The 'Full Liberty of Public Writers':[1]

Special Treatment of Institutional Journalistic Speech in English Law

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30,000 words, rounded to the nearest 100.

[1] *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ).

Abstract

This paper is an investigation into one aspect of the constitutionality of journalistic freedom in the law of England and Wales. It argues that there are instances where the law provides special treatment for the expression of institutional journalists, and that this is legitimate.

The paper has two distinct parts, the doctrinal and the theoretical. Chapter one is doctrinal, and establishes that the law does provide special treatment to institutional journalistic speech. It classifies such treatment, demonstrating that these privileges come in different forms, and create different layers of rights. These forms can be distinguished according to whether the privileges are afforded to institutional journalists or functional journalism, or merely to general speech.

The theoretical part of this paper forms chapters two and three. Chapter two assumes that the provision of special treatment to institutional journalists is justified where institutional journalistic speech particularly promotes free speech values. It argues that institutional journalistic speech does indeed perform such a function, by virtue of particular characteristics it possesses, namely reach and reputation, which are employed in processes such as reporting, investigating and interrogating.

Chapter three considers the counter-arguments to this position. First it considers some arguments that challenge the thesis assumed in chapter two, and then it considers more specific criticisms of the provision of special treatment to institutional journalistic speech. It concludes that, while these limit the validity of the law's affording special treatment to institutional journalistic speech, they do not extinguish it.

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Introduction

This paper examines the extent to which the law provides institutional journalists with special treatment in respect of their speech.[1] It is concerned, following Fenwick and Phillipson, with 'the law governing the *output* of the media',[2] but more particularly with the laws that affect the output of individual journalists rather than the laws that govern media institutions. It is concerned with privileges and immunities, rather than liabilities.

Clarifying what 'institutional journalist' means involves difficulties similar to those involved in providing a definition of 'institutional lawyer', in that any explanation is unlikely to be necessary and complete. However, lack of a watertight definition is not necessarily a bar to informative discussion, so, whilst acknowledging that my usage may be subject to challenge,[3] I take 'institutional journalist' to mean individuals employed by, and to perform the tasks of, 'the portion of the media oriented toward current affairs and public policy […] and related expression historically identified with newspapers.'[4]

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[1] The terms 'speech' and 'expression' will be used interchangeably, unless the context requires otherwise, as will 'media' and 'press'.

[2] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford 2006) 1.

[3] Support for the view that this categorisation is *prima facie* valid can be drawn from the fact that it is recognised administratively by, for example, the United States 'I-Visa' programme, a visa 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, but I will discuss some of the challenges mentioned in the text at 68.

[4] CE Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955, 1022, relying on, amongst others, P Stewart, 'Or of the Press' (1975) 26 Hastings LJ 631. See also F Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge 1982) 106.

Chapter 1. The law: special treatment for institutional journalistic speech

Introduction

The traditional view is that English law provides no special treatment for the press.[1] However, such a view is no longer accurate. As will be seen, there are now instances where the speech of institutional journalists receives special privileges and immunities.[2] The provision by the law of this special treatment can be traced to the influence of the European Convention on Human Rights (ECHR), though the exact nature of such influence can be disputed. Commentators are not unanimous in their reactions to this development. As will be discussed below,[3] Robertson and Nicol[4] and Blom-Cooper[5] doubt there has been a fundamental change, and if there is any special treatment of institutional journalists this is anomalous, while Fenwick and Phillipson[6] and Barendt[7] take a different view.

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[1] T Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] PL 279, 279-280; D Eady, ATH Smith and A Arlidge, *Arlidge, Eady & Smith on Contempt* (3rd edn Common law library, Sweet & Maxwell, London 2005), 2-51.

[2] Examples of special privileges are given at the text above n 45, and their discussion constitutes the rest of the chapter.

[3] 15.

[4] G Robertson and AGL Nicol, *Media Law* (5th edn Thomson / Sweet & Maxwell, London 2007).

[5] L Blom-Cooper, 'Press Freedom: a Constitutional Right or Cultural Assumption?' [2008] PL 260.

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

[7] EM Barendt, *Freedom of Speech* (2nd edn Oxford University Press, Oxford 2005).

Light can be thrown on the nature of any special treatment of institutional journalists by distinguishing the different ways in which the law provides these special privileges to journalism. Confusion can arise from not considering whether such privileges solely benefit the institutional journalist, or rather anyone undertaking journalistic activity. Analysis of the law according to a categorisation based on this distinction illustrates how the law now provides special treatment to journalism, in both its institutional and non-institutional forms, and contributes to a clearer understanding of the constitutional position of the press in English law.

The traditional view

Historically, the law of England and Wales was considered not to provide special treatment to institutional journalists. Dicey wrote that it was 'hardly an exaggeration to say … that liberty of the press is not recognised in England',[8] and in 1934 Lord Aitkin said: 'the liberty of the press … is no more than the liberty of any member of the public, to criticise temperately and fairly, but freely …'.[9] In 1990, Sir John Donaldson MR confirmed that institutional journalists had no special status.[10]

Yet even before the drafting of the Human Rights Act 1998 (HRA) the traditional view had been challenged,[11] and such challenges have been strengthened by the influence of the HRA. There has been considerable change in the constitutional status of freedom

[8] AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan St. Martin's Press, London 1960) 247.

[9] *Ambard v AG for Trinidad and Tobago [1936] AC 322 (PC)* 337.

[10] *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 183.

[11] Gibbons, EM Barendt, 'Press and Broadcasting Freedom: Does anyone have any rights to free speech?' (1991) 44 CLP 63.

of speech;[12] does this mean that there has been commensurate change in the status of the press? That the position of some of the judiciary has altered can be gauged by comparing Lord Aitkin's dicta cited in the paragraph above with a Divisional Court judgment in 2009 where, in contrast to Lord Aitkin's approach, the Divisional Court accepted a suggestion in a leading textbook[13] that: 'the courts (and indeed Parliament) are now willing to accord to the press a 'constitutional significance that was largely unrecognised at common law'.[14]

The European Convention on Human Rights and the Human Rights Act 1998

While any change in the attitude of English law to the constitutional position of the press may be related to the influence of the ECHR, both before and after its incorporation by the HRA, there does need to be some caution. This is because, as with the constitutional position of speech in general, the effect of the ECHR and the HRA on the constitutional position of the press is contestable. So in relation to speech, Barendt is of the opinion that the HRA has not had a radical effect.[15] Further, others argue that the influence of the ECHR itself can be over-stated, as the common law afforded free speech a constitutional

[12] *Redmond-Bate v DPP* (1999) 7 BHRC 375 (QB) [13] (Sedley LJ); *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105 [34] (Lord Bingham); *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), 208 (Lord Steyn).

[13] Eady, Smith and Arlidge (n 1) 2-51.

[14] *R (Mohamed) v Foreign Secretary* [2009] EWHC 152 (Admin), [2009] All ER (D) 64 (Feb) (Divisional Court) [53].

[15] EM Barendt, 'Freedom of Expression in the United Kingdom under the HRA 1998' (2009) 84 Indiana Law Journal 851, 866. Fenwick and Phillipson tend to agree, seeing the HRA as probably at best a catalyst, 1111. As a partial contrast, Cram sees the HRA as, at the least, having changed judicial reasoning: I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart, Oxford 2002) 36.

value irrespective of the effect of the ECHR.[16] In a similar manner it could be argued that the common law also afforded press freedom a constitutional value, relying on contemporary cases such as *R v Home Secretary ex p Simms*,[17] and *R v Central ITV*,[18] and older authorities, most notably *Wason v Walter*, the case that established absolute privilege for the reporting of Parliamentary debates.[19]

Despite such caution, what does seem clear is that the Strasbourg court (ECtHR) has been more prepared to provide the press with special treatment than English courts,[20] and that this, at the least, has exerted an influence on the common law. Such a view is supported by dicta from the Court of Appeal in *Ashworth Hospital Authority v MGN Ltd* (a case on source protection) where the court agreed with counsel's submission that: 'the decisions of the European Court demonstrate that the freedom of the press has in the past carried greater weight in Strasbourg than it has in the courts of this country'.[21]

The Strasbourg court, on numerous occasions, has taken notice of what it describes as: 'the pre-eminent role of the press in a democratic society to impart ideas

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[16] T Poole, 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435; and, for example, Laws J in *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [35]. A contrasting view can be found in *Laporte* (see p000) where Lord Bingham describes the common law's approach to freedom of expression and assembly as 'hesitant and negative' [34], a view shared by AGL Nicol, G Millar and A Sharland, *Media Law and Human Rights* (2nd edn Oxford University Press, Oxford 2009), 1.18.

[17] [2000] 2 AC 115 (HL)

[18] [1994] Fam 192 (CA).

[19] *Wason v Walter* (1868) LR 4 QB 73.

[20] Nicol, Millar and Sharland (n 16) 2.18, 5.32.

[21] *Ashworth HA v MGN Ltd* [2001] 1 WLR 515 (CA) [97] (Lord Phillips MR), referring to the ECtHR. There are exceptions, particularly in the field of contempt of court: Fenwick and Phillipson (see p000) 279 and *Al Megrahi v Times* 2000 JC 22 (HC of Justiciary Sc).

and opinions on matters of public interest'.[22] The statement of 'pre-eminence' is often repeated in the mantra-like judgments of the ECtHR. On the strength of these observations the court has emphasised that: 'the *most careful* of scrutiny under art 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern'.[23] The 'most careful scrutiny' test has had other formulations, such as that of 'utmost caution'.[24] On either wording, it appears that a higher bar is being set, in general, for the restriction of journalistic speech than is set for other speech. The margin of appreciation afforded to national authorities in assessing whether there is a pressing social need for restriction of expression is circumscribed in press cases: this is 'a sphere in which restrictions on freedom of expression are to be strictly construed'.[25]

Further, there appear to be specific protections for journalists, protections not afforded to others. Dicta suggest that journalists may 'exaggerate or provoke'[26] in a way, it appears, that others may not. These dicta are based on the observation that journalists ought to be afforded discretion in their choice as to how to tell their stories because: '[i]t is not for the court to take the place of the press by saying what reporting technique journalists should adopt',[27] the inference being that the court would not be so deferential

[22] For example *Ozturk v Turkey* (App no 17095/03) ECHR 9 June 2009 [27].

[23] *Times Newspapers Ltd (No 1 and 2) v UK* (App nos 3002/03 and 23767/03) ECHR 10 March 2009 [41] . The apparently extraneous word 'of' in this quotation is in the original judgment, but the emphasis has been added.

[24] *Cumpana v Romania* (App no 33348/96) (2005) 41 EHRR 14 [111].

[25] *Thoma v Luxembourg* (App no 38432/97) (2003) 36 EHRR 21 [48], [58]

[26] *id* [46].

[27] *Radio France v France* (App no 53984/00) (2005) 40 EHRR 29 [39].

to the decisions of other speakers in respect of their choice of how to speak. Further, on occasion the courts suggest 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. In a recent case the ECtHR said: 'recourse to criminal prosecution against journalists for purported insults raising issues of public debate […] should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual's rights'.[28] And, considering the point from a different angle, it can be seen in many judgments that the benefits accorded to the press are stated to be conditional. An example: 'the protection afforded by article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with responsible journalism'.[29] The protections afforded by article 10 to other people are not subject to a proviso such as this.[30] Why the difference? The fact that there is a difference suggests that journalism is different.

While Strasbourg may *de facto* provide a measure of special treatment to institutional journalistic expression, it is necessary to describe two limits of such provision. First, in *Von Hannover v Germany*,[31] the court emphasised that the provision of special treatment to journalistic speech is contingent on the content of an institutional journalists' speech. The content that Strasbourg protects is speech that is in the public interest, and of public interest speech political speech is the most important. So, in

[28] *Bodrozic v Serbia* (App no 32550/05) ECHR 23 June 2009 [39].

[29] *Times Newspapers Ltd (No 1 and 2) v UK* (n 23) [42] .

[30] Though Article 10(2), unique in the convention, states that by all speech freedom comes with 'duties and responsibilities'. Nicol, Millar and Sharland, (n 16) 5.54.

[31] *Von Hannover v Germany* (App no 59320/00) (2006) 43 EHRR 7.

balancing article 8 and 10 rights, the court held that 'a fundamental distinction' had to be made between reporting facts capable of contributing to a debate in a democratic society relating to, for example, politicians in the exercise of their functions, and reporting details of the private life of an individual who, as in Princess Caroline's case, does not exercise official functions. In the former case, the press exercises its vital role of 'watchdog'. In the latter case it does not.[32] It will be seen later that the change of emphasis has affected the approach of the English courts.[33]

A second limitation is that Strasbourg's special privileges are likely to be also available to some non-journalists. Support for such a view can be found, as Nicol *et al* observe,[34] in *Steel & Morris v UK*.[35] In this case the government argued that groups of people who were not journalists should not 'attract the high level of protection afforded to the press under article 10', on the assumption that these higher protections ought to be restricted to journalists. The ECtHR rejected this, observing that there exists a strong public interest in enabling groups such as NGOs to be able to contribute to the public debate by disseminating information and ideas on matters of general public interest.[36] Hence non-journalists might benefit from the higher levels of protection often enjoyed by journalists under article 10.

Taken together, these limitations on the provision of special treatment to institutional journalists lead some to the conclusion that article 10 'gives no credence to

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[32] *id* [63], [76], [77].

[33] 4343.

[34] Nicol, Millar and Sharland (n 16) 5.33.

[35] *Steel & Morris v UK* (App no 68416/01) (2005) 18 BHRC 545.

[36] *id* [89].

an institutional right'.[37] Nevertheless, as Fenwick and Phillipson note, the prioritisation of political speech by Strasbourg '*inherently* gives particular weight to the role of the *media*, as opposed to individual expression, since it is only "the fourth estate" which has the ability to disseminate information and political discussion on a large scale'.[38] This is a point that I will examine further in chapters two and three.

A difference of opinion

There is a difference of opinion between commentators as to the extent to which English law provides special treatment to institutional journalists. On the one hand, there is the view that the law provides no special treatment to institutional journalists in relation to their expression, and if it does such treatment is anomalous. Such a view acknowledges that the law treats those who speak publicly in a special way, but it holds that such treatment is derived from the fact of public speaking, and denies that the provision of such treatment is prompted by any professional affiliation of the speaker. So in a recent speech Blom-Cooper, after surveying the law, came to the conclusion that: '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'.[39] This is a view with which Robertson and Nicol agree.[40]

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[37] Blom-Cooper (n 5) 271.

[38] Fenwick and Phillipson, (n 6) 39. This is not a position with which Fenwick and Phillipson agree, as in their view it does not recognise freedom of expression as an individual moral entitlement, nor does it sufficiently protects individual protestors and their like: 43, 107.

[39] Blom-Cooper, (n 5) 268.

[40] Robertson and Nicol, (n 4) 5-052, 5-078 and xvii.

There is another view. This holds that there are indeed special privileges and immunities that accrue to speech by institutional journalists. In 1991 Barendt provided a list of some of these,[41] and in 1999 Smith performed a similar task,[42] surveying contemporary changes in the law[43] 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, 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'.[44] 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.[45]

[41] Barendt, 'Press and Broadcasting Freedom: Does anyone have any rights to free speech?' (n 11) 65.

[42] ATH Smith, 'The Press, the Courts and the Constitution' (1999) 52 CLP 126, 129-130. Smith is a co-author of the textbook cited by the Divisional Court in *Mohamed* n 14.

[43] Most notably *Reynolds* (n 12).

[44] Fenwick and Phillipson, (n 6) 24. They distinguish between special treatment under statute, and special treatment under common law noting the different effects of the HRA and ECHR on both: 109, 124.

[45] Barendt, *Freedom of Speech* (n 15) 427 – 435.

