefits from living in such a society, means that the benefit that flows from recognising a *Reynolds*-style defence for an institutional journalist is indeed sufficiently important to hold others under a duty. And, as Raz holds that a right should be recognised where an interest is sufficiently important to hold others under a duty, a *Reynolds*-style defence can be considered a right.

Further, the Razian argument provides a reason to consider *Reynolds*-style defences as constitutional, or at least constitutional as a part of a wider constitutional right of Press freedom, on the grounds that rights such as Press freedom should not be vulnerable to legislative override, as they are relatively central to the operation of a democracy. Moreover, as rights of this ilk frequently conflict with other rights, this provides another reason for their reservation for consideration by the courts or to other similar fora, as courts are in general terms at least better (or are preferable) venues for determining the results of conflicts of rights than are the legislature. Indeed, Raz's account of the fundamentals of political morality, as was described in chapter seven, provides a template for the determination of such conflicts. Raz's political philosophy emphasises the importance of well-being that is discovered and pursued autonomously as a political goal, and a source of political morality. Hence where *Reynolds*-style defences

promote autonomous well-being, they can be seen to be appropriate, but when they detract from this political aspiration then they can be held to be deficient, but always within the prism of the observation that following a rule may be a preferable way to achieving these desired ends than making a fact-specific determination.

As for the matter of whether this treatment should be exclusive to the institutional Press, the Razian argument is equivocal, but the better view is that it should not. On the one hand, the Razian argument provides a rationale for the exclusivity of such treatment. A *Reynolds*-style defence is an aspect of a wider freedom of the Press, which provides benefits to members of an open society even if they do not directly participate in the discussions which are the product of such a freedom. Hence, the interest of members of the Press to participate relatively freely in political discourse, relatively free that is from the restraint of libel, can afford benefits to the interests of other members of society sufficient to hold others under a duty to recognise such an interest. Moreover, given the argument in chapter three that the Press are sufficiently different to merit being treated differently, such treatment can appropriately be exclusive to the institutional Press. However, the reason why this is the less attractive argument is that, on the other hand, the interest of *anyone* to be able to participate in political discussion relatively free from restraint of libel can also be seen to be an interest sufficient, in an open society, to hold others under a duty. This is not least because of the central importance to Raz's political values of autonomy, which is engaged by and supports the ability of an individual to participate in political discourse for himself or herself. Hence, while the relatively free participation in political discourse by the institutional Press may provide a benefit for an individual, this should by no means exclude the possibility of such an individual

engaging in such political discourse on his or her own account: and, when doing so, being protected by a *Reynolds*-style defence. Hence, while as chapter seven argued the freedom of the Press can be seen to be a right on Raz's account, particular instances of the right such as a *Reynolds* defence, being also an element of a wider right of political participation, should not be exclusive to the institutional Press. The better view, therefore is that the Razian argument supports a *Reynolds*-style defence being of class 2, as described in chapter two, where membership of the Press is a necessary but not sufficient condition for the affording of special treatment.

Conclusion

In principle, special treatment of the institutional Press remains appropriate, and even in the time of the Internet instances of such treatment such as the continued imposition of special merger controls on journalistic companies remains appropriate, as does the continued provision of special benefits such as access to courts. However, the extent to which such provisions are in practice appropriate depends on other considerations, indicated but not canvassed here. The theories discussed provide a template for the consideration of such considerations but are not always determinative of the issues to which they pertain. The insufficiencies of the theories completely to encapsulate our reaction to the propriety of instances of special treatment should perhaps not be surprising. The concepts that are involved in justifying special treatment such as 'democracy', 'Press' and 'journalism' are malleable and ill-defined, and even when better-defined not always consistently applied, and the situation is complicated by the fact that these concepts have historic and contemporary meanings that are not always equivalent and which are still undergoing a process of change. Further, these malleable

concepts interact in a concrete way with organic and changeable commodities such as a living democratic state. The picture is further complicated by the change consequent on developing technology in the Internet era, in particular social and political change. Hence the targets that these arguments are tracking are fuzzy and moving. And, moreover, the correct extent to which special treatment can be afforded to the Press is frequently contestable. The account provided here, therefore, is neither entirely normative nor entirely descriptive, but is an attempt to provide a relatively persuasive explanation of why and under what circumstances special treatment of the institutional Press can be appropriate. Perhaps the best way of evaluating its success is not to consider it in the abstract, nor to consider it when applied, but to weigh it as a series of considerations to be altered and amended to the extent to which it corresponds with the pre-existent but changing concept of the proper ordering of society.⁸

⁸ Chapter one text to n 89.

