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Introduction

Caught in the web: capturing the zeitgeist of ‘Big Tech’ companies, social media speech and privacy

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The Circle, by Dave Eggers,¹ is a dystopian novel in the classic tradition. Our young protagonist, Mae, is an inexperienced and dreamy-eyed graduate who begins entry-level work at the eponymous Big Tech giant, The Circle, before progressing to the upper echelons. Through her eyes, we enter a world that seems perfect and virtuous (‘My God, Mae thought. It’s Heaven!’), but which hides, but only superficially, an authoritarian nightmare. For The Circle – a combination of all recognisable Big Tech companies – has become so embedded in society that it runs everything. Mae’s job is initially as a customer experience technician, responsible for small advertisers. We quickly learn that perfect feedback is not an aspiration but an expectation. Mae’s agony over a sub-100 per cent approval rating tells us something about the sinister environment she works in. She is not comforted by her score being a record for a new starter because she fears unspoken reprisals and negative reactions from her new colleagues. This speaks volumes about the modern service industry whilst also, at a deeper level, speaking to the split-personality that social media idealises: the individual who has both the unquenchable vanity for constant personal validation and the untameable desire to eviscerate others; in other words, the individual who is entirely sensitive, but lacks sensitivity entirely. As Mae becomes noticed by the company founders, through a series of misfortunes her dawning realisation about the true nature of The Circle leads her on a voyage of self-discovery, which terminates in self-recrimination and personal tragedy.

Central to this narrative are The Circle’s social and political ambitions to realise absolute transparency, in personal and professional life, ostensibly to improve society and the betterment of humankind. This project takes on cultish dimensions when consumers are encouraged (and employees expected) to wear cameras constantly, which broadcast in real time everything they do, every encounter they have, every interaction. This will, its creator believes, eradicate crime, stop corruption (particularly in public office) and improve understanding, as people relate to and learn from the experiences of others. But, for Mae, this has terrible consequences – as when her camera inadvertently captures her mother performing fellatio on her father – and causes her former boyfriend, a Luddite, to be chased to his death as he attempts to escape this brave new world. It is these extreme examples that reveal to the book’s readers the profound effect that social media

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1 Penguin 2013.

and Big Tech have upon our way of living. By normalising privacy-invasion and trivialising its effects, individuals are led to believe the slogans that The Circle utilises to its nefarious ends: ‘Secrets are Lies’, ‘Sharing is Caring’, ‘Privacy is Theft’.

This pernicious challenge to social norms finds its equivalent in real life. Recently, Amber Rudd, as Home Secretary, said, with no sense of irony, “‘real people’ aren’t interested in security features that stop the government . . . reading their messages”.² The owners of Whatsapp were, therefore, morally reprehensible for failing to build ‘backdoor’ access to their product that would allow the government (but not anyone else) to view messages between users. In her view, only ‘terrorists’ and ‘would-be terrorists’ benefit from this impenetrable encryption. In other words, it is only *them* but not *us* who value privacy. This position echoes the US government’s policy on intrusive surveillance: ‘if you have nothing to hide, you have nothing to fear’.³ It speaks to an attitude that concern for privacy is sinister, shameful, or (somehow) unpatriotic. It also signals a misguided sense of trust amongst citizens that the intelligence service activities will only ever affect the lives of *others*, never them. Robert Post perceives this problem clearly when he warns of the ‘extreme fragility of privacy norms in modern life’: ‘if [they are] not acknowledged and preserved, [privacy] will vanish’.⁴

This threat to privacy emanates from both private enterprise and government activity. It is well known that, for example, Google’s advertising services are based partly on cookies (meta data capturing web-browsing activities). As will be recalled, Edward Snowden revealed much about both the US and UK’s intelligence services. Specifically, the existence of three covert operations: PRISM, UPSTREAM and Tempora. In the UK, *The Guardian* wrote extensively about these programmes, which include Government Communications Headquarters (GCHQ) indiscriminately intercepting internet data traffic.⁵ It is alleged that GCHQ has intercepted the webcam images (much of which is of a sexual nature) of millions of ordinary people unsuspected of any wrongdoing.⁶ Currently, there is litigation pending in the European Court of Human Rights on this.⁷ It is alleged that the UK intelligence services accesses:

... electronic traffic passing along fibre-optic cables running between the UK and North America. The data collected include both internet and telephone communications . . . the content of e-mails, Facebook entries and website histories. Data is accessed without the need for reasonable suspicion in relation to the activities of any particular targeted persons.⁸

Yet the popular response to this has been apathetic. As *The Guardian* (again) commented: ‘The lack of public alarm at government internet surveillance is frightening, but perhaps

2 Andrew Griffin, “‘Real people’ don’t care if chat apps like Whatsapp keep their messages private if they get new features, says Amber Rudd” *The Independent* (London, 1 August 2017).

3 See discussion in Daniel J Solove, ‘Why privacy matters even if you have “nothing to hide”’ *The Chronicle of Higher Education* (15 May 2011).

4 Robert C Post, ‘The social foundations of privacy: community and self in the common law tort’ (1989) 77(2) *California Law Review* 957, 1010.

5 Nick Hopkins, ‘UK gathering secret intelligence via covert NSA operation’ *The Guardian* (London, 7 June 2013) <www.theguardian.com/technology/2013/jun/07/uk-gathering-secret-intelligence-nsa-prism>.

6 Spencer Ackerman and James Ball, ‘Optic nerve: millions of Yahoo webcam images intercepted by GCHQ’ *The Guardian* (London, 28 February 2014).

7 *Big Brother Watch and Others v UK*, App No 58170/13 (ECHR, 8 November 2017) <www.privacynotprism.org.uk/assets/files/privacynotprism/496577_app_No_58170-13_BBW_ORG_EP_CK_v_UK_Grounds.pdf>.

8 *Ibid*, Joint Application under Article 34, [31].

it's because the problem is difficult to convey in everyday terms.⁹ It seems we have become desensitised to the harm that privacy-invasions cause or else conclude that this threat is a problem for others, never ourselves.

It is with these challenges in mind that a group of distinguished scholars gathered at the Inner Temple in May 2018 for a conference. This special issue contains the finished outputs from our discussions and reflections. The fake news phenomena and Cambridge Analytica scandal provide the context for Peter Coe's impressive paper. He argues, persuasively, that the expectations commentators place upon the traditional press, to act ethically and for the public good, should be extended to social media news outlets. This is especially pressing given the burgeoning influence of social media. As the US Presidential election and UK Brexit vote show, social media may be more powerful than traditional forms of media; certainly, the personal endorsement that 'likes' by friends, family and colleagues provide may be more influential than commentators have previously appreciated. Coe's argument is that the social responsibility theory popularised by the US Commission for Freedom of the Press, chaired by Robert Hutchins in 1947, provides a ready-made philosophical framework by which to judge the actions of social media news producers, and by which to formulate a model of governance.

On a similar theme, Laura Scaife rejects the common view that social media is unregulatable. In her view, the internet is comparable to the sea: just as regulation of the sea proved challenging but, ultimately, achievable, so too the internet can be regulated properly, but only if we alter our perspective of the means by which that regulation is to be achieved. So, it is that she argues for 'an iterative and dynamic model' of governance. Her broader point is that, also like the sea, although its scope is bewildering, the causes of harm raise issues intelligible to law.

. . . despite the changing times and tides, the nature of basic hazards associated with seafaring does not in essentials change, for example, collisions at sea, sinking, smuggling, environmental pollution and piracy. The full list of potential hazards at sea, much like social media (for example, copyright breaches, defamation, criminal speech, breach of privacy rights etc.) is extensive. My argument is that understanding the development of international maritime law can help prompt a dynamic, dialogue-based model for the regulation of international social media. (434)

Consequently, she envisages a fluid model of regulation which, rather than being fixed and inflexible, is responsive to changing social interactions and cultural needs for social media. In this way, she argues, meaningful regulation is achievable through constant dialogue between users and producers.

Robin Barnes takes this discussion in a different direction in her polemic piece, 'Weapons of mass distraction'. In her view, 'Nightly news delivered as propaganda leaves the core of the public's interest in an ill-defined space' (512) and a proliferation of 'journalism that advances insularity over public education concerning the demise of basic freedoms' (476). She makes many pertinent points as she surveys The Circle's real-world comparators, but her central theme is the pernicious use of social media 'news' to distract from serious newsworthy issues, to concentrate on the trivial and titillating. In this way, her article is a critical comment on the appetites of both US and UK audiences. Her concern is that the peculiar political climate, in which serious political debate is anathema in the land of the ethereal, threatens the culture of dissent that the US previously

9 John Naughton, 'Public apathy over GCHQ snooping is a recipe for disaster' *The Guardian* (London, 16 March 2014).

embraced. For her, this is in marked contrast to the progress made following the civil rights movement which, although it had not reached its end in President Obama's reign, is now in serious jeopardy, for what is to be done about the normalisation – and, in some instances, downright idealisation – of rampant misogyny, Islamophobia and racial intolerance that the US and UK are now in the grip of?

Progressing with the theme of fake news and its discontents, Paul Bernal introduces a more positive note by reminding us that the phenomena is hardly new. In his fascinating contribution, we see its origins in the twelfth-century claims of Geoffrey of Monmouth that the kings of Britain were descended from King Arthur and, before that, the Trojan Aeneas. In this sense, there is an inevitability to the proliferation of 'fake news' to achieve social and political ends. It was ever thus. But, as he explains, the nature of Facebook – and comparable social media platforms – creates a perfect storm for this behaviour to embed. First, convincing 'fake news' is simple to create. Modern technologies make it easy to replicate the appearance of authentic information. Secondly, the way that Facebook captures personal data makes it easy to get this information to people, and groups of people, who are likely to engage with it, believe it and disseminate it further. This sort of targeted marketing is much more effective in the digital era than it could ever have been previously. As Bernal says: 'Facebook does not just help with identifying the potential audience but also provides the mechanisms to target them – from the tools for advertisers to the various groups, pages and so forth where they can be found.' (521) A third problem relates to its mass appeal: 'Perhaps most importantly, fake news can be more believable than "real" news. It fits in with people's prejudices.' (ibid) This helps fake news purveyors to attain their goals. Despite the ease of identifying the problem, and the reasons for its success, the solution, assuming there is one, is problematic. As Bernal notes, tackling the source of fake news is no real solution because those sources will spring up interminably and unpredictably. Items could be flagged as 'fake news' but, as Donald Trump has shown so demonstrably, the label becomes a convenient, pernicious political tool to silence dissent. This insight causes Bernal to end on a pessimistic note: 'It is not possible to find a "clean" solution. Instead, messy, imperfect ways ahead may be the best way forward. This is not a problem that is going to go away any time soon.' (530)

The Circle also draws our attention to the special intrusiveness of pictures and images. Absolute transparency robs the individual of the autonomy to present herself to the world as she wants it to see her. It reveals the inner self: the anxieties, fears and flaws of both the physical self and mental state. It is this aspect of social media that Rebecca Moosavian examines in her thoughtful, skilful presentation of the law's response to these issues. Her rich analysis begins by noting the distinction that judges make between photographic and textual intrusions into private life; that the former is considered more intrusive than the latter. By engaging with the work of cultural theorists John Berger, Susan Sontag and Roland Barthes, she seeks to understand, and refine, the philosophical norms that inform this distinction. Unlike text-based invasions, photographs capture something more than just information; they capture the 'chief attributes' of personality. In the most problematic cases, photographs present the subject at their most vulnerable for public scrutiny and critique. Revealing the individual's emotional state, though, overrides that person's autonomy. Whereas emotions are revealed naturally, those moments are transitory. The image that the witness gains, therefore, is one of many by which to make rounded judgements of the individual's personality (and flaws). A picture, however, provides both a partial and permanent expression of one aspect of personality. Consequently, the momentary emotional state is inflated and leads (or can lead) to a

distorted image of that person. As Moosavian concludes, it is both this capacity to capture vulnerability and to so intensely misrepresent its significance to personality that explains (or helps explain) the unique emotional distress that candid photographs cause.

As these articles demonstrate, the issues raised by *The Circle* are numerous and multidisciplinary. Clearly, there is a profound change happening in our social and cultural expectations of privacy, data protection and democratic discourse which the law is yet to properly comprehend, let alone address. In this way, the articles contribute to an important dialogue that is already underway. They set out their own contribution to the agenda, by staking out the serious threat to autonomy that is taking place. Reasonable people will disagree over what needs to be done, and certainly there are no easy answers, but perhaps we should be guided by the insight one character in *The Circle* provides: ‘We are not meant to know everything, Mac.’

(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media

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Abstract

Dave Egger's fictional book The Circle tells the story of an all-powerful new media company of the same name that seeks to totally monopolise its market and remake the world in its image. To achieve this The Circle advocates the unregulated sharing of all information, at all times, regardless of its source and irrespective of the consequences for individuals, society and the state. Although the dystopian view of reality presented by the book is perhaps slightly extreme, it does not take any great leap of faith to see how we could all end up as 'Circlers', particularly because the underlying normative rationale that drives The Circle is what currently underpins online speech in reality. Libertarianism and the inherently libertarian arguments from truth and the marketplace of ideas have historically underpinned the notion of the Fourth Estate and have a 'hold' on First Amendment jurisprudence. In recent years, libertarianism has emerged as the de facto normative paradigm for internet and social media speech worldwide. Although the theory's dominant position fits with the perceived ethos of social media platforms such as Facebook, its philosophical foundations are based on nineteenth and early twentieth-century means of communication. Consequently, as illustrated by issues such as filter bubbles and Facebook's reaction to fake news (bringing in a third-party fact-checking company) which conflicts with the platform's libertarian ideology, as well as the European Court of Human Rights consistently placing the argument from democracy at the heart of its Article 10 ECHR jurisprudence, rather than the argument from truth and marketplace of ideas, this normative framework is idealistic as opposed to being realistic. Therefore, it is not suitable for twenty-first-century free speech and the modern media, of which social media is no longer an outlier, but a central component. Thus, this paper advances the argument that a normative and philosophical framework for media speech, based on social responsibility theory and the argument from democratic self-governance, is more suitable for the modern media than libertarianism. Further, it justifies a coercive regulatory regime that also preserves media freedom.

Keywords: social media; online speech; free speech theory; libertarianism; social responsibility theory; media freedom

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1 Introduction

This paper begins at Section 2 by introducing libertarianism's position as the dominant communication theory for free speech generally and the de facto normative paradigm for online speech. Based on analysis of the argument from truth and the marketplace of ideas, Section 3 advances the argument that libertarianism should be rejected as a normative communication paradigm, particularly in the context of the modern media within which the internet and social media are no longer outliers of free speech, but are central to how we impart and receive information and ideas. This leads on to Section 4 in which it is argued that the social responsibility communication theory should be re-embraced as a normative paradigm. It argues that this theory, combined with the argument from democratic self-governance, provides a more suitable normative and philosophical framework for the modern media than libertarianism. This is because the framework not only rights a number of issues created by libertarianism, but also justifies a coercive regulatory regime for the media that also preserves media freedom.

2 Introducing libertarianism: the de facto normative paradigm for free speech?

Early libertarians such as John Milton¹ and John Erskine² argued that if individuals could be freed from restrictions on communication, people would 'naturally' follow the dictates of their conscience, seek truth, engage in public debate and, consequently, create a better life for themselves and others.³ In applying the theory to the modern media, from a 'pure' libertarian perspective, according to Merrill, it should be characterised by 'uncontrolled, full, unregulated laissez-faire journalism – with a clear separation of State and [media]'.⁴ In Merrill's view, freedom should be the underlying moral principle of any press theory: '[t]here is a basic faith, shown by libertarian advocates, that a free press – working in a laissez-faire, unfettered situation – will naturally result in a pluralism of information and viewpoints necessary in a democratic society'.⁵

In the context of online and social media speech, this correlates closely with the view of cyber-libertarians who, according to Nemes, 'argue that the harm in regulating online speech is greater than the harm caused by the online speech'⁶ and 'favour an archaic, unregulated Internet free from state control, fearing that regulation will stifle Internet development and associated freedoms'.⁷ Echoing these sentiments, in *The Circle* we are told that 'life will be better, will be perfect, when everyone has unfettered access to everyone and everything they know . . . all information, personal or not, should be known

1 Milton's *Areopagitica*, which was published in 1644, provided strong libertarian arguments against authoritarian controls of free speech and the press and for intellectual freedom. Milton's tract laid down the self-righting process, which underpins libertarianism and is enshrined within the marketplace of ideas theory. J Milton, *Areopagitica* (Clarendon Press Series, Leopold Classic Library 2016).

2 Some 50 years after Milton published *Areopagitica*, John Erskine advanced the libertarian principles of freedom of speech and of the press in defence of publishers accused of violating the law. See: T Howell, *A Complete Collection of State Trials London: 1704*, vol 22 (TC Howard 1817) 414.

3 S Baran and D Davis, *Mass Communication Theory: Foundations, Ferment and Future* 7th edn (Wadsworth Publishing 2014) 63.

4 J Merrill, *The Imperative of Freedom: A Philosophy of Journalistic Autonomy* (Freedom House 1990) 11.

5 Ibid 35.

6 I Nemes, 'Regulating hate speech in cyberspace: issues of desirability and efficacy' (2002) 11(3) *Information and Communication Technology Law* 196.

7 Ibid 199. See also B Leiter, 'Clearing cyber-cesspools: Google and free speech' in S Levmore and M Nussbaum (eds), *The Offensive Internet* (Harvard University Press 2010) 156; J Bartlett, *The Dark Net* (Random House 2014) 8–9.

by all'.⁸ Although perhaps not as extreme, in 'real life' in late 2016, Mark Zuckerberg reiterated that Facebook simply distributes content created by its users, using an impersonal and objective algorithm.⁹ In his view, the social network is essentially a platform for others to disseminate speech, and nothing more, and is certainly not a censor or arbiter of truth.¹⁰

The underlying principles in The Circle's mission and Zuckerberg's statement are aligned to libertarianism, which dictates that free speech is an intrinsic natural right that individuals are born with and, therefore, it is absolute, as it does not propagate duties and responsibilities that attach to the right to free speech and, by extension, in a European context at least, media freedom.¹¹ From an Anglo-American perspective, the theory and, as discussed below, the arguments advanced by proponents such as John Milton, John Erskine, John Stuart Mill, Thomas Jefferson¹² and Justice Holmes have served to support the traditional notion of the Fourth Estate.¹³ In the USA, the theory was made an explicit and foundational tenet of democracy, as it is enshrined within the First Amendment,¹⁴ pursuant to which 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'¹⁵ Central to the influence of libertarianism on free speech has been Milton's self-righting process, Mill's argument from truth and, in particular, Justice Holmes' marketplace of ideas theory¹⁶ that was laid down in *Abrams v United States*.¹⁷ This theory encapsulates the self-righting process as it is based on the premise that 'truth', or the 'best'

8 D Eggers, *The Circle* (Penguin 2013) 483–4.

9 M Ingram, 'Mark Zuckerberg finally admits Facebook is a media company' <[www.fortune.com](http://www.fortune.com/2016/12/23/zuckerberg-media-company)> (23 December 2016), <<http://fortune.com/2016/12/23/zuckerberg-media-company>>; M Ingram, 'Facebook's claim that it isn't a media company is getting harder to swallow' <[www.fortune.com](http://www.fortune.com/2016/12/15/facebook-media-claim)> (15 December 2016) <<http://fortune.com/2016/12/15/facebook-media-claim>>.

10 Ibid.

11 Although Article 10(1) ECHR 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. For example, see *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busnioc 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]. Compare with the position in the USA where the US Supreme Court has consistently resisted arguments that the free press clause 'or of the press' in the First Amendment to the US Constitution creates a similar distinction to that provided by the jurisprudence of the Strasbourg Court. For example, see: majority decision in *Citizens United v FEC* 130 S Ct, 905. For detailed analysis see: P Coe, 'Redefining "media" using a "media-as-a-constitutional-component" concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of "media" within a new media landscape' (2017) 37(1) *Legal Studies* 25–53, 49.

12 Jefferson, during his presidency, consistently emphasised the theory in his defence of freedom of the press. For example, see T Jefferson, *The Writings of Thomas Jefferson*, vol 11, A Lipscomb (ed) (Memorial Edition, Thomas Jefferson Memorial Association 1904) 32–4.

13 D Weiss, 'Journalism and theories of the press' in S Littlejohn and K Foss (eds), *Encyclopedia of Communication Theory*, vol 2 (Sage 2009) 574–9, 576. See ch 1, section 3.1, for an explanation of the meaning of 'Fourth Estate'.

14 Ibid; P Plaisance, 'The mass media as discursive network: building on the implications of libertarian and communitarian claims for new media ethics theory' (2005) 15(3) *Communication Theory* 292–313, 295.

15 Consequently, US Supreme Court decisions have consistently defended media freedom from government intervention and regulation based on libertarian ideology. For example, see *New York Times v Sullivan* 376 US 254 (1964); *New York Times v United States* 403 US 713 (1971). See generally P Stewart J, 'Or of the press' (1975) 26 *Hastings Law Journal* 631; ch 2, section 2.

16 See Baran and Davis (n 3) 68; Weiss (n 13) 577; F Siebert, T Peterson and W Schramm, *Four Theories of the Press* (University of Illinois Press 1956) 44–5.

17 250 US 616 (1919).

ideas, will win out, as they will naturally emerge from the competition of ideas in the marketplace.¹⁸ Thus, as Barendt observes:

It is almost impossible to exaggerate the central hold of the ‘market-place of ideas’ metaphor on US jurisprudence and general thinking about the First Amendment freedom of speech. From it stems the belief that the best corrective for the expression of pernicious opinion is not regulation, let alone suppression, but more speech. Truth, it is said, will emerge from the competition of ideas in the market-place . . . This is the central tradition of US free speech jurisprudence . . . it is now taken quite literally as the appropriate framework for First Amendment jurisprudence.¹⁹

Indeed, it is because of Mill’s argument from truth and the introduction by Justice Holmes of the marketplace of ideas that libertarian free speech ideology continued to thrive in the nineteenth century and on into the twentieth.²⁰ Although the twentieth century saw the Royal Commission on the Press²¹ in the UK and the Hutchins Commission report²² in the US, which were both catalysts for the emergence of the social responsibility theory,²³ this ‘doctrine has always been relegated to the fringes of journalism education and the newsroom’.²⁴ This marginalisation of the social responsibility doctrine is certainly the case in respect of the internet and social media speech. For the reasons articulated by cyber-libertarians above,²⁵ as Dahlberg states, the internet has provided the perfect environment for libertarianism and, specifically, the marketplace of ideas theory to flourish as it ‘provides a space for information exchange and individual decision-making free of bureaucracy, administrative power and other restrictions of “real” space’.²⁶ Thus, it has been recognised by a number of scholars that libertarianism has become the de facto communication theory for the internet and social media speech within Western democracies.²⁷ This is because ‘cyberspace is founded on

18 *Abrams v United States* 250 US 616 (1919), 630–1; see also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes.

19 E Barendt, ‘The First Amendment and the media’ in I Loveland (ed), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (Hart 1998) 29–50, 43. See also, F Schauer, ‘The political incidence of the free speech principle’ (1993) 64 *University of Colorado Law Review* 935, 949–52.

20 Siebert et al (n 16).

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

22 R Hutchins, Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press 1947). The Commission was set up in 1942 and reported in 1947. Its aim was ‘to examine areas and circumstances under which the press of the United States is succeeding or failing; to discover where freedom of expression is or is not limited, whether by government censorship pressure from readers or advertisers or the unwisdom of its proprietors or the timidity of its management’. According to McQuail, it was created in ‘response to widespread criticism of the American newspaper press, especially because of its sensationalism and commercialism, but also its political imbalance and monopoly tendencies’. See D McQuail, *McQuail’s Mass Communication Theory* 5th edn (Sage 2005) 170–1.

23 McQuail (n 22); Weiss (n 13) 577; Baran and Davis (n 3) 72–4; D Davis, ‘News and politics’ in D Swanson and D Nimmo (eds), *New Directions in Political Communication* (Sage 1990); J McIntyre, ‘Repositioning a landmark: the Hutchins Commission and freedom of the press’ (1987) 4 *Critical Studies in Mass Communication* 95–135; Siebert et al (n 16), ch 3.

24 C Christians, J Ferre and P Fackler, *Good News: Social Ethics and the Press* (Oxford University Press 1993) 38.

25 See Nemes (n 6) fns 6 and 7.

26 L Dahlberg, ‘Cyber-libertarianism 2.0: a discourse theory/critical political economy examination’ (2010) 6(3) *Cultural Politics* 331–56, 332–3.

27 *Ibid.* Weiss (n 13) 579.

the primacy of individual liberty²⁸ and, as a result, there now exists a ‘normative assumption that all nation-states should adopt a libertarian orientation toward their oversight of new media’.²⁹ As a consequence, largely due to the influence of the argument from truth and, in particular, the marketplace of ideas, libertarianism remains a dominant communication theory, not just in respect of US free speech jurisprudence,³⁰ but also in relation to the underlying principles of the Fourth Estate and, significantly, in the context of online and social media speech.³¹

This section has established libertarianism’s dominant position as a free speech communication theory. The following section will argue that, although this position may fit with the perceived ethos of The Circle and, in reality, cyber-libertarians and social media platforms such as Facebook, as a normative framework it is idealistic as opposed to being realistic. It will reject the theory, based on its unsuitability for twenty-first-century free speech and the modern media. This leads in to the discussion at Section 4 which sets out why the social responsibility model is better suited to this task. Ultimately, it will be argued that it provides a more appropriate normative basis for the argument from democratic self-governance that is an ideal philosophical foundation for free speech and the modern media.

3 Rejecting libertarianism

Justification for the protection of freedom of expression³² and media freedom is underpinned by four philosophical theories. These are: (i) the argument from truth; (ii) the marketplace of ideas;³³ (iii) the argument from self-fulfilment; and (iv) the 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).³⁴ For instance, the House of Lords recognised the existence of

28 M Kapor, ‘Where is the digital highway really going?’ (1993) 1(3) *Wired* 53–9.

29 Weiss (n 13) 579.

30 Barendt (n 19) 43.

31 Dahlberg (31) 332–3.

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

33 This theory was formulated by Justice Oliver Wendell Holmes in *Abrams v United States* (1919) 616, 630–1. 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 and A Sharland, *Media Law and Human Rights* 2nd edn (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) (April) *Public Law* 363–85, 368–9), 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 edn (Oxford University Press 2005) 13), this thesis treats the theories as distinct.

34 According to Fenwick and Phillipson, in *Handyside v UK* (1976) 1 EHRR 737 the ECtHR referred, at least implicitly, to these theories, when it stated, at [49]: ‘Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.’ However, Fenwick and Phillipson go on to observe that although freedom of expression can be defended on all of these rationales, only the argument from democratic self-governance has been prominently employed by the ECtHR. This is discussed in more detail below at section 3.1: See Fenwick and Phillipson (n 32) 707–10; P Wragg, ‘A freedom to criticise? evaluating the public interest in celebrity gossip after *Mosley* and *Terry*’ (2010) 2(2) *Journal of Media Law* 295–320, 318.

all of these rationales in *R v Secretary of State for the Home Department, ex parte Simms*,³⁵ where Lord Steyn stated the often-repeated passage³⁶ that freedom of expression ‘serves a number of broad objectives’.³⁷

This section will demonstrate why the arguments from truth and the marketplace of ideas are ill suited to support modern free speech. This analysis will defend the proposition set out in the previous section that, despite its dominance over free speech jurisprudence, libertarianism does not provide an appropriate normative framework. This leads into Section 4 that argues that the social responsibility model is better suited to this task.

3.1 THE ARGUMENT FROM TRUTH

The argument from truth is located in Mill’s nineteenth-century essay *Of the Liberty of Thought and Discussion*.³⁸ The overall thrust of Mill’s argument is that truth is most likely to emerge from totally uninhibited freedom of thought and almost absolute freedom of expression.³⁹ Consequently, thought and discussion protects individual liberty from its predominant threat,⁴⁰ which is not ‘political oppression’,⁴¹ but ‘social tyranny’.⁴²

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.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ In Mill’s words, the true belief: ‘will be held as a dead dogma, not a living truth’.⁴⁸

Despite Schauer’s argument that the desirability of truth within society is almost universally accepted,⁴⁹ and the fact that this view seems to correlate with Jacob LJ’s *obiter*

35 [2000] 2 AC 115.

36 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].

37 *Ibid* [126].

38 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.

39 Mill, *On Liberty* in Robson (ed) (n 38) 225–6; Wragg (n 33) 365; Fenwick and Phillipson (n 32) 14.

40 Mill, *On Liberty* in Robson (ed) (n 38) 229.

41 *Ibid* 220.

42 *Ibid*.

43 See generally Barendt (n 33) 8; Mill, *On Liberty* in Robson (ed) (n 38) 258.

44 Mill, *On Liberty* in Robson (ed) (n 38) 229.

45 *Ibid* 252, 258.

46 *Ibid* 258.

47 *Ibid* 258; See also Wragg (n 33) 365.

48 *Ibid* 243, 258.

49 Schauer (n 33) 17; see also J Feinberg, *Social Philosophy* (Prentice-Hall 1973) 26.

dicta in *L'Oreal SA v Bellure NV*⁵⁰ that, pursuant to various international laws,⁵¹ 'the right to tell – and to hear – the truth has high international recognition',⁵² the assumption derived from the argument that freedom of expression leads to truth can be attacked on a number of fronts.⁵³ Firstly, there is not necessarily a causal link between freedom of expression and the discovery of truth.⁵⁴ This is particularly pertinent with regard to the modern media, where, via mediums such as social media and the internet, anybody can express opinions or views, or disseminate information. Consequently, the internet and social media in particular are saturated with information that is inaccurate, misleading or untrue. This issue is animated by the 'fake news' phenomenon,⁵⁵ which has led to social media platforms being asked to deal with the proliferation of fake news on their sites,⁵⁶ and the recent Cambridge Analytica scandal. In respect of the former, Facebook, in particular, was the subject of strong criticism in the wake of the US election.⁵⁷ This resulted in the platform announcing that it will be partnering with a third-party fact-checking organisation to deal with the challenge of fake news.⁵⁸ Arguably, the issue with fake news, and Facebook's response, betrays a deeper problem for social-networking platforms: this measure (partnering with a fact-checking organisation) clearly runs counter to libertarian ideology yet, at the same time, Facebook is trying to maintain a grip on libertarian values, demonstrated by its reiteration of its commitment to 'giving people a voice' and that it 'cannot become an arbiter of truth'.⁵⁹ Thus, social media platforms, such as Facebook, are struggling to come to terms with a conflict between the reality of online speech and the libertarian values upon which they, as organisations, were originally founded.⁶⁰ In other words, libertarianism is not compatible with what they have become. In the same vein, the fact that Cambridge Analytica harvested over 50 million user profiles without Facebook's permission and manufactured sex scandals and fake news to influence

50 [2010] EWCA Civ 535.

51 Article 19 Universal Declaration of Human Rights; Article 19(2) International Covenant on Civil and Political Rights; Article 10(1) ECHR; Article 11(1) Charter of the Fundamental Rights of the European Union: [2010] EWCA Civ 535, [10].

52 [2010] EWCA Civ 535, [10].

53 For commentary criticising the argument from truth in relation to pornography, see C MacKinnon, *Feminism Unmodified* (Cambridge University Press 1987) 166; Fenwick and Phillipson (n 32) 309–407.

54 Schauer (n 33) 15.

55 Fake news is discussed in more detail in Section 3.2 in relation to the marketplace of ideas.

56 E Klaris and A Bedat, 'With the threat of fake news, will social media platforms become [like] media companies and forsake legal protections?' (*Infornm's Blog*, 21 December 2016) <<https://inform.wordpress.com/2016/12/21/with-the-threat-of-fake-news-will-social-media-platforms-become-more-media-companies-and-forsake-legal-protections-ed-klaris-and-alexia-bedat>>.

57 See generally A Hunt and M Gertzow, 'Social media and fake news in the 2016 election' (2017) 31(2) *Journal of Economic Perspectives* 211–36; O Solon, '2016: The year Facebook became the bad guy' *The Guardian* (London, 12 December 2018) <www.theguardian.com/technology/2016/dec/12/facebook-2016-problems-fake-news-censorship>.

58 Adam Mosseri, 'Addressing hoaxes and fake news' (*Facebook Newsroom*, 15 December 2017) <<https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news>>.

59 *Ibid.*

60 Incidentally, Germany has recently adopted a new social media law known as NetzG. Amongst other things, this new regulatory regime requires platform providers, such as Facebook, to delete or block illegal content (for example, if it is defamatory, depicts violence or incites hatred). S Thiel, 'The new German social media law: a risk worth taking? An extended look' (*Infornm's Blog*, 20 February 2018) <<https://inform.org/2018/02/20/the-new-german-social-media-law-a-risk-worth-taking-an-extended-look-stefan-thiel>>.

voters in elections around the world⁶¹ is even more damning of libertarian ideology. The relative ease with which the firm breached Facebook's data security enabled it to essentially hijack democracy, demonstrating that the philosophical rationales underpinning libertarianism, in the form of the argument from truth and marketplace of ideas, are fundamentally flawed and unrealistic, particularly in the context of social media speech.

Secondly, despite Jacob LJ's *dicta*, there is no right to truth per se.⁶² Further, contrary to Schauer's statement, arguably the dissemination of truth is not always a good thing. In some situations, the protection of other, countervailing, values should take precedent. Ironically, this is illustrated by the international instruments referred to by Jacob LJ in *L'Oreal*. Taking the European Convention on Human Rights (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. Within the context of online and social media speech, the revenge porn phenomenon illustrates this dichotomy. In the UK, this offence, which exists by virtue of s 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 an ex-partner without that person's permission.⁶³ 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.⁶⁴ 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'.⁶⁵

Finally, a further argument that undermines the argument from truth as a rationale to defend free speech claims relates to its lack of application in ECtHR case law; an argument that, incidentally, applies equally to the marketplace of ideas. Strasbourg jurisprudence is most closely aligned with the argument from democratic self-governance, which the ECtHR has made clear is at the core of Article 10 ECHR.⁶⁶ Of course, the UK's courts are able to develop the concept of free speech domestically, so as to provide for a right that encapsulates the broader arguments for freedom of expression found in the argument from truth, the marketplace of ideas and the argument from self-fulfilment.⁶⁷ Indeed, as illustrated by the judgments of Lord Steyn and Jacob LJ in *R v Secretary of State for the Home Department, ex parte Simms*⁶⁸ and *L'Oreal*⁶⁹ respectively, the

61 P Greenfield, 'The Cambridge Analytica files: the story so far' *The Guardian* (London, 26 March 2018) <www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far accessed>.

62 Wragg (n 33) 372.

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

64 Prior to the Criminal Justice and Courts Act 2015 coming into force, a number of criminal offences and civil causes of action were applied to revenge porn. See *ibid* 13–14.

65 Barendt (n 33) 8.

66 *Lingens v Austria* (1986) 8 EHRR 407; *Jersild v Denmark* (1995) 19 EHRR 1; L Wildhaber, 'The right to offend, shock or disturb? Aspects of freedom of expression under the European Convention on Human Rights' (2001) 36 *Irish Jurist* 17; Wragg (n 34) 314.

67 Wragg (n 34) 314.

68 See above (n 35).

69 See above (n 50).

argument from truth has been employed domestically.⁷⁰ However, in conflict with these judgments, as Wragg observes, the House of Lords consistently interpreted the obligation imposed on judges to take Strasbourg jurisprudence into account in domestic proceedings, pursuant to s 2 of the Human Rights Act 1998, strictly, meaning that the domestic development of the concept of free speech in this way is hard to justify.⁷¹ For instance, in *R (on the application of Ullab) v Special Adjudicator*⁷² Lord Bingham stated that the ‘duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’.⁷³ Consequently, domestic jurisprudence should ‘mirror’ the jurisprudence of the ECtHR.⁷⁴ According to Lord Bingham in *Ullab* failure to follow ‘clear and constant’ Strasbourg jurisprudence would be unlawful under s 6(1) Human Rights Act 1998,⁷⁵ unless there are ‘special circumstances’⁷⁶ that justify departure from that approach.⁷⁷ Despite Lord Bingham’s judgment in *Ullab* being the subject of both judicial⁷⁸ and academic⁷⁹ criticism, the mirror principle remains in place. Thus, unless it can be persuasively argued that such ‘special circumstances’ exist, then surely the philosophical argument that must be applied to domestic case law, in line with Strasbourg jurisprudence, is the argument from democratic self-governance as opposed to the inherently libertarian argument from truth and the marketplace of ideas.

3.2 THE MARKETPLACE OF IDEAS

In *Abrams v United States*⁸⁰ Justice Holmes laid down the marketplace of ideas theory by asserting that: ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’.⁸¹ It dictates that an open and unregulated market, which allows for ideas to be traded through the free expression of all opinions, is most likely to

70 See also *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. However, as stated by Wragg, arguably the argument from democratic self-governance could also have been applied to protect free speech in each of these cases: Wragg (n 34) 318.

71 Wragg (n 34) 314.

72 [2004] 2 AC 323.

73 *Ibid* 350.

74 *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, [34] per Lord Nicholls. See also J Lewis, ‘The European ceiling on human rights’ (2007) Public Law 720; Wragg (n 34) 314.

75 S 6(1) states: ‘[I]t is unlawful for a public authority to act in a way which is incompatible with a Convention right’; pursuant to s 6(3) the definition of ‘public authority’ includes the courts.

76 It is unclear what amounts to ‘special circumstances’. See Wragg (n 34) 314.

77 Wragg (n 34) 314.

78 In *R (on the application of Children’s Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34, [62]–[64], Law LJ stated that: ‘I hope the *Ullab* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention Rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases.’

79 R Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a “municipal” law of human rights under the Human Rights Act (2005) 54 International and Comparative Law Quarterly 907; J Lewis, ‘The European Ceiling on Human Rights’ (2007) Public Law 720.

80 250 US 616 (1919).

81 *Ibid* 630–1; see also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes. Subsequently, Holmes J’s judgment garnered support from other influential judges, including: Justice Brandeis in *Whitney v California* 274 US 357 (1927), 375–8; Justice Hand in *United States v Dennis* 181 F2d 201 (2d Cir 1950) and *International Brotherhood of Electrical Workers v NLRB* 181 F2d 34 (2d Cir 1950); and Justice Frankfurter in *Dennis v United States* 341 US 494 (1951), 546–53 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.’

lead to the truth and, consequently, increased knowledge.⁸² Hence, the examination of an opinion within the ‘marketplace’ subjects it to a test that is more reliable than individual or governmental appraisal.⁸³

Herein lies an initial problem with the theory: it is, in essence, a variation of a fundamental principle of capitalism – namely the notion of a self-regulating *consumer marketplace*. Consequently, it is open to both economic and democratic interpretations,⁸⁴ which will be considered in turn.

The eighteenth-century economist Adam Smith formulated the principle of the ‘invisible hand’, or laissez-faire doctrine, guiding free consumer markets. Pursuant to this principle, there is no need for government regulation of markets, as an open and unregulated marketplace should regulate itself. Echoing Milton’s self-righting process, if one manufacturer charges too much for a product, or produces an inferior product, competitors will either charge less or produce a higher quality product to attract buyers. Thus, government interference is not required to protect consumers or to force manufacturers to meet consumer needs.⁸⁵ According to the theory, Smith’s principle should be applied to the media; that is, if ideas are ‘traded’ freely within society, the correct or best ideas will, eventually, prevail.⁸⁶

However, there are considerable difficulties in applying this logic to the modern media⁸⁷ and, in particular, online speech. Media content is far less tangible than other consumer products.⁸⁸ As a result, and in contrast to the *consumer marketplace*, the perceived meaning of individual media messages can vary depending on the respective recipient. Taking this a step further, the medium through which the information is communicated can also influence not only the communication’s perceived meaning, but also the impact that it has on its intended and, potentially, non-intended audience. This point is illustrated by jurisprudence emanating from both the ECtHR and the US Supreme Court relating to the regulation of different forms of media.⁸⁹ In *Jersild v Denmark*,⁹⁰ in the context of broadcasting, the ECtHR stated:

. . . the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media . . . conveying through images meanings which the print media are not able to impart.⁹¹

The Supreme Court has also acknowledged the significance of a medium in respect of the influence it can have on recipients of information. In *Burstyn v Wilson*,⁹² which

82 See generally J Oster, ‘Theory and doctrine of “media freedom” as a legal concept’ (2013) 5(1) *Journal of Media Law* 57–78, 70; J Alonzo, ‘Restoring the ideal marketplace: how recognizing bloggers as journalists can save the press’ (2006) 9 *New York University Journal of Legislation and Public Policy* 751, 762.