The current position: four different types of special treatment

Insofar as they accept that the law does provide special treatment to institutional journalists, the position of Barendt and Fenwick and Phillipson is to be preferred. As even both Blom-Cooper and Robertson and Nicol recognise, the law does indeed provide special treatment to institutional journalists: Blom-Cooper notes that the law provides institutional journalists with special rights of access to courts under section 69(2) Magistrates Courts Act 1980 (MCA),[46] and Robertson and Nicol recognise special provisions under section 13 (and other sections) of the Police and Criminal Evidence Act 1984 (PACE).[47] Indeed, the weakness of the view that there is no special treatment for institutional journalistic expression might be emphasised by the fact that Blom-Cooper and Robertson and Nicol note *different* instances of special treatment. But it would be an exaggeration to say that the provision of exclusive special treatment to institutional journalistic speech is widespread. Both Blom-Cooper and Robertson and Nicol consider those benefits to institutional journalists that they concede exist to be anomalous, and there is some truth in this observation, insofar as it is an assertion that these rights are uncommon.

To clarify the way in which the law provides special treatment to journalism it will be useful to make some distinctions. The most important is that between institutional and functional journalism as, in contrast to the professional activities performed by doctors and lawyers, journalism can be undertaken by anyone. Special treatment by the law of journalistic speech may be either afforded to those who practice journalism by

[46] Blom-Cooper, (n 5) 265.

[47] Robertson and Nicol (n 4) 5-078.

profession, or those who do not but nevertheless utter journalistic speech. The first class of treatment can be seen as the law providing special treatment to the institutional journalist, and in the latter case the law is rather providing special treatment to the activity of journalism, irrespective of the institutional affiliation of the person undertaking this activity. Such activity can be described as 'functional journalism'. The boundary between these two classes may be fluid, but the cores are sufficiently coherent for the distinction to be useful.[48]

Following from this distinction a four-fold classification arises. In the first class are those instances of special treatment by the law that are reserved only to institutional journalists. In the second and third class are those instances of special treatment that benefit functional journalism, rather than institutional journalism. In the fourth class are general speech benefits, provided for speech in general, which may or may not be journalistic in nature. Benefits in this last class will often be of particular use to both functional and institutional journalism, but are also of benefit to other forms of speech.

The second and third class – the instances of special treatment of functional journalism – can be distinguished by considering the position of an institutional journalist who seeks the benefit of any of these instances of special treatment. In the second class are those privileges that benefit functional journalism, but where the institutional affiliation of a journalist can create a (rebuttable) presumption that they stand to benefit. In the third class are those privileges where there is no such presumption.

Once the distinction between functional and institutional journalism is recognised, it can be seen that 'special treatment' can have at least two meanings. First, it can

[48] I will discuss the impact of the Internet on the fluidity of the boundary at 68.

describe treatment that is exclusive to institutional journalists, in the sense that it is not available to anyone except institutional journalists. Second, it can be exclusive in the sense that while it is available to some other people, academics or medics, perhaps, it is not available to 'functional journalists', namely members of the public undertaking journalistic activity. Again, these categories do not have clean borders, but the cores are sufficiently distinct to be a useful analytical tool.

Analysis of the law

In what follows I will analyse an illustrative selection of some instances of special treatment based on the examples provided by Gibbons, Barendt and Fenwick and Phillipson according to the four-fold classification described above. It is hoped that after this analysis, a clearer picture will emerge of the way in which the law provides special treatments to journalism, and hence the constitutional position of journalism in English law.

Category 1: Special treatment for institutional journalists

The first category of special treatment is those rights and immunities that are afforded only to institutional journalists. Moving from the least to the more contentious these rights are: rights of access to family courts, other court-related access, and the rights of access to jails to talk to prisoners alleging miscarriages of justice. I will also discuss under this category certain defences in defamation law that were once the preserve of institutional journalists but which are so no longer, to show that there may be a trend, with the law providing fewer privileges to institutional journalists and more to functional journalism.

Access to family courts

The least contentious privilege afforded to institutional journalists is the right that representatives of news agencies and newspapers have under s69 (2) of the MCA 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,[49] and following the amendment to the Family Proceedings Rules 1991[50] 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.[51]

Other court-related access

The second example of an exclusive privilege is of access to physical courtrooms. In many courts there is a 'press bench' reserved to the institutional press. 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

[49] *Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146. This is the right Blom-Cooper, considers anomalous, see text above n 39. However, the courts should also permit the press to be present when the public are excluded in an obscenity case: *R v Waterfield* [1975] 1 WLR 711 (CA)

[50] Family Proceedings (Amendment) (No 2) Rules 2009, 2009 No 857.

[51] *Practice Direction (Family Proceedings: Media Representatives)* [2009] 1 WLR 1111 (Fam) ; *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).

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.[52]

As well as discretionary privileges of physical access, journalists may have similar privileges of access to information.[53] In this regard, in *AG v Guardian (No 3)* Brooke J said: 'the courts should be diligent and understanding in accommodating the legitimate interest of the press'.[54] So, for example, copies of skeleton arguments should be made available to the press (but not in cases involving children, or in which special reporting restrictions apply).[55] It might be argued that members of the public could avail themselves of these privileges, as, after all, they are founded on the idea that justice should be done in public,[56] and support for such a view comes from considering the rights of appeal against reporting restrictions imposed by a judge, provided by s159 of the Criminal Justice Act 1988 (CJA). It is true that this provision was the consequence of

[52] *Practice Direction (Crown Court: Young Defendants)* [2000] 1 WLR 659 [14], [15] , caused by the decision of the ECtHR in *V v UK* (App no 24888/94) (1999) 30 EHRR 121. In 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 CPR 39.2.

[53] Eady, Smith and Arlidge (n 1) 2-49 to 2-69.

[54] *AG v Guardian Newspapers (No 3)* [1992] 1 WLR 874 (QB) , 886G.

[55] *Lombard North Central v Pratt* (1989) 139 NLJ 1709 (CA).

[56] Support for this observation can be gained from the words of Lord Lane in *Re Crook (Tim)* (1989) 93 CrAppR 17 (CA) 24.

a case brought by a journalist to the ECtHR,[57] but it is not exclusive to journalists as the words of sub-section 1 provide that '*any* person' (emphasis added) may use the provision and seek appeal in appropriate circumstances.

Even if that is the case, there is an argument that another, similar privilege is less wide. This is the ability of the press to address Magistrates who are considering making a reporting restriction under s4 (2) Contempt of Court Act 1981 (CCA). The Divisional Court has decided that, as 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 s4 (2) order.[58] Mann LJ said that Magistrates can hear from journalists 'who might, by virtue of s4 (2), suffer a curtailment of their freedom to report'.[59] 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 s4 (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.[60] 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.[61] The argument

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[57] *Hodgson and Channel 4* (App nos 11553/85 and 11658/85) (1988) 56 DR 156.

[58] *R v Clerkenwell Stipendiary Magistrate ex p Telegraph* [1993] QB 462 (Divisional Court).

[59] *id* 471.

[60] *id* 472.

[61] 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].

that this benefit is exclusive to the institutional media depends, therefore, more on administrative concerns than a point of principle.

Access to prisoners alleging miscarriages of justice

The third example is more contentious, namely journalists' right of access to prisoners who allege that they have been subject to miscarriages of justice. This right was afforded by *R v Home Secretary, ex parte Simms*.[62] Referring to the Court of Appeal's refusal to allow institutional journalists access to speak to such prisoners, Lord Steyn said:

> 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.[63]

The House found that the Home Secretary's policy of restricting access by journalists to prisoners to investigate miscarriages of justice was unlawful, and a right of access by institutional journalists to visit a prison in certain circumstances was recognised.

It is clear that this right is not exclusive to institutional journalists in the sense of being available to no one else. This much is evident from Lord Millett's speech, in which he – relying on the statutory rules which provided the basis for the action – explicitly notes that the right of access is available (in appropriate circumstances) to: 'journalists *and authors*'.[64] However, the right can be seen as exclusive to institutional journalists insofar as when it is afforded to *journalism* it is only available to institutional journalists, and not 'functional journalists'. This view is based on the fact that in the House made a finding (somewhat surprisingly, perhaps), based on evidence given in the hearing, that

[62] *Simms* (n 18).

[63] *id* 131.

[64] *id* 144, emphasis added.

investigative journalists could be comparable to lawyers in their ability to investigate and seek to remedy miscarriages of justice.[65] It seems that the *Simms* privilege will be limited only to those classes of people who can prove they are likely to bring about a similar effect. It will be difficult for members of the public in general to prove this.

There are, however, at least two problems with asserting that these points establish the *Simms* privilege as special to the institutional journalist even in this restricted sense. The first is that it is feasible that a member of the public with a substantial record of responsible campaigning on the question of miscarriages of justice might indeed be able to establish their ability to investigate miscarriages of justice sufficient to persuade a court to extend the privilege to them. More fundamentally, though, the position depends on there being a clear distinction between journalism and the material produced by authors, yet it is not evident that such a distinction can be drawn. Therefore, the strongest argument to support the view that *Simms* provides a special benefit for institutional journalists is that, as with representations about s4 (2) CCA orders, it is a benefit that is unlikely for administrative reasons to be available to (non-author) functional journalists. Some support for this view comes from the speeches of Lords Hobhouse and Millett, who in their judgments are careful to qualify the availability of the privilege to 'responsible' and even 'professional journalists'.[66] It is difficult, therefore, to see the prison authorities and the courts extending access to members of the public acting journalistically.

[65] *Simms* (n 18) 127 (Lord Steyn), 143 (Lord Hobhouse).

[66] Ibid 143, 145, 146.

Defamation defences

I now turn to two statutory defences to defamation actions that were once, but are no longer, benefits to institutional journalists, to illustrate how the law's provision of privileges to institutional journalism is fluid. The first, s8 of the Law of Libel Amendment Act 1888, provides 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 covers only institutional journalists and notoriously, only newspapers, and does not even apply to individual journalists.[67] However, given the government's declared intention to abolish criminal libel it is likely to become redundant. [68] The second is the statutory protection affording absolute and qualified privileges for the reporting of various public proceedings in parliaments, courts, public inquiries and so on. Originally the protection was afforded only to newspapers,[69] but now the Defamation Act 1996 has extended this protection to the Internet and informal reporters (assuming the statutory criteria for affording the protection are met).[70]

[67] Robertson and Nicol (n 4) 3-083.

[68] F Gibb, '"Arcane" Laws of Sedition and Criminal Libel Scrapped' *Times* (London 15 07 09) <http://business.timesonline.co.uk/tol/business/law/columnists/article6714824.ece> accessed 02 08 09.

[69] *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277 (HL)) 285 (Lord Bingham).

[70] Robertson and Nicol (n 4) 8-118; Defamation Act 1996, s15 and sch 1.

Category 2: Special treatment for functional journalism, with a presumption of benefit for institutional journalists

The second category of special treatment that the law affords to institutional journalism contains a particular set of privileges and immunities that are not limited to institutional journalists. Whilst these privileges are not exclusive to institutional journalists, such people will find it easier to avail themselves of them than members of the public undertaking journalistic activity, because institutional journalists will enjoy, by virtue of their job, a presumption that they will be able to benefit from this special treatment. However, such a presumption is rebuttable.

The examples of special privileges that fall into this category are: the PACE 'shield laws' – the laws that govern when a journalist can resist disclosing information to some officials; similar provisions under the Police Act 1997 which provide some protection for journalists against particular types of investigation by the police and other official agencies, special provisions under the Data Protection Act 1998 the provisions of s12 (4) of the Human Rights Act 1998, and finally the defamation defence of 'reportage'.

Police and Criminal Evidence Act 1984 'shield laws'.

Turning first to the shield laws, these are contained in part II of PACE,[71] which codified previous law on when an entry, search and seizure by (in general) the police is legal. The effect of this part of the Act is that the powers of the police to search and seize 'excluded material' and 'special procedure material' are limited. Both 'excluded material' and 'special procedure material' include 'journalistic material', which is defined by s13. The

[71] The Act does not extend to Scotland.

Police can obtain this material, but not automatically, access only being granted after judicial consideration of an application. 'Excluded material' is material acquired for the purpose of journalism, and held in confidence. In general the police are not entitled to a search warrant for such material, but some statutes, such as the Terrorism Act 2000, provide specific entitlement.[72] 'Special procedure material' is, in general, journalistic material that is not held in confidence, a common example being rushes (un-edited and possibly un-broadcast footage) of a riot. The police can apply to a circuit judge for a search warrant for such material, which will be granted if certain conditions are fulfilled.

These provisions might appear to provide a protection exclusive to institutional journalists, as after all, the provisions taken as a whole expressly provide that journalistic material attracts a higher degree of protection than other material. Is this not an exclusive privilege afforded to journalists? Support for such a view can be found in a recent case examining the relationship between these provisions of PACE and art 10 of the ECHR, when Dyson LJ emphasised the special protection, interpreted in the light of art 10, that the provisions afford to institutional journalists:

> The correct approach to the art 10 issues as articulated in both the Strasbourg jurisprudence and our domestic law emphasises that (i) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist…[73]

However, it is clear that these benefits are not exclusive to institutional journalists, as s11 (1) does not restrict the class of 'excluded material' to journalistic material. So s11 (1)(a) extends the same protection to 'personal records acquired or created in a trade, business

[72] A power exercised in *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] EMLR 19.

[73] id at [48].

or profession or other occupation or for the purpose of any office, paid or unpaid', and s11 (1)(b) extends the same protection to 'human tissue or tissue fluid taken for purposes of diagnosis or medical treatment'. Journalistic material only appears in s11 (1)(c).

A counter-argument is that, as was discussed in relation to *Simms*, where the right is given to journalists as opposed to other 'professionals', it is given to *institutional* journalists and to that extent it is special treatment. However these provisions are different from *Simms*, because as Robertson and Nicol point out: '[t]he holder *need not be a professional journalist* if the material was acquired or created for journalistic purposes' [my italics],[74] hence the right clearly adheres to the material, not to the institutional status of the holder. Nevertheless, it is clear that a professional journalist will find it easier than a non-professional journalist to establish that the material possessed by them is journalistic material. This is a definitional point. A journalist, operating in the course of their employment, is likely to produce journalistic material. Hence there is a rebuttable presumption that any material created by a journalist in the course of their profession is journalistic. Such a view is supported by s13 which defines journalistic material as: 'material acquired or created for the purposes of journalism', when it is in the possession of a person who created it (or acquired it) for such a purpose. One efficient way of establishing that this 'purposes of journalism' test is met is by reference to the job of the person acquiring or creating it, and so an institutional journalist will therefore get a head start in establishing that their material is journalistic, and to that extent receives special treatment from part II of PACE.

[74] Robertson and Nicol (n 4) 5-075.

Police Act 1997

Some provisions of the Police Act 1997 are similar to the shield laws in PACE. The Police Act permits, in general, the Police to interfere with property and radio signals: 'authorised burglary and bugging' in the words of Robertson and Nicol.[75] Permission for such activities needs to be sought before they can be undertaken, and notice of such permission needs to be given to a Commissioner, a High Court judge. In many cases, such notice need only be given after the event; however, in some circumstances a Commissioner must give prior approval in advance. One of these circumstances is when the activity for which permission was sought is likely to result in 'any person acquiring knowledge of … confidential journalistic material.'[76] 'Confidential journalistic material' is similar to the 'excluded material' defined by part II of PACE.[77]

Is this protection exclusive to institutional journalists? Similar arguments apply as applied to PACE, as the benefit adheres to the material not to any job, but a professional journalist would more quickly be afforded the protection of the provision than others. Indeed, this argument is stronger in relation to these Police Act provisions, and the exclusivity of the protection afforded by this provision is likely to be higher than in PACE, because of the nature of the activities permitted by this Act. They are covert. The application for permission is not, realistically, ever going to be made on notice, so there will never be an opportunity for a party to establish that the section applies to them. Hence the decision about the applicability of the section will be made on the basis of

[75] *id* 5 -079.

[76] s97 (2)(b)(iii).

[77] s100.

patent information, rather than on argument. The fact that the target of an application is an institutional journalist is one such piece of patent information that the approver will be likely to take into account, and hence institutional journalists will derive an advantage not afforded to others.

