A SEISMIC SHIFT? AN EVALUATION OF THE IMPACT OF NEW MEDIA ON PERCEPTIONS OF FREEDOM OF EXPRESSION, MEDIA FREEDOM AND PRIVACY

*Peter Coe**

1. INTRODUCTION

The media landscape is undergoing profound change, on an unprecedented scale and at an exponential pace, at the forefront of which, is new media[1]. This communication revolution has been recognised within a variety of international arenas. For instance, in 2011, the United Nations (UN) Human Rights Committee (HRC) stated:

'[I]nternet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries.'[2]

On UN World Press Day in 2012, Abdulaziz Al-Nasser, President of the UN General Assembly, said: *"Governments that try to suppress or shut-down new media platforms should rather embrace new media for the beneficial transformation of their societies"*[3]. Further, in early 2014, the House of Lords Select Committee on Communications Report on Media Plurality recognised the increasingly important role that new media is playing within society[4]. These views have been mirrored in the United States (US), where the influence of, specifically, social media was summed up by the Criminal Court of the City of New York in *New York v Harris*: *"The reality of*

*Lecturer in Law, Aston University, UK; Barrister, East Anglian Chambers, UK

[1] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 16

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

[3] *UN Highlights Role of Press Freedom as Catalyst for Social and Political Change*, UN News Centre, http://www.un.org/apps/news/story.asp?NewsID=41911&Cr=journalist&Cr1 accessed 28th April 2014

[4] House of Lords Select Committee on Communications 1st Report of Session 2013-14, Media Plurality, 4th February 2014, [46]-[52]

today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate"[5].

New media has changed the way in which we communicate, giving rise to a culture of sharing and voluntariness[6]. Thus, according to Van Dijck, social media, in particular, has created a new: *"online layer through which people organise their lives…this layer of platforms influences human interaction on an individual and community level, as well as on a larger societal level, while the worlds of online and offline are increasingly interpenetrating."*[7] Yet, despite the accepted impact of new media on the way in which expression is communicated and received, Lord Justice Leveson devoted only ten of two thousand pages of his *Inquiry into the Culture, Practices and Ethics of the Press* to internet publications[8]. This is surprising bearing in mind, the reach of new media, and how its use compares to traditional media, in particular the press industry[9]. Indeed, Leveson LJ, in his Inquiry, makes reference to the ability of new media, and specifically blogs and social networking sites, to reach vast amounts of people[10]. His Lordship also states that the internet is an: *"ethical vacuum…*[that] *does not claim to operate by express ethical standards, so that bloggers and others may, if they choose, act with impunity."*[11] Specifically, the Inquiry recognises that *"[b]logs and other such websites are entirely unregulated"*[12] and that other new media companies, including social networking sites operate under

[5] *New York v Harris*, 2012 N.Y. Misc. LEXIS 1871 *3, note 3 (Crim. Ct. City of N.Y., N.Y. County, 2012)

[6] D.R. Stewart (ed), *Social Media and the Law*, (Routledge, 2013), viii; C. Shirky, *Here Comes Everybody*, (Allen Lane, 2008), 17

[7] J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 4

[8] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 168-177; 736-737. The Inquiry refers to: *'…blogs, online news aggregators, publishers, social network sites and online hosts'* [4.1]

[9] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 21-24

[10] In relation to blogs, his Lordship refers to *Guido Fawkes* that, according to its founder, Paul Staines, can, when big stories are being broken, be visited by up to 100,000 people per hour. Leveson LJ also makes specific reference to the usage of social media sites, such as Facebook and Twitter. See Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 168, [4.3]-[4.4], 173, [5.2] respectively

[11] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 736, [3.2]

[12] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 171, [4.20]. His Lordship does acknowledge that the Huffington Post UK is unique in having (at the time) voluntarily subscribed to the Press Complaints Commission and abided by the Editors' Code of Practice

different national laws, depending on where they are domiciled, consequently giving rise to issues concerning conflicts of law[13].

This paper seeks to explore impact of new media on perceptions of freedom of expression, media freedom and privacy. It will, firstly, through analysis of European Convention on Human Rights (ECHR) and US jurisprudence and scholarship, comparatively explore the traditional purpose of the media, and how 'media freedom', as opposed to freedom of expression, has been subject to privileged protection, within a ECHR context at least. The emergence of new media, and how it has potentially altered perceptions of privacy at an individual and societal level is then considered, alongside analysis of how it can be differentiated from the traditional media. This is followed by consideration of the philosophical justifications for freedom of expression, and how they enable a workable definition of the media based upon the concept of the media-as-a-constitutional-component.

2. MEDIA FREEDOM

2.1 MEDIA FREEDOM AS A DISTINCT RIGHT TO FREEDOM OF EXPRESSION: A COMPARATIVE ANALYSIS

The traditional professional media, including the printed press, television, radio and film industry, continues to benefit from significant protection beyond that afforded to private individuals and non-media organisations. This position is evident within a number of jurisdictions. For example, pursuant to Article 11(2) of the Charter of the Fundamental Rights of the European Union (CFREU)[14], *'freedom and pluralism of the media shall be respected'*. In Germany, Article 5(1)2 of the German Basic Law provides a separate provision for the specific protection of media expression, thus creating a clear distinction with free expression guarantees for private individuals: *'[f]reedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed'*[15]. Similarly, in the US, the

[13] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 174-177

[14] The Charter was initially solemnly proclaimed at the Nice European Council on 7th December 2000. At that time, it did not have any binding legal effect. However, on 1st December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the European Union institutions and on national governments: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm accessed 3rd April 2015

[15] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 59; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 417-419

First Amendment states that: *'[c]ongress shall make no law…abridging the freedom of speech, or of the press…'*[16].

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

(1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Although Article 10(1) does not specifically provide for protection of media freedom in distinction to that of private individuals and non-media institutions, in interpreting Article 10, the ECtHR has attached great importance to the role of the media[17]. Accordingly, the media's contribution to democracy and democratic self-governance[18], and its *'role of public watchdog'*[19] have been clearly established by the jurisprudence of the Court. Indeed, it recognises a duty on the media to convey information and ideas on political issues and public interest[20], and the right of the public to receive this information[21].

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

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

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

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

[20] *Lingens v Austria* (186) 8 EHRR 103, [26]; *Oberschlick v Austria (No 1)* (1991) 19 EHRR 389, [58]; *Castells v Spain* (1992) 14 EHRR 445, [43]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843; *Jersild v Denmark* (1995) 19 EHRR 1, [31]

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

The special position of the media in relation to freedom of expression, recognised by commentators such as Stewart J, Bezanson and West[22], explains why the jurisprudence of, for instance, the ECtHR, interprets Article 10(1) to contain privileged protection of the media, even in the absence of express provisions to that effect. Media freedom is, therefore, 'special' because a journalist or media company is: *"governed by a different set of factors concerning the scope and intensity of protection when preparing, editing or issuing a publication, compared to freedom of expression afforded to private individuals or non-media entities"*[23]. Thus, the fact that a statement can be classed as media expression, as opposed to expression by a private individual or non-media institution, adds to the burden of justifying its restrictions[24].

In *Vejdeland and others v Sweden*[25] the applicants, who were not associated with the media, had been convicted for distributing homophobic leaflets in a secondary school. The ECtHR upheld the convictions, whilst observing: *"[i]f exactly the same words and phrases were to be used in public newspapers…they would probably not be considered a matter for criminal prosecution and condemnation"*[26]. Thus, the special protection afforded to media expression permits the use of wide discretion as to the methods and techniques adopted to report on matters, and how that material is subsequently presented[27]. It allows the media to have recourse to exaggeration and even provocation[28], including the use of strong terminology or polemic formulations[29]. Additionally, the ECtHR has held that this protection extends beyond the dissemination of the journalist's or media organisation's own opinions, to encapsulate those expressed by third parties in the context of, for example, interviews[30].

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

[23] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 59

[24] ibid.

[25] [2012] ECHR 242

[26] [2012] ECHR 242 per Judge Vucancic at [12]

[27] *Jersild v Denmark* (1995) 19 EHRR 1, [31]; *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [63]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [57]

[28] *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38]; *Thoma v Luxembourg* (2003) 36 EHRR 21, [45]-[46]; R. Clayton QC and H. Tomlinson QC, *Privacy and Freedom of Expression* (2nd ed. Oxford University Press, 2010), 271 [15.254]

[29] *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, [67]; *Oberschlick v Austria (No 2)* (1998) 25 EHRR 357, [33]; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 59

[30] *Jersild v Denmark* (1995) 19 EHRR 1

The ambit of media freedom is not limited to stronger protection for media publications; instead, it extends to rights that are not, in any way, available pursuant to freedom of expression guarantees. Consequently, media freedom and freedom of expression differ in relation to the intensity of the protection and in respect of the scope of the protected action. According to Oster, this position equates to institutional protection of the media that, sequentially, guarantees rights that are not exclusively concerned with expression, but also relate to the media vis-a-vis its newsgathering or editorial activities, or even to the existence of an independent media[31].

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

[31] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 60
[32] ibid.
[33] ibid. 60-61
[34] *Halis Dogan and others v Turkey* Application no. 50693/99 (ECtHR, 10th January 2006), [24]
[35] [2009] ECHR 1465
[36] *Goodwin v United Kingdom* [1996] ECHR 16, [39]; *Radio Twist as v Slovakia* [2006] ECHR 1129, [62]; *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1273, [50]
[37] For example, see: Article 9 Data Protection Directive 95/46/EC, OJ L281/31; Article 5(3)(c) Copyright Directive 2001/29/EC, OJ L167/19
[38] *Informationsverein Lentia and others v Austria* [1993] ECHR 57, [32]-[34]; *TV Vest & Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [78]
[39] *Ozgur Gundem v Turkey* [2000] ECHR 104, [38 ff]
[40] Article 21(4)(2) EC Merger Regulation 139/2004, OJ L24/1; Part 5 Chapter 2 Communications Act 2003 ch 21

In contrast to ECHR jurisprudence, the position in the US is markedly different [42]. Despite leading commentators [43], and dissenting Supreme Court judgments[44] arguing that the specific free press clause *'or of the press'* in the First Amendment to the US Constitution creates a similar distinction to that provided by the CFREU, the German Basic Law and the jurisprudence of the ECHR, this has been opposed by academics such as Volokh [45], and resisted by the Supreme Court [46]. Consequently, the dominant view in the US is based on the press-as-technology model. This model has roots in English common law[47], and is founded on the premise that media freedom should not be subject to privileges or duties over and above freedom of expression[48]. According to Volokh, freedom of the press is technological. It is, therefore, available to all forms of communication classed as technologies, which covers everything[49]. In Volokh's assessment, freedom of the press does not just protect the press industry, but secures the right of everyone to use communications