Bibliography

Books

- Allan TRS, *Constitutional Justice: a Liberal Theory of the Rule of Law* (Oxford University Press 2001)
- Aristotle, *Politics* (Barker E tr, Oxford University Press 1972)
- Baker CE, *Human Liberty and Freedom of Speech* (Oxford University Press 1989)
- Barendt E, *Broadcasting Law: a Comparative Study* (Clarendon Press 1993)
- , *Media Law* (Dartmouth 1993)
- , *Freedom of speech* (2nd edn, Oxford University Press 2007)
- BBC, *Advertising and Sponsorship Guidelines for BBC Commercial Services* (2013)
- , *Editorial Guidelines* (2013)
- Bollinger LC, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press 2010)
- Bowers J, *Whistleblowing: Law and Practice* (2nd edn, Oxford University Press 2007)
- Bradley A and Ewing K, *Constitutional and Administrative Law* (14th edn, Longman 2007)
- Brandeis L, *Other People's Money, and How the Bankers Use it* (A M Kelley 1971)
- Clegg C, *Press Censorship in Elizabethan England* (Cambridge University Press 1997)
- Council of Europe, *Constitutions of Europe. Texts collected by the Council of Europe Venice Commisison* (Martinus Nijhoff Publishers 2004)
- Cram I, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart 2002)
- Curran J and Seaton J, *Power Without Responsibility : Press, Broadcasting, and the Internet in Britain* (7th edn, Routledge 2009)
- Denning A, *The Road to Justice* (Stevens & Sons 1955)
- Dicey A, *Introduction to the Study of the Law of the Constitution* (Wade E ed, 10 edn, Macmillan & Co Ltd 1961)
- Dworkin R, *Taking Rights Seriously* (Duckworth 1977)
- , *A Matter of Principle* (Harvard University Press 1985)
- , *Freedom's Law: the Moral Reading of the American Constitution* (Harvard University Press 1996)
- Eady D, Smith ATH and Arlidge A, *Arlidge, Eady & Smith on Contempt* (3rd edn, Sweet & Maxwell 2005)
- Feldman D, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002)
- Fenwick H and Phillipson G, *Media Freedom under the Human Rights Act* (Oxford University Press 2006)
- Fielden L, *Regulating the Press: A Comparative Study of International Press Councils* (Reuters Institute for the Study of Journalism 2012)
- Gibbons T and Humphreys P, *Audiovisual Regulation Under Pressure : Comparative Cases from North America and Europe* (Routledge 2012)
- Gies L, *Law and the Media* (Routledge-Cavendish 2008)
- Haack S, *Philosophy of Logics* (Cambridge University Press 1978)

Habermas J, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Polity 1989)

Harrison J and Woods L, *European Broadcasting Law and Policy* (Cambridge University Press 2007)

Haworth A, *Free Speech* (Routledge 1998)

Hitchens L, *Broadcasting Pluralism and Diversity : a Comparative Study of Policy and Regulation* (Hart Publishing 2006)

Humboldt W, *The Sphere and Duties of Government* (Coulthard J tr, Chapman 1854)

Jaconelli J, *Open Justice: a Critique of the Public Trial* (Oxford University Press 2002)

Jennings I, *The Law and the Constitution* (5th edn, University of London Press 1959)

Jones M, *Justice and Journalism* (Barry Rose 1974)

Judith Lichtenberg (ed), *Democracy and the Mass Media: a Collection of Essays* (Cambridge University Press 1990)

Keen A, *The Cult of the Amateur* (Rev. edn, Nicholas Brealey 2008)

Keller P, *European and International Media Law: Liberal Democracy, Trade, and the New Media* (Oxford University Press 2011)

Kelly J, *Red Kayaks and Hidden Gold: the Rise, Challenges and Value of Citizen Journalism* (Reuters Institute for the Study of Journalism 2009)

Leigh D, *The Frontiers of Secrecy* (Junction Books 1980)

Lloyd J, *What the Media are Doing to our Politics* (Constable & Robinson 2004)

Locke J, *A Letter Concerning Toleration* (Tully J ed, Hackett Publishing Company Inc 1983)

Mill JS, *On Liberty* (Himmelfarb G ed, Penguin 1985)

Milton J, *Areopagitica: and Other Political Writings of John Milton* (Liberty Fund 1999)

Nic Newman and David Levy (eds), *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism 2013)

Nicol A, Millar G and Sharland A, *Media Law and Human Rights* (2nd edn, Oxford University Press 2009)

Nietzsche F, *Beyond Good and Evil* (Hollingdale RJ tr, Penguin 1990)