Data Protection Act 1998

I will next consider the journalistic exclusion contained in the Data Protection Act 1998 (DPA). The DPA provides a statutory regime for the processing of many types of data. 'Processing' is defined widely, and in *Campbell v MGN*, the Court of Appeal held that the steps taken to make newspapers available to the public constitutes processing.[78] There is no reason such an argument will be confined to the print media, and it is very likely that the provisions of the Act affect all institutional journalists; indeed, it has been pleaded as a cause of action in subsequent litigation against journalists.[79] The Act provides for both civil and criminal liability if data is not processed in accordance with the principles described in the schedules to the Act,[80] but s32 (a) provides an exemption from civil liability, under certain conditions, for: 'any journalistic, literary or artistic material'. The exemption from criminal liability is contained in s55 (as amended),[81] and also provides protection also for 'journalistic, literary or artistic material' if certain conditions are fulfilled.

[78] *Campbell v MGN* [2002] EWCA Civ 1373, [2003] QB 633 [72] – [106].

[79] For example in *Murray v Big Pictures (UK)* [2008] EWCA (Civ) 446, [2008] 3 WLR 1360.

[80] Sections 4(4) and 55 respectively.

[81] Section 55(2) (ca) (ii).

To what extent are these benefits exclusive to the institutional journalist? It will be seen that, as with the benefits provided by PACE, they cannot be said to be exclusive in the sense that they are not afforded to anyone else, as they are clearly available to authors and artists. And, again as with PACE, these rights adhere to the material, not to the institutional status of the holder, and to that extent they are not exclusive. But, as with PACE, there is an argument that the statutory provision creates a benefit to institutional journalists, insofar as it creates a presumption that the material they produce in the course of their employment will fall into the relevant sections. It will be easier, therefore, for them to obtain the benefit of the exclusions.

S12 (4) Human Rights Act 1998

Section 12 of the HRA applies when the court is considering any relief 'which … might affect … freedom of expression'. Section 12 (2) applies to applications made *ex parte*, and s12 (3) to the availability of injunctive relief. Section 12 (4) exhorts the court to have particular regard to freedom of expression where any proceedings relate to (or appear to relate to) journalistic, literary or artistic material. The section as a whole was enacted because of media fears of the horizontal effects of Convention rights, and in particular the fear that the Convention might foster the development of a privacy law. This section was supposed to be a bulwark against such a development.[82] Aside from the fact that it

[82] This is described by both Fenwick and Phillipson (n 6) 123- 126, and Robertson and Nicol (n 4) 2-032. Opinion differs as to the merits of the section. Fenwick and Phillipson write: 'The Government managed to fob off … the press with section 12', 126. In contrast, Robertson and Nicol hold: '…these portentous propositions [the views of Tom Paine, JS Mill, Justice Holmes, Thurgood Marshall and Milton on freedom of speech] are now a part of English law, thanks to s12 of the Human Rights Act and art 10', 2-035.

has proved ineffective in achieving that end,[83] it might still be thought that it provides special treatment to institutional journalists.

Section 12 (4) is the most likely candidate, because it is explicitly triggered by, amongst other things, material that is 'journalistic', hence at first sight providing preference to institutional journalists. However this is not necessarily the case because, as with *Simms*, the right is shared by others (in this case artists and producers of literature), and as with s11 (3) of PACE the right adheres to the material and not to the holder of the material. However, again as with s11 (3) of PACE, there is an argument that an institutional journalist will have an advantage in establishing that their material is journalistic, and to that extent, this section could be an exclusive benefit to institutional journalists.

However, such an argument is less convincing here because of the way that the courts have interpreted s12 (4). In *Douglas v Hello! (No 1)*[84] Sedley LJ noted that an effect of the drafting of s12 (4) was that no priority could be given to freedom of expression, because the section exhorted the court to pay particular regard to article 10. 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,[85] and it is now accepted that no right takes a lexical priority over any other

[83] *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457; *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73.

[84] *Douglas v Hello! (No 1)* [2001] QB 967 (CA) [133].

[85] For example, in *Campbell v MGN* (n 83) [111].

right, and in particular freedom of expression is not a 'trump card'.[86] Consequently, any benefit provided by s12 (4) has been limited.

Nevertheless, some benefits remain. These are likely to be in cases where no other Convention right is engaged, for example, where there is an action against the press by a public body, given that (pure or core) public bodies are unlikely to benefit from Convention rights.[87] In these situations s12 (4) does provide some priority, as s12(4)(a)(i) directs the court, in a relevant application, to have particular regard to the question of whether the material is already available to the public, or may be soon. Robertson and Nicol hold that this would reduce the chance of the courts granting the government an injunction, should an application for an interim injunction equivalent to *Spycatcher* come before the courts again.[88] To this extent, then, the section provides some exclusive benefit to the institutional press.

Reportage

The last example is the defamation defence of 'reportage', a relatively recent development. Simon Brown LJ describes 'reportage' as: 'a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper'.[89] The defence is 'a class designed only to protect the factual reporting in the

[86] *Re (S) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2004] 1 AC 593 [17] (Lord Steyn) . The view of freedom of expression as a 'trump card that always wins' is found in *R v Central ITV* (n 18) 533 (Lord Hoffmann).

[87] *Aston Cantlow and Wilmcote Parish Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [8].

[88] Robertson and Nicol (n 4) 2-032.

[89] *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634, [2002] EMLR 215 [6].

public interest of a dispute containing defamatory matter'.[90] It is likely to be distinct from the *Reynolds* defence,[91] 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.'[92] Despite the iconic situation being a dispute between two parties, Sedley LJ has held that the defence 'cannot logically be confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected.'[93]

The first argument that this defence is only available to institutional journalists relies on the rationales given in the ECtHR cases on which this defence is founded, which indicate that the protection of the media is a purpose of these rules.[94] However, the mere

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[90] *Charman v Orion Publishing Group* [2007] EWCA Civ 972, [2008] EMLR 16 [88] (Sedley LJ).

[91] *id* [90] (Sedley LJ). *Reynolds* (n 12) is discussed below in the text above n 112

[92] *id* [48] (Ward LJ).

[93] *id* [91] (Sedley LJ).

[94] *Jersild v Denmark* (App no 15890/89) (1994) 19 EHRR 1 [35] ; *Thoma v Luxembourg* (n 25) [64].

fact that a rule is justified by reference to the benefits it provides to the press does not take us far, as the discussion of s12 (4) of the HRA illustrated.

The second argument comes from a closer examination of the defence. The 'reportage' defence has been, in a way entirely appropriate given its name, restricted to cases of reporting. In *Charman* it was not available for a book, even a book written by a journalist, because the book did more than merely report, namely analysing and putting allegations in a wider context.[95] As the key to reportage is the mere transmission of information about a dispute that is of public interest, anything more than transmission puts the defence at peril, and adoption destroys the defence. Given that, it is difficult to see anyone other than a journalist availing themselves of the defence. The difficulty is in envisaging what other category of person could surmount the hurdle of establishing that it is in the public interest to report the fact that a defamatory statement has been made, as opposed to reporting the content of the statement. It is difficult to see that a credit reference agency, for example, or an employer writing a reference – people who may traditionally be covered by the defence of qualified privilege – could establish such a case. Further, the courts have indicated that they wish to keep the defence narrowly confined,[96] and so may restrict its availability to the media which impedes arguments that it should be extended to others.

This argument is not entirely convincing. If someone other than an institutional journalist can establish that it is in the public interest for them to report the fact of a dispute, there is no reason as a matter of principle they should be denied the defence. A

[95] *Charman v Orion Publishing Group* (n 90) [56, 57] (Ward LJ).

[96] *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502 [74] (Sedley LJ).

well-informed blogger, for example, may be able to establish that they are reporting a defamatory allegation in the public interest, and someone like Guido Fawlkes, while not an institutional journalist, may have sufficient status to be able to establish such a case.[97] Evidence that such an argument is viable can be found in *Author of a Blog v Times Newspapers*, in which Eady J considered a blogger who was not a professional journalist to be performing a similar function to a professional investigative journalist.[98] It is true that the case is a distinguishable decision of a lower court, being a case on privacy rather than defamation and concerning investigatory rather than watchdog journalism,[99] but its logic supports the argument that that reportage defence may not be limited to institutional journalists.

What remains? The argument that is left is that, as with PACE, this is a defence of which institutional journalists will be able more readily to avail themselves than others. This is because journalists are, in a sense, *prima facie* neutral, in the sense of having an institutional role of reporting material, and so while it will not be impossible for others to establish there is public interest in reporting matters it is a task that institutional journalists will find easier to accomplish.

[97] The same argument applies to the very similar qualified privilege that applies to the reporting of press conferences: *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* (n 69).

[98] *Author of a Blog v Times Newspapers* [2009] EWHC 1358 (QB), HQ09X02293 (Transcript).

[99] The difference between investigation and watchdog journalism will be discussed at 65.

Category 3: Special treatment for functional journalism, with no presumption of benefit for institutional journalists

As with category 2, this category concerns rights that the law affords to functional journalism. However, in contrast to the foregoing section, institutional journalists enjoy no presumption that they can enjoy the benefits of this right. Under this section I will consider the common law shield laws, and the *Reynolds* defence in defamation.

Non-PACE source protection: 'shield laws'

In addition to the shield laws provided by PACE, the common law provides a measure of protection for journalism against *Norwich Pharmacal* [100] applications for disclosure or discovery of information, founded on s10 Contempt of Court Act 1981. Section 10 was reviewed by the ECtHR in *Goodwin v UK*,[101] and the traditional approach of the English courts was held deficient, leading to the *obiter dicta* of the Court of Appeal (mentioned above) in *Ashworth Hospital Authority v MGN Ltd* to the effect that there was a difference between the approaches of the European Court and the English courts to press freedom.[102] 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'.[103] 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

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

[101] *Goodwin v UK* (App no 17488/90) (1997) 25 EHRR 1.

[102] *Ashworth HA v MGN Ltd* (n 21 and text above) [97].

[103] *Ashworth HA v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [38].

engaged, a balancing exercise is required, which will entail the weighing of considerations similar to those operative in a *Reynolds* defence.[104]

As with s12 (4) HRA and reportage, these provisions are justified by reference to the needs of the press and this might be considered evidence that the provisions are special benefits for institutional journalists. The Master of the Rolls held in a recent case 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'.[105] Similarly, Lord Woolf CJ in the House of Lords in *Ashworth Health Authority* stressed that the rationale of the rule was to protect journalists. He said journalistic sources need to be protected for similar reasons to those that explain why the identities of police informants need protection, namely that if the courts did not protect source anonymity in these cases, sources of information useful to society would dry up.[106] Further, in his dissenting opinion in *Goodwin v UK,*[107] Walsh J considered that the decision of the majority entailed that: 'a journalist is by virtue of his profession to be afforded a privilege not available to other persons'. He considered this to be an objectionable development, but it does bolster the assertion that this privilege is indeed an exclusive right for institutional journalists.

However, as with s12 (4) HRA and reportage, these dicta are insufficient to demonstrate that the benefits of the provisions are restricted to institutional journalists. That this is so can be seen from the wording of s10, which – like s159 Criminal Justice

[104] *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, 94 BMLR 84 [35].
[105] Ibid [9], emphasis added.
[106] *Ashworth HA v MGN Ltd* (n 103) [61].
[107] *Goodwin v UK* (n 101) 102-103 [1].

Act 1988 – 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' (added emphasis). 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'.[108] Barendt, relying on dicta of Lord Diplock in a pre-HRA case, *Defence Secretary v Guardian Newspapers Ltd*,[109] 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'.[110] It is entirely feasible given the wording of the statute that it might be prayed in aid by an academic researcher, or a researcher for an NGO. Indeed, Nicol *et al* note that an international court – the Special Court for Sierra Leone – has extended the coverage of the source protection rules (based on *Goodwin*) to people who are not institutional journalists, in this case NGO researchers working for Human Rights Watch and Amnesty International.[111] It seems clear that whilst institutional journalists may feel the benefit of these privileges more than others, they are potentially available to all, and it is difficult to see there being a presumption of benefit to institutional journalists.

[108] Blom-Cooper, (n 5) 269.

[109] *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339 (HL) 348.

[110] Barendt, *Freedom of Speech* (n 7) 437.

[111] Nicol, Millar and Sharland (n 16) 6.15.

The *Reynolds* defence

The *Reynolds* defence arose out of the defamation defence of qualified privilege. It is established when it can be shown that a report of defamatory information was in the public interest, and the report may be considered 'responsible journalism'. It was established in *Reynolds v Times Newspapers*,[112] when Lord Nicholls provided ten indicators for the courts to consider when assessing whether a report could be characterised as responsible journalism.

Given the integrity of the concept of 'responsible journalism' to this privilege, it might appear that it is of exclusive benefit to the media. Such a view would be supported by many of the dicta of the courts explaining the rationale for the creation of the defence. So, for example, in *Bonnick v Morris*, Lord Nicholls said:

> Stated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.[113]

Subsequent case law supported the view that this privilege was reserved to the media. So in *Kearns v General Council of the Bar*, the Court of Appeal suggested that the *Reynolds* defence was only available to media publications.[114]

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[112] *Reynolds* (n 12).

[113] *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300 at [23] ; endorsed in *Charman v Orion Publishing Group* (n 90) [55].

[114] *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 1 WLR 1357 [42].

However such a view was held to be incorrect in *Jameel v Wall Street Journal*, where Lord Hoffmann noted: 'the defence is of course available to anyone who publishes material of public interest in any medium.'[115] Further, in *Seaga v Harper*, albeit a Privy Council case, Lord Carswell said that their Lordships: 'can see no valid reason why it should not extend to publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to 'responsible journalism' are satisfied'.[116]

Category 4: Special treatment for general speech, which encompasses journalism

The final 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, such as s12 (3) of the Human Rights Act, and defences in 'privacy' actions and injunctions.

Section 12 (3) Human Rights Act 1998

By way of contrast to s12 (4) HRA, it could be argued that s12 (3) provides benefits to the institutional press as the courts have not emasculated this section in the way they have s12 (4). Rather, the House of Lords found that s12 (3) strengthens the hand of the press in some situations, in that it raises the threshold for the granting of an injunction in a freedom of expression case, creating an exception to the *American Cyanamid* test.[117]

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[115] *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359 [54].

[116] *Seaga v Harper* [2008] UKPC 9, [2009] AC 1 [11].

[117] *American CyanamCo v Ethicon Ltd* [1975] AC 396 (HL).

The old test indicates 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. When laying down a new test in *Cream Holdings v Banerjee*, Lord Nicholls took notice of the fact that s12 was prompted by Parliamentary concern for the freedom of the press, and in particular a concern to set 'a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline'.[118] The new test does not raise the bar across the board in s12 (3) applications, because of various practical considerations, but now the courts: '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.'[119]

Does that make the benefits derived from s12 (3) an exclusive benefit to an institutional journalist? Despite Lord Nicholls' recognition that the rule is designed to benefit journalists it is clear that it is not exclusive to them, as s12 (1) provides that the section 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 journalistic activity of any type, whether performed by a journalist or a member of the public.

[118] *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 [15]; followed in *Browne v Associated Newspapers* [2007] EWCA Civ 296, [2008] QB 103 [43].

[119] *id* [22].

Actions for 'privacy'

Turning now to injunctions against institutional journalistic speech in actions to prevent 'misuse of private information',[120] here, until relatively recently, it seemed there were exclusive benefits for institutional speech. Such a view was founded on the judgment of the Court of Appeal in *A v B*,[121] a case in which a professional footballer applied for an injunction restraining 'a kiss and tell' story. 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.[122]

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.' Lord Woolf took notice of the argument that: 'if newspapers do not publish information which the public are interested in, there will be fewer newspapers published.'[123] He concluded by saying: 'Once it is accepted that the freedom of the press should prevail, then the form

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[120]The re-named tort of breach of confidence, into which the article 8 right of privacy has been 'shoe-horned'. *Campbell v MGN* (n 83) [14], [51], *McKennitt v Ash* (n 83) [8].

[121] *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195

[122] *id* [11 (iv)].

[123] A minority view in the judiciary, but to some extent endorsed in ATD Denning, *The Road to Justice* (Stevens & Sons, London 1955) 79; and *Re BBC (AG ref 3 of 1999)* [2009] UKHL 34, [2009] 3 WLR 142 [56].