[41] *Manole v Moldova* [2009] ECHR 1292, [109]; *Centro Europa 7 Srl and Di Stefano v Italy* App no 38433/09 (ECtHR, 7th June 2012), [133]

[42] The US view is worthy of consideration at this juncture, as it provides useful parallels with the ECHR position that animates the debate on how the media is defined and how the courts can determine who or what should benefit from media freedom. This is discussed in more detail at section 2.8 below

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

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

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

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

[47] *R v Shipley (Dean of Saint Asaph's Case)* (1784) 21 How. St. Tr. 847 (KB); *R v Rowan* (1794) 22 How. St .Tr. 1033 (KB); *R v Burdett* (1820) 106 Eng. Rep. 873 (KB), 887; 4 B. & Ald. 95, 132; see generally: E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459, 484-489

[48] For example, see: D.L. Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77; WW van Alstyne, 'the Hazards to the Press of Claiming a "Preferred Position" (1977) 28 *Hastings Law Journal* 761, 768-669; A. Lewis, 'A Preferred Position for Journalism' (1978-9) 7 *Hofstra Law Review* 595; C.E. Baker 'Press Performance, Human Rights, and Private Power as a Threat' (2011) 5 *Law & Ethics of Human Rights* 219, 230; E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459, 538-539

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

technology[50]. Therefore, the ambit of the model extends to, not only the traditional media, and professional journalists utilising new media, but also to un-trained citizen journalists, who communicate via mediums such as Facebook, Instagram, Twitter and YouTube[51].

This originalist interpretation [52] is prevalent in US jurisprudence and scholarship, both historically[53] and currently. Despite the Supreme Court recognising that the press operates *'as a powerful antidote to any abuses of power by government officials'*[54], it continues to reject the argument that the institutional press has any constitutional privilege in excess of other speakers[55]. Thus, the majority in *Citizens United v FEC*[56], echoing previous judgments of Brennan J[57], agreed that the First Amendment protects 'speech'[58], as opposed to the source of that expression, whether that emanates from a professional journalist or a casual Twitter user[59].

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[50] E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459, 462-463

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

[52] See: D. Anderson, 'The Origins of the Press Clause' (1982-3) 30 *UCLA Law Review* 455; E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459; D.L. Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77, 88-99; A. Lewis, 'A Preferred Position for Journalism' (1978-9) 7 *Hofstra Law Review* 595, 600; R.P. Bezanson, 'Whither Freedom of the Press?' 97 *Iowa Law Review* 1259

[53] *Republica v Oswald* 1 Dall. 319, 325 (Pa. 1788); *Commonwealth v Freeman,* HERALD OF FREEDOM (Boston), Mar. 18, 1791, at 5 (Mass. 1791); *In re* Fries. 9 F. Cas. 826, 839 (Justice Iredell, Circuit Judge, C.C.D. Pa. 1799) (no. 5126); *Runkle v Meyer* 3 Yeates 518, 519 (Pa. 1803); see generally: E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459, 465-468

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

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

[56] 130 S Ct 876 (2010)

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

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

[59] However, the model is not immune to criticism and opposing views, from both US Supreme Court judges, and legal scholars. For example, see generally: *Bartnicki v Vopper* 532 US 514 (2001); *Minneapolis Star & Tribune Co. v Minn. Comm'r of Revenue* 460 US 575, 592-93 (1983); *Gertz v Robert Welch Inc* 418 US 323 (1974); see the dissenting judgments in *Citizens United v FEC* 130 S Ct 876 (2010) (in particular Stevens J at 951 n. 57); Powell J's dissenting judgment in *Saxbe v Washington Post Company* 417 US 843, 863 (1974); Douglas J's dissenting judgment in *Branzburg v Hayes* 408 US 665, 721 (1972); Stewart J, 'Or of the Press' *26 Hastings L.J.* 631, 634 (1975); T. Dyk, 'Newsgathering, Press Access, and the First Amendment' *44 Stan. L. Rev* 927, 931-932 (1992); P. Horwitz, 'Universities as First Amendment Institutions: Some Easy Answers and Hard Questions' 54

This section has established, within a ECHR context at least, the distinction between the freedom of expression right afforded to private individuals compared with that of non-media institutions, pursuant to media freedom: if the expression emanates from a media entity, whether that be a journalist, or a media company, it will be subject to the privileged protection set out above; to the contrary, if the expression comes from a non-media entity, it will, nonetheless, be subject to general freedom of expression protection. Furthermore, only journalists and media organisations can take advantage of the freedom bestowed upon the media as an institution, for example, with regard to newsgathering activities[60].

3. THE TRANSITONAL ERA: THE TRADITIONAL MEDIA AND THE AGE OF NEW MEDIA

3.1 THE TRADITIONAL MEDIA

The origins of the traditional media, and in particular the press industry, may well be founded on freedom of expression philosophy[61], and the notion that, as 'the Fourth Estate', its primary function is to act as a 'public watchdog',[62] in that it operates as the general public's *"eyes and ears"* by investigating and reporting abuses of power[63]. Prior to the evolution of the internet into a network available throughout the world[64]

UCLA L. Rev. 1497, 1505 (2007); S. West, 'Awakening the Press Clause' 58 *UCLA L. Rev.* 1025, 1027-1029 (2011). See also Bezanson's rejoinder to Volokh's article: R.P. Bezanson, 'Whither Freedom of the Press?' 97 *Iowa Law Review* 1259. These criticisms are discussed in more detail at section 2.8 below in relation to how the courts should determine who and what can benefit from 'media freedom'

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

[61] See section 5.2 below

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

[63] *A-G v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 418

[64] The evolution of the internet is borne out by recent Office for National Statistics data, which states that, in 2013, 83% of British households had internet access. Thirty-six million (73%) adults in Britain used the internet every day, equating to twenty million more than in 2006; with 53% using a mobile phone to access it remotely, more than double 2010's figure of 24% (Indeed, if you add "portable computers" to this, the percentage of people accessing the internet 'on the go' in 2013 rises to 61%: Office for National Statistics, *Internet Access – Households and Individuals, 2013*, 8th August 2013 http://www.ons.gov.uk/ons/dcp171778_322713.pdf accessed 19th May 2015). These figures are reflected by recent statistics from the US and the EU. As of May 2013, 80% of American adults had either a broadband connection at home, or a smartphone, or both (The 80% breaks down as follows: 46% have both home broadband connection and a smartphone; 24% have home broadband connection but no smartphone; 10% have a smartphone, but not home broadband connection: K. Zickurh and A.

and, in particular, the new media revolution, which transformed that network into an accessible form of mass media, creating an audience and producer convergence[65], traditional press and broadcast (television or radio) companies were the only media institutions that had the ability to reach mass audiences through regular publication or broadcasts[66]. Consequently, as observed by Leveson LJ in his Inquiry, in recent years, the traditional media, and in particular the press, has played a critical role in informing the public on matters of public interest and concern[67]. Furthermore, because of the traditional media's ability to reach so many people, for the purposes of media protection, it was relatively easy to distinguish between expression conveyed by a media entity, to that communicated by a private individual[68].

However, in contrast to Leveson LJ's examples of high quality investigative public interest journalism[69], there is no doubt that an increasing number of print and broadcast media outlets choose to engage with 'sexy' stories that sell, as opposed to reporting on matters of public concern[70]; a position that clearly correlates with the criticisms advanced below of Holmes J's marketplace of ideas theory[71]. Thus, a number of commentators have argued that the media's public watchdog role gradually diminished towards the end of the twentieth century. Instead, the focus shifted onto

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Smith, *Home Broadband 2013*, PewResearch Internet Project, 26th August 2013 http://www.pewinternet.org/2013/08/26/home-broadband-2013/; A. Smith, *Smartphone Ownership 2013*, PewResearch Internet Project, 5th June 2013, http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/ both accessed 19th May 2015). In 2012, the percentage of individuals in the EU who used the internet was 73%, 30% of which gained access via mobile devices away from home or work (H. Seybert, Internet use in households and by individuals in 2012, Eurostat, 2012 http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF accessed 19th May 2015). Worldwide, the estimated number of internet users exceeds two billion (F. La Rue, *Report of the Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27, 16th May 2011, [21]; See also: UN General Assembly Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, Resolution 20/8, A/HRC/RES/20/8, 29th June 2012, [2]).

[65] See generally: A. Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Produsage,* (Peter Lang Publishing, 2008)
[66] See generally: J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 3-23
[67] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 455-470
[68] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 62
[69] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 455-470
[70] Numerous examples are provided by Leveson LJ in his Inquiry: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press,* November 2012, 539-591
[71] See section 5.4 below

the commercially viable stories referred to above[72]. It is submitted that media ownership, and the power derived from it, means that there is a constant conflict between the traditional media's role as a watchdog, or gatekeeper, and commercial reality. Indeed, it has been observed that, during the twentieth century, there has been a dilution of news media ownership, which is now vested in a relatively small number of large and powerful companies. Accordingly, this ownership concentration has had a detrimental affect on investigative journalism[73]. To the contrary, as will be seen below, citizen journalists, through the use of new media are, in many instances, replacing the traditional media as the public's watchdog.

3.2 THE AGE OF TRANSITION: NEW MEDIA – A CHANGE OF PERCEPTION

Until relatively recently, the public were, to a great extent, limited as to what they were exposed to reading or seeing, by what large proportions of the traditional media chose to publish or broadcast. As set out above, such decisions may have come down to editorial control, based on, for instance, owner or political bias, commercial revenue, or both, rather than being based on the results of sound investigative journalism[74]. However, the new media revolution, which has facilitated the convergence of audience and producer, and enabled this new breed of citizen journalist to communicate with, potentially, millions of people, means that the ability to reach mass audiences is no longer something that is monopolised by traditional

[72] For example, see: C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7th ed. Routledge, 2010), 96-98; E. Cashmore, *Celebrity Culture*, (2nd ed. Routledge, 2014)

[73] S.L. Carter, 'Technology, Democracy, and the Manipulation of Consent' (1983-1984) *Yale Law Journal* 581, 600-607; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) 72 *Marquette Law Review* 187, 189; See also Leveson LJ's assessment of the commercial pressures on the press: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 93-98

[74] This criticism is advanced by Barendt with regard to the marketplace of ideas theory (dealt with at section 2.3 above): E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12; See also: Similar issues have arisen in the print press with regard to commercial advertising. For example, in January 2015, a number of Daily Telegraph journalists voiced their concerns over the newspaper allegedly discouraging them from writing unfavourable stories about advertising and commercial partners. Furthermore, the journalists provided examples to Newsnight of how commercial concerns impacted upon coverage given to China and Russia. See: C. Cook, *More Telegraph writers voice concern*, 19th February 2015, http://www.bbc.co.uk/news/health-31529682 accessed 19th May 2015

[74] http://www.bbc.co.uk/news/election-2015-32582337 accessed 5th May 2015

media institutions and, therefore, cannot be relied upon to distinguish between media and non-media entities[75].