83 Schauer (n 33) 16; see also Alonzo (n 82) 762.

84 P Napoli, ‘The marketplace of ideas metaphor in communications regulation’ (1999) 49 *Journal of Communication* 151–69, 151–2.

85 *Adam Smith, The Wealth of Nations*, A Skinner (ed) (Penguin 1982). See also Weiss (n 13) 577; Baran and Davis (n 3) 67.

86 Baran and Davis (n 3).

87 *Ibid.*

88 *Ibid.*

89 See generally D Mac Síthigh, *Medium Law* (Routledge 2018) 24–8; M Feintuck and M Varney, *Media Regulation, Public Interest and the Law* 2nd edn (Edinburgh University Press 2006) 81.

90 (1995) 19 EHRR 1.

91 *Ibid* [31].

92 (1952) 343 US 495.

concerned cinema regulation, the court noted how a medium ‘present(s) its own particular problems’.⁹³ Similarly, in *Metromedia v City of San Diego*,⁹⁴ a case relating to billboard regulation, the court stated that each method of communication is a ‘law unto itself’ and, consequently, the law must respond to differences between media, in terms of their ‘natures, values, abuses and dangers’.⁹⁵ In *FCC v Pacifica Foundation*,⁹⁶ which related to television broadcasting regulation, the court recognised television’s immediacy, accessibility and its peculiarly pervasive and intrusive potential.⁹⁷ Similarly, in *Reno v American Civil Liberties Union*⁹⁸ the court was of the opinion that ‘the Internet is not as invasive as radio or television’.⁹⁹ In coming to this decision, the court relied upon the finding of the District Court that:

Communications over the Internet do not invade an individual’s home or appear on one’s computer screen unbidden. Users seldom encounter content by accident . . . [a]lmost all sexually explicit images are preceded by warnings as to the content . . . odds are slim that a user would come across a sexually explicit sight by accident.¹⁰⁰

This decision is indicative of the pace at which online and social media communication has developed, as the findings upon which the decision is based are arguably at odds with current online expression and are without doubt diametrically opposed to The Circle’s, albeit fictional, vision of the world. Internet communications, in particular those transmitted via social media, can be invasive. To an extent this may be ‘allowed’ by the user of the social media platform, by virtue of registering with the platform and joining particular communities. However, users are still subject to ‘unbidden’ messages regularly appearing on their mobile telephone, tablet and laptop screens.¹⁰¹ Further, the availability of sexually explicit content has been proliferated by social media and is synonymous with platforms such as WhatsApp and Snapchat, as demonstrated by the ‘revenge porn’ phenomenon.¹⁰²

Although these cases pre-date the advent of social media and citizen journalism, the concerns espoused by the ECtHR and the Supreme Court are almost prophetic, as they are equally as applicable, if not more pertinent, to online and social media expression. As acknowledged by a number of scholars, the internet and social media have facilitated an audience–producer convergence,¹⁰³ which has allowed for the circumvention of normal editorial and production processes.¹⁰⁴ Whilst this can enable excellent citizen journalism, it can also breed, through the speech it conveys, its own ‘abuses and dangers’.¹⁰⁵ Because

93 Ibid 503.

94 (1981) 453 US 490.

95 Ibid 501.

96 (1978) 438 US 726.

97 Ibid 727.

98 521 US 844 (1997).

99 Ibid 869.

100 *American Civil Liberties Union v Reno*, 929 F Supp 824 (ED Pa, 1996) (finding 88).

101 For detailed analysis of how the economic constructs of social media has influenced this issue, see José van Dijck, *The Culture of Connectivity* (Oxford University Press 2013) 163–76.

102 Coe (n 63) 28–9. See generally Brian Leiter, ‘Cleaning cyber-cesspools: Google and free speech’ in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet* (Harvard University Press 2010) 155.

103 J Rowbottom, ‘To rant, vent and converse: protecting low level digital speech’ (2012) 71(2) *Cambridge Law Journal* 355–83, 365; A Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Prodsusage* (Peter Lang Publishing 2008).

104 Coe (n 11) 32.

105 Ibid. 49.

social media is arguably more ‘immediate, pervasive and accessible’ to individuals than even television broadcasting, its messages have a potentially greater impact than any other medium.

Turning now to the democratic interpretation of the theory, it has been suggested that discovering truth is dependent upon unregulated competition in the actual, as opposed to ideal, marketplace.¹⁰⁶ It has also been said that the theory dictates that the ideas that emanate from the competitive market are the truth, leaving nothing more to be said.¹⁰⁷ Oster relies on this rationale to support his view that, because of the media’s power and ability to communicate via multiple channels, the theory requires that the media should be subject to protection and only minimal restriction.¹⁰⁸ This is because this ‘privilege’ for journalists encourages the dissemination of more information that, sequentially, generates more valuable, truthful information. However, it is submitted that this reasoning is flawed, as it is the very reason 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’,¹⁰⁹ which ‘appear particularly infirm in the context of mass media communications’¹¹⁰ for reasons that can be applied to both traditional and social media.¹¹¹

Firstly, if the assertion that one statement is stronger than another (whether these statements are communicated via a social media platform or by the traditional media) cannot be intellectually supported and defended, the notion of truth loses its integrity,¹¹² as history demonstrates: falsehood frequently triumphs over truth, to the detriment of society.¹¹³ Secondly, in line with Habermas’ concept of ‘discourse’, which aims at reaching a rationally motivated consensus and is based on the assumption of the prevalence of reason,¹¹⁴ 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.¹¹⁵ As both Schauer and Barendt suggest, this assumption is unrealistic.¹¹⁶ Both criticisms are pertinent to social media speech and citizen journalism, but also apply

106 B Williams, *Truth and Truthfulness* (Princeton University Press 2002) 214–15; See also Barendt (n 33) 12.

107 Barendt (n 33) 12.

108 Oster (n 82) 70–1; 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; A Koltay, ‘The concept of media freedom today: new media, new editors and the traditional approach of the law’ (2015) 7(1) *Journal of Media Law* 36–64; A Koltay, ‘What is press freedom now? New media, gatekeepers and the old principles of the law’ in A Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015) 55–87.

109 Barendt (n 33) 12. See also Barendt (n 19).

110 Barendt (n 19).

111 For a comprehensive critique of the theory, see Barendt (n 33) 12.

112 *Ibid.*

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

114 J Habermas, *The Structural Transformation of the Public Sphere* (Polity Press 1962); *The Theory of Communicative Action, vol 1: Reason and the Rationalization of Society* (Beacon Press 1984) 25, 39, 99; *The Theory of Communicative Action, vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (Beacon Press 1987) 120, 319; J Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) 29–31.

115 J Weinberg, ‘Broadcasting and speech’ (1993) 81 *California Law Review* 1103; S Ingber, ‘The marketplace of ideas: a legitimizing myth’ [1984] *Duke Law Journal* 1; J Skorupski, *John Stuart Mill* (Routledge 1991) 371–2.

116 F Schauer, ‘Free speech in a world of private power’ in T Campbell and W Sadurski (eds), *Freedom of Communication* (Dartmouth 1994) 6; Barendt (n 33) 12. See also A Kenyon, ‘Assuming free speech’ (2014) 77(3) *Modern Law Review* 379–408, 382.

equally to the traditional media using social media as a *source* of news. For the reasons discussed in the following paragraphs, it is submitted that this basis of *rationality* makes a fallacy of the marketplace of ideas theory.

The first observation to be made about rationality is that social media 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’,¹¹⁷ regardless of the detrimental impact this may have on society.¹¹⁸ In turn, the traditional media using social media as a source of news may regurgitate the same information. Arguably, this issue is amplified by the ubiquity of anonymity and pseudonymity on the internet and social media, making it hard, if not impossible, for readers to accurately and *rationality* assess the veracity of the speaker.¹¹⁹ Thus, in reality, in a marketplace that contains true *and* untrue or misleading information in at least equal proportions, some of which may be published anonymously or under a pseudonym, it may be impossible for recipients of the communication to make a *rational* assessment of what they have read, viewed or listened to.

This point leads on to a second observation, based on cognitive psychology research that, although pre-dating the advent of social media, is particularly relevant to social media speech, and is therefore worthy of consideration. In order to deal with the endless flow of information we are subjected to on a daily basis we try to fit each new piece of information into a set of pre-existing cognitive structures, or schemas, that provide ‘simplified mental models’ of the world.¹²⁰ Processing new ideas and information this way creates problems when people encounter information that cannot be processed in this manner, as they reject information that conflicts with their schemas.¹²¹ According to scholars such as Graber, McGuire and Peffley et al, in these circumstances, people are pre-disposed to deny the validity of the new information and, instead, reinterpret it so that it conforms to the schema within which they want the information to fit or, alternatively, they process it as an isolated exception.¹²² Therefore, as Fajer suggests, because people interpret ambiguous reality to accord with their schemas, they become self-reinforcing and, in turn, more powerful as they are repeatedly ‘tested’ but never disconfirmed.¹²³ This is indicative of arguments suggesting that the mass media are better at reinforcing existing attitudes and beliefs than changing them,¹²⁴ as we largely ignore information that we deem irrelevant to our existing schemas.¹²⁵ As Weinberg states, once people ‘make up their mind’ and ‘reach closure’ on an issue, they tend to reject new information, regardless of whether it supports or conflicts with their views.¹²⁶

117 This criticism reflects those levelled at Mill’s theory above. In particular, Schauer’s argument that there is not necessarily a causal link between freedom of expression and the discovery of truth. See Section 3.1 above.

118 See, for example, the point made about fake news and the Cambridge Analytica scandal in Section 3.1 above.

119 See generally P Coe, ‘Anonymity and pseudonymity: free speech’s problem children’ (2018) *Media and Arts Law Review* 119, 173–200.

120 D Graber, *Processing the News: How People Tame the Information Tide*, 2nd edn (Guildford Publications 1988) 31.

121 Weinberg (n 133) 1159.

122 Graber (n 120) 174–7; W McGuire, ‘Attitudes and attitude change’ in G Lindzey and E Aronson (eds), *Handbook of Social Psychology* 3rd edn (Lawrence Elbaum Association 1986) 233, 275–6; M Peffley et al, ‘Economic conditions and party competence: processes of belief revision’ (1987) 49 *Journal of Politics* 100, 101.

123 M. Fajer, ‘Can two real men eat quiche together? Storytelling, gender-role stereotypes and legal protection for lesbians and gay men’ (1992) 46 *University of Miami Law Review* 511, 525.

124 L Jaffe, ‘The editorial responsibility of the broadcaster: reflections on fairness and access’ (1972) 85 *Harvard Law Review* 768, 769–70; Weinberg (n 133) 1160.

125 Graber (n 120) 186.

126 Weinberg (n 133) 1160.

Conversely, people seek out and resonate with information that is compatible with their schemas and will, sequentially, 'support' this information.¹²⁷ In Ingber's view, it is impossible to create a collective marketplace of unfettered discourse and discovery if we are constrained by our adherence to long-established mental patterns.¹²⁸ This results in the 'packaging' of an argument determining how well it is received, as opposed to it being assessed on the merits of its 'contents'.¹²⁹ Consequently, because our schemas influence what ideas and information, we are willing to accept 'people's social location . . . control[s] the manner in which they perceive and understand the world'.¹³⁰ This research has been described as having 'distressing implications for marketplace theory';¹³¹ it is submitted that it clearly reinforces the point that the marketplace of ideas' basis of rationality makes a fallacy of the theory; as to the extent that our schemas constrain how we react to new ideas and information, the way we think is not 'characterised by reason'.¹³² This observation is significant to social media which, due to the sheer amount of information it generates and the invasive way in which it can potentially disseminate it, arguably only serves to amplify how we process information using pre-existing schemas and, in doing so, makes the issue with rationality more acute. The fake news phenomenon and its association with social media 'filter bubbles' animate this. Filter bubbles are created by algorithms that filter our online experiences, effectively placing us in echo chambers of our own beliefs,¹³³ which means we are more likely to interact with content which conforms with our pre-existing views¹³⁴ and which, in turn, creates greater polarisation. Therefore, the more we interact with particular 'types' of information on social media, whether that be true or fake, the more of that particular 'type' of information we will be exposed to by virtue of the filter bubble. Thus, within the context of social media speech at least, as Weinberg declares: '[t]o the extent that our most basic views and values are relatively immune to rational argument, the marketplace metaphor seems pointless'.¹³⁵

The third and final reason why the theory is flawed relates to truth discovery. Although this issue is particularly pertinent to the traditional media, it is also relevant to citizen journalism and social media. The theory's 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 revenue¹³⁶ through

127 S Fiske and S Taylor, *Social Cognition* 2nd edn (Sage 1991) 218–20.

128 Ingber (n 155) 34–6; See also: F Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914, 924; Kenyon (n 116) 382.

129 C Baker, 'Scope of the First Amendment freedom of speech' (1978) 25 *University of California Los Angeles Law Review* 964, 976–77; Graber (n 120) 158–60, 261.

130 Baker (n 129) 967.

131 Weinberg (n 133) 1162.

132 Ibid.

133 See generally D Spohr, 'Fake news and ideological polarization: filter bubbles and selective exposure on social media' (2017) 34(3) *Business Information Review* 150–60; E Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin 2011).

134 N Stroud, 'Media use and political predispositions: revisiting the concept of selective exposure' (2008) 30 *Political Behaviour* 341–65.

135 Weinberg (n 133) 1162.

136 For example, in January 2015 *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' (*BBC News*, 19 February 2015) <www.bbc.co.uk/news/health-31529682>.

advertising and/or sales.¹³⁷ This may be true within the context of social media, where there are, in theory at least, fewer restrictions. Although, this is not always the case, as many bloggers may simply regurgitate false, bias or misleading information.¹³⁸ In relation to the traditional media, this assumption is equally as unrealistic, for two reasons: firstly, many media outlets, particularly commercial ones, are driven by the restrictions set out above, to the detriment of investigative journalism.¹³⁹ Indeed, as observed by Gibbons:

The liberal theory of the media appears to be influential, yet there is a countervailing view, supported by much evidence, that the media have a tendency to distort our understanding of the world . . . The media devote a relatively small part of their content to public affairs . . . preferring to emphasise entertainment more generally . . . Furthermore, news may be managed to serve the media's interests, whether they are the proprietor's or the company's more broadly.¹⁴⁰

Thus, as Kenyon states, there is a 'disjunction between ideas of political equality and economic communication markets'.¹⁴¹ These markets are inconsistent with democratic requirements as commercial media's orientations have primarily been to advertisers and to audiences as consumers.¹⁴² Consequently, research points towards there being a 'narrowness of political views within major media'.¹⁴³ As Baker acknowledges, the market-based media cannot be expected to serve audiences well as citizens;¹⁴⁴ secondly, as has been previously discussed, traditional media outlets use citizen journalists and social media generally as a source of news. Thus, in the same way that bloggers may regurgitate false or misleading information obtained, for instance, from the traditional media or other bloggers, the traditional media may do the same in respect of information obtained from social media.¹⁴⁵

Ultimately, libertarianism is flawed as a normative paradigm as it is based on the unproven assertion that the *product* of the media marketplace, which is only one out of an infinite number of potential outcomes, gains a de facto privileged status as the 'truth'.¹⁴⁶

137 Barendt (n 33) 12.

138 Indeed, as discussed below at Section 5.1, Curran, Fenton and Freedom observe that the internet and, it is submitted by extension, social media and citizen journalism, is not exempt from 'corporate dominance, market concentration, controlling gatekeepers, employee exploitation, manipulative rights management, economic exclusion through "tethered appliances" and encroachment upon the information commons.' J Curran, N Fenton and D Freedman, *Misunderstanding the Internet* (Routledge 2012) 180.

139 Barendt (n 33) 12; T Cook, *Governing with the News: The News Media as a Political Institution* 2nd edn (University of Chicago Press 2005) 168; T Gibbons, 'Fair play to all sides of the truth: controlling media distortions' (2009) 62(1) *Current Legal Problems* 286–315, 291; N Davies, *Flat Earth News* (Vintage Books 2009).

140 Gibbons (n 139). See also J Curran, 'Mediations of democracy' in J Curran and M Gurevitch (eds), *Mass Media and Society* 4th edn (Hodder Arnold 2005) 129.

141 Kenyon (116) 386.

142 Ibid; Gibbons (n 139) 290.

143 Kenyon (116) 387. See also the study by Toril Aalberg and James Curran et al which investigated the content of print and broadcast news and ordinary people's knowledge and understanding of matters of political and more general public interest: T Aalberg and J Curran (eds), *How Media Inform Democracy: A Comparative Approach* (Routledge 2012).

144 See generally C Baker, *Media, Markets and Democracy* (Cambridge University Press 2002).

145 Even before and at the dawn of the social media age, various studies showed that certain sources dominate the news: V Campbell, *Information Age Journalism: Journalism in an International Context* (Arnold 2004), ch 4; Goldsmiths Media Group, 'Media Organisations in Society: Central Issues' in J Curran (ed), *Media Organisations in Society* (Arnold 2000) 19–69, 34; P Schlesinger, *Putting 'Reality' Together* (Methuen 1978); Gibbons (n 139) 290.

146 G Wuliger, 'The moral universes of libertarian press theory' (1991) 8 *Critical Studies in Media Communication* 152–67, 156; Plaisance (n 14) 297.

As Schwarzklose states, this creates the ‘dilemma of libertarianism’: in the marketplace of ideas ‘is it truth that survives, or is whatever survives the truth?’¹⁴⁷ Based on the arguments advanced in this section, it is submitted that libertarianism, as a normative paradigm founded upon philosophical doctrine such as the argument from truth and the marketplace of ideas, is unable to provide a suitably robust rejoinder to this ‘dilemma’, which clearly demonstrates that libertarian ideology is an inadequate normative framework for the modern media. The following sections will consider the social responsibility model as a more suitable basis for such a framework.

4 Social responsibility theory and the argument from democratic self-governance: standards and norms of behaviour and discourse

This section will argue that, by endorsing a two-tiered approach to media expression, the social responsibility theory, as underpinned by the argument from democratic self-governance, creates a more appropriate normative and philosophical framework for the modern media than libertarianism. The theory dictates that media freedom is distinct from personal freedom of expression, a view that correlates with the jurisprudence of the ECtHR.¹⁴⁸ This distinction means that certain demands can be placed on media actors in performance of their duties over and above what would apply to individuals. Thus, as Leveson LJ acknowledges in his *Inquiry into the Culture, Practices and Ethics of the Press*,¹⁴⁹ unlike individual expression, freedom of the press (and it is submitted, by extension, the wider media) is valued only instrumentally, as opposed to intrinsically, when it performs democratic functions with a view to developing commercially as a sector, such as informing the democratic process, and acting as a check and balance on political, corporate or individual power.¹⁵⁰ This section will advance the notion that under this social responsibility/argument from democratic self-governance framework the enjoyment of media freedom is contingent upon the fulfilment of certain standards of behaviour and public discourse, or concomitant *duties and responsibilities*: namely the norms referred to in Sections 4.1 and 4.2 below. Specifically, Section 4.1 considers the first tier of the framework: behavioural norms associated with the social responsibility theory. Section 4.2 sets out the second tier: how these norms are complemented by the argument from democratic self-governance in respect of the *type* of speech the media conveys. This will lead in to a discussion at Section 5 on how the theory and the argument provide a more suitable framework for dealing with some of the issues identified in Section 3 that are created by libertarianism and, specifically, from which to ‘hang’ a regulatory regime.

4.1 TIER ONE: SOCIAL RESPONSIBILITY THEORY AND BEHAVIOURAL NORMS

Like libertarianism, the social responsibility theory is an Anglo-American concept. As stated in Section 2, the catalyst for the emergence of the theory was two reports commissioned on either side of the Atlantic in the 1940s: the Royal Commission on the

147 R Schwarzklose, ‘The marketplace of ideas: a measure of free expression’ (1989) 118 *Journalism Monographs* 1–41, 8.

148 See above (n 11). As is discussed in more detail below at Section 5.3 this also correlates with the influential evidence given by Baroness O’Neill to the Leveson Inquiry. O’Neill has long held the view that media freedom is normatively distinct to personal freedom of expression (Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (House of Common 780, 2012) 55, [3.7]). See <<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Witness-Statement-Of-Baroness-ONeil.pdf>>.

149 Leveson (n 148).

150 *Ibid* 55, [4.1]–[4.5].

Press¹⁵¹ in the UK and the Hutchins Commission report¹⁵² in the USA. The Commission's report was particularly influential in establishing this new communication paradigm. Accordingly, in Baker's view, it 'provides the most influential modern account of the goals of journalistic performance' and is virtually treated as the 'official Western view'.¹⁵³ In simple terms the report laid down five requirements of media performance: firstly, to provide a truthful, comprehensive and intelligent account of the day's events in a context which gives them meaning, and to clearly distinguish fact from opinion; secondly, to be a forum for the exchange of comment and criticism by operating as common carriers of public discussion, even if this means disseminating views contrary to their own; thirdly, to project a representative picture of the constituent groups in society; fourthly, to be responsible for the presentation and clarification of the goals and values of society; and, fifthly, to provide full access to the day's intelligence.¹⁵⁴

The Royal Commission and Hutchins Commission reports, and the eventual establishment of the theory, were born out of diminishing faith in libertarianism and the 'optimistic' notion that virtually absolute freedom and the self-righting process carried 'built-in correctives' for the media.¹⁵⁵ Siebert et al distil the themes of criticism of the media at the time as follows: (i) it used its power for its own ends, with owners propagating their own opinions to their political and economic advantage at the expense of opposing views; (ii) it had been subservient to big business, with advertisers controlling editorial policies and content; (iii) it resisted social change; (iv) it was more willing to publish superficial and sensational stories than to publish 'significant' stories; (v) it had endangered public morals; (vi) it invaded the privacy of individuals without just cause; (vii) it was controlled by an elite socioeconomic class, meaning that access to the industry was difficult, which consequently endangered the free and open marketplace of ideas.¹⁵⁶ This disillusionment gave rise to an extreme anti-libertarian movement that resulted in increased pressure on the UK and US governments to regulate the media. Within the Hutchins Commission itself there was a clear divide between those who held strong libertarian views and those who favoured some form of media regulation, due to, in their view, the fragility of the marketplace of ideas theory making the media vulnerable to subversion by anti-democratic forces.¹⁵⁷ These proponents of regulation were guided by a philosophy of public communication developed by social researchers at the University of Chicago during the 1940s.¹⁵⁸ In opposing the notion of the marketplace of ideas the Chicago School argued that unregulated mass media served the interests of large or socially dominant groups. To their mind, the protection of free speech was not the same as the provision of free speech.¹⁵⁹ Therefore, they wanted government regulation to play an 'interventionary role' in order 'to provide enabling structures for a healthy

151 The Royal Commission on the Press 1947–1949.

152 Hutchins (n 22). The Commission was set up in 1942 and reported in 1947.

153 Baker (n 144) 154. Baker has also described it as 'the most important, semi-official, policy orientated study of the mass media in US history'. C Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2007) 2.

154 Baker (n 153) 20–30.

155 Siebert et al (n 16) 77.

156 Ibid 78–9.

157 Baran and Davis (n 3) 73.

158 Ibid. See also V Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (Cambridge University Press 2015) 154.

159 Baran and Davis (n 3) 73.

public sphere'.¹⁶⁰ Despite the majority of the Commission having some sympathy with the ideas advanced by the School, it opposed any direct form of regulation, because it feared that this could act as a catalyst for official control of the media.¹⁶¹ Consequently, a compromise came in the form of the social responsibility theory, which was founded on faith placed in the media by the members of the Commission, who emphasised that the media needed to refocus its efforts on serving the public.¹⁶²

Thus, the theory is based on the following rationale: unlike libertarianism, which dictates that free speech is absolute and, as a result, does not propagate duties and responsibilities that attach to the right to freedom of expression and media freedom, under social responsibility doctrine, freedom of speech carries concomitant responsibilities and obligations to society, employers and the market.¹⁶³ If the media does not at least attempt to meet these behavioural norms then, as a consequence, it cannot benefit from the right to media freedom. The theory rests on the moral principle of justice,¹⁶⁴ hence the right to free speech and media freedom must be balanced against the private rights of others and vital social interests: as beneficiaries of the right to media freedom, the media is obligated to continually strive to preserve democracy¹⁶⁵ by fulfilling essential constitutional normative functions of mass communication that extend beyond the mere provision of a robust marketplace of ideas,¹⁶⁶ including: (i) 'servicing the political system' by providing information, discussion and debate on public affairs; (ii) 'enlightening the public' so as to make it capable of democratic self-governance by disseminating information of public interest; and (iii) 'protecting the rights of the individual' by acting as the public watchdog.¹⁶⁷ In fulfilling these functions the media must ensure that it: sets and maintains high professional standards of truth and balance and conduct; avoids the communication of material that may lead to or incite criminal activity; and refrain from offending minority or marginalised groups.¹⁶⁸ Finally, at the heart of the theory is the requirement of the media to foster productive and creative 'Great Communities' by prioritising cultural pluralism by being a voice for all people, not just elite or dominant groups.¹⁶⁹

160 V Pickard, 'Whether the giants should be slain or persuaded to be good: revisiting the Hutchins Commission and the role of media in a democratic society' (2010) 27 *Critical Studies in Media Communication* 391–411, 394.

161 See generally Davis (n 23) 95–135.

162 Baran and Davis (n 3) 72; J. Curran, 'Mass media and democracy: a reappraisal' in J Curran and M Gurevitch (eds), *Mass Media and Society* (Edward Arnold 1991) 98.

163 Siebert et al (n 16) 74.

164 Plaisance (n 14) 300.

165 Baran and Davis (n 3) 73.

166 Siebert et al (n 16) 74; Plaisance (n 14) 300.

167 Siebert et al (n 16) 74.

168 Weiss (n 13) 577.

169 Baran and Davis (n 3) 73.

4.2 TIER TWO: SOCIAL RESPONSIBILITY THEORY AND THE ARGUMENT FROM DEMOCRATIC SELF-GOVERNANCE – NORMS OF PUBLIC DISCOURSE

Although the argument from democratic self-governance has been applied by the US Supreme Court and the House of Lords to defend free speech claims,¹⁷⁰ it is most commonly associated with the jurisprudence of the ECtHR.¹⁷¹ As explained above in relation to the argument from truth,¹⁷² the ECtHR has consistently placed it at the core of its jurisprudence on Article 10¹⁷³ and, as a result, pursuant to the ‘mirror principle’, it should, in theory at least, be the dominant philosophical foundation for free speech domestically.¹⁷⁴ Regardless of how the argument has been treated jurisprudentially in the USA, by the ECtHR and by domestic courts, it is submitted that, along with the social responsibility paradigm, it is the best-suited philosophical argument to underpin the modern media. Indicative of the behavioural standard and norms underpinning social responsibility theory, set out in the previous section, the argument is based on the premise that the predominant purpose of freedom of expression is to protect the right of citizens to understand political matters in order to facilitate and enable societal engagement with the political and democratic process.¹⁷⁵ Ultimately, an informed electorate is a prerequisite of democracy. Thus, the argument complements the social responsibility paradigm by setting norms, or parameters, for the *type* of speech the media can convey within the confines of media freedom.

According to Bork, speech regarding ‘government behaviour, policy or personnel, whether . . . executive, legislative, judicial or administrative’¹⁷⁶ was the original subject that was perceived as being protected by the right to freedom of expression.¹⁷⁷ However, the scope of this approach was seen as being overly restrictive.¹⁷⁸ Consequently, Alexander Meiklejohn, with whom this argument is now primarily associated,¹⁷⁹ 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

170 For example, from the US Supreme Court see *Whitney v California* 274 US 357 (1927) per Brandeis J at 375–8 (1927); *Garrison v Louisiana* 379 US 64, 74–5 (1964); C Estlund, ‘Speech on matters of public concern: the perils of an emerging First Amendment category’ (1990) 59(1) *George Washington Law Review* 1–54, 1. From the House of Lords, see *R v Secretary of State for the Home Department, ex parte Simms* (n 33) per Lord Steyn at 126. See generally Barendt (n 33) 18.

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

172 See Section 3.1.

173 *Lingens v Austria* (1986) 8 EHRR 407; *Jersild v Denmark* (1995) 19 EHRR 1. See also L Wildhaber, ‘The right to offend, shock or disturb? Aspects of freedom of expression under the European Convention on Human Rights’ (2001) 36 *Irish Jurist* 17; Wragg (n 34) 314.

174 See Section 3.1 for detailed discussion of the ‘mirror principle’.

175 See generally Sir J Laws, ‘Meiklejohn, the First Amendment and free speech in English law’ in Loveland (n 19) 123–37; Nicol et al (n 33) 3 [1.06]; Barendt (n 33) 18.

176 R H Bork, ‘Neutral principles and some First Amendment problems’ (1971) 47 *Indiana Law Journal* 1, 27–8.

177 Oster (n 82) 69.

178 *Ibid*; Milo (n 113) 63–4; 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.

179 Nicol et al (n 33) 3, [1.06].

purely to the casting of votes.¹⁸⁰ 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’.¹⁸¹ A result of this bifurcated interpretation of free speech is a two-tiered approach to expression:¹⁸² speech that is not in the public interest is not protected and is therefore open to restriction to protect the general welfare of society.¹⁸³ In later writings, Meiklejohn clarified this wider view of ‘public discussion’, by stating that voting is merely the ‘external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments’.¹⁸⁴ Accordingly, education, philosophy and science, literature and the arts, and public discussions on public issues are activities that will educate citizens for self-government.¹⁸⁵

This public interest requirement, pursuant to the social responsibility argument and argument from democratic self-governance framework, correlates with the jurisprudence of the US Supreme Court, and the UK Court of Appeal, House of Lords and Supreme Court which have all made consistent reference to it. As Oster observes,¹⁸⁶ the courts have expressed this in a number of ways, including: ‘public interest’ or ‘public concern’;¹⁸⁷ ‘of political, social or other concern to the community’;¹⁸⁸ ‘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’.¹⁸⁹ Similarly, the ECtHR’s jurisprudence 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:¹⁹⁰ national and local level political speech and reporting;¹⁹¹ criticism of

180 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, 255–7; Milo (n 113) 63–4; Oster (n 82) 69.

181 Meiklejohn, *Political Freedom* (n 180) 79.

182 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).

183 Milo (n 113) 62–3.

184 Meiklejohn, ‘The First Amendment’ (n 180) 255.

185 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]. This wider view of public discussion advanced by Meiklejohn reflects the fact that the ECtHR has resisted defining the democratic process value in free speech narrowly; Wragg (n 34) 318. Indeed, the wide ambit afforded to the argument from democratic self-governance by the Strasbourg Court is demonstrated by jurisprudence consistently finding the democratic process value to be at stake in commercial expression cases. For example, see *Krone Verlag GmbH & Co KG v Austria* (2006) 42 EHRR 28.

186 Oster (n 82) 74.

187 For example see *Gertz v Robert Welch Inc* 418 US 323, 246 (1974); *Dun and 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, 533–4 (2001); *London Artists v Littler* [1969] 2 QB 375, 391 (CA) (per Lord Denning); *Reynolds v Times Newspapers Ltd* (n 185) 205 (per Lord Nicholls); *Jameel v Wall Street Journal Europe Sprl* (n 185), 376 (per Lord Bingham); *Flood v Times Newspapers Ltd* [2012] UKSC 11, [24] (per Lord Phillips).

188 *Connick v Myers* 461 US 138, 146 (1983).

189 *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* (n 185) 205 (per Lord Nicholls).

190 For a more comprehensive list, see Oster (n 82) 75.

191 *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; *Filatenco v Russia App No 73219/01* (ECtHR 6 December 2007), para 40.

public administration and justice;¹⁹² abuse of police power;¹⁹³ and criticisms of businesses and those operating businesses.¹⁹⁴ 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.¹⁹⁵ Rather, echoing the criticisms of the media operating within a libertarian framework discussed above, these situations referred to by the Strasbourg Court relate to mere entertainment, as opposed to meeting the standards or norms of public discourse set out on this section.

Thus, social responsibility ideology, together with the argument from democratic self-governance, endorses a two-tiered approach to media expression. Firstly, the framework dictates that the media’s privileged protection is subject to it abiding by certain behavioural standards or norms, including 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 with express reference to these extra duties and responsibilities are Article 10(2) ECHR and Article 19(3) of the International Covenant for Civil and Political Rights (ICCPR). Although these qualification clauses apply to both media and non-media entities, their main purpose is to provide member states with a tool to combat abuses of power by the media.¹⁹⁶ Secondly, pursuant to the parameters, or norms, of speech set by the framework, 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,¹⁹⁷ speech relating to private or intimate matters,¹⁹⁸ and hate speech.¹⁹⁹

192 *De Haes and Gijssels v Belgium* 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.

193 *Thorgeir Thorgeirson v Iceland* App No 13778/88 (ECtHR 25 June 1992).

194 *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.

195 *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; *Erikainen 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.

196 Oster (n 82) 72–3; 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* (n 185) 205 (see also *Jameel v Wall Street Journal Europe Sprl* (n 185), 383 per Lord Hoffmann; *Flood v Times Newspapers Ltd* (n 187), [30] per Lord Phillips), and now enshrined within s 4 of Defamation Act 2013.

197 Barendt (n 33) 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.

198 Barendt (n 33) 230; Fenwick and Phillipson (n 32) 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)* (n 196) para 65; *MGN Ltd v UK* (n 195) para 143; *Mosley v UK* (n 195) para 14.

199 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 *Lebidoux 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).

Consequently, and in conclusion, 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. As a result, 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.²⁰⁰ Pursuant to the jurisprudence of the Strasbourg Court, the concept of media freedom grants protection to those operating as media beyond that afforded to non-media actors by freedom of expression.²⁰¹ However, media actors that are subject to these privileges, beyond private individuals, are also subject to duties and responsibilities in excess of those expected of non-media entities. The reach of the media does not just enable it to fulfil its constitutional functions. This power can be abused in equal measure: the potential impact of abuse of power is far greater than that emanating from private individuals, as the media is not just capable of invading private lives of individuals, or damaging reputations, but it can also shape and mislead public opinion, as demonstrated by the fake news phenomenon and the Cambridge Analytica scandal discussed earlier in this article.²⁰² As established in Section 2 above, 'abuse' of this kind by the media is more likely if it is operating within a libertarian paradigm. Rather, the privilege afforded to the media, deriving from the ambit of the social responsibility theory and the argument from democratic self-governance, is based upon a utilitarian, consequentialist and functional understanding of media freedom. This means that within this normative and philosophical framework 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 whilst behaving in a way that complies with the standards and norms discussed above. If it fails to do this, it relinquishes its protection and may be subject to regulatory sanctions and/or criminal or civil liability. The following section will set out how the social responsibility/argument from democratic self-governance paradigm advanced in this paper provides a mechanism for dealing with, at least some, of these abuses. In particular it will consider how it justifies (and provides) a normative framework from which to 'hang' regulation of the media.

5 Conclusion: how a new normative and philosophical framework can right the wrongs of libertarianism

As identified in Section 2, despite the emergence of social responsibility theory, its historical and ongoing marginalisation²⁰³ has become more acute as a result of libertarianism's position as the de facto normative paradigm for internet and social media expression. Consequently, some of the problems distilled by Siebert et al (as set out above)²⁰⁴ that the Royal Commission and the Hutchins Commission were set up to consider and attempted to resolve, in respect of the traditional media through the creation of the theory, are being repeated, albeit within a modern media context. Through

200 *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; *Scharbach and News Verlagsgesellschaft v Austria* App No 39394/98 (ECtHR, 13 November 2003) para 30.

201 *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busnioc 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]. See also Coe (n 11) 27–31.

202 See Sections 3.1 and 3.2.

203 Christians et al (n 24) 38.

204 Siebert et al (n 16).

recourse to the criticisms of libertarianism and, specifically, the argument from truth and marketplace of ideas set out in Section 3, this section will set out how (re)embracing social responsibility theory could go some way at least to solving these problems.

5.1 'RESISTANCE' TO SOCIAL CHANGE AND THE POLARISATION OF COMMUNITIES: FACILITATING CULTURAL AND MEDIA PLURALITY

Prima facie there is no doubt that social media speech and, in particular, the advent of citizen journalism has in many instances facilitated social change through its enablement of cultural pluralism and its fostering of the 'Great Communities' envisaged by the Hutchins Commission. This is particularly evident in the Arab World and the Middle East²⁰⁵ where social media and citizen journalism 'have been hailed as tools for the empowerment of marginalized communities such as women and the youth, [and have] also brought new opportunities that have resulted in the breaking of the communication monopoly by those in power'.²⁰⁶ For example, the Arab Spring that began in Tunisia in December 2010 and ended in the revolution of 14 January 2011, and has since been followed in Egypt, Libya and Syria, illustrates social media's role in galvanising activists and facilitating social change.²⁰⁷ However, social media does not always stimulate social change; to the contrary, it can encourage social inertia. As identified above at Section 3.2, filter bubbles can actively undermine the marketplace of ideas by entrenching people's views. Rather than exposing us to new and opposing ideas and perspectives, these filter bubbles can create echo chambers, giving rise to what has been referred to as 'my news, my world'.²⁰⁸ Thus, instead of being a catalyst for social change by encouraging cultural plurality and the galvanisation of 'Great Communities', filter bubbles and echo chambers can polarise communities, in particular already marginalised groups.²⁰⁹

It is recognised that re-embracing the social responsibility theory will not necessarily prevent echo chambers, as arguably they are an inherent characteristic of online speech, regardless of the underpinning normative paradigm. However, as the likes of Baran and Davis and Yu and Renderos have observed, social responsibility theory will continue to be revitalised by new and emerging technologies, such as social media and its facilitation of citizen journalism.²¹⁰ It is submitted that the effect of this could be threefold: firstly, promotion of the underlying values of social responsibility theory, particularly its focus on cultural pluralism and media responsibility, *may* discourage the continued widespread implementation of filter bubbles which would actively reduce the amount of echo chambers we are inadvertently captured by; secondly, as social media and citizen journalism has the potential to give new strength to the social responsibility model, by virtue of its rationale, this rejuvenation of the theory *may* encourage more speech adhering to the theory's values. Thus, although not solving the echo chamber issue, it will encourage the dissemination of, and make available, more speech that complies with standard and norms of public discourse set out in Section 4; thirdly, as set out at Section 5.3 below, the social responsibility theory dictates that the government must actively

205 See generally D McGoldrick, 'The limits of freedom of expression on Facebook and social networking sites: A UK perspective' (2013) *Human Rights Law Review* 125–51, 130; Coe (n 63) 30; M Castells, M Fernandez-Ardevol, J Qui and A Say, *Mobile Communication and Society: A Global Perspective* (MIT Press 2007).

206 N Miladi, 'Social media and social change' (2016) 25(1) *Digest of the Middle East* 36–51, 36.

207 *Ibid* 37.