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'.[124]

It is very unlikely that *A v B* remains good law in the light of the judgment of the ECtHR in *Von Hannover*, the case 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.'[125] Sedley LJ, speaking extra-judicially, has said that *Von Hannover* makes it 'extremely doubtful whether [*A v B*] could now be decided as it was',[126] a view with which the Court of Appeal has agreed: 'the width of the rights given to the media by *A v B plc* cannot be reconciled with Von Hannover's case.'[127] As Eady J has observed, at an earlier 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 protected[128]

[124] *A v B Plc* (n 121) [48].

[125] *Von Hannover* (n 31) [63].

[126] Blackstone Lecture, reported in S 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.

[127] *McKennitt v Ash* (n 83) [62].

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

In *CC v AB*[129] he interpreted *A v B* in a restrictive way, and avoided following it. It seems likely that, despite Lord Woolf's dicta in *A v B*, there is now no presumption in favour of media speech when balancing article 8 and article 10.

Conclusion

We have found four different sorts of rights, classified according to the extent to which they are privileges for institutional journalism or functional journalism. Two patterns emerge from our discussion.

The first pattern emerges when we correlate the degree of preference given to institutional journalists against the nature of the right or privilege protected. The clearest examples of benefits for institutional journalists are pre-speech offensive rights: the rights of access to family courts, miscellaneous rights of access to other court processes and information, and the *Simms* right of access to prisoners. This is an important point, and one to which I will return. [130] It is somewhat ironic for this to be the case, as the categorisation of special treatment of institutional journalistic expression as offensive or defensive, and pre- or –post speech, is an amended version of Baker's taxonomy of such privileges,[131] and Baker was not convinced that offensive rights are legitimate.[132] His view is based on his conception, to be discussed below, that the justification for any special treatment is founded on the role of the press as a check on the state. Baker asserts that offensive rights are not required for this to take place, that evaluating claims for such

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

[130] 92.

[131] CE Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, New York ; Oxford 1989), 236 – 242.

[132] *id* 238 – 240.

rights is difficult, and that a failure of the state to provide such rights is not sufficiently disturbing to justify offensive rights. However, he says that on this question his conclusion is 'tentative' as the arguments are 'inconclusive'.[133]

Second, our survey shows that while some special treatments are provided to institutional journalistic speech, many more are afforded to functional journalism. Indeed, it appears from *A v B*,[134] *CC v AB*,[135] and the Defamation Act 1996[136] that the number of exclusively institutional privileges is declining, and the amount of privileges afforded to functional journalism is rising. It also appears that two of the remaining instances where the law does provide institutional benefits – some court-related access and the *Simms* privilege – are more clearly based on administrative convenience rather than principle, and hence may themselves be vulnerable to change.

A question that is raised by both of these observations is the extent to which the provision of special treatment to institutional journalists may be theoretically legitimate. As we have seen, Blom-Cooper asserts that such provision is illegitimate, but Fenwick and Phillipson have noted that, given the characteristics of the 'fourth estate' in our society, Strasbourg's concentration on public interest speech may well create an inherent privileging of institutional journalistic speech. This is the point that I will explore further in the following chapters.

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[133] *id* 240.

[134] *A v B Plc* (n 121).

[135] *CC v AB* (n 129).

[136] 26.

Chapter 2. The theory: why the law should provide special treatment for institutional journalistic speech

Chapter one categorised instances when the law provides special treatment for institutional journalists. Chapters two and three provide an argument that the provision of such treatment is, to an extent, legitimate.

The argument comes in two parts. Chapter two will establish the *prima facie* case. It starts by positing as the theoretical foundation the idea put forward by Lichtenberg and Barendt, endorsed by Fenwick and Phillipson, that the provision of special treatment can be justified to the extent that institutional journalistic speech promotes the ends of free speech. The chapter will then argue that there are some particular qualities of institutional journalistic speech in general which do so promote the ends of free speech. Some of these are identified, namely the reach and reputation of institutional journalistic speech, and the reporting, investigating and interrogating that it undertakes. Chapter three will then subject this *prima facie* case for the legitimacy of providing special treatment to institutional journalistic speech to some counter-arguments, and will conclude by describing the extent to which the case is limited by them.

A theoretical foundation: the Barendt/Lichtenberg thesis

Barendt's argument as to why special privileges to institutional journalists might be legitimate is based on an insight of Judith Lichtenberg that 'freedom 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.'[1] Barendt's case is that '[p]ress claims to special privileges and immunities should only be recognized insofar as they promote the values of freedom of speech'. Fenwick and Phillipson endorse his approach.[2] I will call it the Barendt/Licthenberg thesis.

Lichtenberg formulated her suggestion in the course of an essay considering whether the imposition of regulations mandating public access to media on the owners of US media outlets was justified. Lichtenberg had observed that some of the arguments for individual liberty employed by the owners of media outlets were being used inappropriately. The impropriety derived from the fact that media owners were using arguments for freedom of speech that did not apply to them, or did not apply to them with particular force, given that their position and interests diverged from those of the general public. She observed:

> it does not follow that whatever supports freedom of speech also supports freedom of the press, for at least two related reasons … First, considerations internal to the theory of free speech theory itself may provide reasons for limiting reasons of the press… Second, the modern press consists largely of vast and complex institutions that differ in essential respects both from individuals and from the early press. [3]

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[1] EM Barendt, *Freedom of Speech* (2nd edn Oxford University Press, Oxford 2005)(n 7) 422 – 424; quoting J Lichtenberg, 'Foundations and Limits of Freedom of the Press' in J Lichtenberg (ed) *Democracy and the Mass Media* (Cambridge Univeristy Press, 1990) 104. There are other arguments, most notably CE Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955(n 4) 959-960.

[2] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford 2006) (n 2) 26 – 33.

[3] Lichtenberg (n 1) 105-106. A further convincing argument that there is a difference between freedom of speech and press freedom is found in O O'Neill, 'Conceptions of Press Freedom' (Lecture, Cambridge University 2008) <http://www.admin.cam.ac.uk/offices/communications/community/ideasfestival/reports/conceptions-of-press-freedom-transcript.pdf> accessed 06 10 09.

It is true that Lichtenberg was not directly concerned with the question of whether institutional journalistic expression ought to receive special privileges under the law. Indeed she was arguing the opposite, namely that such expression ought to be more vulnerable to legal control. It is also true that Lichtenberg was concerned with the legal position of the US media, and there are substantial differences between the US and the UK with respect to freedom of speech. Nevertheless neither of these observations is sufficient to undermine the use to which Barendt puts Lichtenberg's insight, as it provides an explanation as to why, and under what circumstances, the press might receive special privileges.

The Barendt/Lichtenberg thesis is attractive because, as Barendt notes, it protects press freedom but only to 'the degree to which it promotes certain values at the core of our interest in freedom of expression generally', and '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'.[4]

Of key importance are the values 'at the core of our interest in freedom of expression'. A short account of these values and the theories that link them to free speech is necessary to understand how they might be promoted by institutional journalistic speech. However despite the fact that this is a complex area on the borders between law and philosophy and my description will inevitably be incomplete, I need to provide sufficient detail to understand some of the criticisms of the Barendt/Lichtenberg thesis that I will discuss in chapter three, given that one of these criticisms rests on the very fact that this area is complex.

[4] Barendt (n 1) 422.

Free speech theories

There are many and varied ways of categorising what these values might be. Schauer's classification[5] is often adopted in legal analysis,[6] but others do not agree with his taxonomy.[7] I will not seek to resolve the question here, and will base my description on Schauer, but the fact that there is disagreement will prove to be of some importance.[8] The values of free speech that the main theories engage can be classified as democracy, truth, individual self-fulfilment and autonomy. How is free speech said to serve these values?

Democracy

The first, and arguably most important value from the point of view of the press is that of democracy. I will describe two theories that link free speech to democracy. The first, and most famous, is that of Alexander Meiklejohn.[9] Meiklejohn stressed the importance of free speech in helping people form and discuss political principles and opinions, and in helping them turn these into action. Meiklejohn's conception of the importance of democracy was founded in his views of the importance of personal autonomy. He viewed democracy to be legitimate as he considered it the form of political organisation that

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[5] F Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge 1982) chapters 2, 3, 4 and 5.

[6] Examples being Barendt (n 1) chapter 1; Fenwick and Phillipson (n 2) chapter 1; I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart, Oxford 2002) chapter 1; AGL Nicol, G Millar and A Sharland, *Media Law and Human Rights* (2nd edn Oxford University Press, Oxford 2009) chapter 1.

[7] Two examples are A Haworth, *Free Speech* (Routledge, London 1998); and CE Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, New York ; Oxford 1989) chapters 1 – 3.

[8] 86.

[9] A Meiklejohn, 'The First Amendment is an Absolute' (1961) Sup Ct Rev 245.

maximises the capacity for individuals to be autonomous, and hence his theory rests on participatory democracy. This can be considered a source of weakness, as it is not clear that a state or its people are deficient if they are not as politically engaged as Meiklejohn wishes them to be. Further, there are other forms of democracy aside from participatory democracy, as it is not clear that the prime, sole or even predominant value of democracy is that it permits the expression of people's autonomy.[10] Further still, Meiklejohn's conception of individual autonomy is rather excessive, and it is not clear that anyone possesses the sort of autonomy he values. There have been other criticisms.[11]

The second argument does not require such a high value to be paid to participatory democracy. Blasi[12] and Baker[13] emphasise that free speech is important as a check on power. It is therefore an integral part of a representative democracy (and can even be important in a state that is not democratic).[14] Blasi's theory stresses that free speech is valuable as it can contribute to or constitute a check or veto on government power in situations where the government is acting badly. Baker notes that this checking function is of particular importance to the press, and on it he bases his 'fourth estate theory' as to why the press should have constitutional protection. He concedes that private speakers also serve the checking function, but holds that 'in our society, the role

[10] A clear statement of this view is KR Popper, *The Open Society and its Enemies* (Routledge classics, Routledge, London 2003) 133.

[11] J Laws, 'Meiklejohn, the First Amendment and Free Speech in English Law' in I Loveland (ed) *Importing the First Amendment* (Hart, Oxford 1998).

[12] V Blasi, 'The Checking Value of the First Amendment' American Bar Foundation Research Journal 521.

[13] Baker, *Human Liberty and Freedom of Speech* (n 7) chapters 10 and 11.

[14] Hartmann J emphasises this in his introduction to D Weisenhaus, *Hong Kong Media Law* (HKUP, Hong Kong 2007).

of the press in exposing abuses of power is likely to be central: think of Watergate, or the Pentagon Papers.'[15] In a later paper, he expands the idea:

> 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, but 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. [16]

Truth

The second value described by free speech theories is truth. As with democracy, the press can play a part in advancing this value.

There are (at least) two classes of argument that link free speech to truth. The first argument is often ascribed to JS Mill,[17] although as Howarth notes[18] (and indeed Mill implicitly acknowledges)[19] many of his arguments had already been expressed by Milton,[20] and in any event his defence of free expression by virtue of its connection to truth is better considered part of a larger argument which involves the relationship of free expression to self-fulfilment and autonomy.[21] The second class of free speech/truth

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[15] Baker, *Human Liberty and Freedom of Speech* (n 7) 234.

[16] Baker, 'The Independent Significance of the Press Clause under Existing Law' (n 1) 959-960. This may also be of value in a society that is not 'free', in the sense the term is often employed in western democracies.

[17] JS Mill, *On Liberty* (Penguin classics, Penguin, Harmondsworth 1985).

[18] Haworth (n 7) chapter 7 and appendix.

[19] Mill (n 17) 75.

[20] J Milton, *Areopagitica: and Other Political Writings of John Milton* (Liberty Fund, Indianapolis 1999).

[21] n 42.

theories is most often ascribed to Holmes J.[22] It 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.[23]

Mill's argument about the linkages between truth and free speech comes in three stages. 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 can have 'any rational assurance of being right,'[24] because only then can we be sure that 'we have neglected nothing that could give the truth a chance of reaching us'.[25] 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'.[26] 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

[22] An origin being his dissenting judgment in *Abrams v US* 250 US 616, 40 S Ct 17 (1919).

[23] Baker, *Human Liberty and Freedom of Speech* (n 7) 7-12.

[24] Mill (n 17) 79.

[25] id 81.

[26] id 95; Haworth (n 7) 128.

is less knowledge so much as 'dead dogma'.[27] As for the third position, suppressing truth mixed with falsity suppresses, by definition, some truth, which is wrong.

Implicit in Mill's argument may be Milton's statement of belief of the inevitability of the triumph of truth over falsity in free discussion: '[l]et [truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'[28] However, despite sometimes being taken as the basic thesis of Mill,[29] Mill's support for this view is tentative. He thought it 'a piece of idle sentimentality' that truth will necessarily prevail against the 'dungeon and the stake'. 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'.[30]

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. To some extent Mill has a reply to this, asserting that the calculation that the

[27] Mill (n 17) 97; Milton (n 20), relying on Francis Bacon, makes a similar point 28-29.

[28] Milton (n 20) 45.

[29] Fenwick and Phillipson (n 2) characterise the basic thesis of Mill as the proposition that 'truth is most likely to emerge from free and uninhibited discussion and debate' 14.

[30] Mill (n 17) 90.

restriction will bring about good results is itself an assumption of infallibility, but it is beyond the scope of this paper to describe these and other arguments in full.[31]

Some of the criticisms of Mill are resolved by the 'marketplace of ideas' thesis of Holmes J: '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.'[32]

Many have criticised this argument. 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, as institutional structures, both commercial and political, pay vast amounts of money to persuade people of the validity of a certain world-view.[33] Schauer observes that an answer to these criticisms may be the adoption of the consensus theory of truth,[34] but as he recognises, at the very least such a theory is controversial.[35] 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

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[31] Ibid 82. For fuller criticisms of Mill see Haworth (n 7) part 1 and Baker, *Human Liberty and Freedom of Speech* (n 7) chapters 1 and 2.

[32] *Abrams v US* (n 22) 630 (dissenting).

[33] Barendt (n 1) 7 - 13; BAO Williams, *Truth and Truthfulness : an Essay in Genealogy* (Princeton University Press, Princeton, N.J. ; Oxford 2002), 213 - 219.

[34] Schauer (n 5) 19.

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

> unregulated. People cannot come in from outside, speak when they feel like it, make endless, irrelevant or insulting interventions.[36]

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.[37] Mill made similar arguments,[38] 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.'[39]

Self-fulfilment

The third value that free speech supports is that of self-fulfilment of the individual. It is an idea that is not always in the forefront of judicial minds, but judges in different jurisdictions have noted its importance.[40] At first sight, the press might be seen as of more marginal importance to the securing of this value; however, an insight of Joseph Raz demonstrates that institutional journalistic speech does indeed have a part to play.[41]

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[36] Williams (n 33) 217.

[37] Blasi (n 12) 548.

[38] Mill (n 17) 111.

[39] Cited in the Himmelfarb introduction, id 39-40.

[40] *Procunier v Martinez* 416 US 396, 94 S Ct 1800 (1974) 427 (Marshall J) ; *Handyside v UK* (App no 5493/72) (1976) 1 EHRR 737 [49] ; *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL)(n 18) 126 (Lord Steyn) .

[41] Described in the text above n 45.

Self-fulfilment stands behind some other theories of speech. Although Mill is often seen merely as proposing argument based on the relationship between free expression and truth, self-fulfilment is an underlying value of Mill's in *On Liberty*,[42] and an early example of a self-fulfilment theory is found in Milton, who describes the invigorating effect that fighting untruth and contesting opinion can have on humanity.[43] There are more contemporary expositions of the link between free expression and self-fulfilment, such as Baker's liberty theory of speech. He holds that: '[s]peech is protected because, without disrespecting the autonomy of other persons, it promotes both the speaker's self-fulfilment and the speaker's ability to participate in change.'[44]

Raz has suggested another account.[45] He suggests two ways in which speech can be beneficial to human fulfilment. By way of background, Raz points out that different ways of living, or lifestyles, can be validated or rejected by the extent to which they are endorsed, reflected, absent or prohibited from general communication. Homosexuality is a good example – in a society where discussion of it is prohibited, some people's lives will be impoverished; in a society where it is freely discussed, such people's lives will be enriched. The first argument for freedom of expression is based on these observations, given that expression is necessary for such validation, Raz argues. The benefit of validation is not only felt by those who seek validation, but also by those who may want

[42] Evidenced by chapter 3, 'On individuality as one of the elements of well-being', as well as the epigram for the book taken from Von Humboldt: Mill (n 17) 57.