New media platforms have changed the traditional media landscape forever, as they have altered our perceptions of the limits of communication, the reception of information and the parameters of what amounts to privacy and our own private lives. It is no longer the case that communication is constrained by boundaries, such as location, time, space or culture[76], or dictated by a media organisation's ownership, political bias or commercial partners[77]. Access to multiple new media outlets and platforms twenty-four hours a day, that are instantaneously accessible, allows users, forming what Benkler refers to as the *"networked public sphere"*[78], to transmit and receive information to one and other, via platforms, such as YouTube, Facebook, Twitter, WhatsApp and Snapchat, without the need to consider, what have become, the boundaries and restrictions mentioned above[79]. When in place, these boundaries acted as a natural filtration system for news, information, or simply the sharing and venting of thoughts and feelings. Their dilution has enabled real-time relationships to exist without any physical interaction[80]. Consequently, Professor McLuhan's proclamation, that the *"medium is the message"*[81], seems both prophetic and entirely apt for the new media era as, according to McLuhan, the media is an extension of ourselves, and new mediums introduced into our lives give rise to personal and social consequences, as a result of that new 'extension'[82]. Accordingly: *"the message of any*

[75] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 63
[76] See generally: F. Webster, *Theories of the Information Society*, (4th ed, Routledge, 2014), 20; I. Barron and R. Curnow, *The Future with Microelectronics: Forecasting the Effects of Information Technology*, (Pinter, 1979); G. Mulgan, *Communication and Control: Networks and the New Economies of Communication*, (Polity, 1991)
[77] For example, see: C. Cook, *More Telegraph writers voice concern*, 19th February 2015, http://www.bbc.co.uk/news/health-31529682 accessed 19th May 2015; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12
[77] http://www.bbc.co.uk/news/election-2015-32582337 accessed 5th May 2015
[78] Y. Benkler, *The Wealth of Networks* (Yale University Press, 2006), 212
[79] See generally: B. Wellman, 'Physical Space and Cyberspace: The Rise of Personalised Networking', *International Journal of Urban and Regional Research* 25(2), 227-51; P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology La*w, (2015), Vol. 24, Issue 1, 16-40, 21-22
[80] B. Wellman, 'Physical Space and Cyberspace: The Rise of Personalised Networking', *International Journal of Urban and Regional Research* 25(2), 227-51
[81] M. McLuhan, *Understanding Media The Extensions of Man* (MIT Press, 1964), 7
[82] Ibid.

medium or technology is the change of scale or pace or pattern that it introduces into human affairs" [83].

These platforms are used as a way of, not only receiving news[84], but of instantaneously, and often spontaneously, without filter, expressing opinions and venting and sharing emotions, thoughts and feelings,[85] circumventing the mass media, and giving rise to a convergence of audience and producer[86]. This is illustrated by using statistics to compare the use of new media with traditional media. For example, the New York Times 2013 print and digital circulation was approximately two million[87], enabling it to proclaim that it was the "*#1 individual newspaper site*" on the internet, with nearly thirty-one million unique visitors per month[88]. In contrast, YouTube, which is owned by Google, has one billion unique visitors per month[89] which, according to Ammori, equates to: *"thirty times more than the New York Times, or as many unique visitors in a day as the* [New York] *Times has every month"*[90]. According to WordPress' statistics, it hosts blogs written in over 120 languages, equating to over 409 million users viewing more than 15.8 billion pages each month. Consequently, users produce approximately 43.7 million new posts and 58.8 million new comments on a monthly basis. These users can choose to create and maintain anonymous blogs[91]. Twitter states that it normally 'takes in' approximately 500 million Tweets per day, equating to an average of 5,700 Tweets per second[92]. It has more visitors per week than the New York Times does in a month[93]. Similarly,

[83] McLuhan *Understanding Media The Extensions of Man* (MIT Press, 1964), 8
[84] According to Ofcom's report, The Communications Market 2013 (at para. 1.9.7), 23% of people use social media platforms, such as Facebook and Twitter, for news: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/UK_1.pdf accessed 19th March 2014
[85] Indeed, in April 2014 Facebook emailed its users to inform them that the messages function is moving out of the Facebook application due to their Messenger application enabling users to reply 20% faster than using Facebook.
[86] See generally: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', *C.L.J.* 2012, 71(2), 355-383, 365
[87] C. Haughney, *Newspapers Post Gains in Digital Circulation*, New York Times, 30th April 2014, http://www.nytimes.com/2013/05/01/business/media/digital-subscribers-buoy-newspaper-circulation.html accessed 19th May 2015
[88] New York Times Media Kit, http://perma.cc/B5KA-VMGC accessed 12th September 2014
[89] Statistics YouTube, http://perma.cc/S8W5-ZRM4, accessed 19th May 2015
[90] M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2266
[91] http://en.wordpress.com/stats/ accessed 19th May 2015
[92] https://blog.twitter.com/2013/new-tweets-per-second-record-and-how accessed 9th January 2015
[93] M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2266

Tumblr hosts over 170 million microblogs[94] and, with 300 million visits per month, enjoys ten times more than the New York Times[95]. According to Facebook, as of 30th September 2014, it had 1.35 billion monthly active users, 703 million of which use their mobile applications to access the platform on a daily basis[96]. Late 2013 saw Instagram's global usage expand by 15%, in just two months, to 150 million people[97]. By December 2014, this had increased to 300 million[98]. LinkedIn's current membership is 300 million[99]. These established platforms are only the 'tip of the new media iceberg'. Pinterest continues to grow rapidly[100], as do emerging platforms, such as Snapchat and WhatsApp[101]. Consequently, for many people, new media platforms have not just replaced the written word; they have become a substitute for the spoken word[102].

This 'reach' of new media amplifies the way that the media, in general, envelopes our existence. Platforms such as Facebook and Twitter have become an embodiment of McLuhan's 'extension of man', and a facilitator of unfiltered expression, by being platforms for *user* speech, as opposed to that of a media organisation's ownership, employees or political stance. Thus, traditional media organisations simply no longer monopolise the methods we use to find and facilitate news-gathering, communication or reception, or indeed how we express emotions, opinions and ideas. As a result, it has become an increasingly important source of news[103] and both formal and informal method of communication. In light of the economic plight of the traditional media, commentators such as Oster and Calvert and

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[94] ibid. 2272

[95] J. Yarow, *The Truth About Tumblr: Its Numbers Are Significantly Worse than You Think*, Business Insider, 21st May 2013 http://www.businessinsider.com/tumblrs-active-users-lighter-than-expected-2013-5 accessed 19th May 2015

[96] https://newsroom.fb.com/key-Facts accessed 19th May 2015

[97] http://instagram.com/press/#; UK Social Media Statistics for 2014, http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014, accessed 19th May 2015

[98] http://instagram.com/press/# accessed 19th May 2015

[99] https://press.linkedin.com/site-resources/news-releases/2014/linkedin-reaches-300-million-members-worldwide accessed 19th May 2015

[100] In 2011/2012 Pinterest had approximately 200,000 users in the UK. In the summer of 2013 this had grown to over 2 million: http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014, accessed 19th May 2015

[101] Ibid.

[102] P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 24

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

Torres observe the ascendence of citizen journalism. This new breed of journalist is increasingly playing the role of public watchdog, and aiding democratic participation. By enriching public discourse through the reporting of matters of public interest and concern[104] it is a paradigm of the argument from democratic self-governance[105]. For example, the death of Osama Bin Laden was leaked on Twitter, before being published by any newspaper[106]. Edward Snowden disclosed information regarding American surveillance programmes to blogger Glenn Greenwald, as he did not trust the New York Times to publish the material[107]. Syria's President, Bashar al-Assad, and his opposing rebels distribute competing propaganda via Instagram[108]. Chelsea Manning, the US soldier convicted in 2013 for, *inter alia*, offences pursuant to the Espionage Act, leaked classified documents to WikiLeaks, as opposed to a 'traditional' media outlet[109]. As a result of the importance attributed to citizen journalism, this new breed of journalist has even gained official recognition as 'press'[110]. Incidentally, traditional media companies are now, largely, operating online outlets in addition to their 'staple' method of communication, whilst companies such as the Huffington Post, which may be classed as 'traditional professional' media, operate exclusively online[111].

Thus, never before has a form of media changed the 'scale, pace or pattern' of human affairs to such an extent, within such a short period of time.[112] It is clear that

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[104] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 63;
C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 344

[105] See section 5.6 below

[106] B. Shelter, *How the Bin Laden Announcement Leaked Out*, New York Times, 1st May 2011, http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/?_php=true&_type=blogs&_r=0 accessed 19th May 2015

[107] M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', *Harvard Law Review*, 2014, vol. 127: 2259-2295, 2265

[108] N. Gaouette, *Assad on Instagram Vies with Rebel Videos to Seek Support*, Bloomberg, 19th September 2013, http://www.bloomberg.com/news/2013-09-19/assad-on-instagram-vies-with-rebel-videos-to-seek-support.html accessed 19th May 2015

[109] Y. Benkler, *The Wealth of Networks* (Yale University Press, 2006), 348

[110] See High Court of Ireland, *Cornec v Morrice* [2012] IEHC 376; K.Q. Seelye, *White House Approves Press Pass for Blogger*, New York Times, 7th March 2005 http://www.nytimes.com/2005/03/07/technology/07press.html?_r=0 accessed 19th May 2015

[111] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 63

[112] Consequently, Time magazine named 'You' the person of the year in 2006: *"for seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game."* See: L. Grossman, *You-Yes, You- Are TIME'S Person of the Year*,

new media, as an extension of man, can liberate and empower individuals, regardless of social status[113]. It has borne millions of 'publishers' who are able to circumvent the traditional mass media, yet fulfil a vital constitutional function as citizen journalists. On the one hand, it is arguable that this can only be good for freedom of expression. These 'publishers' are not subject to the filter system discussed above and, for instance, political bias, censorship, the influence of media ownership or editorial control.