208 Baran and Davis (n 3) 81.

209 See generally C. Sunstein, *#Republic* (Princeton University Press 2017) ch 3.

210 Baran and Davis (n 3) 79; B Yu and S Renderos, 'Seizing the airwaves' (2013) (March) *Extra!* 12–13.

promote the freedom of its citizens,²¹¹ which can be achieved, in part, by guaranteeing adequate media performance.²¹² Arguably, this includes the obligation to support diverse speech environments (in other words, ‘Great Communities’ that encourage cultural pluralism). More broadly, unlike libertarianism, it is submitted that the theory supports the notion of ‘positive’ free speech; as observed by a number of scholars,²¹³ and the Grand Chamber of the ECtHR in *Centro Europa 7 Srl v Italy*, the concept places positive obligations on the state to ensure media plurality (in addition to its negative duty of non-interference).²¹⁴ This is equally important in respect of emerging technologies as it is with the traditional media as, according to Curran et al, the internet and, it is submitted, by extension, social media and citizen journalism, is not exempt from ‘corporate dominance, market concentration, controlling gatekeepers, employee exploitation, manipulative rights management, economic exclusion through “tethered appliances” and encroachment upon the information commons’.²¹⁵

5.2 THE PROBLEM WITH ‘RATIONALITY’: DEALING WITH SENSATIONALISED STORIES, FAKE NEWS, ENTRENCHED VIEWS AND ANONYMOUS AND PSEUDONYMOUS SPEECH

In contrast to libertarianism, social responsibility theory does not accept the proposition that we are innately driven to search for truth and use it as a guide, and it is, at best, sceptical of people’s ability to think *rationally*, particularly in the context of the marketplace. It views us as being lethargic, prone to passively accepting what we see, hear and read and reluctant to apply reason when it does not satisfy our immediate needs and desires. Consequently, as Siebert et al state, the theory perceives us as being ‘easy prey for demagogues, advertising pitchmen, and others who would manipulate [us] for their selfish ends’.²¹⁶ Thus, unlike libertarian ideology, the social responsibility theory acknowledges the inherent flaws in our nature. In applying this to a modern media context, and the discussions in Section 3, it recognises that we are vulnerable to sensationalised stories, fake news and the regurgitation of false or misleading information, entrenchment of views by virtue of preconceived schemas, the fact that we are largely unable to assess the veracity of anonymous and pseudonymous speakers and, as a result of all of this, our inability to *rationally* assess the marketplace. Consequently, it is *realistic*, as opposed to being *idealistic*.

Significantly, it is this pragmatism that makes it a suitable framework for the modern media, as the operation of media freedom is based upon its standards and norms of behaviour and discourse set out in Section 4 that facilitate effective democratic self-governance. Although not a panacea, this helps to protect us against some of the flaws and vulnerabilities in human nature outlined above, by virtue of the behaviours it requires. For instance, it may mean that more care is taken over source-checking to reduce the regurgitation of false or misleading information; discourage the publication of sensationalised stories and encourage the dissemination of constitutionally valuable information; support the introduction by social media platforms, such as Facebook, of

211 Barendt (n 33) 36, 105–7.

212 Siebert et al (n 16) 95; W Hocking, *Freedom of the Press: A Framework of Principle* (University of Chicago Press 1947) 182–93; See also *Özgür Gündem v Turkey* (2001) 31 EHRR 1082, [43].

213 Kenyon (116) 391–402; T Emerson, *The System of Freedom of Expression* (Vintage 1970) 4; J Balkin, ‘Some realism about pluralism: legal realist approaches to the First Amendment’ [1990] *Duke Law Journal* 375, 401; A Hutchinson, ‘Talking the good life: from free speech to democratic dialogue’ (1989) 1 *Yale Journal of Law and Liberation* 17, 25; T Gibbons, ‘Free speech, communication and the state’ in M Amos, J Harrison and L Woods (eds), *Freedom of Expression and the Media* (Martinus Nijhoff 2012) 42.

214 [2012] ECHR 974, [134]; See also: *Manole v Moldova* [2010] ECHR 1112, [107].

215 Curran et al (n 138) 180.

216 *Ibid.* Siebert et al (n 16) 100.

third-party fact-checking organisations to prevent the dissemination of fake news; as a result it means that the audience can have more faith in material published anonymously and pseudonymously without having to compromise the identity of the speaker and, ultimately, discourage such speech to the detriment of freedom of expression. Essentially, this normative and philosophical framework provides us with a more suitable platform from which to assess the marketplace *rationally*.

5.3 A BASIS FOR COERCIVE REGULATION?

Undoubtedly, both the traditional media and users of social media, including citizen journalists, can unjustifiably damage reputations²¹⁷ and invade personal privacy.²¹⁸ The social responsibility theory and argument from democratic self-governance framework offer two layers of protection against this. Publications that damage reputation and/or invade privacy without justification will fall short of the standards and norms of public discourse as they would not be in the public interest. As a result, these publications would not qualify for protection under media freedom.

An additional layer of protection for the rights of individuals that the framework supports is regulation. The Alliance of Independent Press Councils of Europe (AIPCE)²¹⁹ is a network of national voluntary and self-regulatory media councils that was formed to deal with complaints from the public about editorial content.²²⁰ The AIPCE's councils were traditionally concerned with the print and broadcast media, but it has recently extended its remit to online versions of the traditional media and to bloggers and citizen journalists. Although there is no doubt that the print media has, and will continue to, publish stories via traditional methods and online that are morally questionable, cause reputational damage and invade individuals' privacy without just cause, according to the AIPCE, complaints made by the public against online blogs and citizen journalists for alleged breaches of journalistic ethical standards to its various councils continue to increase rapidly.²²¹ Thus, the AIPCE, its councils and ultimately the public, face three problems, as set out in the following paragraphs.

217 See generally Milo (n 113); P Coe, 'The Defamation Act 2013 and CPR 3.4 and 24: a sting in causation's tail' (2014) 25(3) *Entertainment Law Review* 93–6; P Coe 'The Defamation Act 2013: we need to talk about corporate reputation' (2015) 4 *Journal of Business Law* 313–34. In respect of social media, see *Smith v ADVFN plc* [2008] EWHC 1797; *McAlpine v Bercow* [2013] EWHC 1342 (QB); *Monroe v Hopkins* [2017] EWHC 433 (QB).

218 For the traditional media, see generally E Barendt, 'Privacy and freedom of speech' in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law International and Comparative Perspectives* (Cambridge University Press 2006) 11–31; R Wacks, *Privacy and Media Freedom* (Oxford University Press 2013); B Markesinis, *Protecting Privacy* (Oxford University Press 1999); R Barnes, *Outrageous Invasions: Celebrities' Private Lives, Media and the Law* (Oxford University Press 2010); Sir M Warby and N Moreham (eds), *The Law of Privacy and the Media* (Oxford University Press 2016). In respect of social media, notable examples have concerned the use of 'super-injunctions'. For example, see: *CTB v News Group Newspapers* [2011] EWHC 1232. See generally Warby and Moreham (eds), ch 3; P Wragg, 'Protecting private information of public interest: Campbell's great promise unfulfilled' (2015) 7 *Journal of Media Law* 225; R Barnes and P Wragg, 'Social media, sporting figures and the regulation of morality' in D Mangan and L Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar 2017) 155–76.

219 AIPCE <www.aipce.net>.

220 IPSO is a member. IMPRESS is not a member. These regulatory schemes are explained in more detail below.

221 A Hulin, 'Citizen journalism and news blogs: why Media Councils don't care (yet)' (*Inform's Blog*, 15 June 2016) <<https://inform.org/2016/06/16/citizen-journalism-and-news-blogs-why-media-councils-dont-care-yet-adeline-hulin/#more-34437>>.

Firstly, from a UK perspective, the print media is not, at present, subject to a compulsory or coercive regulatory regime. As a result of Leveson LJ's *Inquiry*²²² the Royal Charter on Self-Regulation of the Press created the Press Recognition Panel, a corporate body empowered to approve independent press regulators that fit the criteria imposed by the Charter. This led to the creation of two regulators: IMPRESS²²³ and its rival, the Independent Press Standards Organisation (IPSO),²²⁴ which was created by the press industry itself. IMPRESS has the power to impose fines on its members who breach its code and offers an arbitration service that settles disputes without the need for litigation, whereas IPSO does not. Common to both schemes is their reliance on members of the press to voluntarily join them. Despite the *self-regulatory* nature of IMPRESS and IPSO, there is a framework in place for a *coercive* regime. In light of Leveson LJ's recommendations to 'encourage' press membership of IMPRESS, s 34 of the Crime and Courts Act 2013 enables a court to award exemplary damages against any 'relevant publisher'²²⁵ in media litigation who is not a member of 'an approved regulator'. Among the requirements for an effective regulator is that it will have a low-cost arbitration system to reduce legal costs for both claimants and the press. Section 40 is at the core of this 'costs incentives regime' as it empowers the court to award adverse costs against non-members of an 'approved regulator' by forcing the 'relevant publisher' to pay the claimant's legal costs even if the publisher is successful in defending the claim, subject to certain exceptions.²²⁶ However, s 40 is not yet in force.²²⁷ Consequently, it remains unenforceable until it is activated by the Secretary of State for Digital, Culture, Media and Sport. Thus, Leveson LJ's recommendations have only been partially implemented.

Secondly, s 40 and the abandoned amendment to the Data Protection Bill²²⁸ are controversial. For example, the *Daily Mail* cited an opinion by Antony White QC suggesting that the amendment to the Bill would violate human rights law.²²⁹ The press used the same argument to challenge s 40 in 2013.²³⁰ However, these arguments are flawed. The human rights relied upon pursuant to the ECHR²³¹ are all qualified rights, meaning their interference is lawful so long as it is justified and proportionate. It is submitted that these provisions are justified and proportionate, as s 40 could effectively balance the right to free speech with the rights of the public. This is because publishers who refuse to join an approved regulator deny claimants access to quick and cheap

222 Leveson (n 148).

223 IMPRESS <<https://impress.press>>.

224 IPSO <www.ipso.co.uk>.

225 S 41 sets out what is meant by 'relevant publisher'. This is qualified by Schedule 15 which excludes certain persons and organisations from this definition and, therefore, from the ambit of ss 34 to 42. The scope of s 41 is discussed in the following paragraph.

226 These exceptions are dealt with below.

227 Abandoned amendments to the Data Protection Bill proposed by Labour's Tom Watson would have mirrored the wording of s 40 (in the Data Protection Act 2018), albeit in respect of data breaches by 'relevant publishers'.

228 *Ibid.* The Bill received Royal Assent on 23 May 2018 and the Act's main provisions commenced on 25 May 2018.

229 I Drury, 'Labour's plans for two-tier press regulation that would favour supportive *Guardian* over other newspapers would be illegal, warns a leading QC' (*Mail Online*, 7 May 2018) <www.dailymail.co.uk/news/article-5697875/A-chilling-assault-Press-freedom-Labour-illegal-warns-leading-QC.html>.

230 H Tomlinson QC, 'The Data Protection Bill, human rights and the *Daily Mail*' (*Inform's Blog*, 8 May 2018) <<https://inform.org/2018/05/08/the-data-protection-bill-human-rights-and-the-daily-mail-hugh-tomlinson-qc/#more-39917>>.

231 Article 6 access to a court; Article 10 freedom of expression; Article 14 right not to be discriminated against.

dispute resolution. Consequently, they should pay for that decision, which would otherwise impose costs on potential victims or deny them a remedy. As Hugh Tomlinson QC states:

Publishers have been given a choice that no other business or profession is given: they can choose whether or not to be subject to effective scrutiny. If they choose not to, then they must pay to ensure that victims have access to justice . . . There is no threat to press freedom or human rights – simply a threat to unregulated press abuse.²³²

Furthermore, s 40 is subject to exceptions to the rule that publishers who reject independent regulation pay whether they win or lose. The court can refuse to follow it if it is ‘just and equitable’ to make a different award. This would apply, for example, if the claimant’s case was frivolous or if the claimant had refused a reasonable settlement. Thus, the system retains flexibility to enable the courts to do justice whilst providing an incentive for publishers to join a system that gives claimants access to justice.

If media actors do not join, or comply with, an approved regulatory scheme, that sets ethical standards and provides an appropriate mechanism for redress, then curing the ‘real harm caused to real people’ by breaches of these standards creates a challenge. Indeed, Leveson LJ’s findings were influenced by the evidence of Baroness O’Neill, who has long held the view that media freedom and individual freedom of expression are distinct concepts.²³³ Accordingly, to O’Neill, the public interest in press freedom:

. . . is best construed as an interest in adequate (or better than adequate) standards of public communication, that allow readers, listeners and viewers to gain information and form judgements, as so to participate in social, cultural and democratic life. A free press is a public good because it is needed for civic and common life.²³⁴

According to Wragg,²³⁵ this view is representative of the claim made by social responsibility theorists that the media’s performance of its functions is critical to ensuring participation in the democratic process.²³⁶ In their view, regulation of the media is justified by this rationale on the basis that it protects and enhances media freedom, which in turn safeguards society’s interest in a healthy and functioning democracy. To their mind, regulation ensures that the media achieves this aim, as the media cannot be trusted to do so without it.²³⁷

It is submitted that the framework advanced in this article provides a mechanism to deal with this challenge, as it justifies a tougher regulatory regime for *all* media actors. Unlike libertarianism, the social responsibility paradigm champions media self-regulation where possible, but also acknowledges that a coercive regime may be necessary.²³⁸ Under the theory, the government must not merely allow freedom, it must also actively promote

232 Tomlinson (n 230).

233 See above (n 148).

234 Ibid.

235 P Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, forthcoming).

236 For example, see R Post, ‘The constitutional concept of public discourse: outrageous opinion, democratic deliberation and *Hustler Magazine v Falwell* (1990) 64 Harvard Law Review 255, 308; ‘Meiklejohn’s mistake: individual autonomy and the reform of public discourse’ (1993) 64 University of Colorado Law Review 1109; ‘Participatory democracy and free speech’ (2011) 97 Virginia Law Review 477; J Habermas, *The Theory of Communicative Action*, vols 1 and 2 (Polity Press 1986); J Rawls, *Political Liberalism* (Columbia University Press 1996).

237 Wragg (n 235).

238 Weiss (n 13) 577; Siebert et al (n 16) 76.

it, which means that when necessary the government should act to protect the freedom of its citizens.²³⁹ Inherent within this obligation is the government's status as the 'residuary legatee of responsibility for an adequate press performance'.²⁴⁰ Thus, according to Hocking, if a self-regulating media is insufficient to provide society with the services it requires from it then the government is obliged to correct this by, for instance, enacting legislation to forbid flagrant abuses of the media which may 'poison the wells of public opinion'.²⁴¹ Arguably, in respect of 'relevant publishers', s 40 of the Crime and Courts Act 2013 would achieve this. However, the theory dictates that any government intervention should only occur when the 'need is great and the stakes are high', and even then it should intervene cautiously.²⁴² As Siebert et al state, under the theory, 'the government should not act with a heavy hand' as any 'agency capable of promoting freedom is also capable of destroying it'.²⁴³

Thirdly, online news bloggers and citizen journalists rarely join the various self-regulatory systems that exist across Europe.²⁴⁴ Indeed, in his *Inquiry*, Leveson LJ stated 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'.²⁴⁵ and, specifically, '[b]logs and other such websites are entirely unregulated'.²⁴⁶ Consequently, cyberspace has been described as a 'Wild West, law free zone'.²⁴⁷ As a result, those councils that can only deal with complaints against their *members* are hamstrung when it comes to investigating complaints against non-members.²⁴⁸ In the UK this issue has not been helped by the Crime and Courts Act 2013. As stated above, ss 34 and 40 of the Act apply to any 'relevant publisher'. According to s 41(1) a 'relevant publisher' is a person who, in the course of a business,²⁴⁹ publishes news-related material that is written by different authors and is subject to editorial control. Section 41(2) tells us that this means that a person, who does not have to be the publisher, has editorial or equivalent responsibility for the content and presentation of the material, and the decision to actually publish it. Crucially, s 41 seems to exclude most, if not all, citizen journalists for two reasons. By definition, most citizen journalists are not publishing news-related material 'in the course of a business'. Moreover, citizen journalists tend to be both the author and publisher of their material, as opposed to publishing material 'written by different authors'.

Although Leveson LJ's *Inquiry* was exclusively concerned with the print media, his view that greater press regulation is required to prevent 'real harm caused to real people'²⁵⁰ is equally as applicable to media actors operating online and via social media,

239 Siebert et al (n 16) 95.

240 Hocking (n 212) 182–93.

241 Ibid.

242 Siebert et al (n 16) 95.

243 Ibid 95–6.

244 Leveson (n 148).

245 Ibid [3.2].

246 Ibid 171, [4.20].

247 A Yen, 'Western frontier or feudal society? Metaphors and perceptions of cyberspace' (2002) 17 Berkeley Technology Law Journal 1207.

248 For example, the Austrian and Dutch Councils and the French and Flemish Councils in Belgium will investigate complaints about any media content, regardless of the publisher. Norway's Council has recently enacted a rule change to enable it to deal with complaints against non-members. *ibid*.

249 Whether or not carried on with a view to make a profit.

250 Leveson (n 148) 50, [2.2].

including citizen journalists. Thus, it is submitted that the Crime and Courts Act 2013's definition of 'relevant publisher' is fundamentally flawed: why should traditional media actors, whether they publish material in their newspapers or online, be captured by ss 34 and 40 (if it were enacted), yet citizen journalists, by virtue of not publishing in the course of a business and being both the authors and publishers of their material, not be? Surely, if citizen journalists are acting as media they should then be subject to the same regulatory schemes as traditional journalists? Data protection law demonstrates the inequity of this situation. Pursuant to the jurisprudence of the European Court of Justice (as it then was),²⁵¹ the UK Supreme Court²⁵² and guidance from the Information Commissioner's Office (ICO),²⁵³ 'journalism' has been given a very wide meaning. Thus, in *The Law Society and others v Kordowski*,²⁵⁴ Tugendhat J held that online bloggers engaging in internet journalism are able to avail themselves of the 'special purposes' exemption for 'journalistic, literary or artistic' purposes²⁵⁵ found in s 32 of the Data Protection Act 1998, and subsequently imported into Article 85 of the General Data Protection Regulation (GDPR) and the Data Protection Act 2018.²⁵⁶ According to the ICO, the purpose of the exemption is to 'safeguard freedom of expression'.²⁵⁷

This is a loophole that needs to be addressed. It is submitted that adopting the framework advanced in this article provides normative and philosophical support for the Crime and Courts Act 2013 regime that achieves a fair balance between media freedom and the rights of the public. Unfortunately, the regime excludes what is now a large and important group within the modern media: citizen journalists and online bloggers. In the same way it does in respect of the traditional media, the framework would support an amendment to the relevant 2013 Act provisions to explicitly include online media, or the introduction of new citizen journalist-specific legislation.

251 *Tietosuojavaltutettu v Satakunnan Markkinapörssi Oy Satamedia Oy (Satamedia)* Case C-73/07.

252 *Sugar (Deceased) v BBC* [2012] UKSC 4.

253 *Data Protection and Journalism: A Guide for the Media* (Information Commissioners' Office 2014) 29–30 <<https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>>.

254 [2014] EMLR 2, [99].

255 The provision provides an exemption from most statutory provisions under the 1998 Act/GDPR which apply to the processing of personal data so long as the criteria found in s 32(1)(a)–(c) are met.

256 The exemption has been imported into the Data Protection Act 2018 by virtue of Part 5, para 26 of Schedule 2. Both the GDPR and 2018 Act have added 'academic purposes' to the list.

257 Information Commissioners' Office (n 253) 28.

Learning from the laws of the sea, Foucault and regulatory theory: proposing a ‘regulatory harbour’ model for the regulation of social media that serves rather than rules the waves

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It takes time to know the sea, years and those who keep measuring the brief moments of romance against the punishment of mind and body that the sea imposes, soon gravitate towards a sullen hatred which is akin to the hatred of an alien land where none speak your tongue and all customs are strange . . . Accursed be those moments of deadly fear when the ship groans and shudders as the screw races wildly in the hollow of the valleys of the waves, the engines thumping, the anchor chains thundering with a fearful sound . . . and now the cargo shifts, now the ship itself is listing, and still she plunges into the valleys of the waves . . . Have you lived though that ever? . . . How many facets has a gem? The sea has more. (W Kaufman, *The Eternal Sea*)

Abstract

This paper will make a modest case of the regulation of social media. Improved rule-making comes when the means of securing compliance is shaped having regard to the particular problem at hand, rather than by clinging to the notion that rules shape the world. Through a consideration of the regulation of the sea, this paper has served to illustrate that regulation is possible. In the context of social media, where individuals work constantly on their self-identity and perform self-development through expressive activities in public, the use of social media sites can represent what Foucault described as techniques of the self. This paper proposes a theoretical and methodological approach to thinking about the regulation of social media as conceptualised in an iterative and dynamic model that is characterised by the technologisation of human interaction and increasingly transparent ways of living in an age of ‘technologies of the self’. This approach will facilitate a more critical, responsive and iterative awareness of the regulation of expressive content in a way that can grow with the technological state of the art, alive to cultural sensitivities and the use of the tools as a vessel for self-development.

Keywords: social media; regulatory theory; cyberspace regulation; libertarianism; cyberpaternalism; Foucault; internet; waterfall methodology; agile methodology; governance; hybrid modelling

1 Introduction

This paper will make a modest case of the regulation of social media, drawing on the laws of the sea and regulatory theory to propose a ‘regulatory harbour’ model for its regulation. What it takes to make regulation responsive has been extensively researched;¹ latterly a body of work has developed querying the responsiveness of regulation as applied to the internet,² yet the effective regulation of social media remains largely unaddressed,³ characterised as it is by its dynamic quality, spontaneity and reach. Much like the internet, social media as current legal problem is frequently characterised as somehow unique, differing from other seemingly untameable spaces, such as the sea, which have successfully become the subject of regulation. Regulation can be created for anything. Tomorrow, legislators could ban social media in its entirety if they so wished. However, the test of regulation is whether it is equipped to meet the demands of the legal dilemmas which it raises and whether those persons subject to regulation, submit to it. Improved rule-making comes when the means of securing compliance is shaped having regard to the particular problem at hand, rather than by ‘clinging to the notion that rules shape the world’.⁴

My starting point is to consider the vast and continuous expanse of the ocean’s water to be akin to the equally vast extent of global information and social media content. The shape and geography of the oceans have morphed and evolved through the process of plate tectonics, unrecognisably over the millennia, and existed long before any form of regulation or even the first of passage by man-made vessels. However, there have been rules in place to govern participants of sea-transport since about the first millennium BC. Contemporary maritime law is a mixture of ancient doctrines and new laws, both national and international. From oil to tin, diamonds to gravel, metals to fish, the resources of the sea are enormous. The reality of their exploitation grows day by day as technology opens new ways to tap those resources. The point of the comparison is this; despite the changing times and tides, the nature of basic hazards associated with seafaring does not in essentials change, for example, collisions at sea, sinking, smuggling, environmental pollution and piracy. The full list of potential hazards at sea, much like social media (for example, copyright breaches, defamation, criminal speech, breach of privacy rights etc.) is extensive.⁵ My argument is that understanding the development of international maritime law can help prompt a dynamic, dialogue-based model for the regulation of international social media.

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- 1 S Barrett and C Fudge, *Policy and Action* (Methuen 1981); R Baldwin, ‘Why rules don’t work’ (1990) 3(3) *Modern Law Review* 321–37; F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford University Press 1991); R Baldwin and J Black, ‘Really responsive regulation’ (2008) 71(1) *Modern Law Review* 59–94; R Baldwin and J Black, ‘Really responsive risk-based regulation’ (2010) 32(2) *Law and Policy* 181–213; J Black, *Rules and Regulators* (Oxford Scholarship Online 2012, first published Clarendon 1997); J Black and R Baldwin, ‘When risk-based regulation aims low: approaches and challenges’ (2012) 6(1) *Regulation and Governance* 2–22.
 - 2 Lawrence Lessig, *Code: And Other Laws of Cyberspace*, 2nd edn (ebook, Basic Books 2008) <<http://kentuk.eblib.com/patron/FullRecord.aspx?p=903037>>.
 - 3 There is some work in the field of co-regulation. See Christopher T Marsden, ‘Internet co-regulation and constitutionalism: towards European judicial review’ (2012) 26(2–3) *International Review of Law, Computers and Technology* 211–28, 212. However, there is as of yet no comprehensive attempt to address the overarching regulation of social media in a holistic manner.
 - 4 Baldwin (n 1) 337.
 - 5 This article will not consider these issues individually. For an analysis of the issues as applied to intermediaries see Uta Kohl, ‘The rise and rise of online intermediaries in the governance of the internet and beyond: connectivity intermediaries’ (2012) 26(2–3) *International Review of Law, Computers and Technology* 185–210.

The theoretical context for this paper is provided by the proponents of regulatory theory.⁶ I will argue that such theories are of significant importance in the context of social media communications, given the prevalence, immediacy and internationality of such communication.

The aim of this article is not to examine regulatory theory, or even attempt to apply such a breadth of literature to the technologies and practices characterising the luminous depths of social media platforms powered by Web 2.0.⁷ My aim is to use regulatory theory as a vessel and apply it to social media to formulate a 'really responsive' regulatory approach to a contemporary legal issue.⁸ I draw on software development modelling to propose a 'regulatory harbour' model, for the regulation of social media. This proposed model takes into account the dynamic technological environment, the differential nature of the logics, and the working practices adopted by regulator and regulated to create an iterative model which is built to respond to robust testing and challenges.

The proposed model is as rich and diverse as the oceans: it facilitates tidal waters to flow in and out of protected areas, so that law-abiding vessels which choose to be part of a socially responsible, respectful and self-governing system, based on effective principles and standards, can sail through the harbour entrance as they wish, in accordance with the accepted rules and conventions. The systems and regulation will similarly evolve over time through a process of review, whilst building up customary courses and standards of behaviour based on underlying common principles which should be agreed are desirable of protection and common interest, representing a collaboration between the legislators, developers and the community itself. I will suggest that users and stakeholders could learn to navigate social media with greater aplomb and security, whilst affording technology providers, like those early ship-builders, the necessary latitude to design more sophisticated system architecture and codes, which could again be compared to the evolution of early maritime knowledge, navigational instruments and charts. Through the global adoption and harmonisation of these instruments, explorers will be able to recognise the glorious and expansive opportunities of the social media high seas whilst reducing the risks of being shipwrecked on jagged rocks as they sail through storms, seemingly still waters and violent tempests.

This approach will facilitate a more critical, responsive and iterative approach to the regulation of expressive content, devising a model that can grow with the technological state of the art and that is alive to cultural sensitivities and organisational constraints of both the regulator and the regulatee. It goes further than simply providing a refinement of existing models, demanding an ongoing consideration of the regulatory strategy to be adopted, beginning with principles and problems rather than the regulation itself. The regulation is responsive because it knows the environment which it seeks to *assist* rather than attempting to *command* it, so that it is alive to performance sensitivities and changes in tides, rejecting the notion that regulation is an inherently restrictive force, fostering a regulatory environment in which the internet, the web and social media can exist and have the potential to flourish.

This is only a modest case for regulation because, after advancing the case for the reconceptualisation of social media regulation, much like the oceans, it will not be possible to regulate every aspect of social media, as an omni-directional regulatory system

6 See Baldwin (n 1); Schauer (n 1); Baldwin and Black (2008) (n 1); Baldwin and Black (2010) (n 1); Black and Baldwin (2012) (n 1); Black (2012) (n 1).

7 This paper is confined to a consideration of UK law, and does not consider the role of international law.

8 See generally Baldwin and Black (2008) (n 1).

would rely on all ‘social-seafarers’ obeying the rules, which is unrealistic. Like the oceans, the content posted on social media platforms has its own uncontrollable weather patterns, currents and tides, which will inevitably produce difficult seafaring conditions, creating the need for safe environments, such as harbours, to be designed and constructed to shelter users from violent tempests so they can engage in commercial, social and competitive activity. Regulation should not attempt or expect pirates or smugglers to choose to be subject to regulation. Rather, rogue groups of people, such as trolls, ‘keyboard warriors’, criminals or terrorists will not choose to be constrained by international rules and must continue to be pursued by other investigatory and judiciary systems. The conceptual model proposed for the holistic regulation of social media may be valid, but the application of the principal should vary.

2 Social media: community, power and influence

2.1 THE SELF-DETERMINATIVE POWER, INFLUENCE AND ALLURE OF SOCIAL MEDIA

The wide adoption of internet-enabled smartphones has afforded social media ubiquity, raising it to a modern-day religion which many observe devoutly on a daily basis, with its various preachers (finding form as influential bloggers, and celebrity Twitter account holders) and devoted followers. It even enjoys a confessional quality.⁹ Having recently celebrated its 25th birthday,¹⁰ the internet in comparison is still in its historical infancy, yet it represents a powerful medium for the formation of self-identity. In the western technosocialised world, individuals are constantly working on their self-identities in the public realm, performing such self-development through the use of social networking sites which for Sauter ‘can be conceptualised as what Foucault described as “*techniques of the self*”’.¹¹

Social media is not ethereal, it is a man-made construct, building upon the architecture of Web 1.0,¹² yet it is held up as an omnipotent being, becoming for many a significant part of their day-to-day life, afforded a status akin to our basic human needs, quenching our insatiable thirst for knowledge. According to Sauter, users of social media ‘figure out how to manage their daily actions and interactions within the context of the complex techno-social hybrid realities they live in, constantly navigating their public appearance and their relation to self and others’.¹³ These globules of information which spill forth, shape and carry our collective and individual identities (for example politics, jurisdiction, legal system, social norms, shared values, religion, history, culture etc.), which are some of the most valuable ‘commodities’ that we, as human beings possess, are now passing back and forth across the giant uncharted digital oceans that collectively represent social media content generation which takes place on Web 2.0.¹⁴

As much as the then uncharted waters did for the original global explorers and commodity traders that used the oceans to explore new lands and trading routes, the internet allows users to discover new markets, cultures and friends at the click of a smartphone or the click of a ‘like’ button. For Foucault, practices of the self ‘permit

9 T Sauter, T ‘What’s on your mind? Writing on Facebook as a tool for self-formation’ (2014) 16 *New Media and Society* 823–83, 823, 827.

10 <www.w3.org/webat25>

11 Sauter (n 9) 823.

12 L Scaife, *The Handbook of Social Media and the Law*, 1st edn (Informa Law, Routledge 2014) 4–7.

13 Sauter (n 9) 824.

14 See Sauter (n 9) 824: ‘On Facebook, people write and update status messages not just as a form of communication, but as a means of shaping understandings of self and establishing normative ways of acting, and sometimes transgressing them.’

individuals to affect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct and a way of being, so as to transform themselves to attain a certain state of happiness, purity, wisdom or immortality'.¹⁵ In a paper written shortly after this exploration, Foucault began to describe these practices as 'technologies of the self'.¹⁶ Social media can be located within this theoretical framework in a very general sense, as they represent a means through which one can undertake 'an exercise of self upon self by which one tries to work out, to transform oneself and to attain a certain mode of being'.¹⁷ Foucault could not have known when he wrote his work that it would so neatly apply to the meteoric rise of Instagram photographs of Avocados,¹⁸ 'selfies'¹⁹ and 'clean eating' trends.²⁰

In the Western techno-socialised world, social networking sites (SNSs) 'can be conceptualised as what has been described as "*techniques of the self*".²¹ As noted by Foucault, self-writing as borne through historical analysis has been a relational practice that leads to an 'intensification of social relations'.²² Van Kreiken suggests that 'as social life becomes denser, more competitive, more highly differentiated and more dependent on a variety of means of indirect communication, visibility beyond ones immediate circle of face-to-face contacts becomes increasingly significant'.²³ Indeed, 'the ease of access to these tools for most in the developed world, and the immediacy with which others respond to, and thus provide guidance to, modern self-writers adds a new facet to the age-old practice of self-formation'.²⁴ However, in making their private lives public 'and revealing themselves though their semi-public online self-writing, users expose themselves to an expanded and less clearly defined readership, "inviting, albeit cautiously, a certain level of surveillance"'.²⁵

The quest for self-reflection and its relationship with water is not new. In Greek mythology, Narcissus, who was known for his beauty, was lured by Nemesis to a still pool in which he saw his own reflection in the water and fell in love with it, not realising it was merely an image. Unable to leave the beauty of his reflection, Narcissus lost his will to live. He stared at his reflection until he died. Modern self-writers are lured by social media's own reflective capacities, searching deeper still beyond the water's reflection to understand more about themselves and the community in which they form their self-identities. Walter Kaufman, in *The Eternal Sea* wrote of its powers: 'the sea knows all moods of man, and she imposes them all on those who venture out in ships: serenity and rage, gravity and vehemence, jocundity and gloom, charity and malice – the sea is like no

15 M Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan (trans) (Vintage 1977) 18.

16 M Foucault, *Technologies of the Self*, in L H Martin, H Gutman and P H Hutton (eds), *Technologies of the Self: A Seminar with Michael Foucault* (Tavistock 1988).

17 M Foucault, *The Care of the Self: The History of Sexuality*, vol 3 (Random House 1986) 2.

18 'Avocados now the Oprah of Instagram' (*New Zealand Avocado*, 7 August 2015) <www.nzavocado.co.nz/newsroom/Avocados_now_The_Oprah_of_Instagram>.

19 D Paulhus and K Williams, 'The Dark Triad and trait self-objectification as predictors of men's use and self-presentation behaviors on social networking sites' (2015) 76 *Personality and Individual Differences* 161–5.

20 Hadley Freeman 'Green is the new black: the unstoppable rise of the healthy-eating guru' *The Guardian* (London 27 June 2015) <www.theguardian.com/lifeandstyle/2015/jun/27/new-wellness-bloggers-food-drink-hadley-freeman>.

21 Fox and Rooney (n 19).

22 Foucault (n 17) 53.

23 K Van Kreiken, *Celebrity Society* (Routledge 2012) 138.

24 Sauter (n 9) 833.

25 *Ibid.*

man, and yet she is like humanity boundless as life'.²⁶ These words could have been written in relation to social media platforms and apps, which facilitate such information-sharing and are adopted by users to navigate new worlds, charting progress through both rough and smooth waters, regardless of geographical boundaries. In 2012 complaints to police about alleged crimes linked to the use of Facebook and Twitter increased by 780 per cent in four years, resulting in about 650 people being charged. In the context of the sea, Conrad contends 'if you would know the age of the earth, look at the sea in a storm'.²⁷ For the purposes of this paper, if you would know the infancy of the application of regulation to social media, look to examples of human nature at its worst as played out on this global stage. For instance, the amount of negative 'trolling' aimed at high-profile figures, including female UK Members of Parliament²⁸ and high-profile feminist campaigners²⁹ has led to the formation of the Reclaim the Internet campaign³⁰ and discussions as to what extent the reform of the legislation relating to harassment need to be addressed³¹ in the light of anonymity and the problems presented by jurisdiction. In May 2016 the UK's referendum concerning membership of the EU became an active resource for voicing political views,³² leading to social media platforms becoming a vessel for political road rage.³³ It also led to a rise in reported hate crime.³⁴ It could be argued that such consequences are a risk of engaging with the medium, when one chooses to submit information to the public realm. However, other examples such as contempt of court, incitement to riot during the 2012 London riots, football hooliganism and racist speech highlight that the content played out on social media fall squarely within the remit of the criminal law.³⁵ Recently, the Crown Prosecution Service released figures which show that there were 4908 reports in which Facebook and Twitter were a factor in reported crimes, compared with 556 in 2008.³⁶

One area which throws into sharp focus the limitations of existing regulation is social media's relationship with terrorism. There has been a marked increase in the use of social media to glorify, encourage the commission of and/or provide support for terrorist-related offences, notably the organisation known as the Islamic State of Iraq and Levant (ISIS) which has posted violent video clips of terrorist attacks and beheadings on social

26 W Kaufman, *The Eternal Sea* (Druckerei Fortschritt Erfurt 1970) 9.

27 *Ibid* 10.

28 See Scaife (n 12) 147–50.

29 *Ibid* 147–48; *R v Isabella Sorley and John Nimmo*, Westminster Magistrates Court 24 January 2014 (unreported).

30 <www.reclaimtheinternet.com>

31 Scaife (n 12) 182.

32 Vyacheslav Polonski, 'Analysing the social media voices in the UK's EU referendum' (15 May 2016) <<https://medium.com/@slavacm/social-media-voices-in-the-uks-eu-referendum-brexite-or-bremain-what-does-the-internet-say-about-ebbd7b27cf0f#gg68vebd0>>.

33 Rhiannon Lucy Cosslett, 'Family rifts over Brexit: 'I can barely look at my parents' *The Guardian* (London, 27 June 2018) <www.theguardian.com/lifeandstyle/2016/jun/27/brexit-family-rifts-parents-referendum-conflict-betrayal>. Alex Wood, '52% blamed EU for their problems, blame social media for yours' (*The Memo*, 29 June 2016) <www.thememo.com/2016/06/29/brexit-social-media-eu-half-blamed-the-eu-for-their-problems-blame-social-media-for-yours>.

34 Chris York, 'Post-Brexit racism documented on social media' (*Huffington Post*, 2 July 2016) <www.huffingtonpost.co.uk/entry/post-brexit-racism_uk_5777be69e4b073366f0fd06>. Examples of the postings can be viewed in a Facebook Album entitled 'Worrying Signs' created to document alleged incidents in which people have been targeted with xenophobic comments, accessible via <www.facebook.com/sarah.leblanc.718/media_set?set=a.10101369198638985&type=3&pnref=story>.

35 Scaife (n 12) 177, 182.

36 CPS, 'Violence against Women and Girls Crime Report 2015–2016' <www.cps.gov.uk/publication/cps-violence-against-women-and-girls-crime-report-2015-2016>. Of course, it is debatable whether the number of crimes has increased, or if the 'crimes' are now reported with greater frequency.

media. Such content was available via sites like Archive.org during the infancy of the data revolution. However, these were only accessed by the hardened core who knew where to look for such materials. The new wave social media, like YouTube, Facebook or Twitter, allowed AQI (Al-Qaeda in Iraq) to reach a much wider audience.³⁷ However, for every video seeking to glorify terrorist activity,³⁸ there are many more that, although posted by terrorists or terrorist sympathisers, fall short of inciting terrorist activity in its legal sense, or indeed deal with matters that do not amount to terrorist activity.³⁹ Yasser Arafat, late chair of the Palestine Liberation Organization, captured the issue in a 1974 speech before the UN, declaring '[O]ne man's terrorist is another man's freedom fighter.' Such examples demonstrate that drawing the line between open comment in a community and speech that warrants a regulatory response is not capable of being achieved with the precision of a surgeon's knife, nor draftsmen's pen.

3 Approaches to enforcement and responsive regulation

3.1 DO WE WANT REGULATION?

A critique of governmental and legal regulatory interventions, adopting universalist free speech arguments,⁴⁰ could be advanced that such public entities have no place in responding to individual choices.⁴¹ Examples of speech, as set out above, may be undesirable, but it could be argued that such is the consequence of freedom of choice.⁴²

The concept of a truly free flow of information facilitated by Web 2.0 is on its face a utopian ideal, but this does not accord with the creation of the internet from which the

37 ISIS' first official Twitter account was set up in October 2010 under the name 'al l'tisaamm' with the handle @e3tasimo, which encapsulates the notion of maintaining Islamic tradition without deviation. A key figure in the media tide turn for ISIS was a user operating under the handle @reyadiraq. @reyadiraq was steadily posting more gruesome content, departing from doctrinal matters preferred by the official account to the live tweeting of an amputation of an accused thief's hand. See J M Berger, Twitter post 10 January 2014 <<https://twitter.com/intlwire/status/421707838021316609>>. This link has subsequently been dead-linked and flagged for inappropriate content and is no longer generally accessible.