[43] Milton (n 20) 17, says he 'cannot praise a fugitive and cloistered virtue'. This passage has had an impact on attitudes to reporting the courts: *Ambard v AG for Trinidad and Tobago* [1936] AC 322 (PC) 335 (Lord Atkin) ; B van Niekerk *The Cloistered Virtue* (Praeger, New York, 1987) and Cram (n 6). The argument is also in Mill (n 17) 97- 99.

[44] Baker, *Human Liberty and Freedom of Speech* (n 7) 69.

[45] J Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303.

to be informed or avail themselves of a different way of leading their lives. It's also useful for cultural renewal and change. The second argument is narrower in scope than the first, but stronger in nature where it does reach. It points out that any official restriction or criminalisation of speech is an official condemnation of a certain view or way of life, and this is hurtful and insulting: censorship is a symbolic insult. Raz argues that the second argument is narrower because it only affects content-based censorship, and not (for example) manner and form restrictions that do not, of themselves, damage speech. It is stronger because there are two limbs to it, as '[c]ontent-based censorship and criminalization not only deny individuals the opportunity to provide validation but constitute official condemnation of the way of life aspects of which are censored or criminalised.'[46]

Self-fulfilment theories as a class can be criticised. One criticism notes that focusing on individual self-fulfilment eclipses other important considerations such as the fulfilment of others, or of society more generally. Another notes that such theories, by themselves, do not provide a strong argument against paternalism, as it is entirely possible that people other than the individual can restrict speech, as they – rather than the individual – know what is best for that individual's self-fulfilment. Even Mill acknowledged that the young and the barbarous would need leading.[47] To resist such criticisms, such theories need to be tied into a theory of autonomy, to which I now turn.

[46] id 314.

[47] Mill (n 17) 69.

Autonomy

The fourth value that free speech theories protect is that of autonomy. The value of autonomy as something to which free speech contributes is not at the forefront of judicial comment, but is nevertheless a very significant value because many of the other theories are connected to it. So Meiklejohn's conception of the importance of democracy, to which free speech contributes, is founded on its importance to individual autonomy. This is also true of Blasi's account, and Baker's account of the importance of speech to self-fulfilment rests on the concept of individual autonomy.[48] Mill, arguably, places a value on autonomy that is higher than the value he places on truth, given that he believes it legitimate to let false words be spoken but illegitimate to curtail liberty.

Scanlon proposes a theory that links freedom of speech directly with autonomy.[49] He starts with an assertion of a minimal conception of autonomy: '[t]o regard himself as autonomous …a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action.'[50] From that, it follows that there are limits to the obligations that a citizen can consider himself under in relation to the state. Such a person must retain conceptual space between a state's command and his decision to obey. On the basis of this, such a person could not permit the state to protect him against advocacy or

[48] Baker, *Human Liberty and Freedom of Speech* (n 7) 42, 59.

[49] T Scanlon, 'A Theory of Freedom of Expression' in RM Dworkin (ed) *The Philosophy of Law* (Oxford Readings in Philosophy Oxford University Press, Oxford 1977). There are other autonomy theories. D Kelley and R Donway, 'Liberalism and Free Speech' in J Lichtenberg (ed) *Democracy and the Mass Media* (Cambridge studies in philosophy and public policy Cambridge University Press, Cambridge 1990) expound a libertarian free speech and free press theory from the work of R Nozick, *Anarchy, State and Utopia* (Basil Blackwell, Oxford 1974).

[50] Scanlon (n 49) 162.

indoctrination merely on the grounds that these words might lead him into harm, as ultimately he must be able to make up his own mind. This is a limit posed on the state, rather than a right borne by an individual. The state cannot look to the harm merely caused by advocacy or indoctrination as the rationale for restricting expression. The state can forbid speech that aids and abets, but not speech, on Scanlon's account, that merely counsels. This principle Scanlon describes as the Millian principle after Mill's observations of the limits of justified state authority over the individual. The Millian principle, of itself, does not restrict all the speech that Scanlon thinks ought to be restricted, and he admits to the necessity of weighing up other considerations.[51]

Scanlon himself retreated from the strong statement of his views, largely because it did not leave room for the legitimate restriction of deceptive advertising, and there are other criticisms.[52] However, as Barendt notes, Scanlon's formulation: 'provides a relatively coherent explanation of much judicial interpretation of free expression provisions'.[53]

Other values, and relationships between the values

Any account of the values of free speech would be incomplete without noting that many of the values described above are inter-related. So, as has been described, Meiklejohn, Baker and Blasi all relate their democracy theories to autonomy, and arguments for autonomy may relate to self-fulfilment: Mill's truth theory, for example, can be seen to rest on both autonomy and self-fulfilment. However, it should also be noted that such

[51] id 168

[52]For example R Dworkin, *The Philosophy of Law* (Oxford University Press, Oxford 1977) 14-16; and Barendt(n 7) 16 – 18.

[53] Barendt (n 1) 16.

relationships are controversial. So, by way of a very brief illustration of the point Williams, for example, challenges any linkage of truth and fulfilment with Nietzsche's observation that '[t]here is no pre-established harmony between the furthering of truth and the well-being of humanity'.[54] Williams also observes that the relationship between truth and democracy is complex,[55] and both Nietzsche[56] and Mill,[57] for example, are sceptical of the link between democracy and human fulfilment.

Descriptions of why free speech is important are also incomplete if they do not recognise that free speech may involve other values. As Barendt notes,[58] the importance of the values described above can be reduced to or justified by reference to other values not mentioned above, such as human dignity,[59] happiness, authenticity or utility. Raz, for example, explicitly links free speech to pluralism.[60] Further, free speech may engage these other values directly, without any involvement of the values described by Schauer. The consequence of these observations is that it is clear that it is a mistake to take any one of these values as an *a priori* end in itself, or as the *terminus ad quem* of free speech,

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[54] FW Nietzsche and M Faber, *Human, All Too Human* (Penguin classics, Penguin, London 1994) s517; discussed in Williams (n 33) 15. This translation is Williams'.

[55] Williams (n 33) 211; a view that contrasts with Lord Bingham's assertion that '[t]he fundamental rationale of the democratic process is that … over time … the true [will] prevail over the false': *R (Animal Defenders) v Culture Secretary* [2008] UKHL 15, [2004] 1 AC 185 [28].

[56] 'The democratization of Europe is conducive to the production of a type prepared for slavery in the finest sense.' *FW Nietzsche and RJ Hollingdale, Beyond Good and Evil (Penguin classics, Penguin, Harmondsworth 1990)* s242.

[57] '…governments …make themselves the organ … of the masses … that is to say, collective mediocrity.' JS Mill, *On Liberty* (Ibid1985) (n 17) 131.

[58] Barendt (n 1) 30 – 36.

[59] *Herbert v Lando* 441 US 153, 99 S Ct 1635 (1979) 186 (Brennan J, dissenting in part).

[60] Raz, (n 45) 324.

without further argument that delves deeply into philosophy, a fact that I will show later is of some importance.[61]

Applying the thesis:

We now have a thesis that privileges should be granted to institutional journalists insofar as this promotes the values of democracy, truth, self fulfilment and autonomy, and we have described some of these theories and values: it seems that the fourth estate argument for democracy is likely to provide the strongest grounding for any such privileges. The next step is to apply the thesis, and to consider the ways in which institutional journalistic speech might contribute to the attainment of the free speech values described.

At this point, however, a potential confusion might emerge, given that the thesis can be interpreted in at least two ways. The first interpretation suggests that the thesis provides a general rule, explaining why journalistic speech as a whole can merit receiving special treatment. This could be characterised as a 'rule-based' interpretation of the thesis. The second interpretation of the thesis suggests that the thesis provides a test against which to gauge each particular piece of journalistic speech to see if this in particular merits special treatment, the 'act-based' interpretation. Fenwick and Phillipson use the second conception as the foundation of their 'variable geometry of media freedom',[62] and the application of this test provides the critical backbone of their book.[63]

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[61] 86.

[62] Fenwick and Phillipson (n 2) 27.

[63] Ibid summarised at 1113.

However, I will argue in chapter three that there are substantial problems with such an approach,[64] hence for the rest of this chapter I will assume the rule-based interpretation.

Applying the rule-based thesis involves two stages. The first step is to describe some qualities and activities that are particular to journalistic speech. The second is to show that these promote the values at the core of our interest in free speech. Assuming the Barendt/Lichtenberg thesis is valid, I will thereby have established a *prima facie* case for the legitimacy of institutional journalistic expression receiving special treatment by the law. The challenges to this case will be considered in chapter three.

Step 1: Qualities particular to institutional journalistic speech

The argument starts by asserting that there are qualities that are particular to institutional journalistic speech. Fenwick and Phillipson note the particular ability of the media to disseminate speech,[65] but there are others that the following discussion is intended to describe. This analysis does not purport to be based on a comprehensive analysis, but rather I have selected two characteristics and three particular activities of journalistic expression and argue that these are, to an extent, particular to it. The argument is that journalistic expression, on the whole, possesses these differences from general expression by the public.

Characteristics: reach and reputation

The two main characteristics that may distinguish institutional journalistic expression from general expression are reach and reputation. 'Reach' refers to the public nature of

[64] 91.

[65] Fenwick and Phillipson (n 2) 39, described earlier in this text above at 15.

journalistic speech. While general expression can be public or private, it is generally private. Journalistic expression, on the other hand, is by definition public, in whatever medium such journalists 'write'. As Lord Cockburn noted in the 19th century, there are particular ways in which the public may gain from such 'public writing', distinct from general expression.[66]

The second characteristic particular to journalistic speech is reputation. 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 a difference in the reputation 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 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 *News of the World*, *Private Eye*, *The Times*, and *The New York Times*.

[66] *Wason v Walter* (1868) LR 4 QB 73, 94. The courts have also taken cognisance that it is something from which the public can suffer: *'Truth' (NZ) Limited v Holloway* [1960] 1 WLR 997 (PC), 1003 (Lord Denning).

The reputation of institutional journalistic speech can lead to dramatic results, or at least dramatic allegations. So, for example, the BBC's business editor was blamed by the British Bankers' Association (amongst others) for creating the run on Northern Rock.[67] 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.

Activities: watchdog, bloodhound and questioner

There are three main activities of journalistic speech that may be peculiar to it. Judges have described the first two, recognising the function of journalists as the 'eyes and ears' of the public,[68] an appealing metaphor, but one which requires clarification. This is provided by another judicial metaphor, employed by Lord Nicholls in *Reynolds* to distinguish two different activities of journalism: 'the press discharges vital functions as a bloodhound as well as a watchdog'.[69] Lord Bingham provides a helpful exposition of the difference in *McCartan Turkington Breen*:

> Sometimes the press takes the initiative in exploring factual situations and reporting the outcome of such investigations. In doing so it may, if certain

[67] BBC, 'I did not cause Rock run - Peston' (Article, BBC News 2009) <http://news.bbc.co.uk/1/hi/uk_politics/7870240.stm> accessed 07 10 09.

[68] For example *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 183; *R v B* [2006] EWCA Crim 2692, [2007] EMLR 145 [19] ; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 [50] ; *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277 (HL) [292].

[69] *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 626. This view of the press is particularly important to the ECtHR, in the opinion of Nicol, Millar and Sharland (n 6) 5.32.

> 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.[70]

The journalist can be a watchdog, or reporter, and can by virtue of this activity provide a conduit for patent information, carrying it to and from (amongst others) the general public: 'conduit' journalism. The journalist can also be a bloodhound, discovering information that is not patent which is then reported: investigative journalism. One can see how this distinction underpins some of the special rights provided by the courts to institutional journalistic speech. The reporting, or watchdog, activity of the press has been recognised by the courts in creation of the reportage defence,[71] and the investigative, or bloodhound activity, is recognised in *Reynolds*, and *Simms*.[72]

There is (at least) one other activity of journalism less recognised by the courts, that of interrogating and interviewing: in addition to being the public's eyes and ears, journalists can act as the public's voice. Whilst there is an overlap, it can be seen that interrogative or interview journalism is distinct both from conduit journalism and from investigative journalism. The difference lies in its essential characteristic, that of the direct questioning of subjects, and the observation thereof by the public. It is true that both conduit and investigative journalism may also interview and question, but in some cases, the process of public questioning is as important to interrogative journalism as any

[70] *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* (n 69) 291.

[71] 33.

[72] *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL), discussed above at 23; Reynolds (n 69) discussed above at 40.

information thereby derived. This is particularly evident in broadcast interrogative journalism, though a similar case can be argued for such journalism carried in print.

Perhaps the classic case is the confrontational interviewer asking a minister the same question fourteen times in the dogged pursuit of an answer. Any information thereby derived is obviously potentially of benefit, but very often the interview generates no new information, as the interviewer never gets the information he or she seeks from the subject, as many interviewees, particularly political ones, are adept at evasion. Yet the process of questioning and answering in public remains valuable, as demeanour can be as informative as words.[73] This value, which is irrespective of any information being generated, is the source of the distinction between interrogative journalism and conduit or investigative work.

In the UK, the most eminent example of this type of journalism is BBC radio's *Today* programme, which often vies with Parliament for the status of 'cockpit of the nation'.[74] The gladiatorial approach of this programme and its ilk takes much from the accusatorial approach of our courts, not least a belief implicit therein that truth will out from a clash of equal intellectual opponents.[75] (Indeed, the former barrister Robin Day is

[73] The Court of Appeal has often noted this. Observing the demeanour of witnesses is a benefit that judges in lower courts enjoy, but which is denied to appeal courts. It is often given by appellate courts as a reason not to overturn a judgment, an example being Lord Mantell in *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634, [2002] EMLR 215 [63].

[74] C Turpin and A Tomkins, *British Government and the Constitution* (6th edn Law in context, Cambridge University Press, Cambridge 2007) 607, note the challenges that media debates pose to the primacy of Parliament's debates.

[75] The legitimacy of such a belief is contestable.

said to have been the first to adopt it in this country.)[76] One of the more notable contemporary exponents is Jon Snow on *Channel 4 News*, but the approach need not be confrontational, as illustrated by the approach of Jon Stewart in America's *The Daily Show.* Nor is such journalism only confined to broadcasting, as is indicated by the work of print interviewers such as Lynn Barber.

A counter argument

It can be argued, however, that none of these qualities are unique to journalism, as members of the public can, on occasion, match journalism's reach and reputation, and they can also investigate, report and interrogate. Further, other specific classes of speech have these qualities to a greater extent than journalistic speech: speech by medics and academics, for example, often has a greater reputation than institutional journalistic speech. Hence, any claim that these qualities are distinct to institutional journalism is not strong. In response, it should be conceded – if it were ever claimed – that none of these qualities is unique to journalism, and that many other types of expression possess them. It should also be conceded that it is not the case that each piece of journalistic expression always possesses these qualities, 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 speech, in such a way as to distinguish it from other classes of speech and general expression. What the counter-argument does show, however, is that there will be legitimate claims, made pursuant to an argument of similar form as the present one, that other classes of speech may merit

[76] D Taverne, 'Obituary, Sir Robin Day' *Guardian* (London 08 08 00) <http://www.guardian.co.uk/news/2000/aug/08/guardianobituaries1> accessed 08 08 09.

special treatment. Indeed, this is reflected in the marginal element of special protection that the law currently provides.

Ten years ago it might have been sufficient to leave things there, but the Internet has further undermined the suggestion that these qualities are particular to journalism. So, in relation to reach, the Internet has given everyone the capacity for public expression, and today any individual person can, potentially at least, reach as many people as the most syndicated journalist. In relation to reputation, the Internet has had a similar undermining effect, and many today doubt the 'mainstream media'. Further, some bloggers are developing a reputation equivalent to that possessed by some institutional journalists and superior to that possessed by others, a fact testified to when one compares the reputation of Iain Dale's blog with that of the *Sunday Sport*.