—, *Human, All Too Human* (Faber M tr, Penguin 1994)

Nobles R and Schiff D, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press 2000)

Ofcom, *Broadcasting Code* (2013)

Office of the Parliamentary Commissioner for Standards, *Register of Journalists' Interests* (2013)

Plato, *The Last Days of Socrates* (Tredennick H tr, Penguin Books 1969)

Popper KR, *The Open Society and its Enemies* (Routledge 2003)

Powe L, *American Broadcasting and the First Amendment* (University of California Press 1987)

Powe LA, *The Fourth Estate and the Constitution : Freedom of the Press in America* (University of California Press 1991)

Putnam RD, *Bowling Alone : the Collapse and Revival of American Community* (Simon & Schuster 2000)

Raz J, *The Morality of Freedom* (Oxford University Press 1988)

—, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Rev. edn, Clarendon 1995)

Robertson G and Nicol AGL, *Media Law* (5th edn, Thomson / Sweet & Maxwell 2007)

Schauer F, *Free Speech: a Philosophical Enquiry* (Cambridge University Press 1982)

Siebert FS, *Freedom of the Press in England, 1476-1776 : the Rise and Decline of Government Control* (University of Illinois Press 1965)

Smith RC, *Broadcasting Law and Fundamental Rights* (Clarendon Press 1997)

Solove DJ, *The Future of Reputation : Gossip, Rumor, and Privacy on the Internet* (Yale University Press 2007)

Stephen JF, *Liberty, Equality, Fraternity* (Cambridge University Press 1967)

Sunstein CR, *Republic.com 2.0* (Princeton University Press 2007)

Surowiecki J, *The Wisdom of Crowds : Why the Many are Smarter than the Few* (Abacus 2005)

The Times London., *The World and the Times: The Thunderer in the Making, 1785-1841*, vol 1 (The Times 1935)

Trager R and Dickerson DL, *Freedom of Expression in the 21st Century* (Pine Forge Press 1999)

Trenchard J, Gordon T and Hamowy R, *Cato's Letters* (Liberty Fund 1995)

Turpin C and Tomkins A, *British Government and the Constitution* (6th edn, Cambridge University Press 2007)

Weisenhaus D, *Hong Kong Media Law* (HKUP 2007)

Williams B, *Truth and Truthfulness : an Essay in Genealogy* (Princeton University Press 2002)

Wittgenstein L, *Philosophical Investigations* (Oxford University Press 1988)

Chapters in edited books

Adelstein J, 'Fresh is Not as Fresh as Frozen': A Response to the Commercialization of American Media' (Media Institute, Washington DC, 25 May 2005)

Bazalgette P, 'Is Plurality Really the Issue?' in Gardam T and Levy DAL (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Dworkin R, 'Rights as Trumps' in Waldron J (ed), *Theories of Rights* (Oxford University Press 1984)

Fiss O, 'Why the State?' in Lichtenberg J (ed), *Democracy and the Mass Media* (CUP 1990)

Gardam T, 'The Purpose of Plurality' in Gardam T and Levy DAL (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Hume D, 'Of the Liberty of the Press (1741)' in Haakonssen K (ed), *Hume, Political Essays* (Cambridge University Press 2006)

Kelley D and Donway R, 'Liberalism and Free Speech' in Lichtenberg J (ed), *Democracy and the Mass Media* (Cambridge University Press 1990)

Laughton R, 'Bringing the News to Where You Are' in Gardam T (ed), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Lichtenberg J, 'Foundations and Limits of Freedom of the Press' in Lichtenberg J (ed), *Democracy and the Mass Media* (Cambridge University Press 1990)

Madison J, 'James Madison Argues for Freedom of the Press (Report on the Virginia Resolutions)' in Levy L (ed), *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Co Inc 1800)

—, ‘James Madison to W T Barry (1822)’ in *The Writings of James Madison*, vol 1 (Putnam's Sons 1900-1910)

O'Neill O, ‘Practices of Toleration’ in Lichtenberg J (ed), *Democracy and the Mass Media* (Cambridge University Press 1990)

Preston A, ‘Demographic Divides: How Different Groups Experience Online News’ in Newman N and Levy D (eds), *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism 2013)

Puttnam D, ‘Lessons from the First Communications Act’ in Gardam T and Levy DAL (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Scanlon T, ‘A Theory of Freedom of Expression’ in Dworkin RM (ed), *The Philosophy of Law* (Oxford University Press 1977)

Schauer F, ‘Who Decides?’ in Lichtenberg J (ed), *Democracy and the Mass Media* (Cambridge University Press 1990)