On the other hand, this has a huge impact on individual and societal perceptions of privacy. The power that new media wields, quite literally in our hands, can intoxicate individuals, who are perhaps not prepared for the responsibility that comes with its use, and leads them to communicate as though they operate within a "*'Wild West', law free zone in Cyberspace"*[114]. According to McGoldrick, this has led to *"catastrophic consequences"* [115]. For example, individuals in the UK, and elsewhere, have been convicted of criminal offences[116], investigated by the Federal Bureau of Investigation [117], sued for defamation [118], and have been subject to

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Time, 25th December 2006, http://content.time.com/time/magazine/article/0,9171,1570810,00.html accessed 19th May 2015

[113] D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective', *HRLR* 13 (2013), 125-151,130; See also: *Twitter's fightback against depression*, GQ Magazine, May 2014, 226. This article considers how the former professional footballer, Stan Collymore, used Twitter to document his depression to raise awareness of mental illness to help other sufferers; P. Bernal, 'A defence of responsible tweeting', *Comms. L*. (2014), 19(1), 12-19, 14-15.

[114] A. Yen, 'Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace', (2002) 17 *Berkeley Technology Law Journal* 1207; See also G. Benaim, *A future with social media: Wild West or Utopia? You have a stake in the outcome*, http://inforrm.wordpress.com/2014/05/14/a-future-with-social-media-wild-west-or-utopia-you-have-a-stake-in-the-outcome-gideon-benaim/ accessed 16th May 2014

[115] D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective', *HRLR* 13 (2013), 130-131

[116] For example, see *R v Blackshaw* [2011] EWCA Crim 2312

[117] A 14-year-old Dutch girl was arrested by police in Rotterdam following a tweet made on 13th April 2014 to American Airlines, stating: *"@AmericanAir hello my name's Ibrahim and I'm from Afghanistan. I'm part of Al Qaida and on June 1st I'm gonna do something really big bye"*. Following her arrest American Airlines confirmed that it would pass on the girl's IP address to the FBI for investigation: See, A. Withnall, *Twitter's American Airlines 'terror threat' 14-year-old girl arrested by police in Rotterdam*, The Independent, 14th April 2014 http://www.independent.co.uk/life-style/gadgets-and-tech/twitters-american-airlines-terror-threat-14yearold-girl-arrested-by-police-in-rotterdam-9259485.html; J. McCully, *Terror on Twitter*, http://inforrm.wordpress.com/2014/04/29/terror-on-twitter-jonathan-mccully/#more-26428 both accessed 30th April 2014

[118] For example, see: *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781; [2008] Info TLR 318; *Cairns v Modi* [2012] EWHC 756 (QB); [2012] EWCA Civ 1382; *Tilbrook v Parr* [2012] EHHC 1946 (QB). See also the recent Australian case of *Mickle v Farley* [2013] NSWDC 295 (Farley, a student, was ordered to pay Mickle, his teacher, A$105,000 in damages for tweets sent to his followers) judgment accessible via http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=169992; In the USA, a

disciplinary proceedings, and in some cases, dismissal by their employer[119]. Thus, a consequence of the ubiquity and diversity of these platforms, and the way in which they have ingrained themselves within our social cultural fabric, is that habits, conventions and social norms, that were once informal and transitory manifestations of social life, are now infused within new media platforms. Our perceptions of the parameters of our private lives, and the privacy of others, continue to shift. Boundaries that were relatively clear and static have now become blurred. What were casual and ephemeral actions and/or acts of expression, such as conversing with friends or colleagues or swapping/displaying pictures, or exchanging thoughts that were once kept private or maybe shared with a select few, have now become formalised and permanent[120]. New media's embodiment of the extension of man theory, and its transcendence of a physical filtration system, has meant that these actions and expressions are, in the click of mouse, or the flick of a finger, publicised for the world to see. They enter the "*public domain, with the potential for long-lasting and far reaching-consequences"*[121].

Yet, despite the pitfalls associated with using these platforms, as alluded to above, new media is now a vital, and often the preferred method of imparting and receiving news[122]. As Oster states, its contribution to matters of public interest cannot

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Nevada court ordered the founder of a 'revenge porn' site to pay US$250,000 in damages for defamatory tweets stating that plaintiff was a pedophile who possessed child pornography: D, Lee, *'Revenge porn' site owner Hunter Moore sued for defamation*, 11th March 2013, http://www.bbc.co.uk/news/technology-21740386 accessed 30th April 2014.

[119] See generally, P. Landau, *The antisocial network: why Facebook abuse is a matter for employers*, The Guardian, 1st May 2012 http://www.theguardian.com/money/work-blog/2012/may/01/antisocial-network-facebook-abuse-employers accessed 30th April 2014; There have also been a number of instances involving, in particular, professional football players, who have been subject to disciplinary action by their club and the Football Association following the use of social media. For example, see generally: T. Lowles, *Professional Footballers and Twitter: A match made in (tabloid) heaven*, http://inforrm.wordpress.com/2014/01/16/professional-footballers-and-twitter-a-match-made-in-tabloid-heaven-tim-lowles/#more-24668 accessed 30th April 2014; P. Coe, *Social Media 'faux pas': there's only one 'tweeting' winner*, http://inforrm.wordpress.com/2014/11/06/social-media-faux-pas-theres-only-one-tweeting-winner-peter-coe/#more-28332 accessed 1st December 2014

[120] J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 6-7

[121] Ibid. See also: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', *C.L.J.* 2012, 71(2), 366-377; The case of the then 17-year-old Paris Brown who stood down as Youth Police and Crime Commissioner over tweets she made when she was 14 to 16 years-old V. Dodd, *Youth crime commissioner Paris Brown stands down over Twitter row*, The Guardian, 9th April 2013, http://www.theguardian.com/uk/2013/apr/09/paris-brown-stands-down-twitter accessed 1st May 2014

[122] According to Ofcom's report, The Communications Market 2013, at [1.9.7], 23% of people use social media platforms, such as Facebook and Twitter, for news: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/UK_1.pdf accessed 19th May 2015

be overrated, just as traditional journalism should not be underestimated[123]. This is because new media facilitates the instantaneous, and often spontaneous, expression of opinions and venting and sharing of emotions, thoughts and feelings[124]. Consequently, the internet is saturated with poorly researched, bias and meaningless material. For instance, in his Inquiry, Leveson LJ refers to Popbitch that, in his Lordship's opinion, is: *'clear in its ambition to entertain and understands itself to "poke fun" and comment on the "lighter" side of celebrity culture'*[125].

Despite the best intentions of some serious citizen journalists, they may still lack the education, qualifications and experience to distinguish themselves from professional journalists. Indeed, bloggers post information despite being uncertain as to its provenance and without verifying it for reliability, and instead, rely on readers to judge its accuracy[126]. To the contrary, a blog by a professional journalist may include spontaneous comments and conversation, whilst being supported by professional experience and resources[127]. Although Mill's argument from truth is not concerned with these issues, the criticisms levelled at the theory later in this Chapter clearly apply[128]. Furthermore, these concerns are paradigm examples of the rejoinders raised in relation to Holmes J marketplace of ideas and the argument from self-fulfilment[129]. There exists a symbiosis between citizen journalism and the traditional media that has been articulated by a number of commentators. Essentially, this relationship is mutually beneficial because professional journalists and traditional media entities research and cover the findings of citizen journalism that, sequentially, adds credence to the citizen journalist's work and facilitates the wider dissemination of their research[130].

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[123] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 63

[124] Indeed, in April 2014 Facebook emailed its users to inform them that the messages function is moving out of the Facebook application due to their Messenger application enabling users to reply 20% faster than using Facebook.

[125] Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 168 [4.3]

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

[127] Rowbottom argues for a high and low level distinction for speech that is based on the context within which the expression is made, as opposed to a value based distinction deriving from the content of the expression. See: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', *C.L.J.* 2012, 71(2), 355-383, 371

[128] See section 5.3 below

[129] See sections 5.4 and 5.5 below

[130] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 64; C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When

4 TRADITIONAL APPROACHES FOR DETERMINING THE BENEFICIARIES OF 'MEDIA FREEDOM'

4.1 INTRODUCTION

Traditionally courts and scholars from different jurisdictions have used the following approaches to determine whom and what should benefit from the existence of a distinct right to media freedom: the press-as-technology model; the 'mass audience approach' and; the 'professionalised' publisher approach'[131]. As alluded to above, and discussed in more detail below in relation to these approaches, new media's creation of citizen journalism means that the ability to reach mass audiences is no longer the reserve of traditional media institutions, or trained journalists. This blurring of the lines between our perceptions of the traditional media and citizen journalists has created doctrinal uncertainty as to how the courts should determine the beneficiaries of 'media freedom'. Arguably, in the context of new media, these factors can no longer be relied upon to distinguish between media and non-media actors. As a result, this section will argue that although these approaches may once have been effective, they now lack merit and are, potentially, redundant.

4.2 PRESS-AS-TECHNOLOGY MODEL

As previously explored[132], the dominant view in the US, based upon the press-as-technology model, is that the media should not be subject to any privileges or special duties[133]. Accordingly, there is no need to distinguish it at all and, as a result, this model does not provide the means to do so. This is because, so the press-as-technology movement argues, the Framers of the Constitution understood the words *'or of the press'* to secure the right of every person to use communications technology, as opposed to laying down a right exclusively available to members of

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Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 345; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain,* (7th ed. Routledge, 2010), 286

[131] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 64-68

[132] See section 2.1 above

[133] See generally: E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459

the publishing industry[134]. As a result, in the view of the Supreme Court, the First Amendment protects speech not speakers, regardless of whether the source of the expression is a professional journalist or media organisation, or whether it's a casual social media user[135]. Therefore, in the case of *Branzburg v Hayes*[136], White J, giving the opinion of the majority, resisted attempting to conceptualise the media, and define what it consists of. In White J's judgment, this is because: *"freedom of the press is a fundamental personal right"* which is not confined to the mass media but, instead, attaches to *"every sort of publication which affords a vehicle of information and opinion"* [137]. Thus, there appears a concern, echoed, although not necessarily supported, in the work of scholars such as Oster, Baker and Amar that, in attempting to define the media, there is a risk of creating either an over-inclusive or over-exclusive interpretation of journalism[138]. The former could, potentially, be misused[139], while the latter could give rise to allegations of discrimination[140]. This is because non-journalists, who regularly contribute to matters of public importance, such as business leaders, scientists and artists, would not fall within the province of the additional protection afforded to the media[141]. However, this argument is, it is submitted, largely without merit. Protecting the media with specific provisions or clauses, that provide extra privileges and duties, does not mean those who are not part of the institutional press would be deprived of their rights. For instance, within the context of ECHR jurisprudence, artistic[142] and commercial expression[143] are subject to a relatively high level of protection. Similarly, Article 13 CFREU, and Article 5(3) of the German Basic Law protect freedom of science and freedom of the arts. Thus, there is no

[134] E. Volokh, 'Freedom of the Press as an Industry, or From the Press as a Technology' (2011-12) 160 *University of Pennsylvania Law Review* 459, 463
[135] *Citizens United v FEC* 130 S Ct 876, 905 (2010)
[136] 408 US 665, 704 (1972)
[137] 408 US 665, 704 (1972)
[138] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 65
[139] C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1013-1016
[140] V.D. Amar, 'From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later' (1999) 50 *Hastings Law Journal* 711, 714-715
[141] V.D. Amar, 'From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later' (1999) 50 *Hastings Law Journal* 711, 714-715; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 65
[142] *Muller v Switzerland* (1991) 13 E.H.R.R. 212; *Otto Preminger v Austria* (1995) 19 E.H.R.R. 34; *IA v Turkey* (2007) E.H.R.R. 30
[143] *Markt Intern v Germany* (1989) 12 E.H.R.R. 161, [33]

reason to suggest that, within these legal frameworks at least, privileged protection of the media would operate against business leaders, artists or scientists[144].