The Internet also undermines my argument that the activities of journalistic expression distinguish it from general expression. First, the press's monopoly on reporting is being challenged by the capacity of the Internet to disseminate information widely, quickly and cheaply, and automatic aggregators now filter and prioritise news tailored to the preference of individuals, a task that was once performed by editors. As for the investigatory activity of the press, investigation is now a much easier process because of the Internet. A decade ago, for example, the task of finding people took days of work, and involved trips to municipal libraries to thumb through old electoral rolls, but today the task can be accomplished in a fraction of the time without leaving a computer, as many electoral rolls are available online. The position is similar in relation to the interrogative activity of journalism, the result of email, on-line discussion groups and web-chats.

It is difficult to gainsay these observations, as there is no doubt that the position of institutional journalism in the world is changing. However, it is not the case that the change that has occurred has – yet – extinguished any of the particular association of institutional journalism with these qualities. So, taking reputation for example, while it is true that many now doubt the 'mainstream media' (a term often used pejoratively), the prevalence of this view can easily be over-stated as there is evidence that indicates that suspicion of the mainstream media remains the view of a minority, particularly in respect of broadcasting.[77] Nor is it the case that any change is inevitable, or that it will necessarily have the effect predicted. So, taking investigation as an example, it is unlikely that members of the public, in general, will be able to devote an equivalent amount of time, energy and expense to full-time investigation as that devoted by institutional journalists. And in relation to interrogation, the ability of the public to pose questions to a cabinet minister via websites is unlikely ever to be equivalent to the well-briefed cross-examination of such a minister by an interrogative presenter.

That said, it is entirely conceivable that the claims of institutional journalism to particular qualities may be extinguished if technology and social attitudes continue to change, and functional journalism may eclipse institutional journalism. Conduit journalism is likely to be particularly vulnerable. Indeed, we have seen in chapter one that this process may be already underway, with the law providing fewer privileges to institutional journalistic speech as other ways of disseminating information develop.

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[77] '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).' BBC/Reuters, 'Trust in the Media' (Summary of opinion poll, Globescan 2006) <http://www.globescan.com/news_archives/bbcreut.html> accessed 11 08 09.

However, wholesale change has not yet taken place, and may never do, and given that, for the moment at least, there remains a strong case for considering these qualities as particular to institutional journalism.

Step 2: Journalistic expression promotes free speech values

We have described some qualities of institutional journalistic speech that are characteristic of it, and the next stage of the argument is an analysis of how these may promote some of the values of free speech described above, namely democracy, self-fulfilment and autonomy. The strongest argument is institutional journalistic speech's promotion of democracy, an argument commonly known, but in my description below I will add what I hope will be some novel and significant features. The link to truth is often recognised, [78] but is complicated by the fact that it is something that journalists cannot always be relied on to promote. However, I will not examine this further as this survey needs to be, because of space, selective rather than comprehensive, and I will rather sketch, in addition to democracy, some less obvious links between institutional journalistic speech and autonomy and self-fulfilment.

[78] For example: '… the media generally and newspapers in particular are there to expose. That is also their claim, and it is an important claim …' Lord Fowler, Hansard HL vol 705 col 278 (5 Nov 2008) (<http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/81105-0011.htm> accessed 28/9/09.

Democracy (and autonomy)

The general linkage of journalistic expression and democracy is well known and often described,[79] but I hope to add to the discussion in two ways. First, I will describe some particular ways that such a linkage operates in England, and secondly, more importantly, I will clarify some of the ways in which the particular qualities of journalistic expression described above distinctly operate to promote democracy: first, by being a conduit for information, second by investigating and third by interrogating. Each of these promotes democracy in different ways, but each relies on the reach and reputation of institutional journalistic speech. I will end this section by describing some links between interrogative journalism and the free speech value of autonomy.

Conduit

Watchdog, or conduit, journalism informs the public, and journalism's reach and reputation are integral to this function. The importance of conduit journalism to democracy is a point that the courts have noticed and endorsed in, for example, *Reynolds*, in which Lord Nicholls said: '[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.'[80]

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[79] An early example is *Wason v Walter* (n 66) 89; and a more recent is T Lewis and P Cumper, 'Balancing Freedom of Political Expression against Equality of Political Opportunity' [2009] PL 89, 90. The link between press speech and democracy is important to the ECtHR as demonstrated by Fenwick and Phillipson (n 2) 61 -72. The authors conclude 'the key free speech rationale relied upon at Strasbourg [is] the argument from democracy', 1112, a view they believe to be 'profoundly flawed', 107.

[80] *Reynolds* (n 69) 622. Fenwick and Phillipson (n 2) summarise the argument at 24.

Conduit institutional journalistic expression will obviously promote democracy under Meiklejohn's account of the link between speech and democracy, as it is central to the free flow of information critical in a participatory democracy, being a substantial means by which the raw material on which political views are formed, and the means by which such views are communicated. Conduit institutional journalism is also crucial to Blasi's account of the importance of speech, and also Baker's 'constitutional fourth estate theory'.[81] It is particularly valuable in a representative democracy in assisting the people in holding their rulers to account: it provides the information that is the basis of the decisions to check or veto governments, and also is a significant mechanism that communicates any resulting decisions to check or veto. Such a view is embedded in American political thought. Thomas Jefferson, despite his antipathy to the press, conceded that it was a: 'formidable censor of the public functionaries, by arraigning them at the tribunal of public opinion, produces reform peaceably, which must otherwise be done by revolution.'[82] The process is, consequently, one that is particularly emphasised by American judges.[83]

To what extent can Blasi and Baker's account of journalistic speech as a check be imported into the UK? In addition to concerns founded on differences between English and American constitutional landscapes it may be expected to be of limited value, as we

[81] Baker, *Human Liberty and Freedom of Speech* (n 7) 229 - 234; Schauer (n 5) provides a summary of these arguments at 43.

[82] Thomas Jefferson, letter to Adamantios Coray, 1823 in LW Levy (ed), *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Company, Inc, 1966) 376. Jefferson's antipathy toward the press can be found at 373, 'On the Putrid State of the Press'.

[83] For example in *Mills v Alabama* 384 US 214, 86 S Ct 1434 (1966) 219 (Black J). The position has a notable pedigree, as is demonstrated by Alexander Hamilton's defence of Zenger described in Blasi, (n 12) 534.

do not share the Americans' cultural and historical scepticism of government. However, given the political nature of the constitution of the UK, importation is not difficult, due to the fact that the English system does not have as many institutional checks and balances as the American Constitution. 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.'[84] While there are no doubt other mechanisms too,[85] 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 Scottish judge who in 1968 joined a committee established by the Conservative Party resigned rather than prejudice the work of the committee.'[86]

The provisions of the Human Rights Act enhance this important way that journalistic expression promotes our constitutional democracy. 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

[84] I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959).

[85] J Jaconelli, 'Do Constitutional Conventions bind?' (205) 64 CLJ 149.

[86] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn Longman, Harlow 2007), 27. See also Turpin and Tomkins (n 74) 581 on the media's involvement in the convention about ministerial resignations for errors or maladministration.

courts to read the legislation in a way that gives effect to the legislation in a Convention-compatible manner,[87] the Act provides that the high court and above can issue a declaration of incompatibility.[88] 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.[89] It can be seen that journalistic expression, by virtue of both its reach and reputation, 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.

In addition to policing constitutional conventions, conduit journalistic expression can act as a chilling agent on potential official impropriety. One example is 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:

[87] Human Rights Act 1998, section 3(1).

[88] id s4.

[89] id s4(6); Nicol, Millar and Sharland (n 6) 3.22 – 3.25.

> 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. [90]

There is a further mechanism by which conduit journalistic expression acts as a check in our political constitution: it operates to inform the organs of the state about their performance. This is distinct from the linkages described above as the conduit is to the state rather than to the people, and the checking relates to the effectiveness of administrative processes. One example involves the then prime minister, Mr. Blair, and an – at the time – recently announced policy aimed at reducing the time spent waiting for a GP's appointment. The government had set a target that GP's must offer an appointment within 48 hours of a request but the target had warped practice, with some GP's meeting the target by refusing to permit appointments to be arranged for more than 48 hours in advance. Mr. Blair was unaware of this fact, and it was only by appearing on *Question Time* that he found out about it, when questioned by a member of the public, Diana Church.[91] This might be considered a thin example of journalistic expression being linked to democracy, as the journalistic expression was the barest of bare conduits being restricted to the chairman's moderation. Yet such a view ignores the reputation and reach

[90] Quoted in J Bowers, *Whistleblowing: Law and Practice* (2nd edn Oxford University Press, Oxford 2007) 1.20, 9.

[91] BBC, 'Blair Promises Action on GP Row' (Television clip, BBC News 2005) <http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4495865.stm> accessed 30/09/09.

of journalistic expression, both of which contributed to the fact that the prime minister was questioned in the first place and to the impact of such questioning. Such reach and reputation is substantially the result of the editorial and technical work undertaken by producers and technical staff to enable programmes like *Question Time* to get on air. Covering such areas as the choice of guests and questions, the briefing of presenters and the editing and broadcasting of recorded material, such 'indirect' institutional journalistic expression underpins both the reach and reputation that are the foundation of the political clout of much conduit institutional journalistic speech.

Finally, the conduit function of institutional journalistic expression is particularly important to the principle of open justice. This has been recognized by the common law, ever since 1913, when the House of Lords endorsed Bentham's opinion that: 'publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, whilst trying, under trial.'[92]

Investigation

The importance of investigative journalism to democracy has been judicially recognised, once again by Lord Nicholls in *Reynolds*:

> 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. [93]

[92] *Scott v Scott* [1913] AC 417 (HL) 477. A more recent statement of this view can be found in *Re Trinity Mirror Plc* [2008] EWCA Crim 50, [2008] QB 770 [32]; but a notable critique of the principle is made in J Jaconelli, *Open Justice: a Critique of the Public Trial* (Oxford University Press, Oxford 2002).

[93] *Reynolds* (n 69) 622.

Investigative journalistic expression promotes democracy, on Meiklejohn's analysis, as it discovers information critical to public participation in political decision-making. On Blasi and Baker's analysis, it discovers facts that check government misfeasance. Blasi mentions, as examples, the Woodward and Bernstein investigation of Watergate, and the work of Seymour Hersh, the journalist who uncovered the Mai Lai massacre in the Vietnam war.[94] More recently, in 2004, Hersh (with CBS's *60 Minutes*) broke the story of the mistreatment of prisoners by the US in the Iraqi prison at Abu Ghraib.[95] In the UK Nick Davies and David Leigh have produced notable work for *The Guardian*, Leigh most recently on British Aerospace's involvement in Saudi Arabia,[96] and the Insight team at the *Sunday Times* were, for many years, leaders in this field.

Investigative journalistic expression is particularly important in this jurisdiction, given our political constitution. It has been described earlier how conduit journalistic expression can help enforce our constitutional conventions, and investigative journalistic expression can assist their policing. In this endeavour institutional journalistic expression is likely to be, as a class, more successful than expression by the general public, partly because of the reach and reputation of institutional journalistic speech, but also because in Blasi's words:

> [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

[94] Blasi (n 12) 622.

[95] S Hersh, 'Torture at Abu Ghraib' *The New Yorker* (New York 10 05 04) <http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all> accessed 08 08 09.

[96] D Leigh, 'The BAE files' (Investigative journalism site, Guardian 2009) <http://www.guardian.co.uk/world/bae> accessed 07 10 09.

> 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.[97]

There is as much misfeasance in the private sector as in the public sector, and investigative journalism's discovery of it can be of as much democratic importance as investigation into the government.

Interrogation and democracy and autonomy

Interrogation is important in a democracy for a number of reasons. To begin with, the act of submission by an authority figure to public questioning can emphasise their accountability to the electorate. Their refusal to do so can be damaging. Secondly, the observation of any such questioning can be important to democracy. This can be illustrated with an American example, the 1960 US presidential debate between Nixon and Kennedy. Some watched this debate on television, and others listened to it on the radio. Famously, Nixon sweated copiously during the debate, a fact only obvious to the television audience. After the debate, there was a difference of opinion between the television and radio audience as to who had won. A majority of the television audience considered Kennedy had won, in contrast to the radio audience, a majority of whom considered Nixon had won.[98] The difference in their judgments tends to illustrate that the observing of a debate can have profound political consequences, and the reach of

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[97] Blasi (n 12) 541.

[98] BBC, '1960 Kennedy and Nixon Clash in TV Debate' ('On this day' article, BBC News 1960) <http://news.bbc.co.uk/onthisday/hi/dates/stories/september/26/newsid_3104000/3104393.stm> accessed 29 March 2009.

institutional journalistic expression that broadcast the debate is important in explaining why.

Interrogation can promote another free speech value, namely autonomy. This is not least because autonomy and democracy are free speech values that are integrally related, and I have described how Meiklejohn, Blasi and Baker all link the importance of democracy to autonomy. But the link between interrogation and autonomy is also more direct. Such a view is based on the assertion, often made by interrogative journalists, that they see their function as – in effect – promoting individual autonomy by asking the subject of the interview the questions that the audience want asked.[99] Such direct questioning by the audience may be impossible, unadvisable or impractical for a number of reasons: impractical, because the politician can't answer the questions of everyone in a democracy; unadvisable, because a politician wouldn't want to answer such questions; or impossible because of the inevitable inertia of people who might want to ask questions but never bring themselves to formulate them, and if they do, never to ask them, or if they do, ask the wrong questions through ignorance of some crucial but technical fact. In asking questions of public figures that the public want asked (or might want asked if they considered the matter, or ought to want asked if one takes a Meiklejohnian view of democracy),[100] the interrogative journalist is contributing to an individual's autonomy, by giving that individual a voice. Further, by cross-examining an interviewee, the

[99] For example: 'Of his job, Paxman says: "I think it's pretty straightforward really. You're there to ask the question the average reasonably intelligent viewer would like to see asked"' D Aitkenhead, 'Decca Aitkenhead meets Jeremy Paxman' *Guardian* (London 09 02 09) G2 <http://www.guardian.co.uk/lifeandstyle/2009/feb/09/bbc-television> accessed 12 August 2009.

[100] Meiklejohn (n 9).

interrogative journalist can ask focused questions of a type that some of the audience would be incapable of asking. As an advocate in court enhances her client's autonomy, the argument goes, so an interrogative journalist enhances the autonomy of his audience.

There must be some suspicion of this argument, which has an unattractive air of self-justification about it. How does an interrogative journalist or his team know what the audience want asking? How are they sure that they are not merely promoting their own autonomy, and not promoting the autonomy of the viewer, listener or reader? Is not the chance of confusing the subjective views of the journalist with the wider views of the audience substantial, even if it could be granted that such an argument was being made in good faith? Apposite though these questions are, they do not destroy the case that interrogative journalism may enhance autonomy. In the first place, the journalist may indeed confuse their own subjective views about what should be asked with those of the wider public, but in many cases in interviews the question areas to be asked of the subject are not in much doubt, even if the slant or framing of the questions may be less clear. Secondly, viewing or distribution figures provide some comfort for the proposition that an interviewer is asking questions the audience want asked. If the questions being asked are questions no one wants to ask, viewing figures could be expected to fall.

Even if this confidence is misplaced, other versions of interrogative journalism avoid the criticism completely. These are the forms of interrogative journalism that permit the audience to select, formulate and even ask the questions they want to ask. This is the approach of such programmes as *Any Questions*, *Any Answers*, and *Question Time* on BBC radio and television. A famous example of such questioning occurred on the BBC's *Nationwide* in May 1983, when a member of the public, Diana Gould, challenged

Mrs Thatcher about the sinking of the Argentine warship *Belgrano* during the Falklands War.[101] Mrs Thatcher never conceded the challenge, so no facts were provided nor communicated to the public under questioning, but the fact she was questioned by a member of the public and her demeanour in response to this had political significance.[102]

Self-fulfilment

So far I have described the ways in which journalistic expression tends to promote democracy, and additionally in the case of interrogation, autonomy. There are other ways in which it can promote other free speech values, and I will describe one more, namely the linkage between interrogative journalism and self-fulfilment. Perhaps the most obvious way in which institutional journalistic expression promotes self-fulfilment is by providing a forum for people to express themselves – consider the effect, to some, of having a letter published in *The Times*, *The New York Review of Books*, or the *NME.* However, I will discuss another.