38 With regards to terrorism-related offences specifically, s 1 Terrorism Act 2006 criminalises the 'encouragement of terrorism' which includes making statements that glorify terrorist acts, as well as disseminating terrorist publications under s 2 of the Act, which is punishable by up to seven years' imprisonment

39 The difficulty of content filtering is usefully explored though consideration of the postings of THE radical Muslim cleric, Adnan Awlaki (deceased), who has an enduring active presence on YouTube; with videos covering everything from daily teachings right through to inciting terrorist behaviour. It raises questions as to whether materials about what makes a good marriage, his account of the final moments of the Prophet Muhammad or Awlaki's counsel on the proper diet for a good Muslim should be removed from the internet. These videos do not contravene any particular YouTube standards or law and his postings have also been used in newscasts by CNN and Al Jazeera. Although not directly advocating terrorism in these particular videos, there is evidence that Mr Awlaki's sermons were the gateway materials that lured in individuals who went on to commit violent terrorist activity. An example of this is the 21-year-old British student who confessed to police that she had stabbed a member of the UK Parliament after watching over one hundred hours of Awlaki videos. And, according to a senior source investigating the case 'she was inspired by his sermons, and radicalised by watching them. His message is doing anything, whatever you can.' Quoted in Stephen Timms, 'Attacker guilty of attempted murder' *The Guardian* (London, 2 November 2010) <www.theguardian.com/uk/2010/nov/02/stephen-timms-attacker-guilty>.

40 J Raz, 'Free expression and personal identification' (1991) 11 *Oxford Journal of Legal Studies* 303.

41 Cass R Sunstein, *Flexibility. Regulation: Looking Backward, Looking Forward*, Administrator, Office of Information and Regulatory Affairs' Administrative Law Section (American Bar Association, Capital Hilton DC, 10 May 2012) 152; J Perry-Barlow, 'The economy of selling ideas: selling wine without bottles on a global net' (n.d.) <www.eff.org/EconomyOfIdeas.html>.

42 Debora L Spar, *Ruling the Waves: Cycles of Discovery, Chaos, and Wealth from the Compass to the Internet* (Harcourt 2001) 9.

environment for Web 2.0 developed. The internet was a public sector creation, which only subsequently came under private control.⁴³ Relatedly, the regulation though which proprietary, civil and criminal rights are conferred and defended fosters an environment in which the development of the internet can exist. It has been commonly advanced that regulation is a curb on free speech, producing a chilling effect, but this is not the case. For example, without competition law to govern anti-competitive practice and allow for marketing entrants to create platforms and products there would not be a range of new products for consumers to take advantage of and, without intellectual property rights, platform providers could not define and defend their proprietary rights in the software they create, thus monetising their intellectual property. Without legal protection of any kind, according to Sunstein ‘all sides would be left with the struggle to show superior force’.⁴⁴ In such an environment only the very strongest player would win the battle for dominance and with such a monopoly could curb privacy and freedom of expression if the market did not allow for freedom of competition. The question is not: should we have regulation? But instead: what sort of regulation should we have?⁴⁵

3.2 WHY RULES DON’T WORK

Why rules fail to work and how they may be more effectively designed to meet the particular regulatory challenge they seek to address has been the subject matter of extensive debate.⁴⁶ The test of the success of regulation is whether it meets the challenges faced by today’s regulators.⁴⁷ Black and Baldwin posit that for regulation to be effective:

... regulators have to be responsive not only to the compliance performance of the regulated; to the firms own operative and cognitive frameworks; their attitudinal settings; to the broader institutional environment of regulatory regime; to the different logics of regulatory tools and strategies; to the regimes own performance; and finally to changes in each of these elements.⁴⁸

The criticisms of regulation broadly fall into three groups: the policy or the conceptual; the practical; and the principles. In essence the summation of the critique of all three of these approaches is that they presuppose that top-down regulation is possible, that escalation and de-escalation are possible, and that the regulated will submit to regulation. Assuming always that each ‘player’ within the regulatory model understands the ‘rules of the game’.

43 Sunstein (n 41) 157.

44 Ibid 156.

45 Cass R Sunstein, *Republic.com 2.0*. (Princeton University Press 2007) 160. Murray articulates the question thus: ‘The starting point for this is to return to the root of the subject and ask the question “what is regulation?”’ Andrew Murray, ‘Nodes and gravity in virtual space’ (2011) 5(2) *Legisprudence* 195–221, 214.

46 Black (2012) (n1); Baldwin (n 1); Christopher Ham and Michael Hill, *The Policy Process in the Modern Capitalist State*, 2nd edn (Harvester Wheatsheaf 1993); Michael Hill (ed), *The Policy Process: A Reader* (Harvester Wheatsheaf 1993).

47 Black and Baldwin (2008) (n 1) 59.

48 Ibid 61.

3.3 THE LIMITATIONS OF LOCATING SOCIAL MEDIA WITHIN EXISTING REGULATORY FRAMEWORKS

The regulation of social media content⁴⁹ has been shoe-horned into a range of existing statutes,⁵⁰ leading some to comment that ‘even where the law is clear, many people have raised concern about the police ability to pursue online crime. And in different cases the police have been criticised for failing to take threats seriously, but also for pursuing cases that shouldn’t be prosecuted’.⁵¹

The Communications Act 2003 demonstrates the limitations of determinative regulation and subsequent attempts to interpret it in the context of social media.⁵² Section 127 which deals with messages of an offensive, obscene or menacing character sent via a public electronic communications network, has been used as a means to seek to regulate offensive speech based on societal standards. Under section 127(1) of the Act, the defendant must be shown to have intended or be aware that the message sent was grossly offensive, indecent or menacing, which can be inferred from the terms of the message or from the defendant’s knowledge of the likely recipient. The knowledge of the recipient’s likely reaction is only relevant when making inferences about the defendant’s intention, and not as to whether the message itself was grossly offensive.⁵³ Thus, the offence is committed by sending the message, there is no requirement that any person sees the message or has to be offended by it.⁵⁴ Such a rule, as noted by Black and

49 This essay considers criminal content and privacy matters. A review of the specific laws relating to civil offences such as defamation, particularly the Defamation Act 2013, is beyond the scope of this essay. For a consideration of the public and private sectors’ approach to the regulation of defamatory content online, notably the website operator’s defence contained in Defamation (Operators of Websites) Regulations SI 2013/3028, see Scaife (n 12), ch 3.

50 For example, in the UK cases involving criminal behaviour can be prosecuted under an umbrella of existing legislation including the Protection from Harassment Act 1997 (see *Review of the Protection from Harassment Act 1997: Improving Protection for Victims of Stalking* (Home Office July 2012) and the CPS’s Stalking and Harassment Guidelines <www.cps.gov.uk/legal-guidance/stalking-and-harassment>), the Malicious Communications Act 1988, the Crime and Disorder Act 1998 (see *R v Cryer* (Unreported) 21 March 2012, Newcastle Magistrates’ Court), the Public Order Act 1986 (see *R v Stacey, Swansea Crown Court* (unreported); *R v Stacey*, Appeal No A20120033, 30 March 2011), the Serious Crime Act 2007 (see *R v Blackshaw* [2011] EWCA Crim 2312; *R v Perry John Sutcliffe-Keenan* [2011] EWCA Crim 2312; *R v Ahmad Pelle*, 25 August 2011, Nottingham Crown Court (unreported); *R v Hollie Bentley*, 29 November 2011, Leeds Crown Court (unreported)), and, the most commonly used provision, s 127(1)(a) Communications Act 2003 (see *DPP v Chambers* [2006] UKHL 40). Doubts have also been expressed as to whether creating a webpage or social network group constitutes ‘sending’ a message (see Policy Memorandum on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (2011) at [34]; there are a number of examples where s 127 has been used against internet communications).

51 See n 30.

52 The Communications Act 2003 is only one example of the limitations of the existing law: for further examples both civil and criminal, see Scaife (n 12), part II.

53 See D Ormerod, ‘Telecommunications: sending grossly offensive message by means of public electronic communications network’ [2007] *Criminal Law Review* 98.

54 In contrast with its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, s 127(1) (a) Communications Act 2003 provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection. This inevitably raises the question as to what, if anything, must be proved beyond an intention to send the message. In *DPP v Collins* [2005] EWHC 1308 (Admin); [2006] UKHL 40; [2006] 1 WLR 2223; [2006] 4 All ER 602; (2007) 1 CrAppR 5; (2007) CrimLR 98; *The Times* 21 July 2006, counsel for the DPP, relying by analogy on s 6 (4) of the Public Order Act 1986, suggested that the defendant must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so. For further discussion in the context of the facts of *DPP v Collins* [2006] UKHL 40, see his Lordship’s comments at para [10] of the judgment. However, this still does not provide a definitive answer as to when an individual may take gross offence and how the statute is to be interpreted.

Hart in the wider regulatory context, is therefore reliant upon its interpretation by others.^{55&56}

As noted by Black, in making a generalisation (speech should be regulated), the rule-maker has chosen certain qualities which the event possesses (i.e. speech sent via a public electronic communications network) from a range of individual properties (the speech in question is of an offensive, obscene or menacing character) and searches for aspects which are 'causally relevant to the aim of the rule: the goal which is sought to be achieved or the harm which is sought to be avoided'.⁵⁷ It is here that continuing to apply statutes such as the Communications Act 2003 to social media reveals its inherent weakness as the context in which interactive social media dialogue takes place is quite different to the context in which other communications take place – access is ubiquitous and

55 Black (2012) (n 1) 13; H L A Hart, *The Concept of Law*, 2nd edn (Clarendon 1997) 123.

56 In *DPP v Collins* (n 54) a case pre-dating social media, Lord Bingham considered that the views of Lord Reid in *Sweet v Parsley* fell to be considered in the case as Parliament could not have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage. The issue as to whether offence was meant to be caused and how to prove the intent element of the offence, led their Lordships in *DPP v Collins* to consider cases concerning statutory interpretation for cases where the mental element of the offence is not provided for in the statute. Considering the leading case of *Sweet v Parsley* [1970] AC 132 at [148], their Lordships considered that the court's duty was to consider the words of the statute in question: if they showed a clear intention to create an absolute offence that is an end of the matter, but such cases are very rare. More frequently, the words of the section usually make it clear that *mens rea* is required in one form or another. However, in a large number of cases there is no clear indication either way. In such cases there is a longstanding presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea*, as is the Communications Act 2003, there is a presumption that, in order to give effect to the will of Parliament, the courts must read in words appropriate to require *mens rea*. On the other hand, Lord Reid considered that a culpable state of mind would ordinarily be found where a message was couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender. The court considered that the same would be true where facts known to the sender of a message about an intended recipient render the message peculiarly offensive to that recipient, or likely to be so, whether or not the message in fact reaches the recipient: *DPP v Collins* [2006] UKHL 40 at [10]. The court stressed that individuals are entitled to express their views strongly and that the proper question for determining if s127(1)(a) Communications Act 2003 had been infringed was whether the language used went beyond what could be considered as tolerable in society. It was subsequently affirmed in *DPP v Chambers* [2012] EWHC 2157; 2012 WL 2923016, [38], that the European Court of Human Rights has long adopted the view in its significant body of jurisprudence that an individual's freedom of expression includes the right to say things or express opinions 'that offend, shock or disturb the state or any sector of the population' (*Handyside v United Kingdom* App No 5493/72 A/24 (1976); 1 EHRR 737, at [49]). The UN Special Rapporteur on Freedom of Expression has asserted the same approach, see Frank La Rue, Report of the Human Rights Council Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011, at para 2. The report also acknowledges that the internet has created challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the internet and considers key trends (see para [37] of the report) and that the intention of s 127(1) Communications Act 2003 was not to create interference with the essential freedoms of speech and expression enshrined in Article 10 of the European Convention on Human Rights (ECHR) (*DPP v Collins* [2006] UKHL 40) at [28].

57 F Schauer (n 1) 17–38.

instantaneous.⁵⁸ Banter, jokes and offensive comments are commonplace and often spontaneous and communications intended for a few may reach millions.⁵⁹

- 58 As Eady J stated in the civil case of *Smith v ADVFN* [2008] EWHC 1797 (QB) at [14], in relation to comments on an internet bulletin board: '[they are] like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take".'
- 59 In *DPP v Collins*, Lord Bingham stated that it was plain from the terms of s 127(1) (a), as of its predecessor sections, that the proscribed act, the *actus reus* of the offence, is the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent. Thus, it can make no difference that the message is never received, for example because a recorded message is erased before anyone listens to it. On such an approach, criminal liability would turn on an unforeseeable contingency. This is clearly problematic in the social media context as there is a lack of control once a posting is made, as postings will be saved on the profile on which 'User A' posts them (i.e. 'User B's' profile) and on the SNS server. The information may also be stored on A's computer if A used the World Wide Web to make the posting. Analysis of a computer's hard-drive may sometimes reveal the contents of SNS communications, but normally that information would have to be acquired by either accessing the profile itself online, or seeking the information from the relevant SNS which stored it on its server. Even if the poster subsequently deletes the post, if *Collins* is applied, the offence has already been committed regardless of whether the individual subsequently regrets their actions and deletes the posting. For example, in contrast, in *Redmond-Bate v DPP* (Divisional Court, 23 July 1999), prosecuted under the Public Order Act 1986, Sedley LJ emphasised that the mere fact that words were irritating, contentious, unwelcome and provocative was not enough to justify the invocation of the criminal law unless they tended to provoke violence. In a similar vein in *Dehal v CPS* [2005] EWHC 2154 Moses J, referring to s 4A of the Public Order Act 1986, held that, at [5]: 'the criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public order as to require the invocation of the criminal as opposed to the civil law.' It is suggested that from cases such as *DPP v Collins* censorship in the context of (racist) hate speech, where, despite unpopularity or otherwise, the speech is outlawed (see Public Order Act 1986, Pt III and in particular s 18; see also Crime and Disorder Act 1998, ss 28(1)(b) and 31(1)(c) in relation to s 5 Public Order Act 1986. See also Art 17 ECHR, discussed in *Norwood v UK* (2005) 40 EHRR SE11; *Glimmerveen and Hagenbeek v Netherlands* (1982) 4 EHRR 260; *DPP v Collins* [2006] UKHL 40; [2006] 1 WLR 2223. In international law, see Art 4 Convention on the Elimination of all Forms of Racial Discrimination 660 UNTS 195, entered into force 4 January 1969; Art 20(2) International Covenant on Civil and Political Rights (ICCPR) 993 UNTS 3, entered into force 3 January 1976. Steve Foster, 'Free speech, insulting words or behaviour and art 10 of the European Convention on Human Rights' (2004) 9(1) *Coventry Law Journal* 68, 71; F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 3–15, repression may be acceptable when that suppression based on the 'rights of others' because it accords with the principles underlying free speech), pro-civility cannot, however, be an acceptable starting point to determine criminal liability in every case of distasteful speech which does not necessarily amount to hate speech and may merely be distasteful rather than grossly offensive (whatever that may mean, given the varying approaches taken in the case law). The lack of control which users are subsequently able to exert over comments is not fully taken into account by the court on sentencing, which instead focuses its attention on the reaction of those who read the posts (which is the point at which the offence is committed) and use of privacy settings. This is significant because, as noted above under the Communications Act 2003, those who are grossly offended by the message or posts in question need not be the intended recipients (see also *DPP v Collins* above) and raised the issue of how sophisticated account holders' knowledge is of the regulatory landscape of sites which are sent as an extension of the organisation and fulfilment of their social lives which may be perceived by them as 'private'. As noted by Baldwin and Black (2008) (n 1) 80, sometimes regulatory effectiveness is affected due to 'divergences of understanding between the judiciary and the regulated can also prove to be a problem – notably regarding the purposes and the objectives of the regulation at issue. In cases where there are unresolved disagreements on the meaning of compliance, this renders the activity extremely fraught.'

In *DPP v McConnell*,⁶⁰ a pastor was acquitted of grossly offending Muslims in a sermon that he delivered, which was also transmitted over the internet.⁶¹ Pastor McConnell also referred to Allah as a heathen, cruel and demon deity. Because the sermon was transmitted over the internet the defendant was charged under the Communications Act 2003 with having sent a ‘grossly offensive’ message. Consistent with *Chambers*, DJ McNally found that section 127 was not designed to protect people against receipt of unsolicited messages which they may find seriously objectionable. Indeed, in relation to social media the court noted that:

The legislators can be forgiven for not foreseeing the arrival a short time thereafter of Facebook and Twitter the widespread use of which has resulted in an increasing number of prosecutions under section 127(1) and, in turn, a parallel increase in criticism of the section as an interference to the right of freedom of expression. Specifically it has been criticised as a widely drafted law designed: (a) primarily to regulate one to one communications rather than one to many; and (b) to safeguard a public utility built with public money, which is now being applied to a privately owned, publicly accessed, many to many domain.⁶²

Instead, the court found that its purpose was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of society.⁶³

The UN has noted that there has been a large rise in social media ‘crimes’,⁶⁴ with some countries issuing guidance on prosecuting cases involving communications sent via social media.⁶⁵ It was partly as a result of the mixture of decisions arrived at by prosecutors that, in the UK, the Department for Public Prosecutions recognised the inherent difficulties in prosecuting cases involving a social media element and stated that, in order to *ensure* that Crown Prosecution Service (CPS) decision-making in these difficult cases is clear and consistent, the CPS would issue guidelines on social media cases for prosecutors, designed to assist those tasked with whether criminal charges should be brought in the cases that arise for their consideration.⁶⁶ The result of these

60 *DPP v McConnell* [2016] NI Mag 1

61 In the sermon based on the Book of Timothy, the theme of which was that there was one mediator between God and Man, the Pastor declared that an increasing number of Muslims were ‘putting the Koran’s hatred of Christians and Jews alike into practice’, and the sermon had continued in a similar vein. It should be noted that para [9] of the judgment in *DPP v McConnell* stated: ‘it never entered his head that he would be offending anyone and all he wanted to do was to present the truth. He was completely and totally unaware he had caused offence until he was contacted by Steven Nolan of Radio Ulster a few days later. On being interviewed by Mr Nolan he apologised to any Muslim in Belfast who was offended. It was a sincere apology but he was not apologising for the Gospel. When he said that Islam was satanic, heathen and spawned in hell he was not being gratuitously offensive. He was attacking the doctrine and theology of Islam.’

62 *DPP v McConnell* [2016] NI Mag 1, para [16].

63 *Ibid* [23].

64 In England and Wales, for example, in 2008, there were 556 reports of alleged social media crimes with 46 people charged. In 2012, there were 4908 reports with 653 people charged. See <www.bbc.co.uk/news/uk-20851797>. In Western Asia, a number of recent criminal cases related to internet social media content have also been reported: see <www.bbc.co.uk/news/world-asia-china-16629278>.

65 CPS, Interim Guidelines on Prosecuting Cases Involving Communications Sent via Social Media, Director of Public Prosecutions, 19 December 2012. These Guidelines are discussed in detail below.

66 On drawing up Guidelines for the CPS. Keir Starmer recognised the difficulty in determining whether something was ‘grossly offensive’ when he said: ‘The distinction between offensive and grossly offensive is an important one and not easily made. Context and circumstances are highly relevant and as the European Court of Human Rights observed in the case of *Handyside-v-UK* the right to freedom of expression includes the right to say things or express opinions “that offend, shock or disturb the state or any section of the population”’ quoted in *DPP v McConnell* [2016] NI Mag 1, [22].

considerations arise the CPS's *Guidelines on Prosecuting Cases Involving Communications Sent via Social Media*⁶⁷ (the Guidelines). Guidelines have also been issued by the CPS with regards to stalking and harassment in the social media context.⁶⁸ Whilst it is acknowledged that these measures have sought to finesse the application of existing statutes to the regulation of social media, such innovations still operate in a top-down fashion,⁶⁹ pre-supposing that such a methodology is desirable and can lead to effective and determinative outcomes.⁷⁰ As noted by Baldwin⁷¹ with regard to policy more generally, it is usually 'policy centred' rather than action centred,⁷² which when 'handed down' for implementation, draws an 'unrealistic distinction between policy making and

67 <www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>

68 CPS, Stalking and Harassment Guidelines <www.cps.gov.uk/legal-guidance/stalking-and-harassment>. The social media guidelines need to be read in conjunction with the Code for Crown Prosecutors. This identifies public interest factors which include whether the offence was motivated by any form of discrimination against the victim, including gender discrimination. For a discussion of the guidelines see Scaife (n 12) 182. The CPS launched a public consultation in March 2016 about the proposed revisions to the updated Social Media Guidelines including consideration of whether a new section on 'Violence against girls and women offences' should be included, to reflect that developments in technology have created a new landscape for controlling, sexually motivated or other forms of interpersonal offending. According to the CPS (n 36): 'the use of the internet, social media platforms, emails, text messages, smartphone apps, spyware and GPS tracking software to humiliate, control and threaten victims is rising' (p. 21). The consultation closed in May 2016 and the finalised guidelines are available at <www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>.

69 The CPS Guidelines state: 'These guidelines set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. The guidelines are designed to give *clear advice* to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS. *These guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication sent via social media. Where social media is simply used to facilitate some other substantive offence, prosecutors should proceed under the substantive offence in question.*' (emphasis added) As can be seen from the introductory text, no attention is paid to the unique nature of social media itself, presupposing that existing regulation can be applied to social media so long as the guidance is followed. In *Chambers* [2006] UKHL 40 at [28], however, the court stated: 'the 2003 Act did not create some newly minted interference with the first of President Roosevelt's essential freedoms – freedom of speech and expression. Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation.' See Scaife (n 12) 139–52 for a discussion of the guidelines and 153–5 for a discussion of the weaknesses of the guidelines and how they could be refined.

70 The CPS Guidelines on Prosecuting Cases Involving Communications Sent via Social Media also remind prosecutors that, under the Malicious Communication Act 1988 and Communications Act 2003, the law only applies to communications of a grossly offensive nature. Reiterating the findings of the court in *DPP v Chambers*, the CPS states that this means that a communication has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law. As Lord Bingham made clear in *DPP v Collins* [2006] UKHL 40 at [9], there can be no yardstick of gross offensiveness 'otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context'. It is suggested that the courts, like their Strasbourg counterparts, need to demonstrate a willingness to take into account the experience of the speaker, e.g. an established broadcaster will be held to a higher standard than a member of the public (*R (Gaunt) v Office of Communications* [2010] EWHC 1756 (QB), [2011] AC 17, [2010] HRLR 31, [2011] 1 WLR 663) which is not something which is considered in the CPS guidelines.

71 Baldwin (n 1) 332.

72 Barrett (n 1) 13.

implementation',⁷³ which is why the products of policy, such as the Guidelines, are not effective in terms of meeting their desired outcomes.

As exemplified by the Communications Act 2003, in adopting forms of top-down regulation and applying them to newly charted worlds by reference to the comfort of the familiar, there is an inherent danger that only some features of the event become the focus of the rule and 'are then projected onto future events, beyond the particulars which served as the paradigm or archetype for the formation of the generalization'.⁷⁴ This creates a risk of under/over generalisation in regard to matters that may be irrelevant and leads to a risk that future developments may make the rule less relevant.⁷⁵ Such an approach therefore neglects, 'going back to basics', to understand 'the nature of the instrument which is being used, the properties of rules and their inherent limitations, and to see whether we can gain insights from this analysis which would enable us to make better use of rules as a regulatory technique'.⁷⁶ Thus, 'even rules that seem now to be neither under- or over-inclusive with respect to their background justifications retain the prospect of becoming so'.⁷⁷ Black suggests that this can be achieved in three ways: firstly, though a better appreciation and use of different types of rules; secondly, an understanding of the context in which rules operate; and, finally, considering these issues with reference to the nature of the regulatory community and the style of regulation.⁷⁸

Approaching the regulation of emerging technology in a top-down, determinative manner is not a satisfactory starting point for the regulation of social media, or for creating effective regulation more generally. As noted by Black, one of the problems associated with the creation of rules in any context, are 'their tendency to over or under inclusiveness, their indeterminacy, and their interpretation'.⁷⁹ She observes that many of the issues associated with effective regulation stem from the prescriptive nature of rules as 'anticipatory, generalised abstractions' which when 'endowed with legal status are distinctive, authoritative forms of communication'. In the context of the development of disruptive technology, Spar notes that 'although first technology challenges authority for some period of time, but then ironically, [it] seems to invite authority back in'.⁸⁰ The question is whether it should be let back in and with what design. Spar's rule modelling applies well to social media as, although there is some governmental control, it is

73 Ibid Parts 1 and 3; P Knopf H Weidner, 'Formulation and implementation of air quality control programmes' (1982) 10 Policy and Politics 198–285; Hill and Ham (n 46) 101–8.

74 Black (2012) (n 1) 8.

75 Black notes, *ibid*: 'that this mismatch can occur for three reasons. First, as noted, the generalization which is the operative basis of the rule inevitably suppresses properties that may subsequently be relevant or includes properties that may in some cases be irrelevant. Secondly, the causal relationship between the event and the harm/goal is likely to be only an approximate one: the generalization bears simply a probable relationship to the harm sought to be avoided or goal sought to be achieved. Thirdly, even if a perfect causal match between the generalization and the aim of the rule could be achieved, future events may develop in such a way that it ceases to be so.'

76 *Ibid*.

77 Schauer (n 1) 35.

78 Black (2012) (n 1) 8–10.

79 *Ibid* 6. The jurisprudential literature on rules is extensive. For legal analyses of rules see in particular Schauer (n 1); W L Twining and D Miers, *How to Do Things with Rules* 5th edn (Law in Context Series, Cambridge University Press 2010); H L A Hart and A Sacks, 'The legal process: basic problems in the making and application of law' (1996) 94(6) Michigan Law Review 1571–95; F Schauer, *Playing by the Rules: A philosophical examination of rule-based decision making in law and in life* (Oxford University Press 1991); D Kennedy, 'Form and substance in private law adjudication' (1976) 89 Harvard Law Review 1685–778; N McCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978).

80 Black (2012) (n 1).

minimalist, and in the Foucauldian sense it can therefore remain disciplined from within. The shortcoming of such an approach is that it seeks to herd certain behaviours and/or attributes, to build up a category and/or definition which then forms a basic rule,⁸¹ which is subsequently used as a net which is thrown over a wide variety of circumstances which it was not designed to accommodate. The benefit of adopting a principles-based approach to regulation is that it can ‘create a community of interpretation of rules through rules themselves’, allowing for the necessary reciprocity between regulator and regulatee. For Black and Baldwin, whilst broad principles-based regulation may be criticised as ‘vague’, they ‘assist with the problem of “honest perplexity” as to the rule’s application, and also thwart creatively compliant behaviour’.⁸²

4 Challenges to devising responsive regulation

According to Black and Baldwin, to be really responsive, regulation must respond to attitudinal settings, to the broader regulatory environment, the different logics of regulatory tools and strategies, to the regime’s own performance and, finally, to changes in each of these elements.⁸³ At this point, it is worth considering some of the key regulatory challenges social media raises, namely: (i) the dynamic quality of social media content generation; (ii) issues of jurisdiction and sovereignty; and (iii) whether the media through which social media operates defies regulation in its operational context.

4.1 THE DYNAMIC QUALITY OF SOCIAL MEDIA

The dynamic quality of internet content generation has been the subject of debate in terms of its regulation.⁸⁴ Social media concentrates this dynamism into a digital vortex with its speed, permanence and reach.⁸⁵ Whilst social media facilitated by Web 2.0 has the potential to offer vast opportunities, intrepid digital explorers have to discover these new frontiers before they can be shaped, described and regulated. It is little wonder therefore that, in the context of the development of information technology, Barlow declared:

... law adapts by continuous increments and at a pace second only to geology in its stateliness. Technology advances in lunging jerks, like the punctuation of biological evolution grotesquely accelerated. Real world conditions will continue to change at a blinding pace, and the law will get further behind, more profoundly confused.⁸⁶

Barlow’s ‘permanent mismatch’ has even led some scholars to suggest that the internet cannot be regulated. Steinert-Threlkeld sums up the conundrum with remarkable brevity:

81 Black (ibid) at 7 notes that rules are linguistic in nature, and consequently ‘how we understand, interpret, and apply rules depends in part on how we understand and interpret language’. Black gives the example of a naughty dog in a restaurant which leads to the formation of a rule which regulates dog’s presence in restaurants. The owner in deciding their course of action must consider the dog’s characteristics (dog, black, in a restaurant etc.). Black notes that the proprietor could ‘consider banning all black things or all things called Rufus’. However, not all things which could be indexed within these categories are necessarily disruptive, these qualities were not the root cause of the disruption. Black therefore posits that the proprietor ‘should focus on the fact that Rufus was a dog, and so form a rule, “no dogs allowed”’.

82 Baldwin and Black (2010) (n 1) 218.

83 Baldwin and Black (2008) (n 1) 69.

84 Lessig (n 2); A Murray and C Scott, ‘Controlling the new media: hybrid responses to new forms of power’ (2002) 65(4) *Modern Law Review* 491–516.

85 Eight of the world’s most popular social networks flush out an astonishing amount of content every minute and the social media high seas, double in size every two years. By 2020 it is estimated will reach 44 trillion Gigabytes (See <http://www.emc.com/leadership/digital-universe/2014view/executive-summary.htm>).

86 John Pery Barlow ‘The economy of selling ideas’: Selling wine without bottles on a global net’ available at <<http://www.eff.org/EconomyOfIdeas.html>> accessed 12 July 2016.

'some things never change about governing the Web. Most prominent is its innate ability to resist governance in almost any form.'⁸⁷ Such arguments could equally apply to social media, which arguably concentrates the problem due to its spontaneity, permanence and reach.⁸⁸

4.2 JURISDICTION AND SOVEREIGNTY

In addition to whether a space is regulatable, one must also consider who will regulate it. In the vast majority of circumstances, regulation is not the domain of one sovereign state, but extends to the world, prompting an important question as to how, common with other global issues, regulation can evolve within multi-level governance (state, international conventions etc.). In relation to the internet, libertarians such as Barlow urged governments as the 'weary giants of flesh and still' to accept that this 'home of the mind' was beyond the widely cast nets of such governments' sovereignty:⁸⁹ such arguments could similarly be levied at social media.

For Johnson and Post, 'the rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign'.⁹⁰ There is, however, an inherent flaw in this logic, as it is predicated on the assumption that clear and determinative 'rules' are firstly desirable and secondly necessary to create conditions for effective regulatory governance. This is not a satisfactory starting point, given that social media is not unique in its objects and/or that events which form the subject matter of regulation are dynamic and fluid in nature. As noted by Scott and Murray: 'the problem of regulatory arbitrage emerges wherever subjects of regulation have sufficient mobility in their operations or activities that they can choose to be regulated by one regime or another, the effect is to create a form of market regulation within which dissatisfied subjects can "exit" one regime in favour of another'.⁹¹ Furthermore, Murray contends that 'at first glance it appears the regulatory challenge of cyberspace is to be found in the geography of the place, or rather the lack of geography'. He suggests that 'looking at individual case studies though obscures the wider view. The micro and the macro view are very different'.⁹² For example, in essence, until the rise of modern nations, maritime law did not derive its force from territorial sovereigns; instead it represented what was already conceived to be the customary law of the sea. As commerce moved northward and westward, sea codes developed in northern European ports, with important medieval sea codes such as the *Laws of Wisby* (a Baltic port), the *Laws of Hansa Towns* (a Germanic league) and the *Laws of Oleron* (a French island) being developed. These codes each drew inspiration from the *Consolato del Mare*, notably the *Laws of Oleron*, the second great code of maritime regulation. These codes are revered as the three arches upon which rest modern admiralty

87 Ibid fn 81, as quoted in Lessig (n 2) 57.

88 See for instance Murray and Scott's (n 84) observation that 'with much of the literature classical or 'command and control' regulation is held either to be undesirable or unfeasible in the face of new policy changes' 491.

89 Perry Barlow, J 'The economy of selling ideas: Selling wine without bottles on a global net' available at <http://www.eff.org/EconomyOfIdeas.html> accessed 12 July 2016

90 Johnson, D and Post, D 'Law and Borders- The Rise of Law in Cyberspace' *Stanford Law Review* 48 (1996): p. 1367,1375

91 Murray and Scott (n 84) 494.

92 Murray (n 45) 196. Elaborating on the challenges of such an approach Murray notes, at 197: 'cyber-governance theorists have therefore tended to focus on macro questions of geography and establishment. In this they follow a long established line of enquiry which places the design of the environment centre stage in the regulatory/governance discourse.'

structure (the ‘Three Arches’). According to one historian, the great value of the rules which had been developed for maritime trade lay in the fact that they had been ‘found by practice to be suitable to the needs of a community which knows no national boundaries –the international community of seafarers’.⁹³ The challenge therefore is to find a model suitable for such a dynamic environment whose attempts to impose a degree of artifice work organically with social media’s unique nature, rather than to impose a rigid construct. The goal should be to find a way to marry social media’s naturalistic, metonymic nature with the rules and architecture so that, whilst the rules may remain the ‘organising centre’, they complement the seascape. Rules should not be an edifice whose very infringing of the environment makes them vulnerable.

5 Responsiveness to operational and environmental factors

5.1 THE OPERATIONAL CONTEXT OF REGULATION

This contention that new technologies possess an innate ability to resist governance is an inviting thought, but not one which stands up to scrutiny. Changes of times and tides in technology are not new, nor are they unique to social media. According to Spar, innovative technology (e.g. the compass, the printing press) go through a four-phase cycle of innovation, commercialisation, ‘creative anarchy’ and, finally, rules.⁹⁴ The ‘rules’ phase sees the entry of the regulator into the marketplace and its absorption within the traditional regulatory framework, so that what is seemingly ungovernable is brought under control (much like the regulation of the high seas, the control of airspace etc.). There are, however, limitations, as will be discussed later in this article, in attempting to submit creative spaces to effective regulation.

In the context of social media regulation, it is useful to consider some of the arguments that have been raised in the context of regulating the internet more generally. The original internet made such regulation extremely difficult as originally deployed, as one court put it:

the Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have ‘addresses,’ they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading.⁹⁵

The internet was therefore insensitive because it was *designed* to be so. Therefore, the failing of the existing law and the challenge for any proposed regulatory model is that it must be able to adapt to the constraints of the regulatable environment and bring into its modelling the platform architects who design the technological state of the art which is the subject of such regulation, as well as those stakeholders subject to its regulation. The recurring theme is the need to focus on the nature of the regulatable space and how architecture can be designed which better meets its unique demands. The question therefore becomes not one of what makes a rule effective, but what makes for effective

93 Despite the decline in the historical uniformity of early maritime laws these transactions have always been international in nature often implicating several countries, which can lead to an unpredictability for participants when domestic law becomes involved.

94 Spar (n 42) 8.

95 *American Library Association v Pataki* 969 F Supp 160 (SDNY) 1997, cited in Michael Geist, ‘Cyberlaw 2.0’ (2003) 44 Boston College Law Review 323, 326–7.

architecture and creates an environment in which rules can be conceptualised, nurtured and formed into courses of customary behaviour.

5.2 RESPONSIVENESS TO ENVIRONMENTAL FACTORS

By way of comparison to the sea, since at least the end of the nineteenth century, naval architecture and cargo-handling have changed in significant ways. For example the extensive use of carriers of liquefied natural gas has posed new hazards and questions of liability for oil pollution, calling for the development of new laws that must work alongside the ancient.⁹⁶ In the context of communications technologies, the tension-ridden space inhabited by those caught between innovation and governmental control has been considered by Spar: ‘communication is the sinew of both commerce and politics, the channel through which information – and this power – flows. Ever since God warned Eve to resist the apple, authorities have tried to control information flows.’⁹⁷ The germane point of analysis therefore is perhaps not so much that the internet (and latterly Web 2.0) resists regulation, but that it is ineffectual in practice as the regulation is not observed by those who are regulated.

As noted by Black, ‘increased precision may reduce but can never eliminate the inherent indeterminacy of rules and does not in the end create the understanding which it is trying to replace’.⁹⁸ Therefore, it is necessary to consider how a model could be adopted which can identify, frame and categorise the risks and issues presented by social media which has regard to the complex ‘mosaic of technical, psychological, cultural, social, political, organisational and economic concerns’.⁹⁹ The technical architecture to be adopted must make the threat of visibility inscribed in the subjects, but also consult with them in what essentially began as a community of persons: the users would adjust their behaviours based on community norms and the gaze of fellow users, as well as the regulator.

5.2.1 The development of the regulation of the sea

5.2.1.1 Historical development

Since the seventeenth century, the oceans have been subject to the freedom-of-the-seas doctrine – which essentially limits national rights and jurisdiction over the oceans to a

⁹⁶ Note also that not all of the original principles of maritime law still apply.

⁹⁷ Spar (n 42) 9.

⁹⁸ Black (2012) (n 1) 217.

⁹⁹ Ibid; Black and Baldwin (2012) (n 1) 4. See also Black (2012) (n 1) 216: ‘Rule making has been a continuous activity for the regulators since the regulation’s inception. In the process of rule formation and reformation, four dominant themes in the use of rules can be identified: first, the changing ways in which the tension between certainty and flexibility have been addressed; secondly, the different attempts made to use rule type to distribute discretion and exert control within the rule system; thirdly, the attempts made to develop interpretive communities and so to address the problems of uncertainty, honest perplexity, and creative compliance; and fourthly the use made of rules to reinforce the “self-regulatory” characterization of the system and to define the roles of regulators within that system.’ See also 220–1, the greater the shared understanding of the rule and practices it is addressing, the more the rule maker can rely on tacit understandings as to the aim of the rule and the context in which it operates, the less the need for precision, and the greater the degree to which simple, vague rules can be used. Finally, the idea that a self-regulatory system should be reciprocal, practitioner based, non-governmental, and non-bureaucratic has involved certain assumptions not only as to the particular nature of the regulator/regulated relationship (the regulatory contract), but as to the types of rules which should be adopted, and by which regulator. The emphasis on the self-regulatory characterisation of the system has thus been significant in the use made of rules to define regulatory roles. For further exploration of Black’s work, see Black (2012) (n 1).

narrow belt of sea surrounding a nation's coastline. The remaining vast expanse of the sea was proclaimed to be free to all and belong to none. By the mid-twentieth century there was an impetus to extend national claims over offshore resources due to growing concerns over the toll taken on coastal fish stocks by long-distance fishing fleets, pollution and wastes from transport ships and oil tankers carrying noxious cargoes. Such hazards threatened all forms of sea life. Sovereign nations were competing to maintain a presence across the globe on the surface waters and even under the sea, creating complex claims and growing tensions between coastal nations' rights to these resources. The pressures of long-distance navigation and a seemingly outdated, if not inherently conflicting, freedom-of-the-seas doctrine was threatening to transform the oceans into another arena for conflict and instability.

In 1945, the USA, unilaterally extended US jurisdiction over all natural resources on that nation's continental shelf – oil, gas, minerals – representing a major challenge to the freedom-of-the-seas doctrine. Other nations soon followed suit.¹⁰⁰ As technologies developed, the rich offerings of the oceans, such as transporting goods and extracting natural resources, led to the sea being exploited as never before, activities which were seemingly impossible just a few decades before, such as diamond and tin mining, were now in full swing. This was to say nothing of the fishing, which saw nations flooding the richest fishing waters with their fishing fleets virtually unrestrained as seaboard states attempted to set limits and fishing states contested them.

The tranquillity of the sea was slowly being disrupted by technological breakthroughs, accelerating and multiplying uses. Much like the use of social media, it was a time that held both dangers and promises, risks and hopes. The dangers were numerous: nuclear submarines charting deep waters never before explored; designs for antiballistic missile systems to be placed on the seabed; supertankers ferrying oil from the Middle East to European and other ports, passing through congested straits and leaving behind a trail of oil spills; and rising tensions between nations over conflicting claims to ocean space and resources. The oceans were generating a multitude of claims, counterclaims and sovereignty disputes. The hope was for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among states that would no longer have to eye each other suspiciously over conflicting claims.