In addition to the argument above, there are wider-reaching reasons why the press-as-technology model, and the resistance to defining the media and delineating between those who are subject to a right to media freedom over and above those that are simply entitled to the right to freedom of expression, are subject to criticism. In fact, there is a strong judicial and academic counter-movement in the US that not only correlates more closely with ECHR jurisprudence, but also undermines the model within the new media era.

It is submitted that the specific media protection clauses enshrined within legal instruments, such as Article 11(2) CFREU and the First Amendment, in addition to those provisions safeguarding freedom of expression[145] strongly suggests that, for example, the European Union and the Framers of the US Constitution, intended to distinguish the two, in that they could apply to different entities and mean something different. Taking the First Amendment as an example, scholars such as Stewart J and Bezanson have argued that these provisions must mean something more otherwise they would be redundant[146]. For Stewart J, the First Amendment free press clause operates as a structural guarantee to enable the press to fulfil its constitutional functions of acting as the Fourth Estate; to provide additional checks and balances on the government. Accordingly, the twin speech and press rights are: *"no constitutional accident, but an acknowledgment of the critical role played by the press…"*[147] Further, according to West, in addition to the Fourth Estate function, the press fulfils another primary role beyond the values served by the general right to freedom of expression: dissemination of information of public interest[148].

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[144] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 65-66

[145] See section 2.1 above

[146] P. Stewart J, 'Or of the Press', (1975) 26 *Hastings Law Journal* 631, 633; R.P. Bezanson, 'Whither Freedom of the Press?' 97 *Iowa Law Review* 1259, 1261-1262. See also: M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1974-5) 26 *Hastings Law Journal* 639, 640

[147] *Houchins v KQED Inc.* 438 US 1, 17 (1978)

[148] S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1069-1070

In today's new media era, clearly the institutional press is not the only means to provide a check and balance on government, or convey matters of public interest. Other forms of media can, and do, fulfil this role effectively[149]. Consequently, these views of the press clause are not exclusively institutional[150]. The functions of the press identified by Stewart J and West, as being conducive to its constitutional role, continue to be served by a variety of traditional and new media[151]. Arguably, therefore, when constitutions, statutes and normative theory require protection of the media in addition to freedom of expression, it is incumbent on the courts to delineate between the two, as demonstrated by ECHR jurisprudence, despite the fact that such a challenging line-drawing exercise will generate controversial judgments[152]. Accepting the media as a discrete legal institution[153] is, it is submitted, vitally important within a new media era, in which we can be constantly bombarded by a cacophony of information from different *forms* of media. It is the fulfilment of the unique functions identified by Stewart J and West that serves to distinguish the media-as-a-constitutional-component[154] from mere media entertainment, as the activities of the latter are not subject to the same legal protection[155], at least within an ECHR and CFREU context.

4.3 MASS AUDIENCE APPROACH

According to the UN Human Rights Committee (UNHRC): *'Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere…'*[156] On this analysis, anyone with the ability to

[149] See section 3.2 above
[150] R.P. Bezanson, 'Whither Freedom of the Press?' 97 *Iowa Law Review* 1259, 1267
[151] See section 3.2 above; According to Oster: Media freedom identifies the rights holder. It is concerned with freedom of the press and of the media, and therefore does not convey a right on to a vehicle of publication. In other words, it is *"...not the freedom to publish anything with certain media"* J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 66
[152] F. Schauer, 'Towards and Institutional First Amendment' (2004-5) 89 *Minnesota Law Review* 1256, 1260. See also: C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1016; S.R. West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025, 1048
[153] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) JML 57-78, 66
[154] This concept is discussed in greater detail throughout the remainder of this Chapter
[155] D.A Anderson, 'Freedom of the Press' 80 *Tex. L. Rev* 429, 442 (2002); See Chapter 3 for further discussion on the meaning of 'public interest'.
[156] UN Human Rights Committee, General Comment No 34 (CCPR/C/GC/34), 12th September 2011, para. 44

disseminate information to a mass audience could be considered to be media, and therefore be subject to the same privileges[157]. Historically this approach could have enabled a distinction to be made between media and non-media actors as professional journalists, and the newspapers, publishers and broadcasters they worked for, tended to be the only entities with the ability to reach mass audiences. However, new media's creation of citizen journalists means that this ability is no longer the reserve of these organisations and their journalists or broadcasters. Instead, anybody with access to the internet can, in theory at least, convey information to millions of people through the creation of a blog, posting a YouTube video or using social media, such as Twitter, Facebook or Instagram. Indeed, if you consider the reach of sporting celebrities such as Cristiano Ronaldo, Andy Murray and Lewis Hamilton through their social media accounts, based on the UNHRC's formulation, they would be considered 'journalists'[158].

This situation is paradigmatic of the over-inclusive interpretation of media expression envisaged by Oster and Baker outlined above[159], as it captures virtually every internet publication, including, for instance, tweets by celebrity footballers. Furthermore, as discussed above[160], clearly the appearance and quality of information available on the internet, whether that be through blogs, websites or social media, varies drastically. Despite these apparent inconsistencies, the mass audience approach would classify a casual tweet from Cristiano Ronaldo as being legally indistinguishable to a citizen journalist using their blog to report from a war zone. Therefore, it would be incorrect to classify all publications capable of reaching mass audiences as media: the internet, as a vehicle through which information can be conveyed, must not confused with the media as a legal concept, just as the medium 'paper' does not, necessarily, constitute the press[161]. Consequently, it is imperative to identify diligent journalists operating within the media-as-a-constitutional-component,

[157] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 66-67

[158] By way of example, at the time of writing, Cristiano Ronaldo has 37.1 million followers on Twitter alone. Also, on Twitter, Lewis Hamilton has 2.8 million, Rory McIlroy has 2.5 million and Roger Federer and Andy Murray have 3.2 million followers each.

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

[160] See section 3.2

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

regardless of the form that takes, and distinguish these from media entertainment and *other* information.

4.4 'PROFESSIONALISED' PUBLISHER APPROACH

The Committee of Ministers of the Council of Europe and the jurisprudence of the ECtHR regularly refer to 'media professionals'[162]. Thus, in cases such as *Perrin v UK*[163] and *Willem v France*[164] the ECtHR did not grant protection to private and non-professional internet publications. This view is mirrored in the US in that, for example, under New York shield law, only *'professional journalists'* working for *'gain or livelihood'*[165] are entitled to benefit from special journalistic dispensations[166]. These positions lend support to an approach whereby a publisher must be connected with, and remunerated by, a traditional media company, and/or have undertaken formal journalistic education and training to benefit from privileges attributed to media freedom.

In contrast to the mass audience approach, it is submitted that this approach animates concerns of over-exclusivity[167], for reasons that are relevant within the context of new media. Firstly, who amounts to a professional journalist cannot be defined by membership of a professional body, as unlike lawyers and doctors, journalists are not required to be members of such organisations. Secondly, just because a person has not undergone formal journalistic education or training does not mean they cannot be diligent and professional reporters. Equally, requiring that a person be employed by a professional media organisation eliminates anyone not

[162] For example, see Appendix to Recommendation No R (2000) of the Committee of Minsters of the Council of Europe to Member States on the right of journalists not to disclose their sources of information: *'For the purposes of this Recommendation…the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication'; Surek and Ozdemir v Turkey* App nos. 23927/94 and 24277/94 (ECtHR, 8 July 1999) para. 63; *Wizerkaniuk v Poland* App no. 18990/05 (ECtHR, 5 July 2011), para. 68; *Kaperzynski v Poland* App no. 43206/07 (ECtHR, 3 April 2012), para. 70

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

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

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

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

[167] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 65

subject to regular remuneration. This would include freelancers, bloggers and social media commentators, despite the fact their work may contribute to matters of public interest[168].

The 'professionalised' publisher approach is unconvincing when considering that private blogs can be the only source of news coverage from, for example, war zones, as was the case during the Arab Spring uprising[169]. In contrast, educated and professionally trained journalists, employed by media organisations, do not always write or broadcast material that is in the public interest[170]. Instead, this work may be subject to conflicting interests, such as commercialism[171]. Thus, establishing a presumption that a tabloid journalist reporting on a 'kiss-and-tell' story should be subject to greater legal protection, under the auspices of media freedom, than a private citizen journalist diligently blogging from an area embroiled in conflict, merely because the former is remunerated by a media organisation, and is professionally trained and educated is, it is submitted, unmeritorious and illogical[172]. The former could be classed as mere media entertainment, whilst the later is paradigmatic of the media-as-a-constitutional-component.

5 THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT: A FUNCTIONAL APPROACH TO DISTINGUISHING THE MEDIA FROM NON-MEDIA ACTORS

5.1 INTRODUCTION

The previous section has established the shortfalls of the traditional methods adopted by courts and scholars for distinguishing between media and non-media actors: they simply do not fit in the new media arena. Based on a combination of jurisprudence and scholarship, and by recourse to the philosophical rationales underpinning freedom of expression and the media, this section will attempt to formulate a functional media-

[168] E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 136-137
[169] See generally: D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' *HRLR* 13 (2013) 125-151
[170] See generally: R.D. Barnes, *Outrageous Invasions Celebrities' Private Lives, Media and the Law*, (Oxford University Press, 2010)
[171] See fn 74; E. Barendt, *The First Amendment and the Media*, 30-31 in I. Loveland (ed), *Importing The First Amendment Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing, 1998)
[172] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 68

as-a-constitutional-component approach that, theoretically and normatively, justifies the media as a distinct legal institution. It will argue that the performance of a constitutional function should define the beneficiaries of media freedom, as opposed to the individual being defined as media, simply based upon their employment or training. Ultimately, it seeks to establish the egalitarian principle that media freedom, and its privileges, attach to the constitutional component, and could therefore apply to anyone serving a constitutional function: that is, operating as the Fourth Estate and/or disseminating information of public interest to an audience.