Interrogative interviews can produce information that engages the Razian process of validation,[103] and hence promote self-fulfilment. The more such interviews engage with various forms of life, the greater the potential contribution to self-fulfilment. Regardless of whatever information is provided, the mere fact of asking questions facilitated by or paraphrased by journalistic expression can contribute to self-fulfilment. This can be achieved by the sense of validation that some derive from being selected to

[101] BBC, 'Nationwide, 24 05 83' (Television clip, BBC News 1983) <http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/basics/4393313.stm> accessed 29 03 09.

[102] F Conley, *General Elections Today* (2nd ed edn Manchester University Press, Manchester 1994) 196.

[103] Raz (n 45) 311.

take part in journalistic expression: many people feel encouraged by being selected to ask questions on programmes like *Question Time*. But it can also be of much wider application, and an illustration assists making the point. In July 2008 Jeremy Paxman interviewed on *Newsnight* the former Norwegian prime minister about the latter's struggle with depression.[104] The Prime Minister had stood down, returned to work and then stood for re-election and been voted back into office. The information in the interview was of significance to self-fulfilment in that it showed that in some countries mental illness had not proved fatal to a political career. This information was important, but perhaps of equal importance was the fact that it was derived from questioning, in that a significant public figure who had suffered from such illness was prepared to be asked about the subject in public.[105] This example illustrates a wider point: confessional interviews may be of benefit not only to the speaker but also to the audience, and not only because of the information thereby produced but also because of the nature of 'confessing' in public.

Conclusion

Assuming the rule-based Barendt/Lichtenberg thesis is valid, I have established a *prima facie* case for the legitimacy of institutional journalistic expression receiving special treatment by the law, because institutional journalistic expression, by virtue of its reach and reputation, and because of its reporting, investigating and interrogating, promotes

[104] BBC, 'Former PM Talks about Suffering Depression' (Television clip, Newsnight 2008) <http://news.bbc.co.uk/1/hi/programmes/newsnight/7508376.stm> accessed 07 10 09.

[105] -- --, 'Stand to Reason on BBC World' (Blog, Stand to Reason 2008) <http://www.standtoreason.org.uk/news?id=18> accessed 07 10 09.

various free speech values in a distinct way. However, there are many potential criticisms of this conclusion, not least the fact that it has merely looked for the potential beneficial effects of journalistic expression, and has shut its eyes to the damage that such expression can do to the values of free speech. In the next chapter I will examine this, and other counter-arguments, to see what remains of the case that providing special treatment to institutional journalistic speech is legitimate.

Chapter 3: Counter arguments

Chapters two and three combine to form an argument that the provision of special treatment for institutional journalistic expression is legitimate. In chapter two, I established that the provision of special privileges for institutional journalistic speech could be theoretically justified. In chapter three I will consider the counter-arguments. My conclusion will be that these counter-arguments reduce in strength but do not extinguish the case that it is legitimate for the law to afford to institutional journalistic speech special privileges.

The counter-arguments can be divided into three classes. First are the theoretical arguments that challenge the Barendt/Lichtenberg thesis, and second are criticisms of the way that I have applied the thesis, founded on the observation that institutional journalistic expression can damage, as well as promote, free speech values. The third counter-arguments concentrate on the practical problems, inconsistencies and undesired consequences that arise from special treatment.

Criticism of the Barendt/Lichtenberg thesis

I have described the attractions of the Barendt/Lichtenberg thesis, but it does present two sets of problems. General criticisms of the thesis reveal that it cannot be considered a sufficient test for justifying the provision of special treatment to institutional journalistic speech, and further, particular criticisms of the act-based interpretation of the thesis show that, in that interpretation, it is not even a necessary test.

General criticisms

I will deal with the criticisms of the thesis in general first. These are that the thesis is vague, and that it underplays motivations for permitting journalistic speech and providing it with special treatment that are not related to the values of free speech.

Vagueness

The Barendt/Lichtenberg thesis is vague both as regards theories of free speech and the values themselves. The Barendt/Lichtenberg thesis does not indicate which theories and which interpretation of the values are to be preferred when assessing whether special treatment is merited. The relatively short discussion of free speech theories in chapter two illustrates why this is a problem, as it was seen that there are many different theories that attempt to describe the links between speech and values, and opinion differs as to the strength of these. Matters are further complicated by the fact that there are many and various values at the core of our interest in free speech, and speech does not only promote the oft-repeated list of democracy, truth, self-fulfilment and autonomy. Additionally, free speech values are interconnected.

Even if one confines the values to truth, democracy, self-fulfilment and autonomy there still remain problems because these values themselves are unclear, in that their content and scope may be contested. 'Truth' and 'self-fulfilment' are notoriously slippery concepts, as is 'autonomy,' but perhaps the best example for the current discussion is 'democracy'. The problem lies in the fact that it is not clear whether the value that journalistic speech should promote in order to justify receiving special treatment is a

majoritarian conception of 'democracy' or a constitutional conception of 'democracy'.[1] Rowbottom illustrates the fact that this term has distinct meanings in his discussion of *R (Animal Defenders International) v Culture Secretary*.[2] The facts of the case are not important for the present argument, but what is important is the deployment of the term 'democracy' in the judgments. Rowbottom observes that Lord Bingham's assertion that 'politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy'[3] is open to challenge because: 'politicians will also have an interest in the outcome of the democratic process and may be tempted to regulate political communications to gain a competitive advantage'.[4] Inherent in this critique is the distinction between 'democracy' meaning the result of a plebiscite, and 'democracy' meaning a set of constitutional structures and processes. Politicians may be relied on to protect the former, but there must be concern as to whether they can be relied on to protect the latter.

Even if one could clarify a fixed and preferred meaning for a particular value, conclusive arguments as to whether a particular instance of journalistic expression contributes to their attainment will be elusive. Again looking at democracy as an example, in discussing whether source protection rules promote democracy, Fenwick and Phillipson argue that the journalist Judith Miller's protection of her (pro-Iraq war) White House source was an action that opposed, rather than supported, the public interest and

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[1] The distinction derives from R Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (Harvard University Press, Cambridge, Mass 1996) 15 – 19.

[2] *R (Animal Defenders) v Culture Secretary* [2008] UKHL 15, [2004] 1 AC 185.

[3] id [33].

[4] J Rowbottom, 'Political Advertising and the Broadcast Media' [2008] CLJ 450, 452.

therefore democracy.[5] While arguably true, such a view is politically contentious, and is unlikely to be shared by many on the political right who thought the war legitimate. Hence it will be difficult to unequivocally establish whether or not Miller's acts contributed to the public good and democracy.

Consider as a second example a piece of popular but shallow gossip-related tabloid speech. On one analysis this does not contribute to a constitutional conception of democracy, at least according to Meiklejohn, nor does it act as a check on power that would afford it protection under Blasi and Baker's thesis of the importance of the press. But on another account, it is speech that promotes – indeed is a manifestation of – majoritarian democracy, as it is preferred and therefore validated by a large number of people. Further, it promotes autonomy given that the many autonomous readers who chose to buy it vouch – by their purchase – for its promotion of such a value.[6] Take as a specific example, the outing of Lord Mandelson as gay by Matthew Parris on *Newsnight* on the 27th October 1999. That might be considered gossip which harmed Mandelson's dignity and autonomy, but on the other hand it certainly promoted truth, and given that Mandelson was a cabinet minister, it also engaged the democratic value of speech, both –

[5] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, Oxford 2006) 312.

[6] There are arguments about whether such purchase is really autonomous, as the desire to purchase may have been manipulated by the media speech. On the other hand, a counter argument to this asserts that this devalues the concept of autonomy as a matter of principle, and as a matter of practice is naïve in its assumption that the media has the power to manipulate to such a degree. It is not necessary to resolve this argument for the current discussion, as the point is merely to illustrate the problems underlying the thesis.

arguably – majoritarian and constitutional.[7] Further, under Raz's self-fulfilment theory, the expression of this speech might have increased the validation of some people's lifestyles, given the status and character of Mandelson. My point is not to say whether it did or did not engage these values, nor whether it was or was not defensible, but rather to show that the case is arguable either way. The point of both examples is that the Barendt/Lichtenberg thesis leads to equivocal answers.

Underplays motivations not based on values

The second problem with the thesis is that it underplays the other reasons, reasons that are not connected to 'values,' that exist for permitting speech or granting special treatment. A significant number of these reasons are based on the suspicion of censorship. Such suspicion is founded on a number of practical assertions which it is difficult to characterise as values, yet which may amount to compelling reasons for granting special privileges or for not restricting speech. By concentrating on values, the Barendt/Lichtenberg thesis underplays their importance.

Examples, many of which are drawn from Schauer, help to explain the point.[8] The first is the suggestion that society should be wary of censorship (or decisions about whether to grant special privileges) by governments, because governments have interests in circumscribing speech and are therefore partial and unreliable judges. This is particularly true of political speech, and history illustrates that they have a bad record of

[7] D Macintyre, 'The Truth was 'Out'. And So Were the Knives' *Independent* (London 20 04 99) <http://www.independent.co.uk/arts-entertainment/the-truth-was-out-and-so-were-the-knives-1088357.html> accessed 11 August 2009.

[8] F Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge 1982) chapter 6.

making defensible censorship decisions.[9] 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.'[10]

A third applies whether or not the government is the censoring body: restrictions can sometimes be dangerous as speech can act as a safety valve, allowing dissent to express itself in verbal rather than physical ways.[11] Alternatively, suppression can have the opposite effect to the one intended: suppression of ideas can invigorate rather than destroy.[12] 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.'[13] Further, it may be that suppression proves futile. Milton provides a memorable statement of this idea, comparing the attempt at restricting 'evil doctrine' by licensing with: 'the exploit[s] of that gallant man who thought to pound up the crows by shutting his parkgate'.[14]

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[9] id 80.

[10] I Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart, Oxford 2002) (n 15) 45.

[11] Schauer (n 8) 78.

[12] id 75.

[13] J Milton, *Areopagitica: and Other Political Writings of John Milton* (Liberty Fund, Indianapolis 1999) 34, and Tacitus on Nero's suppressions, quoted in D Lange, 'The Speech and Press Clauses' (1975) 23 UCLA Law Review 42 n 89.

[14] Milton, (n 13) 20. Such a phenomenon has been recognised since antiquity: see, for example Socrates' last speech to the jury. Plato and H Tredennick, *The Last Days of Socrates* (Penguin classics, Penguin Books, Harmondsworth 1969) 73 (*Apology* 39D).

I do not mean to assert that all these reasons to be sceptical of censorship are correct. Many may be wrong, or only correct in certain circumstances. My point is, rather, that the Barendt/Lichtenberg thesis, by concentrating on the links between journalistic speech and the *values* of free speech, does not give sufficient importance to these other reasons for not restricting journalistic speech, or granting it special treatment. Journalistic speech may not promote the values of free speech described above, but that alone does not make it legitimate to suppress it, or to refrain from granting it special treatment: things other than free speech values need to be at least considered. By concentrating solely on values, the thesis omits that step.

The thesis interpreted as an act-based test

This discussion has shown that the Barendt/Lichtenberg will not lead to unequivocal results, and cannot be considered a sufficient test. Those problems apply to the thesis in general. However, as discussed above, the thesis can be interpreted as an act-based test, an interpretation that holds that each particular piece of journalistic speech should be weighed to see if it promotes free speech values, and denied special treatment if it fails to achieve such an end. I have called this the 'act-based' interpretation of the thesis,[15] and have mentioned that it is on this interpretation that Fenwick and Phillipson base their 'variable geometry of media freedom'.[16]

In its favour, the act-based interpretation presents obvious attractions. It provides a threshold test for individual acts of journalistic expression and claims for privilege, and

[15] The act-based / rule-based distinction derives from F Schauer, 'Who Decides?' in J Lichtenberg (ed) *Democracy and the Mass Media* (Cambridge University Press, Cambridge 1990), 207.

[16] Fenwick and Phillipson (n 5) 27.

hence can be a very useful restriction on journalistic misbehaviour. However, the problems with this interpretation are serious. First, it rejects out of hand some privileges that might be legitimate; second it is likely to operate as a chill on journalistic expression; but third and most seriously, it is difficult to prevent an act-based Barendt/Lichtenberg thesis from collapsing into a general harm principle.

Offensive pre-speech privileges

The first two problems with this act-based interpretation of the thesis are practical. To explain the first, I need to return to Baker's categorisation of special privileges: offensive and defensive, pre-speech and post-speech.[17] 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 *Simms*, where the privilege of access to a prison is afforded to a journalist to investigate allegations of miscarriages of justice. 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, as I have described above, holds such

[17] 45.

a view.[18] 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.

Chilling effect

The second practical point 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'.[19] 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. This point may be countered, though, 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.

[18] CE Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, New York ; Oxford 1989) 240.

[19] D Leigh, *The Frontiers of Secrecy* (Junction Books, London 1980), 142.

Collapse into the harm principle

The third problem, a conceptual one, is more fundamental. 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. Mill provides a statement of the harm principle: 'the only purpose for which power can be rightfully exercised over any member of a civilised community … is to prevent harm to others.'[20] A problem with the harm principle is that 'harm' can be defined widely[21] and so any protection afforded by the harm principle is slender. 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.[22] 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, the protection afforded by the act-interpretation of the Barendt/Lichtenberg thesis is slender, given the inherent flexibility in considering which acts promote or do not promote the values of free speech. The protection (or privileging) of journalistic speech is not robust.

An illustration will help clarify the point. Many repressive countries have, and have had, constitutions that protect, or protected, free speech and a free press. To list a

[20] JS Mill, *On Liberty* (Penguin classics, Penguin, Harmondsworth 1985) 68.

[21] Baker (n 18) 73.

[22] Mill (n 20) 152.

few examples: China,[23] the Soviet Union[24] and Iran. The Iranian example is perhaps the most instructive, as it is similar in form to the Barendt/Lichtenberg thesis. 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.'[25] The problem can be seen that under these constitutions, the conditions for legitimate suppression of speech and press freedom are so wide that they afford minimal *de facto* protection. In a similar way, the criteria provided by an act-based interpretation of the Lichtenberg principle – that a particular instance of journalistic speech should promote the values at the core of our interest in free speech – is similarly narrow. Much activity could be characterised as not promoting the values at the core of our interest in free speech, but which we might want to protect. The test depends significantly on, amongst other things, the political stance of the assessor.

Indeed, in contradiction to the thesis, it may be that in some situations, journalistic speech *ought* to be permitted (or special privileges granted to it) even though, in the view of some, it undermines some free speech values. So for example, those who sought to repress free printing in the time of Milton no doubt considered that such speech undermined the values that we could now see as at the core of our interest in free speech. The licensors of Milton's time wished to preserve a stable political structure, and it was legitimate to restrict speech that did not promote this value. There are those who, in a

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[23] D Weisenhaus, *Hong Kong Media Law* (HKUP, Hong Kong 2007) 166.

[24] Cited in G Marshall, 'Press Freedom and Free Speech Theory' [1992] PL 40, 40; and D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn Oxford University Press, Oxford 2002) 18.

[25] R Trager and DL Dickerson, *Freedom of Expression in the 21st Century* (Pine Forge Press, Thousand Oaks, Calif. ; London 1999) 94 – 95.

similar way, assert today that free speech ought to preserve a stable constitutional conception of democracy.[26] Yet Milton asserted the case that it should be protected *despite* the challenges that speech posed to those structures. This is not to assert an absolutist position on free speech in general and journalistic speech in particular, but rather, it is intended to illustrate a limitation in the act-based interpretation of the Barendt/Lichtenberg principle: if it is conceded that there may be occasions when journalistic speech ought to be permitted even though it does not contribute to the values of free speech, it cannot be a necessary test.

The problem with the act-based interpretation of the thesis is likely to be structural, as it amounts to an act-based consequentialist assessment of speech. Schauer points out that if it is permissible to restrict speech on the sole grounds that a specific utterance is causing harm, then no harmful speech is permissible, yet the nature of the 'free speech' principle is that some harm must be able to be caused. This observation leads to the conclusion that an act-based consequentialist approach is deficient, because: 'to 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.'[27] Indeed, this is why there is a right to freedom of expression in the first place, as opposed to a negative liberty.