On 1 November 1967, Malta's Ambassador to the UN, Arvid Pardo, asked the nations of the world to open their eyes to a looming conflict that could devastate the oceans, the lifeline of man's very survival. In a speech to the UN General Assembly,¹⁰¹ he spoke of the super-power rivalry that was spreading to the oceans, of the pollution that was poisoning the seas, of the conflicting legal claims and their implications for a stable order and of the rich potential that lay on the seabed. Pardo ended with a call for 'an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction . . . it is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue'.

100 In October 1946, Argentina claimed its shelf and the epicontinental sea above it. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas. Soon after the Second World War, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit. Later, the archipelagic nation of Indonesia asserted the right to dominion over the water that separated its 13,000 islands. The Philippines did likewise. In 1970, Canada asserted the right to regulate navigation in an area extending for 100 miles from its shores in order to protect Arctic water against pollution.

101 <www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf>

Pardo's urging came at a time when many recognised the need for updating the freedom-of-the-seas doctrine to take into account the technological changes that had altered humankind's relationship to the oceans. It set in motion a process that spanned 15 years and saw the creation of the UN Seabed Committee, the signing of a treaty banning nuclear weapons on the seabed, the adoption of the declaration by the General Assembly that all resources of the seabed beyond the limits of national jurisdiction are the common heritage of humankind, and the convening of the Stockholm Conference on the Human Environment. What started as an exercise to regulate the seabed turned into a global diplomatic effort to regulate and write rules for all ocean areas, all uses of the seas and all of its resources. These were some of the factors that led to the convening of the Third UN Conference on the Law of the Sea, to write a comprehensive treaty for the oceans. The Conference was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas – the UN Convention on the Law of the Sea.

5.2.1.2 *The Convention*

Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a unique feature, a binding procedure for settlement of disputes between states – these are among the important features of the treaty. In short, the Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to humankind's very source of life. The Convention came into force on 16 November 1994, one year after Guyana became the 60th state to adhere to it.

Across the globe, governments have taken steps to bring their extended areas of adjacent ocean within their jurisdiction. They are taking steps to exercise their rights over neighbouring seas, to assess the resources of their waters and on the floor of the continental shelf. The practice of states has in nearly all respects been carried out in a manner consistent with the Convention, particularly after its entry into force and its rapid acceptance by the international community as the basis for all actions dealing with the oceans and the law of the sea.

The Convention retains for naval and merchant ships the right of 'innocent passage' through the territorial seas of a coastal state. This means, for example, that a Japanese ship, picking up oil from Gulf states, would not have to make a 3000-mile detour in order to avoid the territorial sea of Indonesia, provided passage is not detrimental to Indonesia and does not threaten its security or violate its laws.

In addition to their right to enforce any law within their territorial seas, coastal states are also empowered to implement certain rights in an area beyond the territorial sea, extending for 24 nautical miles from their shores, for the purpose of preventing certain violations and enforcing police powers. This area, known as the 'contiguous zone', may be used by a coastguard or its naval equivalent to pursue and, if necessary, arrest and detain suspected drug smugglers, illegal immigrants and customs or tax evaders violating the laws of the coastal state within its territory or the territorial sea.

The Convention also contains a new feature in international law, which is the regime for archipelagic states (states such as the Philippines and Indonesia, which are made up of a group of closely spaced islands). For those states, the territorial sea is a 12-mile zone extending from a line drawn joining the outermost points of the outermost islands of the group that are in close proximity to each other. The waters between the islands are declared archipelagic waters, where ships of all states enjoy the right of innocent passage.

In those waters, states may establish sea lanes and air routes where all ships and aircraft enjoy the right of expeditious and unobstructed passage.

5.2 CONTEMPORARY EXAMPLES OF CHANGES IN TIDES AS TO THE APPROACH TO REGULATION

Murray and Scott observe, with regards to their concept of ‘regulatory arbitrage’, which could be described as a form of jurisdiction forum-shopping by the regulated, that such mischief is addressed for example in Europe by the European Commission issuing harmonised rules requiring all member states to legislate for common standards and services.¹⁰² In Europe, there is an increasing recognition in legislation currently being drafted, which affects the private sector, that regulation can be drafted based on high-level principles which devolve its implementation to those regulated providers who have the capability to deliver technical solutions on a pan-European basis, with extra-territoriality provisions. One such example is the European General Data Protection Regulation (GDPR)¹⁰³ which seeks to regulate information society services¹⁰⁴ at a conceptual level,¹⁰⁵ placing the onus on developers to design appropriate privacy tools by reference to the state of the art in technology which can deliver legally compliant solutions.¹⁰⁶ This sea change in regulatory approach has been conceptualised by the UK Information Commissioner Elizabeth Denman, in the context of privacy regulation, thus: ‘Data protection is a team sport. Effective regulation requires engagement with the public sector, with industry, with civil society and with the public at large.’¹⁰⁷ Indeed, in the context of the UK’s current plan to exit the EU (commonly referred to as ‘Brexit’), the UK after leaving the EU will consider how it can maintain equivalence with European

102 Murray and Scott (n 84) 494.

103 GDPR 2016/679/EU.

104 This includes social media sites, see Scaife (n 12) 16–18

105 Article 25 of the GDPR states that: ‘data controllers must take into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of the GDPR and protect the rights of data subjects’.

106 Recital (78) of the GDPR states: ‘the protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met. In order to be able to demonstrate compliance with this Regulation, the controller should adopt internal policies and implement measures which meet in particular the principles of data protection by design and data protection by default. Such measures could consist, inter alia, of minimising the processing of personal data, pseudonymising personal data as soon as possible, transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features. When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations. The principles of data protection by design and by default should also be taken into consideration in the context of public tenders.’

107 Information Commissioner’s Office Newsletter August 2016
<<http://ico.msgfocus.com/q/1AFE2kFCwd/wv>>.

privacy rules¹⁰⁸ in order to offer mutually equivalent laws for the safe trans-border processing of personal data.¹⁰⁹

As well as hard law, industry can also provide end-users with tools to manage their online presence. For example, in December 2014, Facebook sent an update to users promoting its new ‘Privacy Basics’ service, noting that ‘protecting people’s information and providing meaningful privacy controls are at the core of everything we do’.¹¹⁰ Yet recently, discussion surrounding Cambridge Analytica and the scope of political engineering through the use of social media data have sparked a myriad of debates as to the ethical parameters of data-sharing and use. Although compliance comes with a cost, which in this model is borne by industry, privacy-enhancing technology is now actively sold as a feature of modern products. By way of example, iPhones offer encryption standards which mean that not even the provider of the phone will be able to decrypt its contents,¹¹¹ and in 2016 WhatsApp and Facebook announced that messages will now be sent with end-to-end encryption.^{112&113} Sunstein has advanced arguments in favour of filtering and feedback technologies as a means of ‘nudging compliance’,¹¹⁴ founded on the principle that, while we behave irrationally, our irrationality can be corrected – if only the environment acts upon us, nudging us towards the right option.

6 Responsiveness to attitudinal settings and environments

6.1 REGULATORY DEFIANCE

Despite the presence of rules, they are regularly ignored or actively disobeyed.¹¹⁵ We have rules for the use of our highways, yet individuals still run red lights and break the speed limit. Our land and rivers continue to be polluted and emissions levels have been falsified, at cost to the environment. How regulation can be effectively applied in its operational context is not a new conundrum and has been extensively considered in the wider context

108 On 25 May 2018, the GDPR became applicable in all 28 EU member states, repealing the Data Protection Directive (95/46/EC), and thereby changing the substantive scope of regulation of personal data after more than 23 years. In the UK, the GDPR was automatically incorporated into domestic law via the European Communities Act 1972. From 29 March 2019, when the UK is expected to leave the EU, the European Union (Withdrawal) Act 2018 will repeal the European Communities Act 1972 and simultaneously transpose the GDPR onto the statute book, making it domestic legislation in the UK.

109 Areas of data protection regulation, such as international data transfers, applicable supervisory authorities and enforcement of the GDPR that will be affected when the UK’s status changes to that of a ‘third country’ for the purposes of EU law. In her Mansion House speech on 2 March 2018, the UK Prime Minister (Theresa May) stated that a deal on data protection is one of the foundations that must underpin the UK–EU trading relationship and that the UK would therefore seek more than an adequacy arrangement with the EU, in the form of a Treaty. The UK’s aim was to achieve a relationship that would provide the Information Commissioner’s Office with an ‘appropriate ongoing role’, including in relation to the operation of the ‘one-stop-shop’ mechanism for resolving data protection disputes under the GDPR. The government released a presentation on 23 May 2018, which set out this proposal in greater detail see Framework for UK–EU Partnership concerning Data Protection https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710147/DATA_-_FINAL.pdf.

110 Facebook update, 20 December 2014.

111 See the ‘Privacy’ section on the Apple website <www.apple.com/uk/privacy/government-information-requests>.

112 ‘End-to-end encryption’ (*WhatsApp Blog* 5 April 2016) <<https://blog.whatsapp.com/10000618/end-to-end-encryption>>.

113 The advantage of encryption is also potentially to buffer the user against the all-pervading surveillance of the Foucauldian model, as discussed below.

114 Sunstein (n 41).

115 Baldwin (n 1) 321.

of how to devise effective regulation.¹¹⁶ These observations map well to the problems facing the effective regulation of social media. Baldwin and Black,¹¹⁷ in devising their approach for the creation of conditions to give effect to really responsive regulation, have considered this issue in the context of enforcing fisheries laws, noting that ‘regulates are highly mobile’, ‘inspection at sea is resource intensive’, ‘there are many ways to avoid detection’ and there are logistical challenges associated with monitoring compliance effectively as it involves a large number of organisations, where ‘responsibilities overlap and often the enforcers have no clear set of priorities and outcome objectives to work from’. As a result, the control system relies ‘heavily on self-reporting of catches’ with extensive under-reporting and mis-declarations of fish landed,¹¹⁸ meaning it is difficult to assess ‘off the radar’ compliance’.

6.2 RESPONSIVENESS TO INSTITUTIONAL ENVIRONMENTS

Lessig, in his famous treatment of regulation, posited that regulation is not the sole product of law, but also of market and social norms, and is consequently more concerned with high-level choice, values and democracy. The law does not therefore operate directly, but also indirectly through other modalities, such as the technology itself in order to ‘regulate to law’s own end’, leading to direct and indirect regulatory effects.¹¹⁹ Therefore, law can in principle regulate the architecture, and the architecture can regulate the norms, thereby avoiding a situation whereby detailed rules are created which foster a sense of ‘distrust’ between the rule-maker and its subject.¹²⁰ Both Marsden and Price note that the developer community has traditionally placed great store in self-regulation based upon codes of practice, contractual terms and community standards,¹²¹ with Marsden contending that ‘governments have broadly accepted that a more flexible and innovation-friendly model of regulation is required, particularly in view of the rapid growth, complex

116 See n 2.

117 Baldwin and Black (2008) (n 1) 59–60.

118 In response to a Freedom of Information request submitted to the Ministry of Justice (MoJ) on 18 August 2016 by the author requesting figures relating to social media crimes, the MoJ responded that: ‘the MoJ Court Proceedings Database holds information on defendants proceeded against, found guilty and sentenced for criminal offences in England and Wales. This database holds information on offences provided by the statutes under which proceedings are brought but not all the specific circumstances of each case. From centrally held data, we are unable to link defendants proceeded against and found guilty in court back to the original crime reported to the police. Please bear in mind that the offence under which a criminal event is originally reported to the police may differ from the offence for which the defendant is finally convicted. In addition, we are unable to separately identify offences committed through the use of social media from all offences committed via the use of electronic communications. This detailed information is not reported to Justice Statistics Analytical Services due to its size and complexity.’ In a follow-up response dated 16 September 2016 the MoJ stated: ‘no reports include statistics on offences that involve the use of social media, for the reasons given above. The only information that we have for 2015 is published in Criminal Justice Statistics Quarterly (<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2015>) In the outcomes by offence table, there is some data for small groups of offences (for example, 196- dealing with sending grossly offensive messages under the 2003 Communications Act). In addition, there is some information on these crimes in the experimental statistics published on the same web link. However, this information is based around the statute under which the offence is prosecuted and convicted rather than the circumstances in which it was committed.’

119 Lessig (n 2) chs 4 and 5.

120 Black (2012) (n 1) 217.

121 Marsden (n 3) 211–28.

inter-relationships and dynamic changes taking place in [the] Internet'.¹²² Sassen notes that to create a space where users can engage in activities in a manner that is autonomous from states does not exist in non-digital media,¹²³ with Murray and Scott noting in the digital context that 'digitisation of broadcasting and mobile telecommunications create niches for new forms of service provider, shifting power away from both those who own the physical infrastructure of networks and from those who own content'.¹²⁴

Consequently, given Black's observations regarding the context in which law operates and the reciprocal relationship between technology and rules, they must be considered in parallel when proposing a regulatory model suitable for the complex demands presented by social media,¹²⁵ so that a form of regulation can be adopted which can adapt to meet new challenges where non-compliance is concealed and/or new methods of evading

122 Ibid 212. The Director of Public Prosecutions has stated that everyone from tech companies like Twitter and Facebook, to police and the CPS and wider society, needed to do more to tackle the growing scale of threatening and abusive communications online. 'The flip side of that is that the evidence is out there and it is pretty incontrovertible evidence. We have been working with Twitter and Facebook to help us train prosecutors in how to be aware of what evidence is available and talking to them about how they can help us and victims.' As quoted in S Laville, 'Violent crimes against women in England and Wales reach record high' *The Guardian* (London, 6 September 2016) <www.theguardian.com/society/2016/sep/05/violent-crimes-against-women-in-england-and-wales-reach-record-high>.

123 S Sassen, 'Towards a sociology of information technology' (2002) 50(3) *Current Sociology* 365–88.

124 Murray and Scott (n 84) 493.

125 An electronic communications service (ECS) is defined in the UK Communications Act 2003 as 'a service consisting of, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service'. The Information Commissioner's Office, which oversees data protection rights in the UK, has stated that an ECS is any such service that is provided so as to be available for use by members of the public. In terms of the application of ECS to social networking, having regard to the above, it has been suggested by some commentators that SNSs constitute information society services, but not ECSs. This is supported by the fact that retention obligations in the Data Retention (EC Directive) Regulations 2009 do not currently extend to any SNS communications. (Directive 2006/24 on data retention [2006] OJ L105/54). See further, responses of Mr Vernon Coaker to questions posed during the discussion of the Draft Data Retention (EC Directive) Regulations 2009 (Fourth Delegated Legislation Committee, 16 March 2009), and Data Retention Expert Group (Commission Decision 2008/324/EC) on webmail and web-based messaging: DATRET/EXPGRP (2009) 2 -- FINAL - ANNEX- 03 12 2009. For critique of the Directive. See I Brown, 'Communications data retention in an evolving internet' (2011) 19(2) *International Journal of Law and Information Technology* 95–109. Many countries have expressed concern over the Directive and the European Court of Justice is soon due to rule on its legality following a referral from Ireland. See further, opinion of the European Data Protection Supervisor <https://edps.europa.eu/sites/edp/files/publication/11-05-30_evaluation_report_drd_en.pdf>. In *DPP v Chambers*, a ground-breaking element of the Court of Appeal's judgment in this case came from its agreement with the Crown Court's analysis that the internet itself constitutes a public network. The Crown Court has stated ([2006] UKHL 40) at [23]: 'the "Twitter" website although privately owned cannot, as we understand it, operate save through the internet, which is plainly a public electronic network provided for the public and paid for by the public through the various service providers we are all familiar with . . . The internet is widely available to the public and funded by the public and without it facilities such as "Twitter" would not exist. The fact that it is a private company in our view is irrelevant; the mechanism by which it was sent was a public electronic network and within the statutory definition . . . "Twitter", as we all know is widely used by individuals and organisations to disseminate and receive information. In our judgment, it is inconceivable that grossly offensive, indecent, obscene or menacing messages sent in this way would not be potentially unlawful.' In defining the internet thus, the court stated at [24] that the internet 'is plainly a public electronic communications network provided for the public and paid for by the public through the various service providers we are all familiar with' and that 'potential recipients of the message were the public as a whole, consisting of all sections of society'. Judge Jacqueline Davies' reasoning, with which the Court of Appeal agreed, derived from an analysis of the internet's network infrastructure as a series of links. These links cover networks of networks and services linking individuals, service providers, network providers, platform providers and content providers.

detection are devised so that the ‘gap between rules and objectives’ does not become too wide.^{125a}

6.3 THE PLATFORM PROVIDERS

Barlow’s comments with regards to the law’s ability to keep pace with change in the internet context support the contention that the destinies of regulation and technology are intertwined.¹²⁶ As rules cannot apply themselves, ‘for the rule to be applied in a way which will further the overall aims of the rule maker, then the person applying it has to share the rule maker’s interpretation of it’.¹²⁷ Quite simply, the tools that can shape it inform the form of the regulation. As David Brin posits, ‘if we admire the Net, should not a burden of proof fall on those who would change the basic assumptions that brought it about in the first place?’¹²⁸

The value of consulting the private sector when determining how to regulate social media is highlighted by reference to the US responses to terrorist content posted online. Even if such materials can be moderated, there is the risk that materials will slip through the (inter)net (given the sheer volume of material that would need to be screened), or that censoring materials may be cast too wide. Social media sites commonly use algorithms to ‘flag’ accounts that might need to be suspended as there are not the resources or time to conduct a thorough review of all content posted online or every item that attracts a small number of complaints.¹²⁹ In the summer of 2015, a Bill was still put before Congress as part of the Intelligence Authorisation Bill¹³⁰ with provisions similar to the laws that require companies to report child pornography.¹³¹ Such identifiers cannot, however, be assigned en masse to terrorist content. For instance, a news article or video clip used by CNN could end up having the same identifiers as a posting made by an ISIS member (e.g. the presence of an ISIS flag), meaning it is difficult for the algorithm to figure out what is propaganda and what is not.¹³² Whilst it may be argued that regulation is possible, given that copyright breaches committed via social media-enabled platforms have become the subject matter of regulation, one such instance of its successful application of content removal via Twitter and Facebook of Olympics materials, which were subject matter of copyright, represents a compelling example of how market interests have shaped an active response from the platform providers. Matters relating to expressive content and privacy rights are more nuanced, having to absorb constitutional and cultural factors, which such hard-edged law is simply not well placed to accommodate, or indeed adjudicate.

125a Black and Baldwin (2008) (n 1) 81.

126 Barlow (n 86).

127 Black (2012) (n 1) 218.

128 D Brin, *The Transparent Society: Will Technology Force Us to Choose Between Privacy and Freedom?* (Perseus 1999) 324.

129 These algorithms can, however, be exploited through ‘flag spamming campaigns’ as was evident though their use to push critics of the Russian and Vietnamese governments off Facebook. For example, shortly after their video ‘If i wanted America to fail’ went viral, Free Market America found themselves kicked off Twitter. See J Hayward, ‘If I wanted America to fail’ (*Human Events*, 23 April 2012) <www.humanevents.com/2012/04/23/if-i-wanted-america-to-fail>. Companies like Google have sought to grant enhanced flagging privileges to non-governmental ‘trusted users’ who have the ability to report offensive material and obtain quick action from service providers. Whether this is more of an affront to freedom of expression than member state interference is debatable, but it does demonstrate that with an in providing a degree of latitude there is room for creative solutions to be explored.

130 That still has to be approved by the Senate.

131 Determining what constitutes child pornography is, technically speaking, a simple task as a criminal photograph can be digitally analysed and assigned a unique identifier, which can then be used to detect similar images.

132 See nn 37 and 38.

This is not to suggest that the process of comprehensive regulation can merely be achieved through wider and earlier stakeholder engagement; it is instead a far more iterative process.¹³³ By way of comparison, ships started out as basic vessels to carry the goods/thoughts of their passengers in a primitive way.¹³⁴ The passage of time allowed ships to become ever more sophisticated moving from seafarers making use of the sun and the stars (celestial navigation), to using compasses, sextants and telescopes to navigate. Navigation has since evolved with the use of radar, electronic charts, long-range tracking and identification systems and global positioning systems (GPS) technology and so on. Comparing this with social media, platforms and apps were originally quite basic. However, as the algorithms used to generate site content and manage user preferences (notably in relation to privacy) have developed, they are therefore increasingly equipped to deal with complex risks and challenges¹³⁵ and in a position to comment on the practicality of delivering the regulations to which it is proposed they are subject.

There is a note of caution: such systems are often designed by giving notice and choice to customers, which for Lessig can lead to a situation by which ‘code becomes a means by which to transfer decisions from the public realm to the privatised realm . . . [i]t

133 As noted by Murray (n 45) 213–19: ‘As regulators are inclined to rely ever more on gatekeepers as proxies in their attempts to control online activities, it means that our old models for cyber-governance and regulation have become outdated.’ Murray suggests instead a model that applies regulatory modelling to communicative relationships of power to provide a richer model that articulates the regulation spheres of activities.

134 Scaife (n 12) 4–7.

135 In June 2011, the Special Rapporteur, together with the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the Organisation of American States, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples’ Rights, issued a joint declaration establishing guidelines to protect freedom of expression on the internet, reinforcing the need to protect freedom of expression even in the online context <www.osce.org/fom/99558?download=true>. On the issue of censorship, the mandatory blocking of websites is an extreme action that may only be justified in accordance with international standards. The rapporteurs stated that content-filtering systems that cannot be controlled users, imposed by governments or commercial providers, are also actions that are incompatible with freedom of expression. It is noted that in relation to the criminal law this has caused significant difficulties in the UK regarding when filtering and content removal should occur. The report considered this issue in some depth, noting that, while the state (which is party to human rights treaties) has an obligation to establish criminal law and systems sufficient to deter and respond to attacks on individuals (See, for example, ECtHR App No 23452/94. 28 October 1998, in which the court stated that the right to life (Art 2(1) ECHR) included the obligation to put in place ‘effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions’), it must not go so far as to deny individual rights by its criminalisation of particular conduct (United Nations Commission on Narcotic Drugs, and Commission on Crime Prevention and Criminal Justice, 2010: Drug control, crime prevention and criminal justice: A Human Rights perspective. Note by the Executive Director. E/CN.7/2010/CRP.6 – E/CN.15/2010/CRP.1. 3 March 2010). In order to undertake an impact assessment, states must therefore assess criminal provisions on a ‘right-by-right’ basis. By approaching an analysis of the provisions in this way, it is possible to test whether its contents infringe a range of individual rights – such as the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence (Art 17 ICCPR), the right to freedom of thought, conscience and religion (Art 18 ICCPR), or the right of peaceful assembly (Art 21 ICCPR).

is a way to convert political rights into market commodities',¹³⁶ for example, non-profit organisations such as Code for America which then co-opt the state – under the guise of encouraging talented hackers to tackle civic problems.

Furthermore, there is also a distinction to be drawn between the *trust* placed in private companies as opposed to the government, with research indicating that the government is more trusted.¹³⁷ More recently, concern has been expressed regarding the government's use of data,¹³⁸ particularly in terms of recent profiling and data leaks,¹³⁹ compounded by

136 Lessig (n 2) ch 11 and 159–63. The old adage that nothing in life is free very much applies to 'free online services'. There is a value trade-off garnered from the information you provide to companies offering online services. This is because data relating to your buying habits and social/lifestyle preferences is a valuable trade for big organisations being employed to different degrees to do everything from marketing to helping to determine credit scores and insurance price (see J Leber, 'How wireless carriers are monetizing your movements' (*MIT Technology Review Website*, 12 April 2013) <www.technologyreview.com/s/513016/how-wireless-carriers-are-monetizing-your-movements>) creating 'a detailed composite of the consumer's life' (*Data Brokers: A Call for Transparency and Accountability* (Federal Trade Commission May 2014) <www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>). Such site providers disclose this information in their terms of service, for instance, with the aim of generating advertising revenue, for example Google's online terms of service state 'Our automated systems analyze your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection. This analysis occurs as the content is sent, received, and when <<https://policies.google.com/privacy/google-partners?hl=en>>. Sources can include a user's IP address, Google and YouTube profiles. Social media sites are engaged in the trading of data, according to Facebook's Data Policy <www.facebook.com/help/111814505650678> it 'shares' information about users 'within the family of companies that are part of Facebook' to 'facilitate, support and integrate their activities': see <www.facebook.com/about/privacy/update>. There are currently 10 companies listed in the family, including WhatsApp, Instagram and Atlas. Facebook's Audience Network programme provides app developers with aggregated data to target their ads. 'Facebook Services' are also covered by this Data Policy and include services such as 'Audience Insights'. This service is designed to provide businesses with information about the 'geography, demographics and purchasing behaviour and more' (See <www.facebook.com/business/news/audience-insights>). In March 2016, social networking forum Reddit removed a section from its website used to tacitly inform users that it had never received a certain type of US government surveillance request <www.reuters.com/article/us-usa-cyber-reddit-idUSKCN0WX2YF>. Reddit also deleted a paragraph usually included in its transparency report known as a 'warrant canary' to signal to users that it had not been subject to so-called national security letters, which are used by the FBI to conduct electronic surveillance without the need for court approval. This 'Big Brother' society has caused privacy watchdogs to more closely scrutinise the practices of big businesses. Indeed, in April 2015, the Information Commissioner's Office, which oversees data protection issues in the UK, launched an investigation into UK firms sharing pension, medical and financial data (see the announcement on the Information Commissioner's Office website <<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/04/ico-to-make-enquiries-about-sale-of-pension-data>>). Access to services is often a condition of signing up, which means that the consent in practice may not be freely given in a world where such services are the lifeblood of modern life, as expressed by one commentator: 'It's not reasonable to tell people that if they don't like the data collection, they shouldn't email, shop online, use Facebook or have a cell phone. I can't imagine students getting through school anymore without Internet search or Wikipedia, much less finding a job afterwards. These are the tools of modern life.' B Schneier, *Data and Goliath*, 1st edn (W W Norton 2015) ch 4.

137 See 2.27(a) above, last bullet point, and Ipsos MORI: ESRC/ONS; Deloitte; Eurobarometer. Within the US government at least, there may also be some differentiation; see Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* (May 2014), in which law enforcement and intelligence agencies were ranked low in terms of public trust.

138 Polling was conducted by Ipsos MORI for the *Evening Standard* in October 2014. See 'Public backs curbs on police seeing phone records of journalists' *Evening Standard* (London, 21 October 2014) as excerpted in D Anderson, *A Question of Trust* (Report of the Investigatory Powers Review 2015) 33–4; Ipsos MORI: RSS; 13% had high trust in the British government compared to 46% with low trust.

139 Anderson (n 138).

the ‘Snowden effect’.¹⁴⁰ A number of studies have suggested that most people had already assumed that the type of action alleged in the Snowden documents was undertaken;¹⁴¹ however, this has not overturned some research indicating low levels of trust in the UK government to use people’s data appropriately,¹⁴² with many holding the opinion that neither government nor private companies can now keep their data completely secure.¹⁴³

Baldwin notes that, as such interests are accommodated, the broad principles can become less accessible as they seek to accommodate private sector interests and the contemporary politics of policy-making¹⁴⁴ which leads to a jarring as between participation and effectiveness.¹⁴⁵ However, the private sector in recent years has increasingly become a backstop for state interference with privacy rights. Microsoft has successfully resisted the US government’s demand for emails of a non-US citizen that the company has stored in a data centre located in Ireland.¹⁴⁶ Similarly, Apple has refused requests by the Federal Bureau of Investigation (FBI) to reveal information and/or change code on its phones which would allow the authorities to unlock phones which are cryptographically protected.¹⁴⁷ Of course, not all platform providers are so scrupulous. For example, platforms such as Telegram and Surespot, which are popularly used by terrorist groups like ISIS, have been accused of harbouring terrorists, at the expense of risking state security and the protection of citizens in favour of commercial gain.¹⁴⁸

A situation must not, however, be created by which the price of co-operation is so high that it erodes the original purpose for which the regulation was adopted. Nevertheless, this is not to say that co-regulation is not possible, merely that the interests of third-party providers and the remaining need to maintain some sort of coercion must be considered. In the context of fisheries,^{148a} note that regulation ‘may lead fishermen to act in a way in which they regard as unnatural’. A potential solution to this for such ‘maverick offenders’ is to encourage general buy-in from the industry or make access to

140 Ibid.

141 See TNS-BMRB Polling 23–27 January 2014, as excepted in Anderson (n 138).

142 Anderson (n 138). 13% of those polled had high trust in the British Government compared to 46% with low trust: *ibid.*

143 Ibid.

144 Baldwin (n 1) 334.

145 Foucault (n 15) 278

146 ‘Microsoft suit is latest tech clash with US over privacy’ (*Tempo.co*, 1 April 2016) <<http://en.tempo.co/read/news/2016/04/16/310763182/Microsoft-Suit-is-Latest-Tech-Clash-with-US-over-Privacy>>.

147 Gary Fagan, ‘In the matter of the search of an Apple iPhone seized during the execution of a search warrant on a black Lexus IS300, California License plate 35KGD203’ (*Ars Technica*, 4 March 2016) <www.clearinghouse.net/detail.php?id=15497ext>.

148 Surespot <www.surespot.me> and Telegram <<https://telegram.org>> are popular with jihadis, due to their ability to facilitate the encryption of messages so that only the intended recipient can read it. Tantalisingly, Surespot declares on its website: ‘we don’t know or share anything about you . . . Surespot is about taking back your right to privacy and it is made free to provide unrestricted access for everyone.’ The website explains Surespot’s encryption by using the example of a postcard that anyone who touches can read: ‘Typically you do not send information like a credit card number or your pin number or an intimate thought using the postcard format. Today this is what sending an email or a text message or an instant message or a picture is like. The message is the postcard which travels along many hops until it reaches its destination. At every one of these “hops” the message could potentially be read’.

148a Black and Baldwin (2008) (n 1) 82.

the market conditional on submitting to being regulated.¹⁴⁹ Inevitably, there will always be detection challenges, which is why coercive compliance measures such as the issuing of fines and undertakings must still be factored into a model to catch those who will only respond to punitive measures. It is therefore suggested that any proposed regulatory model must be backed up with stringent financial and operational sanctions such as fine and enforcement regimes, as well as rights for the state to audit information society service providers.¹⁵⁰

6.4 RESPONSIVENESS TO THE BEHAVIOUR, ATTITUDE AND CULTURE OF THE COMMUNITIES WHICH REGULATION MUST SERVE

The media has been described as an ‘extension of man’,¹⁵¹ acting as a vessel through which a discovery process of giving and receiving information makes individuals more visible to other users. As noted by Bucher, ‘the regime of visibility associated with Web 2.0 connects to the notion of empowerment, as it has greatly expanded the social field of becoming recognised as a subject with a voice’.¹⁵² For Foucault, the ‘the turning of real lives into writing . . . functions as a procedure of objectification and subjugation’.¹⁵³ This raises the question of to what extent platforms can design and build sufficient architecture to successfully ‘police’ their platforms when faced with an endless tide of content creation. Modern-day King Canute YouTube has stated that, for every single minute of the 24 hours in a day, it receives an average of 35 hours of video from millions of contributors.¹⁵⁴ Essentially, this boils down to a quite simple concept: sites cannot pre-screen material prior to uploading and active policing is neither possible nor practical.

Prisons and other such institutions are essentially places of ‘constructed visibility’.¹⁵⁵ The sixteenth century onward saw the emergence of disciplinary societies in which a small few controlled the many. Jeremy Bentham’s panopticon¹⁵⁶ was a powerful representation of the regulatory force of power, strengthened though certain architectural compositions,¹⁵⁷ and even the Disney World is based on a model in which visitors are ‘controlled by an architecture in which nearly every aspect of the design has a disciplinary function’.¹⁵⁸ Although long pre-dating the digital content, Foucault operated from the proposition that it is not just what is seen (or posted) that is important

149 Black (2012) (n 1) 217–18: ‘The propensity for detailed rules to fail in this manner has been recognized, at least to an extent. In particular, the moves towards the creation of interpretive communities can be seen as attempts to find ways to escape the need for precise and complex rules. Three different aspects of this development can be identified. The first is the use of rule type, the second a change, in the level of rhetoric at least, of regulatory approach, and the third an increased emphasis on the regulatee’s own attitude, education, training, and competence. Each is aimed at changing the internal attitude of (p.218) the regulated to the regulation; displacing the need for control by building up understandings within the regulatory system as to what the regulatee is meant to do, how it is meant to act’.

150 Scaife (n 12) 16.

151 M McLuhan, *Understanding Media: The Extensions of Man* (MIT Press 1964).

152 Raz (n 4); T Bucher, ‘Want to be on the top? Algorithmic power and the threat of invisibility on Facebook’ (2012) 14(7) *New Media and Society*, 1164–80, 1165.

153 Foucault (n 15) 290.

154 Statistics, YouTube Press Office. Accessible via <<https://www.youtube.com/yt/press/statistics.html>>. Accessed January 2016.

155 Foucault (n 15) 171.

156 J Bentham, *Proposal for a New and Less Expensive mode of Employing and Reforming Convicts* (London 1798)

157 Bucher (n 152) 1170.

158 Murray and Scott (n 84) 500. Clifford D Shearing and Philip Stenning, ‘From the Panopticon to Disney World: the development of discipline’ in A N Doob and E L Greenspan (eds), *Perspectives in Criminal Law: Essays in Honour of John LJ Edwards* (Canada Law Book 1985) 335–49 195–231.

in terms of understanding its visibility, but how it is constructed (by the regulated community). Therefore, social media platforms could be described as paradigms of constructed virtual visibility. As noted by Bucher, with regards to the regulation of social media by reference to the Foucauldian notion of visibility ‘the medium specificity of the architectural organization of visibility i.e. what can be seen and heard, to a large extent became a question of software’,¹⁵⁹ highlighting the symbiosis between law and technology, which leads to the need for a cyclical approach to the formation of effective principles-based regulation.¹⁶⁰

Lessig imagines a world where there would be a dynamic dialogue between regulator and regulated.¹⁶¹ Here the panoptic model may offer some assistance: ‘The major effect of the panopticon: is to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.’¹⁶² The uncertainty associated with the spectral gaze of the regulator means that users adjust their behaviour to act as if they are indeed being permanently observed. Discipline in this context makes the principle the subject of its own subjugation,¹⁶³ in which the subjects are responsible for their own behaviour’s discipline, therefore making individuals, as it is ‘the specific technique of power that regards individuals as both objects and instruments of its exercise’,¹⁶⁴ imposing particular conduct on a particular human multiplicity.¹⁶⁵ For Bucher, Foucault developed this notion of disciplinary power in ‘order to account for the duality of power and subjectification’,¹⁶⁶ thus the trained subject becomes the principle of their own regulatory conduct through hierarchical observation, normalising judgement and examination.¹⁶⁷

One of the most common representations of Foucault’s paradigm shift is the circle of desks, which decentralise power, creating parity. ‘In the first instance’, Foucault writes, ‘discipline proceeds from the distribution of individuals in space . . . and sometimes requires enclosure, the specification of a place heterogeneous to all others and closed in upon itself.’¹⁶⁸ The circle of desks encloses it to a ‘collaborative composition cell . . . transforming the confused, useless or dangerous multitude into ordered multiplicities’.¹⁶⁹ Such ‘cells’ of desks can be compared to groups, pages liked, Facebook newsfeed content, each individual’s specific Facebook friends, Twitter followers, liking hashtags etc. According to Foucault, the challenge for disciplinary spaces in this context is that it must

159 Bucher (n 152) 1166.

160 Murray and Scott (n 84) note, at 502: ‘Law in Lessig’s terms is merely the constraint placed upon the individual. Accordingly hierarchical control provides both a better label and a substantively enriched conception of this modality.’

161 See, for example, Lessig’s concept of the ‘pathetic dot’ (n 2) 122: ‘That someone is regulated is represented by this (pathetic dot) – a creature (you or me) subject to different regulations that might have the effect of constraining (or enabling) the dot’s behaviour.’ For a discussion of the ‘pathetic dot’ and the development of dynamic forms of cybernetic and nodal governance models see Murray (n 45) 203–7.

162 Foucault (n 15) 201.

163 Ibid 203.

164 Ibid 170.

165 G Deleuze, *Foucault* (Continuum 2006) 27.

166 Foucault (n 15) 212.

167 Sunstein (n 41) in the broader context of the requirements for the issuance of ‘new rules’ emphasises five key points for the success of such measures: 1 public participation; 2 advance consultation 3 simplification; 4 harmonisation; and 5 Qualification.

168 Foucault (n 15) 141.

169 P Heilker, ‘Discipline and punish and process and paradigms (or Foucault, visibility, (dis)empowerment, and the construction of composition studies)’ (1995) 27(2) *Composition Studies* 4–13; Foucault (n 15) 148.

be a 'filter, a mechanism that pins down and partitions; it must provide a hold over this whole mobile, swarming mass'.¹⁷⁰

By viewing regulation in 'cells' (in the 'collaborative unit' sense, rather than a prison room), self-discipline and interdisciplinary activity can help to 'organise' the space. The perfect disciplinary space, Foucault writes, would be constructed to 'permit an internal articulated and detailed control – to render it visible to those who are inside it', thus transforming them 'to act on those it shelters, to provide a hold on their conduct, to carry the effects of power right to them, to make it possible to know them, to alter them' through 'the calculation of openings, of filled and empty spaces, passages and transparencies'.¹⁷¹

The value of such modelling is that, in this context, disciplinary power 'has its principle not so much in a person as in a certain concerted distribution of bodies, surfaces, lights and gazes'¹⁷² and thus 'anyone can come and exercise . . . the functions of surveillance'.¹⁷³ In the disciplinary space, therefore, 'it does not matter who exercises power . . . any individual, taken almost at random, can operate the machine', indeed 'the more numerous those . . . temporary observers are, the greater the risk of the [subject] being surprised and the greater his anxious awareness of his being observed'.¹⁷⁴ If an appropriate technological architecture can be adopted which creates an environment for the mechanics of observation, 'the ability to penetrate into men's behaviours; knowledge follows the advances of power, discovering new objects of knowledge over all the surfaces on which power is exercised'.¹⁷⁵ The advantage of this is that it can substitute for a 'power that is manifested through the brilliance of those who exercise it, a power that insidiously objectifies those on whom it is applied; to form a body of knowledge about these individuals, rather than to deploy the ostentatious signs of sovereignty'.¹⁷⁶

As modern day drug smugglers have recently used improvised submarines and semi-submersible vessels to transport their illegal narcotics to their wider distribution channels, the 'Dark Net' will always provide a three-dimensional space for criminal activity to take place undetected. Regulation cannot go beneath social media's surface to the dark sea bed and seek to regulate it completely; instead, it must provide a principles-based code for the safe and transparent passage of users on the surface.