—, ‘The Exceptional First Amendment’ in Ignatieff M (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005)

Seaton J, ‘A Diversity of Understanding’ in Gardam T and Levy DAL (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Sedley S, ‘The First Amendment: A case for import controls’ in Loveland I (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Hart 1998)

Tait R, ‘Impartiality - Why it Must Stay’ in Gardam T and Levy DAL (eds), *The Price of Plurality* (Reuters Institute for the Study of Journalism 2008)

Levy D and Nielsen R (eds), *The Changing Business of Journalism and its Implications for Democracy* (Reuters Institute for the Study of Journalism 2010)

Levy LW (ed) *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Company, Inc 1966)

Articles

Anderson DA, ‘The Origins of the Press Clause’ (1983) 30 UCLA Law Review 455

—, ‘Freedom of the Press’ (2002) 80 Texas Law Review 429

Baker CE, ‘Private Power, The Press, and the Constitution’ [1993] Constitutional Commentary 421

—, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 Hofstra Law Review 955

Barendt E, ‘Press and Broadcasting Freedom: Does anyone have any rights to free speech?’ (1991) 44 CLP 63

—, ‘Bad News for Bloggers’ (2009) 2 Journal of Media Law 141

—, ‘Reynolds Privilege and Reports of Police Investigations’ (2012) 4(1) Journal of Media Law 1

Barron J, ‘Access to the Media - A New First Amendment Right’ (1967) 81 Harv L Rev 1641

Bezanson R, ‘The Developing Law of Editorial Judgment’ (1999) 78 Nebraska Law Rev 754

Blasi V, ‘The Checking Value of the First Amendment’ (1977) American Bar Foundation Research Journal 521

Blom-Cooper L, 'Press Freedom: a Constitutional Right or Cultural Assumption?' [2008] PL 260

Bollinger LC, 'Freedom of the Press and Public Access: Towards a Theory of Partial Regulation of the Media' (1976) 75 Michigan Law Review 1

Edros D, 'Freedom of Expression Turned on its Head? Academic Social Research and Journalism in the European Privacy Framework' [2013] PL 52

Fathaigh RÓ, 'The Recognition of a Right of Reply under the European Convention' (2012) 4(2) Journal of Media Law 322

Gibbons T, 'Freedom of the Press: Ownership and Editorial Values' [1992] PL 279

Gilles S, 'The Image of 'Good Journalism' in Privilege, Tort Law, and Constitutional Law' (2006) 32 Ohio Northern University Law Review 485

Jaconelli J, 'Do Constitutional Conventions bind?' (2005) 64 CLJ 149

Lange D, 'The Speech and Press Clauses' (1975) 23 UCLA Law Review 42

Lewis A, 'A Preferred Position for Journalism?' (1979) 7 Hofstra Law Review 595

Marshall G, 'Press Freedom and Free Speech Theory' [1992] PL 40

Meiklejohn A, 'The First Amendment is an Absolute' (1961) Sup Ct rev 245

Nimmer M, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 California Law Review 935

Oster J, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept' (2013) 5(1) Journal of Media Law 57

Poole T, 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435

Rogers K, 'Bloggers beware!' (2007) 157 NLJ 1718

Rowbottom J, 'To Rant, Vent and Converse' (2012) 71 CLJ 355

—, 'Leveson, Press Freedom and the Watchdogs' (2013) 21 Renewal 57

Sadurski W, 'Freedom of the Press and General Theory of Freedom of Speech' (2011) Sydney Law School Legal Studies Research Paper 11/57

Schauer F, 'Towards and institutional first amendment' (2005) 89 Minneapolis Law Review 1256

Smith A, 'The Press, the Courts and the Constitution' (1999) 52 CLP 126

Stewart P, 'Or of the Press' (1975) 26 Hastings LJ 631

Vamialis A, 'Online defamation: confronting anonymity' (2013) 21 (1) International Journal of Law and IT 31

Woods L, 'Beyond *Murphy*, Films and Football: Audiovisual Content in Europe' (2012) 4(2) Journal of Media Law 189

Newspaper articles

'Reason Interview: Mark S Fowler' *Reason* (November 1981)
 <<http://reason.com/archives/1998/12/01/voices-of-reason/4>> accessed 9/10/13

Barry D and others, 'Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception' *New York Times* (New York, 11/5/13)
 <<http://www.nytimes.com/2003/05/11/national/11PAPE.html?ex=1367985600&en=d6f511319c259463&ei=5007&partner=USERLAND>> accessed 26/9/13