The weakness we can see here of the act-based interpretation of the Barendt/Lichtenberg thesis may be a structural weakness in act-consequentialist protections of liberal values in general, because, as O'Neill notes:

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[26] R Cohen-Almagor, *Speech, Media and Ethics : the Limits of Free Expression* (Palgrave Macmillan, Basingstoke 2001).

[27] Schauer, 'Who Decides?' (n 15) 208.

> 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.[28]

Conclusion

What emerges from this discussion is that the act-based interpretation of the Barendt/Lichtenberg thesis is unsatisfactory and not a necessary test, and hence should not be our guiding principle in deciding whether to grant special privileges to institutional journalistic speech. However, the rule-based approach is still of use, as long as we bear in mind that it is likely to lead to equivocal answers, and that we will need to take account of other matters when considering the granting of special privileges. Its use derives from the fact as will be seen, that it provides answers to the other arguments against the legitimacy of the provision of special treatment to institutional journalistic speech.

Criticisms of the application of the Barendt/Lichtenberg thesis

The second criticism of my argument in chapter two concerns the application of the Barendt/Lichtenberg thesis. Even if it is conceded that journalistic expression has distinct qualities and that these can promote some of the values of free speech, it could be argued that this is insufficient to establish that institutional journalistic speech merits special protection because journalistic expression can also damage free speech values.[29] Various

[28] O O'Neill, 'Practices of Toleration', in ibid (n 15) 158.

[29] Fenwick and Phillipson (n 5) 29.

authors have described such damage, and one can associate these descriptions with each of the three activities of journalistic expression that I've identified, namely conduit, investigation and interrogation. I will describe a representative sample of these arguments below, but there are no doubt others. These criticisms are problematic because they appear to produce a paradox; that while special treatment is justified on the grounds that journalistic expression promotes free speech values, the very same expression can also damage these values. However, the paradox can be resolved.

Cohen-Almagor argues that conduit journalism can damage democracy. This is the case when, for example, it broadcasts terrorist-related speech, or hate speech. Propagation of such material causes damage, and it is on this basis that Cohen-Almagor asserts that: 'the idea of objectivity should be rejected in cases presenting ideas sharply opposed to democracy, which sanctify various forms of discrimination or violence against others', and so: 'on some occasions journalists should be subjected to criticism because they *refrain* from taking sides in a controversy'.[30]

Investigative journalism is also criticised. In particular it is argued that investigative (and interrogative) journalists sometimes wish to know too much, and this can damage democracy. Williams suggests that: '[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 governments can be expected to behave.' This is because:

> Not everyone … equally deserves the truth. People can put us in situations in which deceit is a necessary defence or precaution against their threats or manipulations or other damaging intentions… If someone wants to know

[30] Cohen-Almagor, (n 26) 70, 72.

> too much, the first resort, as the casuists said, is a refusal to answer, and a proper pride drawn from the motivations of honour and shame can be a great help in this regard, but under pressure, and particularly if other interests need to be protected, silence may have to turn into evasion, and evasion into deceit.[31]

Third, Lloyd suggests that aggressive interrogative journalism can damage democracy, by unjustifiably reducing confidence in politicians. Inherent in the combative approach of eminent interrogative journalists is the implicit, and illegitimate, assertion that politicians as a class are untrustworthy.

> The public sphere has not been seen as one to preserve, but as an area on which tournaments may be staged on the one hand, and on the other as a landscape dotted with forests, in whose depths reporters can hunt for prey, dragging them out into the light of day on the end of their spears.[32]

What can be said against these observations? It cannot be denied that what they describe, on occasion, is correct, and these qualities of journalistic expression do damage free speech values. However, this is not the end of the argument. For evidence of damage does not negate the observation that there is also good that is done. The question is then whether the damage and the risk of damage are more significant than the good and the potential for benefit. One way of approaching the question is to consider steps to minimise damage done by journalistic expression. But assuming that it will not be possible to entirely remove the damage done by journalistic expression, the question will remain. Wouldn't it be better to, say, balance the damage it does with the benefit it might occur before granting it special treatment? The problem with a balancing exercise is that

[31] BAO Williams, *Truth and Truthfulness : an Essay in Genealogy* (Princeton University Press, Princeton, N.J. ; Oxford 2002) 117.

[32] J Lloyd, *What the Media are Doing to our Politics* (Constable & Robinson, London 2004) 11.

it would amount to an act-consequentialist approach to granting special treatment to journalistic expression, and this presents substantial difficulties that I have described above.[33] This may seem an unsatisfactory position, as the paradox has appeared. We are arguing to protect journalistic expression on the grounds that it contributes to the ends of free speech, but are accepting that that such expression will actually damage the reasons we granted protection in the first place.

However, this is not as paradoxical a position as it seems. Merely because journalistic speech can be 'bad' is not, of itself, sufficient to rebut the assertion that it ought to merit special treatment because it may also do 'good'. This is not just true of journalism. The fact that things can be 'bad' does not prohibit protecting them because they may be able to do 'good': just as every tool can be used, any tool can be misused. As James Madison said: '[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'.[34] 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.

Again, this is not to advocate a free-for-all, nor an absolutist position on press freedom. It should be stressed that the current discussion is about the legitimacy of providing journalistic speech with special treatment; it is not about discerning the

[33] 94.

[34] J Madison, *Report on the Virginia Resolutions* (1800), at 216 in LW Levy (ed), *Freedom of the Press from Zenger to Jefferson* (Bobbs-Merrill Company, Inc, 1966)n 82). This quotation is the epigraph in Cram (n 10).

threshold criteria for such speech. Journalistic speech can still be punished or restricted if it is considered to be in breach of criteria set as a threshold of acceptability, and even if special treatment of journalistic speech is merited, such treatment will come with responsibilities, even the possibility of limited application or revocation. As Smith suggested might be the case a decade ago, there is an analogy between the position in law of the journalist and the policeman. Neither is 'no more than … citizen[s] at work'. As with police officers, it is appropriate to accept the legitimacy of affording special privileges to institutional journalists. 'That having been recognised, it [will] become important to ensure that [such special privileges] are properly exercised, and not abused'.[35]

General criticisms of special treatment

The third criticism, or rather set of criticisms, of the view that special treatment for institutional journalists can be legitimate concerns the difficulties, inconsistencies, and damaging consequences of such a state of affairs. They can be classified under the following headings. The comment in parenthesis refers to the argument summarised in the text that follows:

A) There is no reason in principle for providing the institutional press with special treatment (the first argument);

B) Providing special treatment may result in damage to desirable processes (the second, seventh and eighth arguments);

[35] ATH Smith, 'The Press, the Courts and the Constitution' (1999) 52 CLP 126, 149.

C) Identification of institutional journalists is practically difficult (the third argument);

D) Exclusive special treatment is illogical as other people perform functions similar to journalists (the fourth, fifth and sixth arguments).

The first argument, and perhaps the most fundamental argument, against the provision of special treatment to institutional journalistic speech, has been stated by Blom-Cooper. He asserts that there is no theoretical legitimacy for affording such people privileges. He asks (in relation to the exclusive right of access under s69 (2) MCA):[36]

> 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.[37]

The second argument is also advanced by Blom-Cooper. He raises the problem of identifying and accrediting institutional journalists because of the spectre of licensing that that entails:

> 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.[38]

Robertson and Nicol are similarly concerned that if journalists are afforded a special position then it will be easier to regulate them, and press freedom may consequently suffer. They consider that these concerns have been validated by the fact that, subsequent

[36] Discussed in the text above, 20.

[37] L Blom-Cooper, 'Press Freedom: a Constitutional Right or Cultural Assumption?' [2008] PL 260 266.

[38] Ibid 267.

to the affording of special rights to journalists by PACE discussed above, [39] the courts have interpreted any right away thereby 'decid[ing] that the protection was not very special after all.'[40]

There are a number of other arguments. The ones described below derive from American scholarship. It is true that American discussions, because of the First Amendment, may be thought of limited use to the present discussion about England, but despite the differences in constitutional landscapes much in the American writings is of value. There are sections of less value, in particular those that attempt to interpret the First Amendment either by discerning the intentions of the Founding Fathers or by reference to US history, but others of greater value consider the status and function of a press in a modern Western liberal democracy, and how it should be treated by the law. These are summarised below.

A third problem with special treatment is that of definition,[41] 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 – particularly as, if Robertson is correct, there ought never to be one? 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!*, the stringer for the

[39] 26.

[40] G Robertson and AGL Nicol, *Media Law* (5th edn Thomson / Sweet & Maxwell, London 2007) 5-078.

[41] Baker provides a summary in CE Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955, 1016.

Financial Times in Uzbekistan, and the political blogger Guido Fawlkes? An attempt to draw bright lines, for reasons described above by Robertson and Nicol, might be a threat to journalistic autonomy.

Lange poses the fourth 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?[42] 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 *Sunday Sport* it would be perverse to grant them access and deny it to a respectable author.

Fifthly, as Anderson points out, why 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'.[43] The sixth argument is similar: what logical justification is there for granting privileges to institutional journalists yet denying them to 'the lone pamphleteer',[44] or her modern equivalent, the blogger? With the developments of the Internet such as blogging and citizen journalism, such difficulties can only increase.

Lange, describing a seventh argument, is concerned that if institutional journalists are granted special treatment 'speech interests which are seen as distinct from the press

[42] Lange, (n 13) reprinted in EM Barendt, *Media Law* (International library of essays in law and legal theory, Dartmouth, Aldershot 1993), 59.

[43] DA Anderson, 'Freedom of the Press' (2002) 80 Texas Law Review 429, 530.

[44] *Branzburg v Hayes* 408 US 665, 92 S Ct 2646 (1972) 704.

may be ignored or undervalued, and thus begin to wither'.[45] He also suspects, suspicion amounting to an eighth argument, that providing journalists with special privileges may not even be in the best interests of the press in general, as it 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.[46]

Lewis shares similar 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 journalist's, historical and proper nature "as a freebooter outside the system."'[47]

Counter-arguments

The rule-based Barendt/Lichtenberg thesis provides an answer to arguments of the form A and B. It obviously provides a theoretical rationale, albeit an instrumental one, for the provision of special treatment and therefore counters argument A, but it also explains why damaging consequences may be acceptable, and hence counters argument B. The damages noted by these arguments are acceptable if it can be shown that the provision of special treatment to the press in general contributes to the attainment of the values that

[45] Lange, (n 42) 72.

[46] id 62. To British ears this does not sound so much like a problem as a benefit.

[47] A Lewis, 'A Preferred Position for Journalism?' (1979) 7 Hofstra Law Review 595, 605; cited in Baker, 'The Independent Significance of the Press Clause under Existing Law' (n 41) 1014.

are at the core of our interest in free speech. However, should the provision of such special privileges not so contribute, then such special treatment is not legitimate. (It should be emphasised that, given the rejection of the act-based interpretation of the thesis, this justification refers to institutional journalistic speech *in general*, as a class.)

Additionally, the particular concerns of Blom-Cooper and Robertson and Nicol, described above as the second argument, can be met – in part at least - by another observation. The concern is that the provision of special treatment to journalists may result in a form of censorship. However, to the extent that special treatment consists of offensive pre-speech privileges, their concern is misplaced, as the provision of such pre-speech privileges will not, of itself, amount to a restriction on speech itself.

In relation to argument C, it is clear that the practical problems of definition are over-stated. As Anderson notes:

> [t]he 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 are usually created by some form of law – statute, regulation, rule, or policy. These legal preferences are among the principal features that distinguish the press from other information businesses.[48]

As well as noting particular shield laws and reporters' privileges in some states, he continues by noting that '[t]he press gets preferential access to legislative chambers, executive news conferences, trials, war zones, disaster scenes, prisons, and executions'.[49] In practice, there is no particular difficulty in identifying whom we afford these privileges to. The situation is comparable in England. The courts for example, recognise

[48] Anderson, (n 43) 430.

[49] id 431.

possession of identification issued by the UK Press Card Authority as sufficient, if not necessary, proof of status.[50]

This leaves argument D. The rule-based Barendt/Lichtenberg thesis removes the sting of illogicality from this argument, as it provides a rationale for the provision of special treatment to institutional journalists – such a class of person is provided with special treatment if it contributes to free speech values. However, a sting remains in respect of the rule-based thesis, as this leads to the apparently indefensible result of, for example, providing a *Simms* privilege to a tabloid reporter, but denying it to, say, Solzhenitsyn. How could this be justified? An answer lies in conceding that argument D prevents the provision of *exclusive* special privileges to institutional journalists in the first sense described in chapter one – other professions may also benefit from such treatment – but it does not restrict the provision to them of special privileges, in the sense of privileges available to institutional rather than functional journalism. If this is recognised, argument D can be countered by conceding that other people, such as authors, might well have their own legitimate claims for special privileges, but such claims do not extinguish the claims of institutional journalists, when compared with functional journalists as a class, to special privileges.

Conclusion

Chapters two and three of this paper have amounted to a defence of the provision by the law of special privileges to institutional journalistic speech as a class. In essence, the case is that institutional journalistic speech contributes to the ends of free speech in particular

[50] For example, *Practice Direction (Family Proceedings: Media Representatives)* [2009] 1 WLR 1111 (Fam) (n 51) [4.2].

ways, and hence it can be legitimate to provide it, as a class, with special privileges. It has an instrumental value in our society that, at the moment at least, justifies receiving special treatment. It remains to summarise the effect of the counter-arguments on the legitimacy of such privileges considered throughout this paper. They can be summarised here as falling under three heads. First, journalistic speech can undermine free speech values. Second, technological and social change reduces journalism's claim to merit special treatment. Third, special treatment of journalistic expression necessarily entails a breach of the breach of equality principle.

All three counter-arguments have merit, but they do not extinguish the argument for special treatment. In response to the first, journalistic expression that does undermine the ends of free speech can still be punished or restricted. Indeed, recognition of special treatment for journalistic expression might facilitate this regulation of journalistic expression. The second argument makes journalism's claim for special treatment weaker than it had been before the development of the Internet, but such a claim has not yet been extinguished. In relation to the third argument it seems clear that, while prioritising journalists may to some seem anathema, it is legitimate as it is based on recognition of the instrumental value of their speech, and the law already recognises that special privileges are legitimate to some classes of speakers given the instrumental value of their speech.[51] Considered together it can be seen that while these counter-arguments do not refute any argument for special treatment for journalistic expression, they do limit it in three ways: in extent, by time, and in exclusivity.

[51] Bill of Rights 1689, article 9: 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'

Part 4: Conclusion

This paper has had two distinct parts, the doctrinal and the theoretical. The doctrinal section, chapter one, classified the ways in which the law provides special privileges to institutional and functional journalism. It demonstrated that there are special privileges to institutional journalistic expression, but they come in different forms, and they change over time. Most of the less contestable privileges afforded to institutional journalists are pre-speech and, in Baker's terms, offensive.

The theoretical section of this paper, chapters two and three, proposed a theoretical argument for the legitimacy of such treatment. The theoretical basis for the argument was a rule-based approach to the Barendt/Lichtenberg thesis, namely that special privileges can be justified if institutional journalistic speech, as a class of speech, particularly promotes free speech values. The application of the theory suggested that institutional journalistic reach and reputation, employed in the processes of reporting, investigating and interrogating, could be seen as performing this function. From this, it appears that institutional journalists may have a quasi-constitutional function, based on the fact that their qualities are required for democracy. (An additional argument, but one not explored here, is that given the difficulties in identifying political speech, recognising institutional journalistic speech as deserving of special protection may remove one problem of privileging speech that is important in our society.) Hence institutional journalistic speech, in general, can merit special treatment, albeit of a limited nature.

The doctrinal analysis confined itself to looking at the law in general to see in what way it provided special privileges to institutional journalistic speech. Three

questions therefore spring from this preparatory analysis: first, what is the nature of institutional journalist privileges in specific areas of the law? Second, are these privileges appropriate, in the sense of reflecting the theory that underpins them? Third, how can the act-based Barent/Lichtenberg thesis be improved upon to provide a more robust way of discerning in which particular situations (as opposed to which situations in general) are privileges appropriate? It is to these questions that I will turn in the DPhil.

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