As complete regulation is not possible, instead, the sites could rely on a self-policing community to police content through reporting materials that infringe the YouTube community guidelines.¹⁷⁷ It is suggested that the use of voluntary lifeboat persons

170 Foucault (n 17) 144.

171 Foucault (n 15) 148, 204, 72.

172 Ibid 148, 204, 202.

173 Ibid 148, 204, 207.

174 Ibid 148, 202.

175 Ibid 148, 204.

176 Ibid 220.

177 The community guidelines can be accessed via <www.youtube.co.uk/t/community_guidelines>. In the case of terrorism-related material, objections could fall in the categories 'violent or repulsive conduct', including subcategories for 'physical attack' or 'promotes terrorism'. Recognising that there are shades of grey and not all videos may be specifically calling individuals to commit terrorist activity, content can also be reported if it amounts to 'hateful or abusive content' that 'promotes hatred or violence'.

remains a viable solution for the regulation of social media which does not amount to legally regulated infringement of the principles.¹⁷⁸

In a multi-regulatory environment, and recognising the unique challenges of social media, the social media community of users¹⁷⁹ itself should also share a responsibility to make use of the technologies such as privacy settings, content blockers, report buttons and flagging of breaches of community standards in order to take personal responsibility for the content posted online and how it is viewed, shared and engaged with by other users.¹⁸⁰ Bucher makes an interesting observation with regards to punishment, which goes beyond the traditional notion of 'regulatory censure'. Not conforming with the rules and architecture is punishable in the sense that it will reduce the users visibility on the platform, thereby limiting their participation in the discourse which takes place online either through the sites removing content or other users choosing to block that user, un-

178 For example just a few days after the terrorist attacks in Paris in 2015, Anonymous announced #OpParis 'this is only the beginning, ISIS. We will hunt you, take down your sites, accounts, emails and expose you . . . You will be treated like a virus and we are the cure', stated a masked crusader in a video posted on YouTube. 'We are Anonymous. We are legion. We do not forgive. We do not forget. ISIS, it is too late to expect us' and 'Anonymous from all over the world will hunt you down. You should know that we will find you and we will not let you go. We will launch the biggest operation ever against you. Expect massive cyber-attacks. War is declared. Get prepared. The French people are stronger than you and will come out of this atrocity even stronger.' As a result of the Oklahoma shootings, a hacker by the name of WauchulaGhost hacked an ISIS account going under the Twitter handle @gi_h_a_d35, changing the profile picture to a gay flag, accompanied by the following message: 'Hello World. It's time I share with you a little secret . . . I'm Gay and I'm Proud!! #GayPride #OrlandoWillNotBeForgotten !!! #GhostOfNoNation.' WauchulaGhost has also been tweeting out IP addresses, phone numbers and other contact information for other hackers to get busy with. WauchulaGhost published a statement regarding the motivation for his actions: 'I did it for the lives lost in Orlando. Daesh [ISIS] have been spreading and praising the attack, so I thought I would defend those that were lost. The taking of innocent lives will not be tolerated. Our actions are directed at Jihadist extremists. Many of our own [group of hackers] are Muslim and we respect all religions that do not take innocent lives.' R Lee, 'Anonymous hacks ISIS's Twitter, makes it as fabulously gay as humanly possible' (*Techly.com*, 16 June 2016) <www.techly.com.au/2016/06/16/anonymous-hacks-isis-twitter-makes-it-as-fabulously-gay-as-humanly-possible>. As well as blocking accounts, Anonymous has also launched cyber-attacks on Turkey, accusing the country's leaders of supporting ISIS. In one operation, Anonymous claimed to have brought down 40,000 websites across Turkey by attacking the country's 'root servers' and threatened to sabotage servers of Turkey's airports, banks, military services and government facilities if they failed to stop aiding ISIS. Sabotage has also been a fruitful avenue of hactivism, for example the Ghost Security Group (an Anonymous affiliated group) has plunged into the Dark Web to find ISIS recruitment hubs and donation pages, replacing them with ads for Prozac and Viagra: M Stainer, 'Ghost Sec, Anonymous affiliate, hacks ISIS site on deep web with Viagra, Prozac ad' *Washington Times* (Washington DC, 26 November 2015.)

179 See Scaife (n 12) 3–7 for a chronology of the development of social media communities. See M Bakardjeva and G Gaden, 'Web 2.0 technologies of the self' (2012) 25(3) *Philosophy and Technology* 408–11, for an analysis of the literature relating to the ways in which the self is constituted through peer groups and social medias wider circle of 'friends'.

180 Murray (n 45) 215–20 provides an excellent analysis of the second regulatory state. Explaining how 'collective decisions and communities form, as well as the complexity of regulatory control systems', he cites Burris et al's explanation of nodal governance: 'Take any group of people living in the same place or on some other basis identifying themselves as a group for at least some important purposes. We will refer to this as a "collectivity". The things these people do create outcomes over space and time. These outcomes are not necessarily the result of their intentional activities or of their activities alone. Outcomes are produced by the complex interaction of what people do, how they relate to one another, the institutions, technologies and mentalities they deploy, their biological equipment and the conditions and stimuli from the larger physical and social environment in which they operate. Any given collectivity can be understood to be an "outcome generating system" (OGS). By this we mean that the products of the operation of the collectivity across space and time are not exogenous but organic to the collectivity, reflect the conditions of the OGS, and in turn influence the further development of the system over time. Individual collectivities constitute larger and even more complex systems. A system of collectivities is simply a larger OGS.' S Burris, P Drahos and C Shearing, 'Nodal governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 37.

follow or report them. As asserted by Foucault, 'what is specific to the disciplinary penalty is not observance, that which does not measure up to the rule, that departs from it'.¹⁸¹ The 'goal' is not to create a perfectly regulated space – indeed, this is not possible, rules will inevitably be circumvented or broken – it is instead to create a regulatory environment in which those users 'manning the world's ships' are alert, motivated, educated, trained and qualified to the proper standards and in fact possess the skills necessary to engage with social media in a manner consistent with the regulatory principles.¹⁸²

7 Reconceptualising the regulation of social media

7.1 DEVISING A METHODOLOGICAL APPROACH TO THE REGULATION OF SOCIAL MEDIA BY COMPARISON TO SOFTWARE DEVELOPMENT MODELLING

As with all emerging technologies, software engineering has faced technological challenges, heavily influenced by 'hardware-oriented development approaches on software development'.¹⁸³ In response to this in the 1960s and 1970s, industry considered how best to control the development of complex software projects. The technique developed¹⁸⁴ systems that relied heavily on upfront process. This method came to be known as the waterfall approach due to its common graphic representation. In its most basic representation, the waterfall model has the main blocks as shown in Figure 1.

181 Foucault (n 15) 148, 204, 202, 178. In September 2015, with the support of stakeholders, the CPS ran its first social media campaign on this issue. The #ConsentIs campaign subsequently won the 2016 UK Public Sector Communications Award, recognising its impact in provoking discussion and understanding of the issue. The campaign was launched with the support of a number of stakeholders, including Rape Crisis, Survivors Manchester, End Violence against Women, National Union of Students and White Ribbon Campaign. The CPS worked closely with these groups beforehand, interviewing them for three #ConsentIs videos which discussed what consent is, myths and stereotypes about consent, and where consent fits into wider society. The public was asked to engage on Twitter using the hashtag #ConsentIs. On its first day of launch, the hashtag was trending on Twitter and over the next two-and-a-half weeks it had a potential reach of almost 12 million accounts, potentially being seen over 45 million times. In addition, over 4000 tweets were sent using the hashtag, and a variety of people became involved in the discussion, including local police forces, MPs, local councils, prominent charities, media commentators and members of the public. CPS (n 36) 54. It is interesting to note that in July 2016, the CPS won the 2016 UK Public Sector Communications Award for its campaign in the category 'Low Budget Campaign of the Year', highlighting that regulation does not necessarily mean that large budgets are required to assist with compliance.

182 Black (2012) (n 1). See n 149 above.

183 Steve Palmquist, Mary Ann Lapham, Suzanne Garcia-Miller, Timothy Chick and Ipek Ozkaya, *Parallel Worlds: Agile and Waterfall Differences and Similarities* (Software Engineering Institute 2013).

184 Winston Royce is often credited with being the father of the waterfall methodology as set out in his paper 'Managing the development of large software systems' (1970) 26 Proceedings of IEEE WESCON 328–88. Royce never envisioned his paper as a solution to complex software development problems. 'He was always a proponent of iterative, incremental, evolutionary development. His paper described the waterfall as the simplest description, but that it would not work for all but the most straightforward projects. The rest of his paper describes [iterative practices] within the context of the 60s/70s government contracting models (a serious set of constraints).' See C Larman and V R Basili, 'Iterative and incremental developments. a brief history' (2003) 36(6) Computer 47–56.

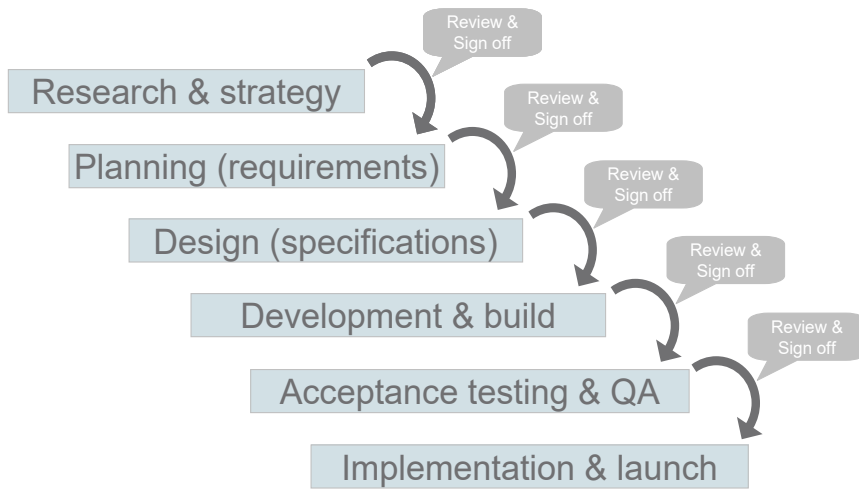


Figure 1

As can be seen from the Figure 1, the process is sequential, and all requirements must be known upfront, with the analysis and design undertaken proceeding on the assumption that those assumptions will remain unchanging, which leads to a rigid, document-intensive and review-intensive approach. As noted by Palmquist et al, such an approach does not pay heed to the customer, who is most involved in integrating the requirements. All of the core features of the product need to be locked down upfront and all aspects of the design and decision-making must be documented before work can commence to ensure that the architecture is adequate.¹⁸⁵

Recognising the pitfalls of the waterfall approach, a more iterative approach to modelling began to develop, called the 'Agile method'. Agile is an umbrella for a collection of methods and/or approaches that share common characteristics and/or goals. One definition for Agile offered by Lapham is 'an iterative and incremental (evolutionary) approach to software development which is performed in a highly collaborative manner by self-organising teams within an effective governance framework with "just enough" ceremony that produces high quality software in a cost effective and timely manner which meets the changing needs of its stakeholders'.¹⁸⁶ Agile shares some commonalities with the waterfall methodology, insofar as requirements are characterised upfront. However, they are assumed to be changing, which allows for processes to evolve in short iterations where work is analysed, tested and created in 'huddles' which feed into and off one another. This can

185 Palmquist et al (n 183) 5. More iterative approaches to waterfall have been developed. See Larman and Basili on Walker Royce, Dr Royce's son, said this of his father and the paper: 'System Require Software Require Analysis Program Design Coding Test Operations' CMU/SEI-2013-TN-021 79: 'He was always a proponent of iterative, incremental, evolutionary development. His paper described the waterfall as the simplest description, but that it would not work for all but the most straightforward projects. The rest of his paper describes [iterative practices] within the context of the 60s/70s government contracting models (a serious set of constraints).' (Larman and Basili (n 184), as quoted by Palmquist et al (n 183). A consideration of such modelling is beyond the scope of this article but is considered in depth by Palmquist et al. An important point here is that Agile is a disciplined planning process, including understanding requirement dependencies, potential groupings and infrastructure needs. Agile planning also includes other technical practices such as configuration management, testing, and the like as part of this disciplined planning perspective.

186 Mary Ann Lapham, Ray Williams, Charles (Bud) Hammons, Daniel Burton and Alfred Schenker, *Considerations for Using Agile in DoD Acquisition* CMU/SEI-2010-TN-002 (Software Engineering Institute, Carnegie Mellon University 2010) <www.sei.cmu.edu/library/abstracts/reports/10tn002.cfm>.

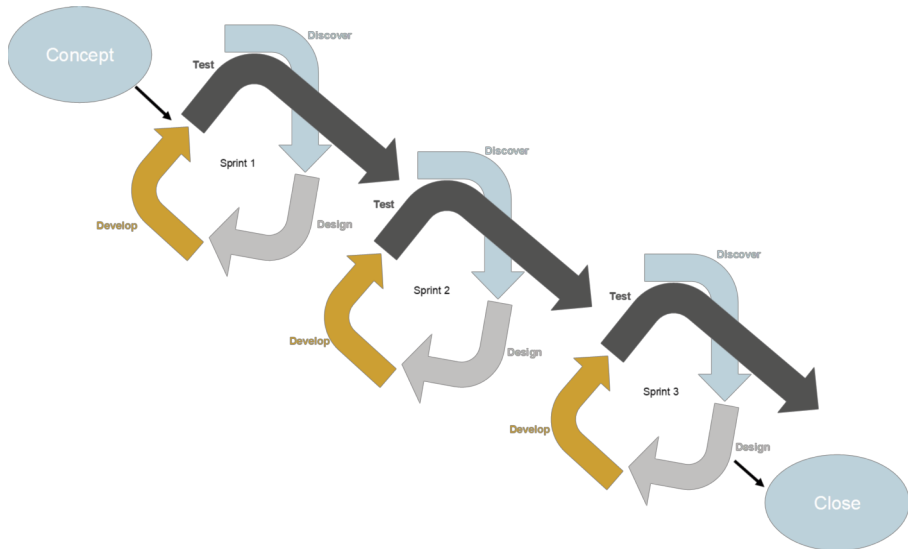


Figure 2

be usefully compared to Foucault's circle of desks, which decentralise power, creating parity. Crucially, there is stakeholder involvement in the process at each iteration, so that the documentation develops only as it is needed and tailored to fit the project.

This type of iterative modelling can be useful if located within constitutional dialogue theory. The employment of a 'constitutional dialogue', in 'constitutional dialogue theory',¹⁸⁷ tends to refer to *equality* between dialogic partners, or at least a (temporary) ignoring of power relations, moving from hierarchy to heterarchy as a basic structure within which the disciplining of public power takes place.¹⁸⁸ The dialogue also enjoys a deliberative quality.¹⁸⁹ Although participants still have agendas and interests to defend, they are fused into their relationships with their dialogic partners and the agendas and interests those partners may have, even where such interests conflict.¹⁹⁰ For example, in the content of international dialogues, Jackson considers the *transnational nature of the process* leading to the incorporation of certain human rights norms into national constitutions.¹⁹¹ According to Meuwese and Snel, the value of such dialogue is that the constitutional actors do not need to acknowledge that they are engaged in a dialogue.¹⁹² They suggest that the instances of dialogue may be called 'constitutional' 'because of their *aspiration* to contribute to, implement or even shape the basic norms that govern the

187 E.g. B M Bakker, 'Blogs as Constitutional dialogue: rekindling the dialogic promise?' (2008) 63 *New York University Annual Survey of American Law* 215–67; G Dor, 'Constitutional dialogues in action: Canadian and Israeli experiences in comparative perspectives' (2000) 11 *Indiana International and Comparative Law Review* 1–36.

188 R S Allan, 'Constitutional dialogue and the justification of judicial review' (2003) 23 *Oxford Journal of Legal Studies* 563–84.

189 Staffan Himmelroos, 'Discourse quality in deliberative citizen forums – a comparison of four deliberative mini-publics' (2017) 13(1) *Journal of Public Deliberation*, Article 3.

190 M Claes and M de Visser, 'Are you networked yet? On dialogues in European judicial networks' (2012) 8(2) *Utrecht Law Review* 100–114, 105.

191 V C Jackson, 'Constitutional dialogue and human dignity: states and transnational *constitutional* discourse' (2004) 65 *Montana Law Review* 15–40.

192 A Meuwese and M Snel, 'Constitutional dialogue: an overview' 9(2) *Utrecht Law Review* 123–40.

actions of public entities and their exercise of coercive power in particular'.¹⁹³ This is not to presuppose that the model need be a codified 'dialogical mechanisms' as is present in some constitutions (such as Article 33 of the Canadian Charter). Indeed, whilst this may be suitable for the courts, technology providers and policy makers, it would not be appropriate for the regulated community of users: the act can still be constitutional as an *institutionalised practice*.¹⁹⁴ An example of a simple Agile model is shown in Figure 2.

7.2 An iterative and dynamic model for the regulation of social media

The great value of the rules which had been developed for maritime trade lay in the fact that they had been found by practice to be suitable to the needs of a community which knows no national boundaries. Just like the Law of the Sea and of the *Consolato del Mare* (which represented compilations of comprehensive rules for all maritime subjects, covering everything from ownership of vessels, the duties and responsibilities of the masters or captains thereof, duties of seamen and their wages, freight, salvage, jettison, average contribution, and the like, enjoying an authority far beyond the port from which it hailed), a principles-based approach can be adopted to create an environment in which law, users and technology can work together to create a co-regulated principles-based space which has the necessary flexibility to adapt to the development of technology, whilst respecting core principles of human rights. Taking these principles as a base, international regulation can be developed which has the necessary flexibility to take into account the state of the art and sustain a rigorous regulatory environment, with a better and more effective outcome-focused approach despite being applied, rather than artificially seeking to apply detailed rules prescribing how outcomes must be achieved,¹⁹⁵ instead creating a system which can adapt based on performance assessments and modification of the approach adopted.¹⁹⁶ It is suggested that an Agile methodology could be applied to the regulation of social media.

It has been noted by several authors **Bucher (2014)**¹⁹⁷ that, in the Foucauldian sense, the diagrammatic representation of regulatory architecture highlights the 'distribution of individuals in relation to one another, of hierarchal organisation, of dispositions of centres and channels of power'¹⁹⁸ and 'it is the diagram of a mechanism of power reduced to its ideal form'¹⁹⁹ representing 'a forceful framework for understanding visibility, to highlight the 'distribution of individuals in relation to one another, of hierarchical organisation, of dispositions of centres and channels of power'.²⁰⁰ However, whilst principles-based regulation informs the technological architecture that powers social media to make things more visible, what is clear is that something more flexible is required to regulate social media effectively, something that moves away from an outcomes-based focus of a social media panopticon and more towards overcoming and working with the limitations of its architecture to find a new blueprint. Crucially, therefore, the model must depart from a purely panoptic model to allow for

... a sequel of implicitly or explicitly shaped communications back and forth between two or more actors characterized by the absence of a dominant actor –

193 N Walker, 'The idea of constitutional pluralism' (2002) 65(3) *Modern Law Review* 317–59.

194 Muwese and Snel (n 192) 131.

195 Black (2012) (n 1). See n 149 above

196 Black and Baldwin (2012) (n 1) 140.

197 Bucher (n 152); Sauter (n 9); Kohl (n 5); Spar (n 42); Bucher (n 152).

198 Foucault (n 15) 205.

199 Bucher (n 152).

200 *Ibid.*

or at least by a bracketing of dominance – with the shared intention of improving the practice of interpreting, reviewing, writing or amending constitutions.²⁰¹

8 The regulatory harbour model

Drawing upon the theoretical perspectives explored in this essay and the way in which the Laws of the Sea were created, this paper will now propose a framework through which social media can be regulated, by offering a holistic and iterative approach to the design of the regulatory architecture.²⁰²

Firstly, core principles such as freedom of expression, the state's ability to protect its citizens and privacy concerns (the 'arches of social media') could be adopted as the principles envisaged which must be designed and/or drafted into the vision for regulation. At this point regulation can be drafted that is sufficiently broad to protect principles, by reference to the state of the art of technology, backed by sanctions. These high-level requirements will by their nature be relatively coarse, setting out the overall scope of the principle to be respected. To recognise the inherent broadness of a principles-based approach, and as noted above,²⁰³ the developer community has a role to play in considering how to deliver the outcomes, which has the necessary breadth to find a closer fit between achieving their business objectives and meeting regulatory requirements.²⁰⁴ This can be achieved though the parties agreeing an overarching roadmap, which, however incomplete, has the capacity to evolve. High-level outputs can be agreed by putting the principles into the context of the technological environment in which they operate, which, over time, should lead to a situation by which the discourse allows the parties to understand one another and communicate more effectively.²⁰⁵

Engagement with the technological community may, of course, lead to concerns that solutions are inconsistent and that there is a lack of transparency in decision-making, as well as costs for the state regulators in terms of creating continuity. It is suggested that to counter this risk and foster a consistent approach to regulation, 'peer panels'²⁰⁶ comprised of the main social media platform providers and policy-makers could be adopted to foster the development of common language about risk and to facilitate learning.²⁰⁷ The solution can then be finessed to balance the government's priorities and human rights obligations and understand industries' risk (such as cost, complexity of delivery etc.) in order to resolve the construction, deployment and operation of the

201 Muwese and Snel (n 192) 126.

202 For the purposes of this modelling, the notion of rules, is adopted in the sense of norms as described by Murray and Scott, namely 'the preferred meaning of the word norm is as the generic term of standards, guidelines, and legal and non-legal rules' (n 84) 503. See also P Drahos and J Braithwaite, *Global Business Regulation* (Cambridge University Press 2000) 20.

203 Black (2012) (n 1) 218: 'the rule to be applied in a way which will further the overall aims of the rule maker, then the person applying it has to share the rule maker's interpretation of it'.

204 For Black (2012) (n 1) 219: 'part of the aim behind the Principles was to lift the issue of compliance from compliance officers up into the boardroom, and to help senior executives to see the moral wood for the technical trees'.

205 For example, see Murray and Scott's (n 84) control methodology of: elemental, hierarchical, community-based, competition and design-based control(s), Figure 1 at 504.

206 Black (2010) (n 1); Black (2012) (n 1); Black and Baldwin (2012) (n 1).

207 See Baldwin and Black (2008) (n 1) 71: 'the third element of really responsive regulation is responsiveness to the logics of different regulatory strategies and tools. Different regulatory strategies can have different logics. They embody, or at least place emphasis on, different understandings of the nature of behaviours or an institutional environment, and in turn have different pre-conditions for effectiveness (namely that the institutional environment of behaviours conforms to those foundational understandings)'.

proposed model. The roadmap can then be broken down into a series of releases, with the high overarching architectural requirements taking precedence over the successive iterations of the technological solutions used to achieve the overall legal principle. When regulation is approached in this manner, the model adopted can take into account the institutional environments in which the regulators act,²⁰⁸ whilst factoring in the view of the regulated without having the need to resort to a radical remodelling of the regulatory approach which would not have the necessary flexibility to take into account the degree of institutionalism that is present in regulation and which cannot be easily divested. The goal should be iterative evolution not prescriptive arbitrary revolution.

As the delivery of any one given principle will involve the consideration of different legal issues (e.g. criminal liability, privacy infringement, defamation, trolling etc.),²⁰⁹ reflecting the reality that there will always be a mixture of detailed rules and principles – ‘rules will never be able to be dispensed with. But they should in a number of areas be able to become less prescriptive’²¹⁰ – the releases can be broken down into sprints which can be considered in manageable blocks. During each iteration the regulator cannot add more requirements to the iteration, but it can clarify its requirements. With the platform providers feeding back on envisaged problems in the process, it is suggested that this is a crucial part of the modelling, given that regulation is ‘not self-executing’ and ‘depends on willingness to engage with the process’,²¹¹ as those to whom the rules apply will be less willing to comply if they are not informed or engaged with as to what compliance will mean and/or involve.²¹²

Once the parties are satisfied, the policy/principle can be released, in a way that has allowed the platform providers to consider the architecture issues in a timely manner, prior to the implementation of the regulation. There is, of course, an important role to be played in terms of the delivery to the wider social media community (such as companies, individual users etc.). It is therefore suggested that, when the draft legislation is prepared, information campaigns, guidance notes, training and awareness, and stakeholder consultation could be undertaken with interested parties to improve the design and implementation of the principles. It is suggested that the outcome of such consultations would be best reflected through the adoption of detailed guidance notes issued by an appropriate centralised regulator which reflect cultural, political and community standards. The advantage of adopting such a model is that the process need never be considered ‘complete’ and, if there is sufficient friction in any one of the given sprints to cause the creation of a reverse current when the water attempts to flow past an obstacle (known in marine terms as a ‘back eddy’), there will always be an inlet in the preceding harbour which can accommodate the water.²¹³ Therefore unlike the traditional

208 Ibid 70.

209 It is beyond the scope of this article to consider these discrete areas of regulation. For an analysis of the issues as applied to intermediaries see Kohl (n 5).

210 Black (2012) (n 1) 220.

211 Black and Baldwin (2012) (n 1) 141.

212 Baldwin (n 1) 336.

213 Michael Hill, ‘The policy/implementation distinction: a quest for rational control’ in Barrett and Fudge (n 1) has argued that ‘the policy-implementation distinction will tend to be more clearly drawn when, at some point in the chain, one of the parties asserts a right to prescribe goals for those at subsequent points in the chain . . . where one party regards itself as having a legitimate right to pay down ‘a policy’ for others and where it has powers to do so. It is suggested that by averring from this narrowness of perspective the harbour model will allow for enough stakeholder engagement to ensure that policy is not prescriptively delivered in a top-down fashion. For Baldwin and Black (2008) (n 1) 72: ‘performance sensitivity rests on the regimes ability both to assess its performance in the light of its objectives and to modify its tools and strategies accordingly’.

drafting model, which would lead to a situation whereby an intolerable strain would be placed on the legislation seeking to contain the issue, there is always a pressure-release system which can accommodate such backward currents.²¹⁴ The model for social media which has been suggested embraces this complex matrix, placing it at its heart, accepting the tension and allowing ways for it to ebb and flow, whilst always accepting that there will be an undercurrent in the water. In this way, a framework can be offered which can respond to attitudinal setting, institutionalisation and the private sector's interests, creating sensitive models which respond to change.²¹⁵

Inevitably, there will be situations where content falls short of an infringement of the legal principles and/or involves individual users or involves matters of a trivial and/or low speech value nature.²¹⁶ Whilst in the overall context they are low risk,²¹⁷ they create disharmony within the community. Much like the seas, it is considered that this is best dealt with by fellow seafarers, by adopting a Foucauldian model of visibility, such as 'trusted users' who will be best placed to engage with such matters within their 'community cells'. In certain circumstances, a more formal approach may be required and, in such scenarios, harbourmasters or coastguard authorities (courts, policy makers etc.) could be utilised. However this should not be the first (choice) 'port of call'. The Harbourmasters should be used sparingly for enforcing the regulations of a particular harbour or port, in order to ensure the safety of navigation, the security of the harbour and the correct operation of the port facilities. coastguard agencies (policymakers, prosecution services etc) could be responsible for issuing local 'safety information' as they do for seafarers. The outcome of this process can thereby lead to a process by which appropriate community standards, acting as a contract between the user and the platform provider, can be adopted that have community stakeholder engagement. In this way the 'community of persons' can adjust its behaviours based on community norms and the gaze of fellow users, as well as the regulator and the platform provider.

A representation of the proposed model is shown at Figure 3:

214 See Baldwin (n 1) 334–5: 'The message here is that a more realistic approach to rule choice can be adopted, that it is a mistake to assume that a rule will emerge with the same degree of rigour and as in the same form as the first draft . . . trade offs should be made in the real not the ideal world'. Baldwin also notes Eugene Bardach's metaphor of the 'game' (E Bardach, *The Implementation Game* (MIT Press 1977) 6) in which groups struggle to control the administrative process; the process for Bardach 'directs us to look at the players, what they regard as the states, their strategies and tactics, their resources for playing, the rule so of play . . . the nature of the communications (or lack of them) among the players and the degree of uncertainty surrounding possible outcomes'.

215 Black and Baldwin (2008) (n 1) 72: 'Responsive regulation requires escalation up a punitive scale that crosses logics; smart regulation theory encounters such issues in a more complex framework (and to a degree addresses complementarities and inconsistencies of approach).'

216 For a comprehensive case history of the hierarchy of speech see Scaife (n 12) 145.

217 Black and Baldwin (2012) (n 1) deal comprehensively with the regulation of 'low risk' regulatory activities, it is beyond the scope of this essay to fully consider these issues.

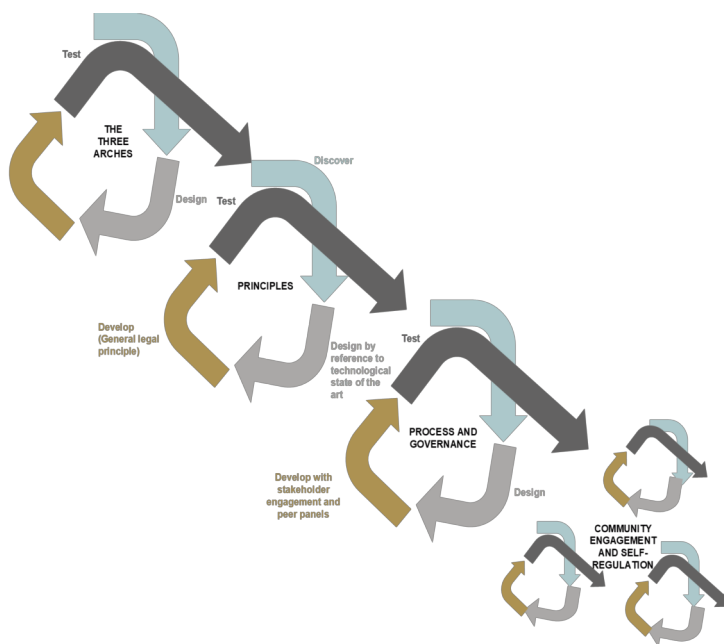


Figure 3

9 Conclusion

Improved rule-making comes when the means of securing compliance is shaped having regard to the particular problem at hand, rather than by ‘clinging to the notion that rules shape the world’²¹⁸ is possible. Through a consideration of the regulation of the sea, this paper has served to illustrate that regulation is possible. It has proposed a theoretical and methodological approach to thinking about the regulation of social media as conceptualised in an iterative and dynamic model that is characterised by the technologisation of human interaction and increasingly transparent ways of living in an age of ‘technologies of the self’. This approach will facilitate a more critical, responsive and iterative awareness of the regulation of expressive content in a way that can grow with the technological state of the art, alive to cultural sensitivities and the use of the tools as a vessel for self-development.

Building upon the work of Murray and Scott,²¹⁹ the model adopted seeks to take into account in its design how norms are obeyed, which leads to the formation of rules whilst acknowledging the role of challenging and encouraging ‘honest perplexity’ as to the rule’s application, so as not to thwart creatively compliant behaviour. It acknowledges the historical context and limitations of this unique medium and avoids a technologically deterministic or meta-narrative approach to regulation of multiple actors. With regards to the comparisons between ‘unregulatable spaces’ such as the sea, care much also be taken between overstating the translatability of such older practices of rule formation. There is a fine line to be drawn in terms of providing a model that has just enough architecture to be used as a blueprint for continuous refinement, and over-engineering the suggested

²¹⁸ Baldwin, (n 1) 337.

²¹⁹ Black (2012) (n 1).

model so that it becomes the very sort of panoptic model which it is seeking to transgress in the search for really responsive regulation.

Whilst such modelling may be viewed as eclectic and broad, with regards to enforcement and compliance the approach has served to demonstrate that there are several ways in which to achieve the overall principles which are deemed worthy of protection, each naturally with its own strengths and weaknesses. Indeed, the challenges of 'such novel governance mechanisms are how to deploy them in such a way that they are perceived legitimate'. The legitimacy of democratic government is linked to the processes of representation and open decision-making.²²⁰ The approach taken towards regulation will naturally vary according to context. Similar to theoretical approaches adopted with regards to really responsive regulation,²²¹ the model and underlying analysis put forward in this article go beyond prescriptive approaches so as to offer the regulator and the regulated a framework for evaluating the relative merit of different approaches and players' involvement and allows for the adoption of innovative combinations of regulatory logic, allowing optimal responses to be developed by the whole community, with the scope for feedback by each player in the community. In this regard, it goes further than simply providing a refinement of existing models, demanding an ongoing consideration of the regulatory strategy to be adopted, beginning with principles and problems rather than the regulation itself. The regulation is responsive because it knows the environment that it seeks to assist rather than attempting to command it, and is responsive to performance sensitivities and changes in tides – waving, not drowning.

220 Ibid 516.

221 Black and Baldwin (2008) (n 1) 94.

Weapons of mass distraction

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Abstract

The Circle invites an ever closer look at the ethos of current and emerging surveillance technology. Dave Eggers' novel foreshadowed the culminating moments in 2018, when high-powered social media platforms generated a maelstrom of controversy in the US and UK and then nothing changed. Concern over the integrity of electoral processes around the globe has risen to new heights, as privacy experts warn that unfettered growth of surveillance capitalism could change democracy forever. Far from a case of unintended consequences run amok, corporate tech executives admit that continual mining of personal data for unrestricted use by corporations and political operatives that specialise in psychological manipulation were part of the original design. The dark side of all this connectivity as highlighted by the ruckus over Cambridge Analytica places mainstream news producers squarely under the microscope. This article examines the wilderness between the goal of reporting in the public's interest and the current role of news organisations.

Keywords: surveillance technology; propaganda; psychological manipulation; investigative journalism; political rights; main stream media

1 Introduction: propaganda or wishful thinking?

Surveillance technologies and algorithmic programming enable mining of personal data for collection by governments and sale to marketers for the purposes of predicting and modifying behaviour through psychological manipulation. High-profile tech companies – through voice and facial recognition technology, social media accounts, user apps for goods and services, RFID (radio frequency identification) chips and history retained by phone, VOIP (voice of internet protocol) and internet service providers – collect more detailed personal information on individual consumers than every other source combined. The storm that erupted over Cambridge Analytica demonstrates just how government officials, candidates for public office and political operatives working on their behalf deploy private intelligence agencies to destroy opposition and use propaganda to undermine democracy while claiming to bolster it.

¹ Executive Director, Global Institute for Freedom and Awareness, USA (Emeritus Professor of Law, JD, LL.M). Many thanks to the presenters and participants of the 'Joining the Circle: Capturing the Zeitgeist of Big Tech Companies, Social Media and Privacy Conference' held at London's Inner Temple on 23 May 2018, discussing Dave Eggers, *The Circle* (Vintage Books 2014). Much appreciation goes to Paul Bernal and Alicia Wanless each of whom provided timely feedback for the development and clarity of this essay.

Media focus upon hateful rhetoric, while noting the speed at which legitimate disagreements devolve into an impasse, often overshadows rational discourse around viable solutions for large-scale humanitarian crises. International broadcast media features clusters of panellists warning that entire governments have been hijacked by vigilantes inspired by populist rhetoric steeped in nationalist ideologies, while proposals that actually advance socio-economic justice are largely ignored. Meanwhile, tech's strongest minds are being used to augment authoritarian control, provide a rapid means to manufacture consent, quash dissent and threaten harm and/or personal chaos.

Any discussion of *propaganda* in social or mainstream media requires some definition if for no other reason than, similar to its epistemological cousin '*politically correct*',² the word is widely used with intent to alert an audience or those in dialogue that deception is nigh. It delivers strong impetus to summarily dismiss ideas inimical to one's stated beliefs. Propaganda as a tool directly aims to influence opinion and behaviour. Common characteristics include high-volume (inundation) and subtle insidious deployment of logical fallacies such as gross generalisation, intentional vagueness, oversimplification, red herrings, slogans, stereotypes and unstated assumptions.³ Indoctrination, in context, is acceptance of false, inappropriate, misleading, or unwarranted assumptions as forgone conclusions. Arguments in Eggers' *The Circle* favouring round-the-clock 360-degree transparency provide a cogent example.

Journalist Margaret Atwood's review of the book reasonably concludes that it forces readers to consider the 'means of social construction, deconstruction of privacy, corporate ownership of surveillance data and their impact upon democracy'.⁴ It features the world's leading tech company, set upon a live-in campus of new age design to optimise ingenuity and experimentation with total transparency where every moment of every day is recorded and accessed in real-time. Atwood describes Eggers' portrayal as the 'green and pleasant land of a satirical utopia' where 'recycling and organics abound, people keep saying how much they like each other, and the brave new world of virtual sharing and caring breeds monsters'.⁵ The monstrous scale of privacy invasion in the Western world is thinly veiled at best.

Collective understanding of the role of free speech and association in constitutional democracies has been compromised as tides of obfuscation mask the precarious assault on whistle-blowers, investigative journalists, and their confidential sources of information. One consequence from our failure to curb propaganda in the media is a collective haze supported by journalism that advances insularity over public education concerning the demise of basic freedoms. Meaningful safeguards are not yet realised in law, as democratically elected governments openly disregard individual rights. A judiciary

2 The phrase 'politically correct' has had an array of definitions. It has been used to describe what is politically wise, and it has been employed as ironic self-mockery. The phrase has driven contentious debates in which free speech and free choice are pitted against civility and inclusion. But it hasn't just changed meaning, it has changed targets. Kat Chow, "'Politically correct': the phrase has gone from wisdom to weapon' (NPR 14 December 2016) <<https://www.npr.org/sections/codeswitch/2016/12/14/505324427/politically-correct-the-phrase-has-gone-from-wisdom-to-weapon>>.

3 Propaganda as defined reference article is mainly selected from the English Wikipedia <www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/p/Propaganda.htm>.

4 Margaret Atwood, 'When privacy is theft' (*New York Books*, 21 November 2013) <www.nybooks.com/articles/2013/11/21/eggers-circle-when-privacy-is-theft>.

5 Martin Banks, 'Cambridge Analytica revelations are only "tip of the iceberg", warns EU data protection chief' (*The Parliament Magazine EU*, 20 March 2018) <www.theparliamentmagazine.eu/articles/news/cambridge-analytica-revelations-are-only-tip-iceberg-warns-eu-data-protection-chief>.

keen to extol the intrinsic role that free speech plays in democratic governance is slow to redress official abuse of basic civil rights. Unsurprisingly, the last bastion of refuge – in a fast eroding system of checks and balances – yields little more than perpetual seduction by mainstream media personalities demonstrably more eager to become part of the story than with authenticity and relevancy in reporting. Predictably, the dark side of that erosion *wags the dog*.

Recent tech scandals involve countless social, political and consumer issues,⁶ but here we focus upon the international coordination of technologies designed to spread disinformation⁷ further and faster with only limited manpower and increasing precision.⁸ We now have expanded awareness of how low standards are for news reporting. Current use and reach of surveillance technology summons two collective responses: continual examination of our use of social media,⁹ and meaningful exploration of our commitment to democratic rule. Broadcast news that facilitates that examination and commitment on behalf of the general welfare will by definition curtail its use of subtle techniques that direct viewers toward actions that mostly neutralise democratic processes.¹⁰

1.1 EVOLUTIONARY FORCES: FROM CYBERSPACE TO OUTER SPACE

Discussions in the new millennium over the role of digital media in sparking populist uprisings against repressive regimes outlined a promising trajectory of the coming era.¹¹ Human rights organisers agree that new social media platforms had unparalleled capacity for extending the global reach of proposals for socio-economic justice.¹² Early proponents of digital media could be forgiven for their exuberant optimism. Social media

6 Avery Hartmans, 'The 17 Biggest Tech Scandals of 2017' (*Business Insider*, 30 December 2017) <uk.businessinsider.com/biggest-tech-scandals-2017-12>.

7 Advertisements evolved from the traditional commercial advertisements to include also a new type in the form of paid articles or broadcasts disguised as news. These generally present an issue in a very subjective and often misleading light, primarily meant to persuade rather than inform.

8 Behavioural advertisers use sophisticated algorithms to analyse the collected data, to build detailed users' personal profiles and to assign them to various interest categories. See e.g. Office of the Privacy Commissioner of Canada, *Online Behavioural Advertising in Brief* <www.priv.gc.ca/en/privacy-topics/advertising-and-marketing/behaviouraltargeted-advertising/02_05_d_52_ba_02>.

9 Jay Baer, '6 Unexpected Trends in 2018' (*Social Media Research*, 2018) <www.convinceandconvert.com/social-media-measurement/6-unexpected-trends-in-2018-social-media-research>; see Laura Scaife, 'Learning from the laws of the sea, Foucault and regulatory theory: proposing a "regulatory harbour" model for the regulation of social media, that serves rather than rules the waves' (2018) 69(4) *Northern Ireland Legal Quarterly* (this issue). Arguing that a sensible approach begins with principles and the impetus to *assist* rather than *command* in ways that encourage flourishing expression.

10 In behavioural economics, nudge theory has recently been deployed by governments in order to lead people towards particular desirable outcomes. Thomas Smith, 'The future of behavioural economics: nudge theory' (*Market Mogul*, 7 August 2017) <<https://themarketmogul.com/nudge-theory>>.