5.2 FREEDOM OF EXPRESSION JUSTIFICATIONS AND THEIR APPLICATION TO MEDIA FREEDOM

As stated by Fenwick and Phillipson, freedom of expression is regarded as being one of the most fundamental rights[173]. Justification for its protection is underpinned by philosophical theories. These are the: (i) argument from truth; (ii) marketplace of ideas[174]; (iii) argument from self-fulfilment; (iv) argument from democratic self-governance. This philosophical foundation is apparent, to varying degrees, within contemporary domestic jurisprudence and, that of the European Court of Human Rights (ECtHR)[175]. For instance, the House of Lords recognised the existence of all of these rationales in *R v Secretary of State for the Home Department, ex parte Simms*[176],

[173] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 12

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

[175] According to Fenwick and Phillipson, in *Handyside v United Kingdom* (1976) 1 EHRR 737 the ECtHR referred, at least implicitly, to these theories, when it stated, at para. 49: *"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."* See H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 39

where Lord Steyn stated the often repeated passage[177] that freedom of expression *"serves a number of broad objectives"*, and is intrinsically valuable because:

"First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Mr Justice Holmes (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate..."[178]

Leading commentators, including Dworkin[179], Schauer[180], Greenwalt[181], Raz[182], Barendt[183], Wragg[184] and Fenwick and Phillipson[185], have already provided rich and extensive coverage of these arguments, exploration of which is beyond the scope of this thesis[186]. Instead, this section seeks to do the following: advance the proposition that the argument from democratic self-governance is better suited than the arguments from self-fulfilment and truth, and the marketplace of ideas, to underpin new media, and provide a workable definition of 'the media' as a constitutional component, that effectively delineates it from non-media actors.

5.3 THE ARGUMENT FROM TRUTH

The argument from truth is located in John Stuart Mill's 19th Century text *On Liberty* and, predominantly, his essay, *Of the Liberty of Thought and Discussion*[187]. The

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[176] [2000] 2 AC 115
[177] Lord Steyn's judgment has been referred to numerous times within domestic jurisprudence. For a recent example see: *R (On the application of Lord Carlisle of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 per Lord Kerr at [164]
[178] [2000] 2 AC 115, 126
[179] R. Dworkin, *Do we have a right to pornography?* In *A Matter of Principle* (Harvard University Press, 1985); R. Dworkin, *Freedom's Law*, (Oxford University Press, 1996)
[180] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982)
[181] K. Greenwalt, 'Free Speech Justifications', (1989) 89 *Columbia Law Review* 119
[182] J. Raz, 'Free Expression and Personal Identification', (1991) 11 *OJLS* 303
[183] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005)
[184] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', (2013) *Public Law*, Apr 363-385
[185] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006)
[186] See also: L. Alexander, *Is there a Right to Freedom of Expression*, (Cambridge University Press, 2005); T. Campbell and W. Sadurski, *Freedom of Communication*, (Dartmouth, 1994); J.M. Bakin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1
[187] J. Mill, *On Liberty and Other Essays*, (Oxford University Press, 1991); J. Mill, *On Liberty*, *Essays on Politics and Society*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977). Other Millian essays are of importance to the theory. When required, they are cited in the footnotes.

overall thrust of Mill's argument is that truth is most likely to emerge from totally uninhibited freedom of thought, and almost absolute freedom of expression[188]. Consequently, thought and discussion protects individual liberty from its predominant threat[189], which is not *"political oppression"*[190], but *"social tyranny"*[191]: a *"tyrannical majority"*[192] that does not allow for autonomous thought, expression or opposition, but instead requires absolute accord with its own ideas and opinions[193].

As will be seen below, in relation to the four facets of Mill's argument, it is subject to a conflict between the discoverability of truth, and the constant need for disagreement about that truth[194]. Mill argues that truth does not, always and immediately triumph, but rather, that it will continually be subject to rediscovery, and will eventually emerge victorious, despite suppression[195].

According to Schauer, for Mill, the issue is not certain truth; instead, his primary concern is *"epistemic advance"*[196]. Indeed, Mill regards truth, at times, as merely a by-product of open discussion[197]. Thus, of paramount importance to Mill is not the discovery of truth, but the process of discussion and debate[198]. Mill argues that the foundations and reasoning upon which opinions are based must be continually tested and, as result, the acceptance of alternative views by others, and ultimately the

[188] J. Mill, *On Liberty*, *Essays on Politics and Society*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 225-226; P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law*. (2013), Apr, 363-385, 365; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 14

[189] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 229

[190] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 220

[191] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 220

[192] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 219

[193] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 219-220; P. Wragg, *Mill's dead dogma: the value of truth to free speech jurisprudence*, P.L. (2013), Apr, 363-385, 365

[194] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365; The importance of truth is discussed in more detail below.

[195] ibid. 365

[196] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 25

[197] J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 110

[198] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 20; This is discussed in relation to problems with the justifications below

reliable discovery of truth, must derive from effective persuasion, rather than coercion[199].

The argument has four facets. Firstly, the state would expose its own fallibility if it suppresses opinion on account of that opinion's perceived falsity as, in fact, it may be true[200]. Secondly, even if the suppressed opinion is objectively false, it has some value, as it may (and in Mill's opinion very commonly does) contain an element of truth[201]. Thirdly, since the dominant opinion on any given subject is rarely, or never, the whole truth, what remains will only appear as a result of the collision of adverse opinions[202]. Finally, notwithstanding the third facet, even if the received opinion is not only true, but the entire truth, unless it is rigorously discussed and debated, it will not carry the same weight, as the rationale behind it may not be fully and accurately comprehended[203]. Consequently, unless opinions can be frequently and freely challenged, by forcing those holding them to defend their views, the very meaning and essence of that true belief may, itself, be weakened, become ineffective, or even lost[204]: In Mill's words, the true belief: *"will be held as a dead dogma, not a living truth"*[205].

As articulated by Wragg, Mill values open discussion and debate instrumentally *and* intrinsically[206]: *"as a condition of that rationality and belief which he conceives of as a characteristic feature of a free man"*[207]. Mill argues that there should be: *"freedom of opinion and sentiment on all subjects, practical or*

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[199] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 217-223

[200] See generally: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 8; J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 229-243, 258

[201] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 229

[202] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 252, 258

[203] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 258

[204] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 258; See also: P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365

[205] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 243, 258

[206] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365; See also: H. Fenwick, *Civil Liberties and Human Rights* (4th ed. Routledge Cavendish, 2007), 302

[207] J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 107

speculative, scientific, moral or theological"[208]. Accordingly, the very existence of disagreement is critical to the health of society[209] and the type or quality of expression is irrelevant, as the *"usefulness of an opinion is itself a matter of opinion"* and to make an assessment of quality is an *"assumption of infallibility"*[210]. Thus, as advanced by Fenwick and Phillipson, it appears that Mill envisaged the argument to apply to the expression of opinion and debate. However, it can also be used in support of freedom of information claims as: *"the possession of pertinent information about a subject will nearly always be a prerequisite to the formation of a well-worked-out opinion on the matter"*[211].

Despite Schauer's argument that the desirability of truth within society is almost universally accepted[212], and the fact that this view seems to correlate with Jacob LJ's *obiter dicta* in *L'Oreal SA v Bellure NV*[213] that, pursuant to various international laws[214], *"the right to tell – and to hear – the truth has high international recognition"*[215], the assumption derived from the argument, that freedom of expression leads to truth, can be attacked on a number of fronts[216]. Firstly, there is not necessarily a causal link between freedom of expression and the discovery of truth[217]. This is particularly pertinent with regard to the new media landscape, where anybody can express opinions or views, or disseminate information. Consequently, new media outlets are saturated with information that is inaccurate, misleading or untrue. Secondly, despite Jacob LJ's dicta, there is no right to truth *per se*[218]. Further,

[208] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 226
[209] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 365
[210] J. Mill, *On Liberty*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977), 233-234; See also: K.C. O'Rourke, *John Stuart Mill and Freedom of Expression The genesis of a theory*, (Routledge, 2001), 108
[211] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 15
[212] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 17; See also J. Feinberg, *Social Philosophy*, (Prentice-Hall, 1973), 26
[213] [2010] EWCA Civ 535
[214] Article 19 Universal Declaration of Human Rights; Article 19(2) International Covenant on Civil and Political Rights; Article 10(1) European Convention on Human Rights; Article 11(1) Charter of the Fundamental Rights of the European Union: [2010] EWCA Civ 535, [10]
[215] [2010] EWCA Civ 535, [10]
[216] For commentary criticising the argument from truth in relation to pornography, see: C. MacKinnon, *Feminism Unmodified*, (Cambridge University Press, 1987), 166; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 309-407
[217] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 15
[218] P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', *Public Law* (2013), Apr, 363-385, 372

contrary to Schauer's statement, arguably the dissemination of truth is not always a good thing. In some situations, the protection of other, countervailing values, should take precedent. Ironically, this is illustrated by the international instruments referred to by Jacob LJ in *L'Oreal*. Taking the ECHR as an example, Article 10(1) is qualified by Article 10(2), which enables expression, and therefore both truths and untruths, to be legitimately withheld on grounds of, *inter alia*, health or morals, national security, public safety, protecting the reputation and honour of private individuals, the prevention of disorder or crime and breach of confidence. Equally, this can be applied to trade secrets, medical information, data protection, confidentiality agreements, or official secrecy. Within the context of new media, the revenge porn phenomenon illustrates this dichotomy. This new offence, which exists by virtue of section 33 of the Criminal Justice and Courts Act 2015, was essentially created to combat individuals sharing, via text messages and social media, sexually explicit content of ex-partners without that person's permission[219]. Although the explicit pictures, videos and accompanying text may well be 'true', the dissemination of this content could, clearly, harm the victim's health and morals, their reputation and honour and be a misuse of private information[220]. Thus, as Barendt argues: *"[i]t is not inconsistent to defend a ban on the publication of propositions on the ground that their propagation would seriously damage society, while conceding that they might be true."*[221]

5.4 THE MARKETPLACE OF IDEAS

This theory originates from the jurisprudence of US judges. Although it is a distinct theory, it is generally regarded as deriving from Mill's argument from truth[222]. The theory emanates from Justice Holmes judgment in *Abrams v United States*[223], in which it was asserted that: *"the best test of truth is the power of the thought to get itself accepted in the competition of the market."* [224] Subsequently, Holmes J's

[219] For further analysis see: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 13-14

[220] Prior to the Criminal Justice and Courts Act 2015 coming into force, a number of criminal offences and civil causes of action were applied to revenge porn. See: P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 13-14

[221] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 8

[222] See fn 174

[223] 250 US 616 (1919)

[224] 250 US 616 (1919), 630-631; See also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes

judgment garnered support from other influential judges, including: Justice Brandeis in *Whitney v California*[225]; Justice Hand in *United States v Dennis*[226] and *International Brotherhood of Electrical Workers v NLRB*[227]; and, Justice Frankfurter in *Dennis v United States*[228] who observed that: *"the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded other truths. Therefore, of man to search for truth ought not be fettered, no matter what orthodoxies he may challenge"*[229]. According to the theory, an open and unregulated market, which allows for ideas to be traded through the free expression of all opinions, is most likely to lead to the truth and, consequently, increased knowledge[230]. Therefore, the examination of an opinion within the 'marketplace' subjects it to a test that is more reliable than individual or governmental appraisal[231].