Cross J, 'It's shameful that two top Premier League players have been unable to admit to being gay in 2010' *Daily Mirror* (24/12/09)

<<http://www.mirrorfootball.co.uk/opinion/columnists/john-cross/It-s-shameful-that-two-top-Premier-League-players-have-been-unable-to-admit-to-being-gay-in-2010-article267249.html>> accessed 29 02 12

Deer B, 'Revealed: MMR Research scandal' *The Times* (22/2/04)

<<http://www.thetimes.co.uk/tto/health/article1879347.ece>> accessed 3/10/13

Editorial, *Gloucester Journal* (28/2/1738)

—, *Gloucester Journal* (4/7/1757)

Hertzberg H, 'Stonewall Plus Forty' *The New Yorker* (New York, 6/6/09)

<http://www.newyorker.com/talk/comment/2009/07/06/090706taco_talk_hertzberg> accessed 17/6/13

Hickman M, 'Special investigation: TV Company Takes Millions from Malaysian Government to make documentaries for BBC... about Malaysia' *Independent* (17/8/13)

<<http://www.independent.co.uk/news/media/tv-radio/special-investigation-tv-company-takes-millions-from-malaysian-government-to-make-documentaries-for-bbc-about-malaysia-2338813.html>> accessed 26/9/13

O'Neill O, 'The Limits of Press Freedom' *Independent* (London, 25/3/02)

<<http://www.independent.co.uk/opinion/commentators/onora-oneill-freedom-of-the-press-cannot-be-unrestricted-655228.html>> accessed 07/10/09

Rozenberg J, 'Open Justice Rises up the Agenda' *Guardian* (4/10/13)

<<http://www.theguardian.com/law/2013/oct/04/senior-uk-judges-open-justice>> accessed 9/10/13

Webb S, 'Curbs on a Modern Miller's Tale' *Guardian* (London, 11/12/06)

<<http://www.guardian.co.uk/media/2006/dec/11/mondaymediasection9>> accessed 05/08/09

Reports

Australian Broadcasting Authority, *Commercial Radio Inquiry. Final Report of the Australian Broadcasting Authority* (August 2000)

—, *Commercial Radio Inquiry: Report of the Australian Broadcasting Authority Hearing into Radio 2UE Sydney Pty Ltd* (February 2000)

BBC Trust, *Funding Arrangements and Sponsorship of Documentary and Feature Programmes on BBC World News (a BBC Commercial Service)* (2011)

Council of Europe Committee of Ministers, *Declaration on Freedom of Political Debate in the Media* (12 February 2004)

Department of Culture Media and Sport, *An Agreement Between Her Majesty's Secretary of State for Culture Media and Sport and the British Broadcasting Corporation* (Cm 6872, 2006)

Joint Committee on Human Rights, *Nineteenth Report of the Session 2001-2002* (HL Paper 149, HC Paper 1102, 19 July 2002)

Leveson LJ, *An Inquiry Into the Culture, Practices and Ethics of The Press* (The Stationery Office, 2012)

Ofcom, *Ofcom Review of Public Service Broadcasting: Phase 2 - Meeting the Digital Challenge* (2004)

UN Human Rights Committee, *General Comment No 34* (2011)

Websites and blogs

BBC, 'I did not cause Rock run - Peston' (*BBC News*, 4/2/09)

<http://news.bbc.co.uk/1/hi/uk_politics/7870240.stm> accessed 7/10/09

European Commission Competition Directorate-General, 'Legal Framework Conditions Applicable to State Aid to Public Service Broadcasting: Commission Decisions on State Aid to Public Service Broadcasting (1999-2012)' (2013)

<http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf> accessed 25/9/13

Globescan, 'BBC/Reuters/Media Center Poll: Country Profiles' (3/5/06)

<http://www.globescan.com/news_archives/bbcreut_country.html> accessed 26/9/13

—, 'BBC/Reuters/Media Center Poll: Trust in the Media' (3/5/06)

<http://www.globescan.com/news_archives/bbcreut.html> accessed 26/9/13

Judiciary of England and Wales, 'Press Conference held by the Lord Chief Justice and the Master of the Rolls' (2011)

<<http://www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf>>

Kellner P, 'The Problem of Trust' (13/11/12)

<<http://yougov.co.uk/news/2012/11/13/problem-trust/>> accessed 26/9/13

O'Neill O, 'Conceptions of Press Freedom' (*Cambridge University*, 2008)

<<http://www.admin.cam.ac.uk/offices/communications/community/ideasfestival/reports/conceptions-of-press-freedom-transcript.pdf>> accessed 6/10/09