11 John Wihbey, 'The Arab Spring and the internet: research roundup' (Harvard Kennedy School, Shorenstein Center on Media, Politics and Public Policy, 25 September 2013) <<https://journalistsresource.org/studies/international/global-tech/research-arab-spring-internet-key-studies>>. Wihbey focuses upon a 2012 report from the Pew Research Center, 'Social networking popular across globe: Arab public's most likely to express political views online' (Pew Research Center Global Attitudes Project, 14 December 2012) and looks at the distinct online dynamics of nations in the region: 'In Egypt and Tunisia, two nations at the heart of the Arab Spring, more than 6 in 10 social networkers share their views about politics online. In contrast, across 20 of the nations surveyed, a median of only 34% post their political opinions. Similarly, in Egypt, Tunisia, Lebanon and Jordan, more than 7 in 10 share views on community issues, compared with a cross-national median of just 46%'.

12 See generally, John G McNutt, *Technology, Activism, and Social Justice in a Digital Age* (Oxford University Press 2018).

was hailed as the harbinger of instant access to news and information that would allow like-minded individuals to make informed choices or act in concert to benefit their community. Twitter, once billed as the coalescing force behind the Arab-spring and its liberating global impact, is now more widely known as the tour de force that shoved the global community into its (newly built) nuclear bunkers waiting for Donald John Trump and Kim Jong Un to finish comparing the size of their 'buttons'.¹³ Over the next decade, studies indicated that the new technologies would soon be dominated by mob rule, cyber-bullies and privacy invasions that constrain their targets. At the outset, such prospects seemed remote at best.¹⁴ Yet increasingly, with the aid of robotics,¹⁵ the scope of targeted harassment has widened,¹⁶ personal threats have increased,¹⁷ and the pace of direct manipulation has left the average citizen to cope with conflicting impulses.¹⁸

A single body, the Federal Communications Commission (FCC), operates with congressional oversight to prevent media monopolies and address complaints.¹⁹ As the sole regulator of radio, television, cable, wire and satellite communications within the USA and its territories, journalists report that the agency is as susceptible to the defects of crony capitalism as any other. FCC chair, Ajit Pai, is currently under investigation for ties to Sinclair Broadcasting, a company whose bid for large-scale merger is widely predicted to undermine grassroots democracy.²⁰ FCC scrutiny of the excesses of cable

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- 13 'Trump to Kim: my nuclear button is "bigger and more powerful"' (*BBC News*, 3 January 2018) <www.bbc.com/news/world-asia-42549687>; According to Yanis Varoufakis the comparisons also happen behind closed doors. His initial encounter with is German counterpart Wolfgang Schauble, Finance Minister, included the warning 'it's yours against mine'. Yanis Varoufakis, 'The six Brexit traps that will defeat Theresa May' *The Guardian* (London, 3 May 2017) <www.theguardian.com/politics/2017/may/03/the-six-brexit-traps-that-will-defeat-theresa-may>.
- 14 Dylan Curran, 'Are your phone camera and microphone spying on you?' *The Guardian* (London, 6 April 2018) <www.theguardian.com/commentisfree/2018/apr/06/phone-camera-microphone-spying>; Jacob Hoffman-Andrews, 'New Twitter policy abandons a longstanding privacy pledge' (*Electronic Frontier Foundation*, 22 May 2017) <www.eff.org/deeplinks/2017/05/new-twitter-policy-abandons-longstanding-privacy-pledge>.
- 15 Chris Baraniuk, 'How Twitter bots help fuel political feuds' *Scientific American* (New York, 27 March 2018) <www.scientificamerican.com/article/how-twitter-bots-help-fuel-political-feuds>.
- 16 Nadia Khomami, 'NSPCC records 88% rise in children seeking help for online abuse' *The Guardian* (London, 13 November 2016) <www.theguardian.com/society/2016/nov/14/nspcc-records-88-rise-in-children-seeking-help-for-online-abuse>.
- 17 The risk is ever present for women reporting sexual assault by high-profile figures. See, Robin Barnes and Paul Wragg, 'Social media, sporting figures and the regulation of morality' in David Magnan and Lorna Gillies (eds), *The Legal Challenges of Social Media* (Elgar Law, Technology and Society 2017) ch 8 (discussing the treatment of rape victim by fans of high profile footballer in UK). Elise Viebeck, 'An alt-right Twitter account leaked the address of Kavanaugh's accuser' *Chicago Tribune* (Chicago, 18 September 2018) <www.chicagotribune.com/news/nationworld/ct-kavanaugh-accuser-online-attacks-20180918-story.html>; <http://www.chicagotribune.com/news/nationworld/ct-kavanaugh-accuser-online-attacks-20180918-story.html>; 'Trump's second nominee to the US Supreme Court has been accused of raping a woman and the FBI has not been called upon to investigate the rape. However, the woman and her family have been forced to relocate due to death threats.
- 18 Caroline C Ravello, 'Preserving your sanity: the social media dilemma' *Guardian* (Trinidad and Tobago, 14 June 2017) <www4.guardian.co.tt/lifestyle/2017-06-14/preserving-your-sanity-social-media-dilemma>.
- 19 For a summary of the functions of the US FCC, see Nadeem Unuth, 'The Federal Communications Commission (FCC)' (*Lifewire*, 21 March 2018) <www.lifewire.com/federal-communications-commissions-3426347>.
- 20 Kieren McCarthy, 'FCC inspector general sticks corruption probe into chairman Ajit Pai amid \$4bn media merger' (*The Register*, 15 February 2018) <www.theregister.co.uk/2018/02/15/fcc_chairman_investigation>; Kevin Carty, 'Sinclair's vast media merger threatens democratic ideals. Congress must fight it' *The Guardian* (London, 24 November 2017) <www.theguardian.com/commentisfree/2017/nov/24/sinclair-tribune-media-merger-free-speech>.

news organisations in particular has fallen by the wayside.²¹ Nonetheless, the motivation and wherewithal to advance technological capabilities in arenas where surveillance capitalism, critical infrastructure design and national security all meet is nothing short of astounding.²²

FCC 2017 approval of SpaceX's plan for broadband internet satellites was advertised as meeting the need to bring high-speed internet access to rural areas. It effectively eliminates all consumer choice in the matter of connectivity: 800 miles above Earth, a US-licensed constellation will deliver broadband using low-Earth orbit satellites. Its primary aim may have more to do with expanding the range of territory over which newer technologies can monitor and track movement, by capturing activities in remote places where fibre-optic cables and cell towers cannot reach. The official statement lauds the action as 'another step to increase high-speed broadband availability and competition in the United States'.²³ By 2020, Galileo, which is an £8-billion satellite navigation system designed to rival the US-controlled global positioning system, will operate with similar capabilities.²⁴ Debate in the EU about the role of Galileo, and who will have access to its capabilities, has further complicated negotiations over Brexit.²⁵

As US surveillance expands, legislators in both political parties used the Congressional Review Act to swiftly dismantle newly issued broadband user privacy rights before they went into effect.²⁶ Bowing to advertisers' demands for the ability to track every move as somehow vital to innovation, the real winners are those who capitalise upon data-driven marketing economies, including purveyors of unilateral mechanisms that operate outside the awareness of the data subject.²⁷ Platform operators hide the details of their metrics,²⁸ encouraging consumer engagement with surveys and 'like' buttons which demand no cognitive effort. Studies cite proof that individuals often go on to disseminate media content after having only seen the headline and introduction, with the result that false and

21 Harper Neidig, 'FCC to vote on rolling back media ownership rules' (*The Hill*, 25 October 2017) <<http://thehill.com/policy/technology/357172-fcc-to-vote-on-rolling-back-media-ownership-rules>>.

22 'Snapshot: using satellites and data analytics to protect the Homeland' (Homeland Security Science and Technology, 29 September 2017) <www.dhs.gov/science-and-technology/news/2017/09/29/snapshot-using-satellites-and-data-analytics-protect-homeland>.

23 Sarah Young, 'FCC approves SpaceX's plan for broadband internet satellites' (*Consumer Affairs*, 23 March 2017) <www.consumeraffairs.com/news/fcc-approves-spacexs-plan-for-broadband-internet-satellites-033018.html>.

24 Daniel Boffey, 'Security row over EU Galileo satellite project as Britain is shut out' *The Guardian* (London, 13 June 2018) <www.theguardian.com/technology/2018/jun/13/eu-member-states-block-uks-access-to-galileo-satellite-programme-after-brexite>; for a brief summary of the evolution and issues related to the referendum from multiple perspectives in and around the UK and EU, see Dagmar Schiek, 'On the never-ending road to Brexit: perspectives for the European Union' (2018) 69(3) *Northern Ireland Legal Quarterly* 221–30.

25 Daniel Boffey, 'EU split over exclusion of UK from Galileo after Brexit' *The Guardian* (London, 23 May 2018) <www.theguardian.com/politics/2018/may/24/eu-split-exclusion-uk-galileo-brexite>.

26 James Hood, 'Senate agrees to ditch broadband users' privacy rights' (*Consumer Affairs*, 23 March 2017) <www.consumeraffairs.com/news/senate-agrees-to-ditch-broadband-users-privacy-rights-032317.html>.

27 Louise Matsakis, 'How the government hides secret surveillance programs' (*Wired*, 9 January 2018) <www.wired.com/story/stingray-secret-surveillance-programs>.

28 E.g. Google's search algorithms are a commercial secret, so the chance of a transparent audit of how they make those decisions is slim. What standards does Google use? If it only follows my previously manifested desires, it is not going to give me the information that would most be of use to me. A C Grayling, 'The googlization of everything: has Google turned evil?' (*Salon*, 12 April 2011) <www.salon.com/2011/04/12/the_googlization_of_everything_siva_vaidhyanathan>.

misleading content will often be remembered by the sender and or recipient as true, effectively dragging consumers down a digital rabbit hole.²⁹

Algorithms that rank content and personalise its presentation are said to be at ‘the heart of the complex, interdependent process underlying digital discourse’.³⁰ The next level of debate must include the methods by which they will be integrated with artificial intelligence (AI) technologies to produce outcomes that are not all that complex, but instead assist those seeking to control individuals through use of highly personal information captured by their internet service providers under ‘take it or leave it’ terms of service.³¹ Widespread failure to require algorithmic auditing that reveals the nature and scope of intrusion and bias risks long-term suppression of troves of useful information about digital manipulation.³² While the private sector engine may be fuelled by proprietary, patentable, profitable ventures, and we routinely applaud ingenuity,³³ the line in the sand must be highlighted by public media.³⁴ Acknowledging that Netflix knew exactly why its original TV series would be a hit – based on data about the viewing habits of its 33 million users³⁵ – does not excuse pernicious use against consumers. Assume that its calculations involve a list of every show watched and how often, even those merely browsed, later come back to, lingered over, saved to favourites, and then linked to personal data that is collected and stored indefinitely.³⁶

In sum, individually identifiable information on movies watched over a decade, paired with a vast array of private information, such as medical history or travel, and then cross-referenced with lists of friends, lovers, email content, Facebook posts, chats, text messages and the like in order to play havoc with the life of an individual target and used to deter or stop a political opponent, for example, is despotic.³⁷ The obvious effects of buying a new car or designer watch that you don’t need and can’t afford or expensive vacations that render little of the promised excitement, pales in comparison to accepting

29 A Wanless and M Berk, ‘Participatory propaganda: the engagement of audiences in the spread of persuasive communications’ (Proceedings of Social Media and Social Order, Culture Conflict 2.0, Oslo, 1 December 2017).

30 Manan Vatsyayana, ‘How algorithms are radically changing public discourse, shaping public opinion’ (*Scroll*, 12 February 2018) <<https://scroll.in/article/867888/how-algorithms-are-radically-changing-public-discourse-shaping-public-opinion>>.

31 ‘Take it or leave it: how NYC residents are forced to sacrifice online privacy for internet service’ (*Digital Equity Laboratory*, 2 June 2018) <www.digitalequitylab.org/take-it-or-leave-it>.

32 Jessi Hempel, ‘Want to prove your business is fair? Audit your algorithm’ (*Wired*, 9 May 2018) <www.wired.com/story/want-to-prove-your-business-is-fair-audit-your-algorithm>.

33 Grayling (n 28) quotes Siva Vaidhyanathan as an admirer of the innovations promised by the latter aim, but wary of power Google retains over how its users view the world.

34 Human Rights Watch, ‘Liberty to monitor all: how large scale US surveillance is harming journalism, law, democracy’ (28 July 2014) <www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>.

35 Jessica Leber “‘House of cards’ and our future of algorithmic programming’ (*Technology Review*, 26 February 2013) <www.technologyreview.com/s/511771/house-of-cards-and-our-future-of-algorithmic-programming>.

36 See e.g. ‘Policy position on online behavioural advertising’ (Office of the Privacy Commissioner of Canada, December 2015) <www.priv.gc.ca/en/privacy-topics/advertising-and-marketing/behaviouraltargeted-advertising/bg_ba_1206>.

37 Lauren Etter, Vernon Silver and Sarah Frier, ‘How Facebook’s political unit enables the dark art of digital propaganda’ (*Bloomberg*, 21 December 2017) <www.bloomberg.com/news/features/2017-12-21/inside-the-facebook-team-helping-regimes-that-reach-out-and-crack-down>.

the validity of a costly medical procedure directed at uniquely vulnerable individuals,³⁸ voting against your interests in a national referendum,³⁹ or becoming the target of black-ops contractors when choosing to exercise your civil and political rights.⁴⁰ Without wider media scrutiny and calls for public discussion of the studies that reveal the toll this has taken through distortion of social norms and civil society amounts to journalistic negligence.⁴¹ News media that focuses upon the vitriol while ignoring the relevance of known factors that affect consumer choices offer only limited insight, let alone investigation, into critical issues that impact the general welfare.⁴²

Some critics accept these circumstances as evidence that mainstream media organisations are not currently designed to operate as a *Fourth Estate*, but rather as public relations outlets for their corporate owners and sponsors.⁴³ Close examination reveals that direct public acknowledgment of their constitutionally protected role nearly always coincides with an attack by authoritarian personalities such as Donald Trump. He often declares fake media to be the real enemy of the American people while targeting individual journalists and specific news organisations.⁴⁴ The drumbeat of alarm over Trump's 'fake news' mantra sparked a coordinated effort where 350 editorial boards committed to simultaneously publishing a 'We Are Not The Enemy' response on 19 August 2018.⁴⁵ Not since the 2006 collective re-publication of those vile cartoons of the Prophet Mohammed has the print press shown such solidarity while claiming to defend a stated principle.⁴⁶

1.2 UNMEDIATED PUBLIC DISCOURSE

For all of the advances in the last two decades, changes in the global digital sphere have produced an unmediated discourse that rejects reasoned disagreement.⁴⁷ Historically,

38 Robert Glatter, 'Bot or not? How fake social media accounts can jeopardize your health' (*Forbes*, 23 December 2017) <www.forbes.com/sites/robertglatter/2017/12/23/bot-or-not-how-fake-social-media-accounts-can-jeopardize-your-health/#54ce61e7bac5>.

39 Claudia Geib, 'We've seen what bots do to democracy. are we adapting fast enough?' (*Futurism*, 21 March 2018) <<https://futurism.com/bots-democracy-ireland-referendum>>.

40 Jeremy Scahill, 'Blackwater's black ops, internal documents reveal the firm's clandestine work for multinationals and governments' (*The Nation*, 15 September 2016) <www.thenation.com/article/blackwaters-black-ops>. Tim Hains, 'Ronan Farrow on Trump collusion with Nat'l Enquirer, "echo chamber" memo, research into Israeli meddling in US politics' (*Real Clear Politics*, 24 August 2018) <www.realclearpolitics.com/video/2018/08/24/ronan_farrow_on_trump_media_collusion_with_national_enquirer.html>.

41 Tim Hains, 'How social media distorts our perceptions of groups' (*Practical Ethics*, 10 July 2017) <<http://blog.practicaethics.ox.ac.uk/2017/07/how-social-media-distorts-our-perceptions-of-groups>>.

42 Ezra Klein, 'Trump picks cultural fights to distract Americans from his policies and their results' (*Vox*, 9 October 2017) <www.vox.com/policy-and-politics/2017/10/9/16447610/trump-pence-nfl-distraction>.

43 Ashley Lutz, 'These 6 corporations control 90% of the media in America' (*Business Insider*, 14 June 2012) <www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6>.

44 Nick Visser, 'Comey memo: Trump floated idea of jailing journalists to make them "talk"' (*Huffington Post*, 20 April 2018) <www.huffingtonpost.com/entry/trump-jail-journalists-james-comey-memos_us_5ad96bef4b029ebe0229019>.

45 See typical example, 'Journalists are not the enemy' *Boston Globe* (Boston, 16 August 2018) <<https://apps.bostonglobe.com/opinion/graphics/2018/08/freepress>>.

46 Robin Barnes, *Outrageous Invasions, Celebrities' Private Lives, Media and the Law* (Oxford University Press 2010) 113–24. Read discussion of the global fallout which begins in the section titled 'The cartoons that travelled the globe'.

47 Mark Thompson, 'From Trump to Brexit rhetoric: how today's politicians have got away with words' *The Guardian* (London, 27 August 2016) <www.theguardian.com/books/2016/aug/27/from-trump-to-brexit-rhetoric-how-todays-politicians-have-got-away-with-words>; Steven Hayward, 'Political attacks, circa 1800' *New York Times* (New York, 20 April 2011) <www.nytimes.com/roomfordebate/2011/01/10/assassins-and-american-history/political-attacks-circa-1800>.

strong advocacy coupled with strategic commitment to single outcomes routinely accounted for differences over solutions. However, current trends impede measurable progress toward higher levels of debate.⁴⁸ Disputes over which set of underlying facts inform basic understanding of the problem now seamlessly devolve into endless vilification.⁴⁹ For example, our long-standing need to investigate electoral accounting and skewed outcomes in high-stakes elections has been hijacked by incessant focus upon fascism.⁵⁰ A range of deflective techniques within public discourse pass without traditional corrective measures that might otherwise serve to contain or modify offending behaviours.⁵¹

Among the justifications for total transparency in *The Circle* is the suggestion that illicit behaviours are easily neutralised. One could cite or even applaud the swift seemingly public response when Facebook founder and chief executive officer (CEO), Mark Zuckerberg, suffered a \$10-billion loss of revenue in a single week following revelation of the grievous machinations of Facebook executives in their support of the psy-ops cyber-firm known as Cambridge Analytica.⁵² Flash reports across a stream of media platforms pointed toward ripples on the Stock Exchange, advertiser defections and eroding consumer confidence.⁵³ Given the stakes, with Cambridge Analytica reportedly flipping a major election in the USA, as well as the Brexit referendum in the UK, how does one assess a \$10-billion loss? Examined in context it might prove far too little, way too late and woefully insufficient to deter future encroachment.⁵⁴ Reports that stock prices correlated with projected loss of revenue far outpaced outrage over an assumed lapse in moral judgement are entirely relevant given the scant coverage of Facebook's clear patterns of prior deviance.⁵⁵ In the aftermath, the Federal Trade Commission opened an investigation into whether Facebook violated an earlier (2011) consent decree

48 'Civility, public discourse and the 2016 presidential campaign' *Diane Rehm Show* (25 October 2016) <<https://dianerehm.org/shows/2016-10-25/civility-public-discourse-and-the-2016-presidential-election>>.

49 Germany began enforcing strict rules that could fine major internet sites such as Facebook, Twitter and YouTube up to €50 million for failure to remove posts containing hate speech within 24 hours of receiving a complaint. The massive amount of hate content, in particular, has been a problem for the sites. In June, Facebook said it removes 66,000 such posts every week. Zoey Chong, 'Germany kicks year off with strict online hate speech law' CNET (1 January 2018) <www.cnet.com/news/german-hate-speech-law-goes-into-effect-on-1-jan>.

50 Christina Pazzanese, 'In Europe, nationalism rising' *Harvard Gazette* (Cambridge MA, 27 February 2017) <<https://news.harvard.edu/gazette/story/2017/02/in-europe-nationalisms-rising>>; Sasha Polakow-Suransky, 'White nationalism is destroying the West' *New York Times* (New York, 12 October 2017) <www.nytimes.com/2017/10/12/opinion/sunday/white-nationalism-threat-islam-america.html>.

51 For an insightful discussion and commentary see, 'Where should the limits to freedom of speech be set?' (*Debating Europe*, 4 June 2015) <www.debatingeurope.eu/2015/06/04/where-should-the-limits-to-freedom-of-speech-be-set/#.W3_dddJZRjo>.

52 Lisa Marie Segarra, 'Mark Zuckerberg lost 10 billion in one week after Facebook's privacy scandal' *Time* (24 March 2018) <<http://time.com/money/5213181/mark-zuckerberg-lost-10-billion-in-one-week-after-facebooks-privacy-scandal>>.

53 'Facebook has lost \$70 billion in 10 days – and now advertisers are pulling out' (*Financial Post*, 27 March 2018) <<https://business.financialpost.com/technology/u-s-ftc-investigating-facebooks-privacy-practices>>.

54 Andrew Hutchinson, 'How will Facebook change in the wake of the Cambridge Analytica issue?' (*Social Media Today*, 28 March 2018) <www.socialmediatoday.com/news/how-will-facebook-change-in-the-wake-of-the-cambridge-analytica-issue/520103>.

55 Annie Gowen and Max Bearak, 'Fake news on Facebook fan the flames of hate against the Rohingya in Burma' *Washington Post* (Washington, 8 December 2017) <www.washingtonpost.com/world/asia_pacific/fake-news-on-facebook-fans-the-flames-of-hate-against-the-rohingya-in-burma/2017/12/07/2c1ef830-ca1f-11e7-b506-8a10ed11ecf5_story.html?utm_term=.83fcbac73e08>.

with the agency over data leaks. Similar efforts are underway in Australia.⁵⁶ Nonetheless, polling showed that Facebook's platform users remained unphazed.⁵⁷ Facebook executives have been directly implicated in privacy invasions and in the advocacy of violence, not only in the West, but in fuelling ethnic violence in south-east Asia. These violations are under-reported by mainstream media.⁵⁸ Zuckerberg seemed ill-prepared to explain the company's role in the spread of hate speech against Rohingya Muslims in Burma⁵⁹ after UN investigators concluded that Facebook had played a 'determining role' in that genocide.⁶⁰ Within months of the privacy debacle, Facebook lost an additional \$119 billion – the largest one-day drop in the history of the Stock Exchange – alongside revelations of its links to elections of authoritarian leaders around the world.⁶¹ Facebook's days of reckoning following years of abuse and indifference demonstrate that corporate and government accountability in real-time is lagging.⁶²

Trends toward superficial analysis leave US citizens sifting through national media reports that fail to distinguish indifference from complicity and are far more prone to dismiss outright advocacy of violence as mere hyperbole.⁶³ *New York Times* reporter Maggie Haberman has covered Trump exclusively for the past three years, during 18 months on the campaign trail and 18 months in office. His use of Twitter as a 'breaking news service' has emerged as a constant talking point among journalists since the 2016 election. According to Haberman, journalists 'file stories, watch Twitter and make calls' non-stop throughout the day.⁶⁴ The leader of the current administration has achieved global notoriety, surpassing all former US presidents in every category of disrepute, and

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- 56 Jones Day, 'Changes to the ACCC's power to obtain information' (*Lexology*, 1 February 2018). The Australian Competition and Consumer Commission had been tasked with assessing whether platforms like Facebook were using their market power in commercial dealings to the detriment of users, news media and advertisers. <www.lexology.com/library/detail.aspx?g=a28026f0-9ce7-43db-ac10-a86ef7e0acd0>.
- 57 A Reuters/Ipsos poll has found that Facebook has so far suffered no ill effects from the recent privacy scandal. Chris Kahn, 'Three-quarters Facebook users as active or more since privacy scandal' Reuters (6 May 2018) <www.reuters.com/article/us-facebook-privacy-poll/three-quarters-facebook-users-as-active-or-more-since-privacy-scandal-reuters-ipsos-poll-idUSKBN117081>.
- 58 Timothy McLaughlin, 'How Facebook's rise fueled chaos and confusion in Myanmar' (*Wired*, 6 July 2018) <www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar>.
- 59 Adam Taylor, 'The big questions for Mark Zuckerberg on Facebook's role in Burma' *Washington Post* (Washington, 10 April 2018) <www.washingtonpost.com/news/worldviews/wp/2018/04/10/the-big-questions-for-mark-zuckerberg-on-facebooks-role-in-burma/?noredirect=on&utm_term=.64285686baa4>.
- 60 Jen Kirby, 'New UN report documents evidence of mass atrocities in Myanmar against the Rohingya' (*Vox*, 18 September 2018) <www.vox.com/world/2018/9/18/17873638/rohingya-united-nations-myanmar-war-crimeshttps://www.vox.com/world/2018/9/18/17873638/elise_rohingya-united-nations-myanmar-war-crimes>.
- 61 'A threat to global democracy: how Facebook and surveillance capitalism empower authoritarianism' (*Democracy Now*, 1 August 2018) <www.democracynow.org/2018/8/1/a_threat_to_global_democracy_how>; Barbara Ortutay, 'Facebook's \$119 billion loss is biggest one-day drop in history of US Stock Market' *ChicagoTribune* (Chicago, 27 July 2018) <www.chicagotribune.com/business/ct-biz-facebook-worst-trading-day-20180726-story.html#>.
- 62 Nicholas Thompson and Fred Vogelstein, 'Inside the two years that shook Facebook – and the world' (*Wired*, 12 February 2018) <www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell>; Nicholas Thompson, 'Mark Zuckerberg talks to Wired about Facebook's privacy problem' (*Wired*, 21 March 2018) <www.wired.com/story/mark-zuckerberg-talks-to-wired-about-facebooks-privacy-problem>.
- 63 Aaron P Bernstein, 'Judge to Trump: no protection for campaign rally speech inciting violence' NBC (1 March 2016) <www.nbcnews.com/politics/politics-news/judge-trump-no-protection-campaign-rally-speech-inciting-violence-n741731>.
- 64 Maggie Haberman, 'Trump is not what he seems' Speech (Covering the Trump White House, hosted by CSPAN, 21 July 2018) <www.youtube.com/watch?v=rg4IqrIpuQU>.

described by a leading conservative as a ‘Frankenstein’s monster of past presidents’ worst attributes’.⁶⁵ On 16 August 2018, the *Washington Post* published an open letter to Donald Trump submitted by retired Navy Admiral William H. McRaven, commander of the 2011 Navy SEAL raid in Pakistan that killed Osama bin Laden.⁶⁶ McRaven neatly summarised the non-partisan American view of this presidency:

A good leader tries to embody the best qualities of his or her organisation. A good leader sets the example for others to follow. A good leader always puts the welfare of others before himself or herself. Your leadership, however, has shown little of these qualities. Through your actions, you have embarrassed us in the eyes of our children, humiliated us on the world stage and, worst of all, divided us as a nation. If you think for a moment that your McCarthy-era tactics will suppress the voices of criticism, you are sadly mistaken.⁶⁷

Less like a lightning rod than a tsunami, the Trump presidency, also known as Trumpocracy, has delivered a new paradigm of governance that feeds off chaos and deflection, broadly assisted by the knowing efforts of Facebook executives and the companies that pay for their data.⁶⁸

During the summer before Trump’s election there was an explosion of violence across the USA. A media storm around Facebook’s deleterious influence featured a leaked memo by company executive Andrew Bozworth who simply declared: ‘that’s what we do. We connect people.’ In context it rang like an endorsement. Four days earlier a French police commander and his partner were murdered by an ISIS affiliate in their home near Paris. The Jihadist then appeared on Facebook Live with their surviving toddler announcing that he was still deciding what to do with him and urging others to follow suit.⁶⁹ The night before that, a mass shooting at Orlando Florida’s Pulse nightclub that left 49 dead and 58 injured was viewed as a live broadcast. Footage of stampedes and trapped victims pleading for help via text messages from a bathroom are still available on line.⁷⁰ According to a Facebook representative, they remain because there is no violation of community standards. A disturbing video that does not incite violence is presumed to be

65 According to Harvard Law Professor Jack Goldsmith: ‘Donald Trump is testing the institution of the presidency unlike any of his 43 predecessors. We have never had a president so ill-informed about the nature of his office, so openly mendacious, so self-destructive, or so brazen in his abusive attacks on the courts, the press, Congress (including members of his own party), and even senior officials within his own administration. Trump is a Frankenstein’s monster of past presidents’ worst attributes: Andrew Jackson’s rage; Millard Fillmore’s bigotry; James Buchanan’s incompetence and spite; Theodore Roosevelt’s self-aggrandizement; Richard Nixon’s paranoia, insecurity, and indifference to law; and Bill Clinton’s lack of self-control and reflexive dishonesty.’ Jack Goldsmith, ‘Will Donald Trump destroy the presidency?’ (*The Atlantic*, October 2017) <www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921>.

66 For commentary on the official documents pertaining to the raid, see Eli Watkins, ‘CIA releases more files it says came from Bin Laden Raid, including his journal’ CNN (2 November 2017) <www.cnn.com/2017/11/01/politics/cia-osama-bin-laden-release>.

67 William McRaven, ‘Revoke my security clearance too’ *Washington Post* (16 August 2018) <www.washingtonpost.com/opinions/revoke-my-security-clearance-too-mr-president/2018/08/16/8b149b02-a178-11e8-93e3-24d1703d2a7a_story.html>.

68 Bernard Marr, ‘Where can you buy Big Data? Here are the biggest consumer data brokers’ (*Forbes*, 7 September 2017) <www.forbes.com/sites/bernardmarr/2017/09/07/where-can-you-buy-big-data-here-are-the-biggest-consumer-data-brokers>.

69 Angelique Chrisafis and Kim Willsher, ‘French police officer and partner murdered in “odious terrorist attack”’ *The Guardian* (London, 14 June 2016) <www.theguardian.com/world/2016/jun/14/french-police-officer-wife-murdered-larossi-abballa-isis>.

70 Lizette Alvarez and Richard Pérez-Peña, ‘Orlando gunman attacks gay nightclub, leaving 50 dead’ *New York Times* (New York, 12 June 2016) <www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html>.

posted and shared in order to raise awareness, thus viewers receive a warning.⁷¹ Chicago native Anthony Perkins filmed his own murder live on Facebook three days before Bozworth's infamous memo explaining the objectives of social media:⁷²

Size matters, above all else.

And that end of connecting more people more often justifies the means – even if it involves sketchy treatment of data or satisfying the demands of a repressive foreign regime.

All the work we do in growth is justified. All the questionable contact importing practices. All the subtle language that helps people stay searchable by friends. All of the work we do to bring more communication in.

Sketchy treatment of data meets with his approval. This raises the question of whether multinational data collectors' treatment of personally identifiable data is subject to effective monitoring and review by any governing authority. In 2017, Australian-based Ars Technica leaked Facebook's pitch to potential advertisers.⁷³ The tech giant was caught advertising its ability to leverage a time-sensitive marketing strategy to coax Australian and New Zealand teenagers, as young as 14 years old, to purchase certain products when they felt anxious and worthless.⁷⁴ Algorithms pinpoint 'moments when young people need a confidence boost' because they are overcome with emotion in highly vulnerable states. Failing to disclose whether this was a global strategy, early dissembling suggesting the possibility of 'disciplinary' action was replaced with discussion of the ad's accuracy.⁷⁵ Beyond its proprietary algorithms, Facebook buys data about its users' offline behaviour from third parties to enlarge targeting capability.⁷⁶

71 Laurie Segall, 'CNN still shows video: shooting death of Chicago man captured live on Facebook' (*Money*, 20 June 2016) <<http://money.cnn.com/2016/06/17/technology/facebook-live-shooting-death>>. It's not clear whether the same policy would apply under the Audiovisual Media Services Directive (AVMSD). See Michael Russ, 'Problematically proactive: a summary of recent legal developments in the field of internet intermediary liability' (2018) 69(4) Northern Ireland Legal Quarterly (this issue), describing a proposal to amend the current AVMSD (2010) (Directive of European Parliament and the Council 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1). Not expected to exercise editorial control over the user content they host, only having substantial control over the way this content is organised, they will still be expected to prevent adult content, such as pornography or advertisements for alcohol, from being made readily available to children. They will also be expected to prevent access to content which is hateful to minority ethnic groups as well as content which seeks to incite violence.

72 Angela Bronner Helm, 'Chicago man captures own murder on Facebook live' (*The Root*, 18 June 2016) <www.theroot.com/chicago-man-captures-own-murder-on-facebook-live-1790855712>.

73 Sam Machkovech, 'Report: Facebook helped advertisers target teens who feel "worthless"' (1 May 2017) <<https://arstechnica.com/information-technology/2017/05/facebook-helped-advertisers-target-teens-who-feel-worthless>>.

74 Described as insecure, defeated, anxious, silly, useless, stupid, overwhelmed, stressed, or like a failure. Michael Reilly, 'Is Facebook targeting ads at sad teens?' (*Technology Review*, 1 May 2017) <www.technologyreview.com/s/604307/is-facebook-targeting-ads-at-sad-teens>.

75 Ibid. In 2014, for example, a few of the company's researchers published a paper in a high-profile journal in which they detailed how they manipulated 700,000 users' news feeds with varying degrees of happy or sad content to see how the users reacted.

76 Mark Bergen and Jennifer Surane, 'Google and Mastercard cut a secret ad deal to track retail sales' (*Bloomberg*, 31 August 2018) <www.bloomberg.com/news/articles/2018-08-30/google-and-mastercard-cut-a-secret-ad-deal-to-track-retail-sales>; Nathan Ingraham, 'Facebook buys data on users' offline habits for better ads, and opting out is a lot more complicated than it should be' (*Engadget*, 30 December 2016) <www.engadget.com/2016/12/30/facebook-buys-data-on-users-offline-habits-for-better-ads>.

1.3 CAMBRIDGE ANALYTICA: WHO'S MONITORING THE FRIGHTFUL FIVE?

Curiously, US media showed only limited interest in how Cambridge Analytica quietly closed its doors. Given the scope of its offences, there are no updates on the trajectory of official investigations into its operations,⁷⁷ or into the global reach of psy-op firms in general.⁷⁸ Fact-checking disclosures by whistle-blower Christopher Wylie seem to be low on the list of US media priorities.⁷⁹

If Cambridge Analytica wrought political disruption with intent to undermine democracy, and emerging revelations over misuse of citizens' private information focus upon other data-analytic companies in the USA, UK, Israel and Canada,⁸⁰ who and what is policing and counteracting this influence?⁸¹ Right-wing strategist Steve Bannon is alleged to have requested that the group develop more effective voter suppression strategies.⁸² This methodology is characterised by Wylie as a form of modern-day digital colonialism.⁸³ The wherewithal to put Trump in office, pass Brexit and thwart the civil institutions of countries that are struggling to develop them, if true, would be an undeniably toxic mix.

Why are military-style information operations being used to undermine democracy?⁸⁴ Why are national news outlets lock-scoped on playboy playmate revelations while military-grade psy-ops are disrupting the lives of millions right under their investigative noses?⁸⁵ Why are corporate executives excused for allowing the acquisition of personal data of millions of its users? Facebook reportedly removed Cambridge Analytica from its platform and made relevant changes as far back as 2014 to restrict unauthorised access to private data. This claim appeared alongside mounting speculation about the scope of televised hearings before the Senate Judiciary and Commerce Committees.⁸⁶ Many analysts observed that septuagenarians in the US Congress were so far outmatched by the tech star that they could not fathom the depth of their own ignorance, allowing Facebook

77 Issie Lapowsky, 'UK regulators may fine Facebook over Cambridge Analytica' (*Wired*, 10 July 2018) <www.wired.com/story/uk-regulators-may-fine-facebook-over-cambridge-analytica>.

78 Eric Schmitt and Thom Shanker, 'Big pay luring military's elite to private jobs' *New York Times* (New York, 30 March 2004) <www.nytimes.com/2004/03/30/us/big-pay-luring-military-s-elite-to-private-jobs.html>.

79 Natasha Lomas, 'Fake news inquiry calls for social media levy to defend democracy' (*Tech Crunch*, 30 July 2018) <<https://techcrunch.com/2018/07/30/fake-news-inquiry-calls-for-social-media-levy-to-defend-democracy/>>.

80 Mike Memoli and Anna Schecter, 'Bannon turned Cambridge into "propaganda machine," whistleblower says' NBC (25 April 2018) <www.nbcnews.com/politics/donald-trump/bannon-turned-cambridge-propaganda-machine-whistleblower-says-n869126>; Merritt Kennedy, "'They don't care": whistleblower says Cambridge Analytica aims to undermine democracy' NPR (27 March 2018) <www.npr.org/sections/thetwo-way/2018/03/27/597279596/they-don-t-care-whistleblower-says-cambridge-analytica-seeks-to-undermine-democracy>.

81 Siva Vaidhyanathan, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy* (Oxford University Press 2018).

82 Memoli and Schecter (n 80).

83 Ibid.

84 Kennedy (n 80)

85 Colin Freeze and David Ebner, 'Parliamentary committee to question AggregateIQ founders about data-misuse allegations' *Globe and Mail* (Toronto, 23 April 2018) <www.theglobeandmail.com/politics/article-parliamentary-committee-to-question-aggregateiq-founders-about-data>. The global effects of the Trump presidency alone will take years to untangle. AggregateIQ is accused of using Facebook data to build Ripon, the election software platform in the US and UK, in addition to serving as a proxy money-laundering vehicle for funnelling illegal funds into campaigns calling for the UK to leave the EU.

86 Mallory Locklear, 'Cambridge Analytica is closing but it solves nothing' (*Engadget*, 2 May 2018) <www.engadget.com/2018/05/02/cambridge-analytica-closing-solves-nothing>.

CEO, Mark Zuckerberg, to ‘charm, evade, and mislead his way through the committee-hearing gauntlet’.⁸⁷ At his company’s annual F8 Developer conference, there were reports that a typically quiet developer-focused affair was transformed into a litmus test for Facebook’s handling of the personal data breach.⁸⁸ Zuckerberg’s keynote was about moving on from Cambridge Analytica, even though we still have no idea who else may have purchased Cambridge Analytica researcher Aleksandr Kogan’s trove of data.⁸⁹

In contrast, the UK’s Digital, Culture, Media and Sport Parliamentary Committee posed a few of the following unanswered questions to Facebook’s chief technology officer, Michael Schroepfer.⁹⁰ How many developers were penalised between 2011 and 2014? What is the scope of the non-disclosure agreement between Facebook and Cambridge Analytica? Does Facebook plan to take legal action against the company? Who at Facebook is leading the Cambridge Analytica investigation? What is the nature and scope of developers using personal data? What are the financial and data-sharing arrangements between and among Facebook in the US, Aggregate IQ in Canada, SCL Group/Cambridge Analytica in the UK, and Black Cube in Israel?⁹¹ What means exist for assessing the scope of data legally acquired from Facebook,⁹² but later sold in contravention of an unenforced company policy and how much of it might still be in use elsewhere?⁹³ Facebook’s digital forensic audit at Cambridge Analytica’s London office⁹⁴ began three days earlier than the UK Information Commissioner could obtain a search warrant.⁹⁵

87 Will Oremus, ‘The Senate fought Mark Zuckerberg, and Mark Zuckerberg won’ (*Slate*, 10 April 2018) <<https://slate.com/technology/2018/04/the-senate-fought-mark-zuckerberg-and-mark-zuckerberg-won.html>>; Emily Stewart, ‘Lawmakers seem confused about what Facebook does – and how to fix it’ (*Vox*, 10 April 2018) <www.vox.com/policy-and-politics/2018/4/10/17222062/mark-zuckerberg-testimony-graham-facebook-regulations>.