One interpretation of the theory is that discovering truth is dependent upon unregulated competition in the actual, as opposed to ideal marketplace[232]. To the contrary, it is arguable that it is grounded in relativism, in that the ideas that emanate from the competitive market are the truth, leaving nothing more to be said[233]. Oster relies heavily upon this rationale to distinguish media from non-media actors[234]. In his view, because of the media's power and ability to communicate via multiple channels, the theory dictates that the media should be subject to protection and only minimal restriction. This is because this 'privilege' for journalists encourages the dissemination of more information that, sequentially, generates more valuable,

[225] 274 US 357 (1927), 375-378
[226] 181 F2d 201 (2d Cir 1950); *Dennis v United States* 341 US 494, 584 (1951)
[227] 181 F2d 34 (2d Cir 1950)
[228] 341 US 494 (1951), 546-553
[229] See also Frankfurter J's judgment in *Kovacs v Cooper* 336 US 77, 95-7 (1949)
[230] See generally: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 70; J. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press', (2006) 9 *NYU Journal of Legislation and Public Policy*, 751, 762
[231] F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 16; see also: J. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press' (2006) 9 *NYU Journal of Legislation and Public Policy* 751, 762
[232] B. Williams, *Truth and Truthfulness*, (Princeton University Press, 2002), 214-215; See also: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12
[233] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12
[234] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 70-71; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211

truthful information[235]. However, it is submitted that this reasoning is flawed, as it is the very reasons used by Oster to support his approach that renders the theory unsuitable to that which it has been applied. Indeed, according to Barendt, whatever interpretation is adopted, the theory *"rests on shaky grounds"*[236] for reasons that can be applied to both traditional and new media[237].

Firstly, if the assertion that one statement is stronger than another (whether these statements are communicated via a tweet, or a post on Facebook or YouTube, or whether they are printed in a traditional newspaper) cannot be intellectually supported and defended, the notion of truth loses its integrity[238], as history demonstrates: falsehood frequently triumphs over truth, to the detriment of society[239]. Secondly, the theory assumes that recipients of the communication consider what they read or view within the context of the 'marketplace' rationally; deciding whether to accept or reject it, based on whether it will improve their lifestyle, and society generally[240]. As Barendt suggests, this assumption is unrealistic, and over-optimistic[241]. Both criticisms are pertinent to new media, which proliferates a huge amount of information that is poorly researched or simply untrue, yet has the potential to, and very often does emerge as the dominant 'view'[242] regardless of the detrimental impact this may have on society. Thirdly, and of particular relevance to the traditional media, insofar as this theory relates to truth discovery, its integrity is contingent upon the sincerity and truthfulness of the speaker, and therefore assumes that the marketplace contains expression that solely represents the views of the proponents of, for instance, publications or broadcasts, as opposed to being conveyed on the basis of restrictions such as editorial control, ownership, political bias or increased commercial revenue

[235] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 70-71; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211

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

[237] For a comprehensive critique of the theory see: E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12

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

[239] R. Abel, *Speech and Respect*, (Stevens & Sons Limited, 1994), 48; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 57

[240] S. Ingber, 'The Marketplace of Ideas: a Legitimizing Myth', [1984] *Duke Law Journal* 1; J. Skorupski, *John Stuart Mill*, (Routledge, 1991), 371-372

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

[242] This criticism reflects those leveled at Mill's theory above. In particular, Schauer's argument that there is not necessarily a causal link between freedom of expression and the discovery of truth. See section 5.3 above

through advertising and/or sales[243]. This may be true within the context of new media, where there are, in theory at least, less restrictions. Although, this is not always the case, as many bloggers may simply regurgitate false, bias or misleading information[244]. In relation to the traditional media, this assumption is unrealistic, as many media outlets are driven by these restrictions, to the detriment of investigative journalism[245].

5.5 THE ARGUMENT FROM SELF-FULFILMENT

Endorsement of this argument as a justification for freedom of expression of broad application[246] can be found in the jurisprudence of a number of jurisdictions. In *Simms*, Lord Steyn stated that freedom of expression *"…promotes the self-fulfilment of individuals in society"*[247]; in *Handyside v United Kingdom* the ECtHR considered that the right is *"one of the basic conditions…for the development of man"*[248]; Thurgood Marshall J, in the US Supreme Court case of *Procunier v Martinez* held that it *"…serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression"*[249].

The argument is based on the individual liberty paradigm; that individuals must be able to express themselves[250]. Pursuant to this theory, freedom of expression is afforded protection, as it is integral to an individual's need for self-fulfilment and development[251]. Contrarily, suppression of expression is an affront to personal dignity[252], as this undermines equality of respect afforded to individuals to exercise

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[243] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 12
[244] See section 3.2 above
[245] ibid.
[246] A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 4, [1.07]
[247] [2000] 2 AC 115, 126
[248] (1976) 1 EHRR 737 [49]; See also: *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [48]
[249] 416 US 396, 427 (1974); See also: *Whitney v California* 274 US 357 (1927) in which Brandeis J held at 375 that: *"…the final end of the state was to make men free to develop their faculties…*[liberty is valued] *both as an end and as a means."*
[250] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 73; C.E. Baker, 'Scope of the First Amendment Freedom of Speech', (1978) 25 *UCLA Law Review* 964, 996; V. Blasi, 'The Checking Value in First Amendment Theory', [1977] *American Bar Foundation Research Journal* 521, 545; T.M. Scanlon, 'Freedom of Expression and Categories of Expression', (1978-79) 40 *University of Pittsburgh Law Review* 519, 533 ff; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211
[251] M. Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591
[252] D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 78

their moral powers of reason and rationality [253]. Consequently, if expression contributes to the speaker's values and visions, it should be subject to protection[254].

Scholars such as Nimmer, Nestler and Fargo and Alexander argue that media expression, by virtue of constitutional functions, is far less significant under this rationale compared with the argument from democratic self-governance[255]. This is because, pursuant to this argument, freedom of expression emanates from the role of the speaker, not the speaker's impact on society[256]. While a professional or citizen journalist may claim personal gratification and fulfilment from their publications, this rationale does not apply to media companies, as these entities cannot be fulfilled through expression as a natural person can. Thus, media freedom is not inherently valuable on a personal level[257]. Instead, it is instrumentally and functionally valuable, as it protects individuals and legal persons fulfilling a constitutional role for society, rather than protecting expression for expression's sake.

5.6 THE ARGUMENT FROM DEMOCRATIC SELF-GOVERNANCE

This argument is the most fashionable of the justifications in Western democracies[258] and, it is submitted, is best suited to underpin new media and support the notion of the media-as-a-constitutional component. It is based on the premise that the predominant purpose of freedom of expression is to protect the right of citizens to understand political matters in order to facilitate and enable societal engagement with the political and democratic process [259]. Ultimately, an informed electorate is a

[253] D.A.J. Richards, *Free Speech and the Politics of Identity* (Oxford University Press, 1999), 23; D.A.J. Richards, *Toleration and the Constitution* (Oxford University Press, 1986) 169

[254] C.E. Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989) 68-69

[255] M.B. Nimmer, 'Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1975) 26 *Hastings Law Journal* 631, 654; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 212; A.L. Fargo and L.B. Alexander, 'Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts' (2009) 32 *Harvard Journal of Law & Public Policy* 1094, 1097

[256] V.A. Blasi, 'The Checking Value in First Amendment Theory' [1977] *American Bar Foundation Research Journal* 521, 553

[257] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 73-74

[258] E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 18; For example, see *Whitney v California* 274 US 357 (1927) per Brandeis J at 375-378 (1927); the ECtHR cases of, for instance, *Lingens v Austria* (1986) A 103, [42]; *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [48]

[259] See generally: Sir J. Laws, *Meiklejohn, the First Amendment and Free Speech in English Law,* in I. Loveland (ed), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA,* (Hart Publishing, 1998), 123-137; A. Nicol QC, G. Millar QC & A. Sharland, *Media Law*

prerequisite of democracy. Therefore, *"there must be no constraints on the free flow of information and ideas"*[260]. According to Bork, speech regarding *"government behaviour, policy or personnel, whether…executive, legislative, judicial or administrative"*[261] was the original subject that was perceived as being protected by the right to freedom of expression[262]. However, commentators such as Milo, Oster and Chesterman observe that the scope of this approach was seen as being overly restrictive[263], as focusing purely on political expression to the exclusion of other matters of public interest gave rise to an *"old-fashioned distinction between public and private power"* [264]. Consequently, Alexander Meiklejohn, with whom this argument is now primarily associated[265], argued for the substitution of political expression with the wider, and less restrictive notion of 'public discussion', relating to any matter of public interest, as opposed to expression linked purely to the casting of votes[266]. Meiklejohn stated that public discussion is speech which impacts *"directly or indirectly, upon the issues with which voters have to deal* [i.e.] *to matters of public interest"*[267]. A result of this bifurcated interpretation of free speech is a two-tiered approach to freedom of expression[268]: expression that is not in the interest of the public, is not protected, and is therefore open to restriction to protect the general welfare of society[269]. In later writings, Meiklejohn clarified this wider view of 'public discussion', by stating that voting is merely the *"external expression of a wide and diverse number of activities by means of which citizens attempt to meet the*

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and Human Rights, (2nd ed. Oxford University Press, 2009), 3 [1.06]; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 18

[260] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 69

[261] R.H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 I*ndiana Law Journal* 1, 27-28

[262] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 69

[263] ibid.;D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 63-64

[264] M.R. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, (Ashgate Publishing, 2000), 48; See also: A. Kenyon, 'Defamation and Critique: Political Speech and New York Times v Sullivan in Australia and England', (2001) 25 *Melbourne University Law Review* 522, 539; R. Gilson and M. Leopold, 'Restoring the "Central Meaning of the First Amendment": Absolute Immunity for Political Libel', (1986) 90 *Dickinson Law Review* 559, 574

[265] A. Nicol QC, G. Millar QC & A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 3 [1.06]

[266] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, 1960), 42; A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255-257; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 63-64; J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 69

[267] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, 1960), 79

[268] An advocate of this approach is C.R. Sunstein. See generally: C.R. Sunstein, *Democracy and the Problem of Free Speech*, (The Free Press, 1993); C.R. Sunstein, *The Partial Constitution*, (Harvard University Press, 1994)

[269] D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 62-63

responsibilities of making judgments"[270]. Accordingly, education, philosophy and science, literature and the arts, and public discussions on public issues, are activities that will educate citizens for self-government[271].

Historically, due to its reach, it was incumbent upon the traditional media to disseminate matters of public interest, and to act as the public watchdog and Fourth Estate; to provide a check and balance on government. Consequently, the ECtHR has consistently stated that media freedom provides one of the best means for the public to discover and form opinions about the ideas and attitudes of political leaders, and on other matters of general interest, and that the public has a right to receive this information[272]. However, as explored above[273], this role can be fulfilled by both the traditional media and, by virtue of new media, citizen journalists. Therefore, it is submitted that this argument helps to define the media by providing a clear delineation between media and non-media actors. Pursuant to its 'public discussion' scope, this rationale underpins the media-as-a-constitutional-component concept, as it supports media freedom protection, beyond that afforded to private individuals pursuant to the right to freedom of expression, for *any* actor that contributes regularly and widely to the dissemination of matters of public interest and/or operates as a public watchdog.

5.7 MEDIA PRIVILEGE AND RESPONSIBILITIES

The prevailing sections have established that media freedom grants protection beyond that afforded by freedom of expression to media actors fulfilling the media-as-a-constitutional-component concept. However, media that, pursuant to this concept, is subject to these privileges, beyond private individuals, is also subject to duties and responsibilities in excess of those expected of non-media entities. As has been discussed throughout this Chapter, the reach of both the traditional and new media, including citizen journalists, does not just enable it to fulfil its constitutional functions. This power can be abused in equal measure. Due to the reach of the media,

[270] A. Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245, 255
[271] ibid. 257, 263; For judicial application of this wider interpretation of the theory see: *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, (HL) per Lord Cooke at 220; *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, (HL) per Baroness Hale at [158]
[272] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42; *Oberschlick v Austria* (No 1) App no 1162/85 (ECtHr 23 May 1991), para 58; *Scharsach and News Verlagsgesellschaft v Austria* App no 39394/98 (ECtHR, 13 November 2003), para 30
[273] See section 3 above

the potential impact of abuse of power is far greater than those emanating from private individuals. The media is not just capable of invading private lives of individuals, or damaging reputations, but it can also shape and mislead public opinion.

Therefore, the argument from democratic self-governance endorses a two-tiered approach to media expression[274]. Firstly, public discussion should be protected. However, if the expression is not of public interest, it should not be afforded the same level of protection compared to that which is of public concern. This includes speech primarily concerned with commercial or financial matters[275], speech relating to private or intimate matters[276], and hate speech[277]. Further, it is submitted that the argument from democratic self-governance rationale, and its public discussion ambit, dictates that the media's privileged protection, pursuant to it being a constitutional component, is subject to it acting ethically and in good faith, and publishing or broadcasting material that is based on reasonable research to verify the provenance of it and its sources. Incidentally, the only legal instruments that qualify the right to free speech or expression with express reference to these extra duties and responsibilities are Article 10(2) ECHR and Article 19(3) ICCPR. These qualification clauses apply to both media and non-media entities however, according to Oster, their main purpose is to provide member states with a tool to combat abuses of power by the media[278].

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[274] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 71-72

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

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

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

[278] J. Oster, *Theory and Doctrine of 'Media Freedom' as a Legal Concept*, (2013) 5(1) JML 57-78, 72-73; These duties and responsibilities are particularly significant when applied as factors of the qualified privilege defence, as defined by Lord Nicholls in *Reynolds v Times Newspapers* [2001] 2 AC 127, 205 (see also: *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 383 per Lord Hoffmann; *Flood v*

Consequently, and in conclusion, the privilege afforded to the media, deriving primarily from the wide ambit of the argument from democratic self-governance, is based upon a utilitarian, consequentialist and functional understanding of media freedom. The media-as-a-constitutional-component concept means that media actors are protected for disseminating matters of public interest, and operating as the public watchdog/Fourth estate, and therefore fulfilling functions beneficial to society. However, this protection carries with it the *obligation* to fulfil these functions. If it fails to do this, it relinquishes its protection and may be subject to criminal or civil liability.

6 CONCLUSION: A WORKABLE DEFINITION OF 'THE MEDIA' WITHIN THE TRANSITIONAL ERA

Based on the media-as-a-constitutional-component concept of media freedom that has been advanced throughout this paper, it is suggested that an egalitarian principle should be adopted to define the media. This principle and its definition will focus on the functions that are performed by the media actors, as opposed to their inherent characteristics. Therefore, media freedom does not have to be a purely institutional privilege; it can apply to any actor that conforms to the definition. As a consequence of the requirement that these functions are fulfilled in order to satisfy the constitutional component concept, it will also give consideration to the obligations of the media. Pursuant to the scholarship and jurisprudence from both the US and Europe, examined in prevailing sections, the following definition of media is, therefore, proposed: '(1) a natural and legal person (2) engaged in the process of gathering information of public concern, interest and significance (3) with the intention, and for the purpose of, disseminating this information to a mass audience (4) whilst complying with standards governing the research, newsgathering and editorial process'[279].

As the media's privileged protection is based upon the constitutional component concept, which derives from the argument from democratic self-

Times Newspapers Ltd [2012] UKSC 11, [30] per Lord Phillips), and now enshrined within section 4 of Defamation Act 2013

[279] Compare Oster and Ugland for definitions from a European and US perspective respectively: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 74; E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 138

governance, one of the fundamental requirements for determining that an actor is media is its contribution to matters of public interest. Oster's argument that for this requirement to be fulfilled it must occur periodically[280] is, it is submitted, over-exclusive. Actors can fulfil the definition above, and operate as a constitutional component, on one-off occasions or on an ad-hoc basis[281]. This is particularly the case within a new media context, in which contributions to the public interest can be made via many different platforms.

Scholarship and jurisprudence from the US, England and Wales and the ECtHR suggests that this requirement could be met with differences of opinion. From a US scholarship perspective, it is likely to be opposed on a doctrinal basis, as content discrimination is not permitted under the First Amendment[282]. To the contrary however, according to Sunstein: *'…it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee'*.[283] Indeed, the US Supreme Court, and the Court of Appeal, House of Lords and Supreme Court have made consistent reference to the public interest requirement. As Oster observes[284], the courts have expressed this in a number of ways, including: 'public interest' or 'public concern'[285]; 'of political, social or other concern to the community'[286]; 'influences social relations and politics on a grand scale,'; or is part of a 'debate about public affairs'; makes a 'contribution to the public debate'; stimulating 'political and social changes'[287]. Similarly, the ECtHR's jurisprudence

[280] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 74
[281] *Editions Plon v France* App no 58148/00 (ECtHR 18 May 2004) para. 43; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR 22 October 2007) para. 47
[282] L.L. Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371, 1411; C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 976
[283] C.R. Sunstein, 'Pornography and the First Amendment' (1986) 35 *Duke Law Journal* 589, 605
[284] J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 74
[285] For example see: *Gertz v Robert Welch Inc* 418 US 323, 246 (1974); *Dun & Bradstreet Inc v Greenmoss Builders* 472 US 749, 761 (1985); *Hustler Magazine v Falwell* 485 US 46, 50 (1988); *Bartnicki v Vopper* 532 US 514, 528, 533-534 (2001); *London Artists v Littler* [1969] 2 QB 375, 391 (CA) (per Lord Denning); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls); *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 376 (per Lord Bingham); *Flood v Times Newspapers Ltd* [2012] UKSC 11, [24] (per Lord Phillips)
[286] *Connick v Myers* 461 US 138, 146 (1983)
[287] *Roth v United States* 354 US 476, 484 (1957); *New York Times v Sullivan* 376 US 254, 269 (1964); *Hustler Magazine v Falwell* 485 US 46, 53 (1988); *Lion Laboratories Ltd v Evans* [1984] 1 WLR 526, 530; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 897; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls)

provides rich precedent supporting the public interest requirement. It has regularly referred to 'matters of general public interest' and 'matters of public concern' within a variety of different circumstances. The principle has been applied to, amongst many other things[288]: national and local level political speech and reporting[289]; criticism of public administration and justice[290]; abuse of police power[291]; criticisms of businesses and those operating businesses[292]. Hence, according to the ECtHR, publishing material relating exclusively to private matters or on *'tawdry allegations'* and *'sensational and…lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life'* and serving to *'entertain'* rather than *'educate'* is not in the public interest[293].

These situations referred to by the ECtHR relate to mere entertainment, as opposed to the fulfilment of a constitutional function pursuant to the media-as-a-constitutional-component and the proposed definition. In such situations, a publisher is not fulfilling their constitutional function, or role as public watchdog within a democracy. Consequently, they should not be subject to the privileges attached to media freedom. Thus, this proposed definition of the media has the potential to exclude from media privileges actors that have, traditionally, been considered part of the media, and subject to the protection offered by media freedom, despite their purpose being to primarily treat 'the private lives of those in the public eye' as 'a highly lucrative commodity' by exposing aspects of people's private lives or engaging in entertainment and sensationalism. These actors and entities do not conform to the

[288] For a more comprehensive list, see: J. Oster, 'Theory and Doctrine of 'Media Freedom' as a Legal Concept', (2013) 5(1) *JML* 57-78, 75

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

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

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

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

[293] *Mosley v UK* App no 48009/08 (ECtHR 10 May 2011), para. 114; *von Hannover v Germany (No 1)* App no 59320/00 (ECtHR 24 June 2004) para. 65; *Hachette Filipacchi Associes v France* App no 12268/03 (ECtHR 23 July 2009) para. 40; *Eerikainen and others v Finland* App no 3514/02 (ECtHR 10 february 2009) para. 62; *Standard Verlags GmbH v Austria (No 2)* App no 21277/05 (ECtHR 4 June 2009) para. 52; *MGN Ltd v UK* App no 39401/04 (ECtHR 18 January 2011) para.143

requirements of the definition by publishing material that contributes to the dissemination of matters of public interest.