88 Nick Statt, ‘How to watch Mark Zuckerberg’s keynote at Facebook’s F8 Developer Conference’ (*The Verge*, 1 May 2018) <www.theverge.com/2018/5/1/17304376/facebook-f8-2018-live-stream-agenda-mark-zuckerberg-keynote-start-time>.

89 See Paul Bernal, ‘Fakebook: why Facebook makes the fake news problem inevitable’ (2018) 69(4) *Northern Ireland Legal Quarterly* (this issue). Facebook does not just help with identifying the potential audience, but also provides the mechanisms to target them – from the tools for advertisers to the various groups, pages and so forth where they can be found. Paid political advertisements are only a small part of this – the spreading of information in other ways is a critical part of the way that fake news works. Critically, much of this happens without those behind the fake news needing to take any action: Facebook’s whole ‘sharing’ system does much of this automatically. Kogan exploited a Facebook feature called ‘friends permission’ that allowed developers to access the profiles of not only the person who installed their app but all their friends too.

90 Gian Volpicelli, ‘The stupefying pointlessness of Facebook’s political theatre’ (*Wired*, 27 April 2018) <www.wired.co.uk/article/facebook-cambridge-analytica-dcms-evidence-parliament>.

91 Devin Coldewey, ‘Facebook reportedly suspends AggregateIQ over connection to improper data-sharing’ (*Tech Crunch*, 6 April 2018) <<https://techcrunch.com/2018/04/06/facebook-reportedly-suspends-aggregateiq-over-connection-to-improper-data-sharing/>>; Ifreke Inyang, ‘Whistle blower reveals firm that hacked President Buhari’s emails’ *Daily Post* (Nigeria, 28 March 2018) <<http://dailypost.ng/2018/03/28/whistle-blower-reveals-firm-hacked-president-buharis-emails>>.

92 Fred Imbert, ‘Facebook says it gave companies “one-time” access to user data after restricting information 2015’ *CNBC* (1 July 2018) <www.cnbc.com/2018/07/01/facebook-says-it-gave-companies-access-to-user-data-after-restricting-.html>.

93 Jane Wakefield, ‘Facebook scandal: who is selling your personal data?’ (*BBC News*, 11 July 2018) <www.bbc.com/news/technology-44793247>.

94 Sarah Frier, ‘Facebook says Cambridge Analytica audit on hold amid UK probe’ (*Bloomberg*, 19 March 2018) <www.bloomberg.com/news/articles/2018-03-19/facebook-says-cambridge-analytica-agreed-to-forensic-data-audit>.

95 Hannah Summers, ‘Investigators complete seven-hour Cambridge Analytica HQ search’ *The Guardian* (London, 24 March 2018) <www.theguardian.com/news/2018/mar/23/judge-grants-search-warrant-for-cambridge-analyticas-offices>.

Cambridge Analytica executives invoke the spectre of a witch-hunt, claiming that their 'efforts to correct the record pertaining to numerous unfounded accusations' have only led to their vilification for activities that are both legal and widely accepted as standard business practice in political and commercial arenas.⁹⁶ Open debate and analysis of the accuracy of that statement would undoubtedly serve the public interest. Chasing down the porn star suing Donald Trump, while providing her lawyer with close to a million dollars-worth of free airtime to expound upon every burp, hiccup and growl in the legal intestinal track of a dispute over a non-disclosure agreement in the most widely disclosed saga of any American President is simply unacceptable.

It will take years to assess the damage to democratic order bred by surveillance capitalism, some in plain sight, others foreshadowed by the ubiquity of manipulation and other offences.⁹⁷ Volumes will be written about the psycho-neurosis bred by the privacy invasions, stolen elections,⁹⁸ exacerbated traumas,⁹⁹ and the intentional infliction of emotional distress upon large groups of long-standing, fully integrated people deported or expelled from their homes and communities in violation of their civil and human rights.¹⁰⁰ Much of this is owing to the impact of the Frightful Five, a phrase coined by journalist Farhad Manjoo, a *New York Times* tech reporter whose many articles and forthcoming book detail how leading US tech companies operate more like totalitarian governments than private companies.¹⁰¹

Manjoo analyses the impact of Facebook, Google, Amazon, Microsoft and Apple.¹⁰² Siva Vaidhyanathan, author of *The Googlization of Everything*, describes the pattern facilitated by social media giants, as the 'Authoritarian Playbook' which starts with flooding public debate with propaganda and spreading disinformation about opponents,

96 Antonia Blumberg, 'Cambridge Analytica being investigated by Justice Department, FBI: report' (*Huffington Post*, 15 May 2018) <www.huffingtonpost.com/entry/cambridge-analytica-investigated-by-justice-department-fbi_us_5afb691be4b0779345d3dd20>.

97 Grayling (n 28). The most recent development in lawsuits initiated by publishers and authors against Google's book digitisation plan was a March 2011 decision by a New York court: the settlement offer, according to Judge Denny Chin, would 'give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission'. It would also gain Google the profits from 'orphan works' whose copyright holders cannot be located.

98 Michael Regan, 'An 11-year-old changed election results on a replica Florida State website in under 10 Minutes' (*PBS*, 12 August 2018) <www.pbs.org/newshour/nation/an-11-year-old-changed-election-results-on-a-replica-florida-state-website-in-under-10-minutes>; J Eliza Newlin Carney, 'Jill Stein pulls back the curtain on America's voting chaos' (*Prospect*, 15 December 2016) <<http://prospect.org/article/jill-stein-pulls-back-curtain-america%E2%80%99s-voting-chaos>>.

99 Daniel K Gelb, 'Privacy invasions now last forever' *New York Times* (New York, 14 November 2011) <www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/privacy-invasions-now-last-forever>.

100 Suzanne Gamboa, 'After judge's contempt threat, Trump admin returns deported mom, child to US' *NBC* (10 August 18) <www.nbcnews.com/storyline/immigration-border-crisis/after-judge-s-contempt-threat-trump-admin-returns-deported-mom-n899691>.

101 Terry Gross, 'How 5 tech giants have become more like governments than companies' *NPR* (26 October 2018) <<https://www.npr.org/2017/10/26/560136311/how-5-tech-giants-have-become-more-like-governments-than-companies>>.

102 Farhad Manjoo, 'Tech's Frightful Five: they've got us' *New York Times* (New York, 10 May 2017) <www.nytimes.com/2017/05/10/technology/techs-frightful-five-theyve-got-us.html>.

and then concludes with the harassment and intimidation of critics.¹⁰³ Scott Galloway's book, *The Four: The Hidden DNA of Amazon, Apple, Facebook and Google*, explores the power wielded by US tech conglomerates in their race to the top.¹⁰⁴ In August 2018, Apple became the first publicly traded US company to reach a \$1 trillion.¹⁰⁵ Author Shoshana Zuboff declared: 'Google is ground zero for a wholly new subspecies of capitalism in which profits derive from the unilateral surveillance and modification of human behaviour.'¹⁰⁶ In retrospect, her studies offer a clear perspective on the emerging integration of AI technologies. She warns that Behavioural Futures Markets have spread to the insurance, health and finance sectors.¹⁰⁷

The recent release of Facebook's virtual reality platform, Oculus Go, is designed to replace both mobile phones and personal computers and increase the total depth of individual monitoring.¹⁰⁸ Verizon USA, a mega digital service provider, assists such efforts with non-stop offers of hundreds of dollars in discounts toward the purchase of Google's Nest smart home devices, with its furtive venture into digital health monitoring. Despite myriad ethical implications, the advent and promotion of sex robots, now a \$30-billion industry, could bring new meaning to the term marital privacy – given the spring 2017 marriage of 31-year-old AI engineer Zheng Jiajia to Ying Ying, a life-size robot that he created.¹⁰⁹ Representing the ultimate smart device with unmatched access and surveillance capabilities, planning for custom orders – in the image of your favourite Hollywood actor no less – is already in the works.¹¹⁰

Connectivity is no longer an option. Under surveillance capitalism, tracking must ultimately generate revenue: feeding the cycle of surveillance, data capture, product

103 'Threat to global democracy' (n 61). They use Facebook and WhatsApp to distribute propaganda about themselves, flooding out all other discussion about what's going on in politics and government. Secondly, they use the same sort of propaganda machines, very accurately targeted, to undermine their opponents and critics publicly. And then, thirdly, they use WhatsApp and Facebook to generate harassment, the sort of harassment that can put any non-governmental organisation, human rights organisation, journalist, scholar or political party off its game, because of constantly being accused of paedophilia, rape, or being threatened with rape, kidnapping, or murder, which makes it impossible to actually perform publicly in a democratic space.

104 Tom Upchurch, 'Why is it so hard to ditch Apple, Amazon, Google and Facebook?' (*Wired*, 5 October 2017) <www.wired.com/wired/article/scott-galloway-the-four-book-review>.

105 Ibid. The four-horse race to become the first trillion-dollar company. In a casually incisive style, he uncovers how each of these companies have deployed iconic leadership, technology, storytelling, fearless innovation, lightning execution – and blatant plagiarism – to devastating effect.

106 Shoshana Zuboff, 'The secrets of surveillance capitalism' (*Cybersalon*, 22 May 2017) <<http://cybersalon.org/the-secrets-of-surveillance-capitalism-by-shoshana-zuboff>>; John D McKinnon and Douglas MacMillan, 'Google says it continues to allow apps to scan data from Gmail accounts' *Wall Street Journal* (New York, 20 September 2018) <www.wsj.com/articles/google-says-it-continues-to-allow-apps-to-scan-data-from-gmail-accounts-1537459989?mod=trending_now_1>.

107 Zuboff (n 106)

108 Dave Lee, 'Has Facebook slipped up with VR?' (*BBC News*, 11 February 2017) <www.bbc.com/news/technology-38941256>.

109 Angela Chen, 'There's no evidence that sex robots provide health benefits' (*The Verge*, 5 June 2018) <www.theverge.com/2018/6/5/17429602/sex-robot-health-science-therapy-relationships>; Chen Jingwen, 'Chinese man marries his robot after failing to find a human wife' (*Asia One*, 4 April 2017) <www.asiaone.com/asia/chinese-man-marries-his-robot-after-failing-find-human-wife>. The story flows straight from Greek mythology. King Pygmalion of Cypress, a sculptor par excellence, expressed his feminine ideal in a life-size ivory statue and fell madly in love with his own creation. <www.greeka.com/greece-myths/pygmalion-galatea.htm>.

110 Doug Bolton, 'Scarlett Johansson lookalike robot created by Hong Kong man in his flat' *The Independent* (London, 14 April 2016) <www.independent.co.uk/life-style/gadgets-and-tech/news/scarlett-johansson-robot-hong-kong-ricky-ma-a6967971.html>.

development and sales.¹¹¹ While retaining the lion's share of capability when it comes to privacy invasion, Google evades the limelight, even though it was first to surreptitiously implement tools that operate without consumer knowledge, through 'deceit and obfuscation'.¹¹² Apple CEO Tim Cook's call for enhanced user privacy at a recent China summit indirectly speaks to the power it has amassed.¹¹³ Zuboff agrees: 'They do not have the right to claim our reality and our actions for their own revenue streams.'¹¹⁴ Data and Society research analyst Laura Reed and researcher Robyn Caplan put together a set of case studies to complement the contemporary issues primer *Mediation, Automation, and Power*, for the Algorithms and Publics project.¹¹⁵ These case studies explore situations in which algorithmic media is shaping the public sphere across a variety of dimensions, including the changing role of the journalism industry.¹¹⁶ It examines the use of algorithms for censorship and international compliance, how algorithms are functioning within foreign policy aims, digital gerrymandering, the spread of misinformation and more.¹¹⁷ Professor Luciano Floridi analyses how the production of YouTube videos will shift with the emergence of DeepFake,¹¹⁸ where facial mapping and voice-over technology is used to alter videos to create an entirely different message. The sway of fake Twitter accounts spreading disinformation will pale in comparison.¹¹⁹

2 Distractions and deception

Freedom of the press is guaranteed to encourage the free flow of facts without censorship to enable intelligent action on the part of the electorate and to provide a social safety valve.¹²⁰ Journalist Maggie Haberman believes that poor performance during the lead-up to the Iraq War, lax coverage of the 2008 presidential campaign and the Clinton email fiasco in 2016 have decimated public trust in media institutions.¹²¹ While they certainly didn't help matters, the rhetoric of a free press was overtaken by the reality of

111 Zuboff (n 106).

112 Dylan Curran, 'Are you ready? Here is all the data Facebook and Google have on you' *The Guardian* (London, 30 March 2018) <www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy>; 'Google tracks your movements – like it or not' CBS (13 August 2018) <www.cbsnews.com/news/google-tracks-your-movements-like-it-or-not>.

113 'Apple's Tim Cook calls for more regulations on data privacy' (*Bloomberg News*, 24 March 2018) <www.engadget.com/2018/03/24/tim-cook-calls-for-tougher-regulation-of-personal-data>: 'This situation is so dire and has become so large that probably some well-crafted regulation is necessary, the ability of anyone to know what you've been browsing about for years, who your contacts are, who their contacts are, things you like and dislike and every intimate detail of your life – from my own point of view it shouldn't exist.'

114 Shoshana Zuboff, 'Rendering reality and cash cows' (*Science Node*, 17 October 18) <<https://sciencenode.org/feature/shoshana-zuboff,-part-two-rendering-reality.php>>.

115 Laura Reed and Robyn Caplan, 'Who controls the public sphere in an era of algorithms: case studies' (*Data Society*, 13 May 2016) <<https://datasociety.net/output/who-controls-the-public-sphere-in-an-era-of-algorithms-case-studies>>.

116 Nikolay Malyarov, 'Journalism in the age of algorithms, platforms and newsfeeds' (*Fipp*, 18 October 2016) <www.fipp.com/news/features/journalism-in-the-age-of-algorithms-platforms-newsfeeds>.

117 Reed and Caplan (n 115).

118 'I never said that! High-tech deception of "deepfake" videos' Associated Press (2 July 2018) <www.cbsnews.com/news/i-never-said-that-high-tech-deception-of-deepfake-videos>.

119 Nicholas Confessore, Gabriel Dance, Richard Harris and Mark Hansen, 'The follower factory' *New York Times* (New York, 27 January 2018) <www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>.

120 American Historical Society, 'News and Propaganda' <[www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-2-what-is-propaganda-\(1944\)/news-and-propaganda](http://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-2-what-is-propaganda-(1944)/news-and-propaganda)>.

121 Haberman (n 64).

a pernicious influence quietly operating in the background long before 2004. As war propaganda flourished in mainstream media outlets, high court judges weakened tort law and pursued flawed interpretations of First Amendment freedoms. Hunting down celebrities served to distract the masses,¹²² as privacy advocates were rebuked for approaching a *slippery slope of runaway censorship*.¹²³ The *public's right to know*¹²⁴ became the rallying cry in the high courts as investigative journalism languished on life-support.¹²⁵ The perceived need for fidelity to truth-telling as a civic virtue gave way to unwarranted constitutional protection for noxious opinions, hateful satirical lambastes and outrageous invasions of privacy.¹²⁶ It began with public officials.¹²⁷ Then libel, slander and false accusations were similarly directed at celebrities with impunity,¹²⁸ and then extended to citizens who became involved in *matters of public concern*.¹²⁹ Many cases would then go on to challenge fundamental requirements of foreknowledge and consent.¹³⁰ These rulings promoted a tabloid circus within a loose atmosphere of denial, obfuscation and spin.¹³¹ *He said—she said* and lots of opinion dished with a dose of embarrassing private facts gives way to a realm of disruption that perpetuates confusion.¹³²

2.1 FROM *NEW YORK TIMES V SULLIVAN* TO TELL-ALL, SELFIE, TWITTER CULTURE

New York Times Co v Sullivan denied the libel claim of a corrupt police official seeking to bankrupt national newspapers as part of the southern strategy to cripple the civil rights movement.¹³³ Its progeny features a steady stream of Supreme Court cases interpreting the US Constitution as providing legal protection for speech rights when weighed against privacy and reputational torts.¹³⁴ As the appetite for print news began to decline and talk-

122 Barnes (n 46) 19–31. See generally, Rebecca Moosavian, ‘Stealing “souls”? Article 8 and photographic intrusion’ (2018) 69(4) Northern Ireland Legal Quarterly (this issue).

123 Charles Sykes, *The End of Privacy* (St Martin’s Griffin 2000) 230.

124 Clifford Rechtschaffen, ‘The public right to know’ (Center for Progressive Reform 2018) <www.progressivereform.org/perspright.cfm>.

125 For a summary of its devolution see, Robert McChesney and John Nichols, *The Death and Life of American Journalism* (Nation Books 2010) 7–56.

126 Barnes (n 46) 125–55. The recent censorship in the US of right-wing conspiracist Alex Jones provides a recent and very interesting subject for debate around these issues. See Steve Coll, ‘Alex Jones, the First Amendment, and the digital public square: how should we challenge hate-mongering in the age of social media?’ *New Yorker* (New York, 20 August 2018) <www.newyorker.com/magazine/2018/08/20/alex-jones-the-first-amendment-and-the-digital-public-square>.

127 Barnes (n 46) 63–4.

128 Ibid 20–31.

129 Ibid 134–7.

130 Ian Wilkie, ‘Sacha Baron Cohen: is he wrong to make fools of the unwitting?’ (*The Conversation*, 18 July 2018) <<http://theconversation.com/sacha-baron-cohen-is-he-wrong-to-make-fools-of-the-unwitting-100193>>; Jennifer Mann and Robert Patrick, ‘“Girls gone wild” ordered to pay \$5.77 million to woman filmed in St Louis’ *St Louis Post Dispatch* (St Louis, 26 April 2012) <www.stltoday.com/news/local/crime-and-courts/girls-gone-wild-ordered-to-pay-million-to-woman-filmed/article_0bbb7adf-757b-53cb-90ce-124a459dd28d.html>. Teen girls given alcohol and filmed in naked play for videos sold internationally raised questions of meaningful consent.

131 See e.g. Will Gore, ‘Now Charlie Gard’s parents have ended their court case, we should ask why his case became the media circus it did’ *The Independent* (24 July 2017) <www.independent.co.uk/voices/charlie-gard-court-case-ruling-became-media-circus-a7857841.html>.

132 Sonia Moghe, ‘Ex-Trump World Tower doorman’s “catch-and-kill” contract released’ CNN (25 August, 2018) <www.cnn.com/2018/08/24/politics/trump-tower-doorman-contract-ami>.

133 Rick Perlstein, ‘Lee Atwater’s infamous 1981 interview on the southern strategy’ (*The Nation*, 13 November 2012) <www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy>.

134 Sykes (n 123) 80.

shows surfaced as a main stage for public discussion,¹³⁵ self-disclosure and a tell-all-show-all atmosphere of reality TV and Facebook Live led to shifts in assumptions about privacy.¹³⁶ Those who understood its value were marginalised as overly sensitive conspiracy theorists. Heroines proclaimed: ‘I’ve got nothing to hide.’¹³⁷ In the wake of 9/11, the idea that survival of the nation required trading privacy for security was never seriously questioned by mainstream media.¹³⁸ US courts strained to justify protection for dissemination of information. With rare exceptions, the broadcast of private, disparaging, false and even hateful speech was deemed protected and somehow consistent with the public interest.¹³⁹ Then came the threat to overturn those tables when the journalistic spotlight reached the late US Supreme Court Justice Antonin Scalia, caught lying about his absence from a public ceremony vital to his role as a public servant.¹⁴⁰ He later warned – in a 2006 interview with journalist Norm Pearlstine – that he just might have to reconsider his support for the landmark case that paved the way for such reporting.¹⁴¹ ABC’s Investigate News team uncovered that just as the current Chief Justice was being sworn in to high office, Antonin Scalia played golf with his right-wing posse while nursing wounds over failure to acquire the title of Chief Justice: something he evidently preferred to lie about.

New York Times Co v Sullivan was rightly decided, but much of its progeny opened the flood gates for rulings that wholly undermined the intrinsic value of privacy and reputation as an individual right.¹⁴² Following a perceived invasion of his privacy, Antonin Scalia might have become a late-breaking opponent of newspapers’ right to disclose that a public servant had lied about matters related to the discharge of official duties. Twelve years hence, the new age of reality television is bolstered by tell-all blogs and a culture of selfie-expression¹⁴³ where you simply record and post in real-time while counting the re-tweets, likes and shares for psychological satisfiers and proof of

135 Barnes (n 46) 36–9.

136 Omer Tene and Jules Polonetsky, ‘A theory of creep: technology, privacy and shifting social norms’ (2013) 16 *Yale Journal of Law and Technology* 59 <<https://yjolt.org/theory-creepy-technology-privacy-and-shifting-social-norms>>.

137 Xavier Harding, ‘“Who Cares, I have nothing to hide”: why the popular response to online privacy is so flawed’ (*MIC*, 22 March 2018) <<https://mic.com/articles/188563/who-cares-i-have-nothing-to-hide-why-the-popular-response-to-online-privacy-is-so-flawed>>.

138 Lee Rainie and Shiva Maniam, ‘Americans feel the tensions between privacy and security concerns’ (Pew Research Center, 19 February 2016) <www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns>.

139 ‘The court and free speech’ *New York Times* (New York, 23 April 2010) <www.nytimes.com/2010/04/24/opinion/24sat1.html>.

140 Brian Ross, ‘Supreme ethics problem?’ ABC News (23 January 2006) <<https://abcnews.go.com/Nightline/Investigation/story?id=1534260>>.

141 Dahlia Lithwick, ‘Target practice, Justice Scalia sets his sights on *New York Times Co v Sullivan*’ (*Slate*, 7 July 2007) <www.slate.com/articles/news_and_politics/jurisprudence/2007/07/target_practice.html>.

142 Barnes (n 46) 140–2.

143 Baer (n 9): ‘Photo-driven social media is ascendant: every social platform features a lot of photos. But only three are almost entirely photo or video dependent: Instagram, Pinterest, and Snapchat. Among the top six social media destinations, only those three saw an increase in usage in the past year, with Instagram moving from 34 percent to 36 percent, Pinterest moving from 30 percent to 31 percent, and Snapchat moving from 29 percent to 31 percent.’

legitimacy.¹⁴⁴ Addictive stimuli were built in to today's technology,¹⁴⁵ which may explain why Donald Trump is now seen by many as addicted to Twitter,¹⁴⁶ with predictions that it may eventually lead to his downfall.¹⁴⁷

2.2 MISTRESSES AND BANKERS IN THE AGE OF MASS DISTRACTION

Infotainment evolved from a storyline that related 'human interest' stories with the public good.¹⁴⁸ News about entertainment and humorous reporting of light news is different from using the personal difficulties of those in the industry to entertain the public. As the lines blurred, high courts abandoned first principles and the long-term damaging effects are difficult to quantify. Circa 2009, major news outlets decided that the world needed non-stop coverage of Tiger Woods' mistress count and full-blown panel discussions of all things monogamous.¹⁴⁹ Behind the scenes, the same cadre of Wall-Street bankers with singular responsibility for a global economic meltdown gave themselves millions of dollars in bonuses as taxpayers funded massive bailouts.¹⁵⁰ That style of distraction since 2016 has morphed into full-scale propaganda both online and in cable news broadcasts. With the exception of mass protests, and the occasional mention of the massive teacher strikes across the mid-west,¹⁵¹ citizens endured near hourly updates on the lawsuit brought by Trump's former lover.¹⁵² Under cloud of a million-dollar judgment if she disclosed details surrounding her affair with Trump, ten multimillionaires offered to pay it in full if she would just tell all.¹⁵³

Media narratives rang against the backdrop of a still photo slide-show of the adult film actress.¹⁵⁴ One could easily be forgiven for never imagining that there could be that many different photos of a single person taken in a life-time. Once you have endured it all: should they refer to her as Stormy Daniels or Stephanie Clifford?¹⁵⁵ Is she a porn star

144 Maureen O'Connor, 'Addicted to likes: how social media feeds our neediness' (*The Cut*, 20 February 2014) <www.thecut.com/2014/02/addicted-to-likes-social-media-makes-us-needier.html>.

145 Anna Johansson, 'Your social media apps are as addictive as slot machines – should they be similarly regulated?' (*The Next Web*, 25 March 2018) <<https://thenextweb.com/contributors/2018/03/25/social-media-apps-addictive-slot-machines-similarly-regulated>>.

146 Eli Stokols, 'Trump's Twitter addiction could reshape the presidency' (*Politico*, 29 November 2016) <www.politico.com/story/2016/11/donald-trump-twitter-231959>.

147 Ibid.

148 Zachary Shucklin, 'A chronological list of Trump's 8 known mistresses' (*Advocate*, 24 May 2018) <www.advocate.com/politicians/2018/5/24/chronological-list-trumps-8-known-mistresses>.

149 Mark Seal, 'The temptation of Tiger Woods' *Vanity Fair* (30 April 2010) <www.vanityfair.com/culture/2010/05/tiger-woods-article-full-201005>.

150 Phillip Inman, 'Wall Street bonuses under fire' *The Guardian* (London, 30 July 2009) <www.theguardian.com/business/2009/jul/31/wall-street-bonuses-bailout>.

151 'What's different about this wave of teacher strikes' (PBS, 13 April 2018) <www.pbs.org/newshour/show/whats-different-about-this-wave-of-teacher-strikes>.

152 'Tools of Trump's fixer: payouts, intimidation and the tabloids' *New York Times* (New York, 18 February 2018) <www.nytimes.com/2018/02/18/us/politics/michael-cohen-trump.html>.

153 'Stormy Daniels' lawyer: 10 people offered to pay for her story' (CNN Interview, 10 March 2018) <<https://edition.cnn.com/videos/tv/2018/03/10/stormy-daniels-lawyer-she-will-discuss-whats-happened.cnn>>.

154 Amana Fontanella-Khan and Lauren Gambino, 'Bernie Sanders: Russia and Stormy Daniels distract us from real problem of inequality' *The Guardian* (London, 20 March 2018) <www.theguardian.com/us-news/2018/mar/20/bernie-sanders-russia-and-stormy-daniels-distract-us-from-real-problem-of-inequality>.

155 Martha Ross, 'Stormy Daniels reveals why Donald Trump should be worried: "My name is Stormy for a reason"' (*Mercury News*, 7 March 2018) <www.mercurynews.com/2018/03/07/stormy-daniels-reveals-why-donald-trump-should-be-worried-my-name-is-stormy-for-a-reason>.

or adult film actress?¹⁵⁶ Which part of the story is most believable, that Trump remarked that she resembles his daughter or that he chased her around the hotel room in white cotton briefs before she spanked him with a magazine? Lie detector? Check.¹⁵⁷ Condom? Sorry. Then just as reports surfaced of a house-keeper love-child from the 1980s, White House staffers were aghast to see tweets that the US would soon bomb Syria.¹⁵⁸ Recent speculation suggests that another long-time mistress received more than \$1.6 million for silence about her recent abortion.¹⁵⁹ Michael Avenati, the star attorney who challenged the Trump cabal around hush money paid to secure his election, claims to have been contacted by three other women.¹⁶⁰ These are among the few stories known to temporarily shift focus away from the ordained narrative of Russian meddling.¹⁶¹ Similar to late 2008 to early 2009, as the media directs the public toward salacious details surrounding Playboy models, hookers and pee tapes, bankers have once again been walking away with the store.¹⁶²

156 Danielle Kurtzleben, 'Get caught up: Trump's alleged affair with adult film star Stormy Daniels' (NPR, 19 January 2018) <www.npr.org/2018/01/19/579195588/get-caught-up-trumps-alleged-affair-with-adult-film-star-stormy-daniels>.

157 Mandy Mayfield, 'Stormy Daniels passed a lie detector test about her affair with Trump' *Washington Examiner* (Washington, 20 March 2018) <www.washingtonexaminer.com/news/stormy-daniel-passed-a-lie-detector-test-about-her-affair-with-trump-report>.

158 David K Li, 'Doorman who sold Trump "love child" story now says he's free to talk' *New York Post* (New York, 25 August 2018) <<https://nypost.com/2018/08/25/doorman-who-sold-story-of-alleged-trump-love-child-to-ami-says-hes-free-to-talk-now>>; rumours of the shelved story surfaced on 12 April 2018, in a report by investigative journalist Ronan Farrow, just one day following the Trump Syria warning. Ronan Farrow, 'The National Enquirer, a Trump rumor, and another secret payment to buy silence' *New Yorker* (New York, 12 April 2018) <www.newyorker.com/news/news-desk/the-national-enquirer-a-donald-trump-rumor-and-another-secret-payment-to-buy-silence-dino-sajudin-david-pecker>; Kevin Liptak and Kaitlan Collins, 'A Syria decision hadn't been made when Trump tweeted missiles "will be coming"' CNN (11 April 2018) <www.cnn.com/2018/04/11/politics/donald-trump-syria-tweets>.

159 Paul Campos, 'Here's a theory about that \$1.6 million payout from a GOP official to a playboy model' *New York Magazine* (New York, 8 May 2018) <<http://nymag.com/daily/intelligencer/2018/05/theory-playboy-model-had-affair-with-trump-not-broidy.html>>.

160 Michael Balsamo and Michael Sisak, '3 women paid "hush money" for Trump relationships, Avenatti says' *Boston Globe* (Boston, 27 July 2018) <www.bostonglobe.com/news/politics/2018/07/27/women-paid-hush-money-for-trump-relationships-avenatti-says/i0wbN773TU2OKMD4GCPQOM/story.html>.

161 Joe Concha, 'Michael Moore: Russia, Stormy Daniels stories are "shiny keys to distract us"' (*The Hill*, 20 March 2018) <<http://thehill.com/homenews/media/379278-michael-moore-russia-stormy-daniels-stories-are-shiny-keys-to-distract-us>>.

162 Victoria Guida, 'Trump's regulators deliver new victory for banks' (*Politico*, 30 May 2018) <www.politico.com/story/2018/05/30/trump-bank-regulations-volcker-rule-577718>; Robert Reich, 'The critical lessons we didn't learn from the financial crisis' *Newsweek* (17 September 2018) <www.newsweek.com/robert-reich-critical-lessons-we-didnt-learn-financial-crisis-opinion-1123466>.

2.3 TRUTH, RACE-BAITING AND MEDIA WATCHDOGS

The search for truth, as the cornerstone of a free press, has been altogether abandoned in the public sphere.¹⁶³ Award-winning journalists,¹⁶⁴ writers, scholars and cultural anthropologists have warned us for years about the growing concentration of media empires.¹⁶⁵ If we reached the point of ‘crisis’ in the 1950s when it comes to mainstream news media, today might be viewed as a full-blown catastrophe: non-stop continuation of business as usual. Professor Jerry Kroth has demonstrated the evolving state of public delusion compounded by mainstream media.¹⁶⁶ Corporations, politicians and states all strategically use media for their dis/mis-information campaigns,¹⁶⁷ thus deploying techniques to divert attention is prerequisite when deception is the end-goal.¹⁶⁸

Disconnection from the truth culminates on the Left, according to journalist McKay Coppins, with an underexamined phenomenon in American politics, where ‘polemicists, conspiracists, and outright fabulists’ feed an alternative media landscape where the implausibility of a claim is no bar to its acceptance.¹⁶⁹ He notes that since the mid-1990s discussion has boiled over about increasing levels of toxicity in conservative media: ‘While serious Republicans in the political class spent years scoffing at the “entertainers” and “provocateurs” on the supposedly powerless fringe, the denizens of the fever swamp were busy taking over the party.’ Coppins sees a growing counter-trend, posing the question: could the same thing happen on the Left?

During the 2016 presidential election, liberal media outlets gave Donald John Trump nearly \$5-billion-worth of free air time.¹⁷⁰ Psychologists have been quicker to offer assessments of Trump’s mental state¹⁷¹ than that of an electorate with heightened

163 See, Michiko Kakutani, *The Death of Truth: How We Gave up on Facts and Ended Up with Trump* (Penguin 2018); Alissa Wilkinson, ‘2017’s best documentaries found new ways to engage reality in a post-truth world’ (*Vox*, 27 December 2017) <www.vox.com/2017-in-review/2017/12/27/16808872/best-documentaries-2017-post-truth-fiction-jane-jonbenet-ex-libris-inconvenient-sequel>; Peter Coe, ‘(Re)embracing social responsibility theory as a basis for media speech: shifting the normative paradigm for a modern media’ (2018) 69(4) *Northern Ireland Legal Quarterly* (this issue), Section 3.1: The argument from truth, 408: ‘[T]ruth is most likely to emerge from totally uninhibited freedom of thought, and almost absolute freedom of expression. Consequently, thought and discussion protects individual liberty from its predominant threat, which is not “political oppression”, but “social tyranny”.’

164 See generally, Kristina Borjesson (ed), *Into the Buzzsaw Myth of a Free Press* (Prometheus Books 2004).

165 Helen Lewis, ‘The echo chamber of social media is luring the left into cosy delusion and dangerous insularity’ *New Statesman* (London, 27 July 2015) <www.newstatesman.com/helen-lewis/2015/07/echo-chamber-social-media-luring-left-cosy-delusion-and-dangerous-insularity>.

166 See generally, Jerry Kroth, *Implosion: Delusion, Denial, and the Prospect of Collapse* (Genotype 2016)

167 Steven Livingston, ‘Disinformation campaigns target tech-enabled citizen journalists’ (Brookings Institute, 2 March 2017) <www.brookings.edu/blog/techtank/2017/03/02/disinformation-campaigns-target-tech-enabled-citizen-journalists>.

168 Max Boot, ‘Donald Trump’s biggest disinformation campaign yet’ (*Foreign Policy*, 31 October 2017) <<http://foreignpolicy.com/2017/10/31/donald-trumps-biggest-disinformation-campaign-yet>>.

169 McKay Coppins, ‘How the left lost its mind’ (*The Atlantic*, 2 July 2017) <www.theatlantic.com/politics/archive/2017/07/liberal-fever-swamps/530736>.

170 Jennifer Saba, ‘Breaking views: Trump’s \$4.6 billion in free media’ CNBC (30 September 2016) <www.cnbc.com/2016/09/30/breakingviews-trump-cold-shoulder-for-tv-ads-may-set-the-trend.html>.

171 Elaine Godfrey, ‘Psychiatrist telling Congress Trump could be involuntarily committed’ (*The Atlantic*, 12 January 2018) <www.theatlantic.com/politics/archive/2018/01/bandy-lee/550193>.

exposure to a single personality in such a concentrated time-frame.¹⁷² A few days after the election, Oxford Dictionaries announced that ‘post-truth’ had been chosen as the 2016 word of the year: defined as a condition ‘in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief’.¹⁷³ Points of saturation are easily established,¹⁷⁴ it’s the question of when it morphed into paralysis, a collective brainwave-styled entrainment that has yet to be explained. ‘Vote Democrat!’ is the new psalm. Two self-styled centrist news corporations (CNN and MSNBC) have so hyped the 2018 special and mid-term elections and the prospects of running conservatives from office with a pitch-fork that they have failed to hone their message about what is truly at stake for the future of our nation.¹⁷⁵ Even worse, they have neglected a much-needed proportionate follow-up of the candidates that they have paraded into office over the past 12 months. The one thing we know for sure is that Vladimir Vladimirovich Putin and his cronies have been added to the narrative, and now Russia shares in that bounty of non-stop coverage.¹⁷⁶

According to journalist Sarah Jones, creation of outlets like Trump TV, produced by his daughter-in-law, broadcast live from his private building in New York and distributed via Facebook, is propaganda stripped even of the veneer of professional journalism.¹⁷⁷ Right-wing cable news outlets have been walking a fine line since the end of the Fairness Doctrine in 1987, paving the way for a ‘constellation of right-wing websites – Breitbart, The Federalist, The Daily Caller, Townhall – that traffic in xenophobia, homophobia, racism, and social Darwinism’.¹⁷⁸ Traditional mechanisms for media accountability, according to a 2017 study, such as fact-checking sites, media watchdog groups and cross-media criticism, have little influence on the insular conservative media sphere.¹⁷⁹ Messages designed for ‘internal’ consumption get everyone on the same page within the

172 Diane Herbst, ‘Top psychiatrists gather to warn that Donald Trump “represents a danger to public health”’ (*People*, 1 May 2018) <<https://people.com/politics/psychiatrists-warn-donald-trump-danger-public-health>>; Gail Sheehy, ‘America’s therapists are worried about Trump’s effect on your mental health’ (*Politico*, 10 October 2016). ‘His candidacy is sowing fear, distress and anger across the country’, they say. ‘Here’s what one psychologist is doing to try to stop it.’ <www.politico.com/magazine/story/2016/10/donald-trump-2016-therapists-214333>.

173 Susan Glasser, ‘Covering politics in a post-truth America’ (Brookings Institute, 2 December 2016) <www.brookings.edu/essay/covering-politics-in-a-post-truth-america>; Michiko Kakutani, ‘“How propaganda works” is a timely reminder for a post-truth age’ *New York Times* (New York, 26 December 2016) <www.nytimes.com/2016/12/26/books/how-propaganda-works-is-a-timely-reminder-for-a-post-truth-age.html>.

174 Adrienne LaFrance, ‘Trump’s media saturation quantified’ (*The Atlantic*, 1 September 2016) <www.theatlantic.com/technology/archive/2016/09/trumps-media-saturation-quantified/498389>.

175 Not much has changed since the Clinton White House, See, Jeff Faux, ‘The myth of the New Democrats’ (1993) (Fall) *Prospect* <<http://prospect.org/article/myth-new-democrats>>.

176 Simon Dumenco, ‘Vladimir Trump (or Donald Putin?) lands the cover of Time’ (*Adage*, 19 July 2018) <<http://adage.com/article/media/vladimir-trump-donald-putin-lands-cover-time/314273>>.

177 Sara Jones, ‘How Trump is creating a propaganda state’ (*The New Republic*, 30 August 2017) <<https://newrepublic.com/article/144592/trump-creating-propaganda-state>>. Federal law specifically mandates that any advertisement appearing in the format of a news item must state that the item is in fact a paid advertisement. The Bush Administration has come under fire for allegedly producing and disseminating covert propaganda in the form of television programmes, aired in the USA, which appeared to be legitimate news broadcasts and did not include any information signifying that the programmes were not generated by a private-sector news source.

178 *Ibid.*

179 *Ibid.*

right-wing echo-chamber. Messaging tends toward the extreme, lacks internal coherence and embraces 'paranoia'.¹⁸⁰

Edward Bernays is credited with the discovery of the legitimating precursor, the field of public relations. Easily manipulated narratives now dominate the social media environment, and persistent publication of false and misleading stories presented as fact has been seized upon by a large cast of individuals creating their own content. To maintain control of these narratives, large organisations deploy bot farms,¹⁸¹ opinion surveys¹⁸² and AI¹⁸³ to sway those who might stray from the official storyline. Digital media analyst Alicia Wanless notes that 77 per cent of alt-right Facebook pages in support of Trump during the 2016 election allowed users to comment and post: 'inserting highly controversial content into echo chambers, and promoting engagement with it, creates a massive amount of activity and begins to game current media algorithms'.¹⁸⁴ Conservative political architects have long stopped offering weak denials of these and similar tactics.¹⁸⁵ Steven Bannon, the poster-boy of the supposed right-wing revolution,¹⁸⁶ has special knowledge of what gets attention.¹⁸⁷ He designs his speeches to ensure maximum exposure in the press. Like Pavlov's dogs his 'Let Them Call You Racist, Wear it as a Badge of Honor' refrain appeared in print and video across the globe in record time.¹⁸⁸ The leader of France's National Front Party and base of neo-Nazi supporters cheered in response and the right-wing freak flag was raised to new heights all over Europe just in time for spring elections.¹⁸⁹ A few months later, Ivanka Trump posted photos cuddling her two year-old son¹⁹⁰ in the midst of a media frenzy showing little brown Spanish-speaking girls hysterical for their own mothers. Shortly thereafter,

180 Rob Faris, Hal Roberts, Bruce Etling, Nikki Bourassa, Ethan Zuckerman and Yochai Benkler, 'Partisanship, propaganda, and disinformation: online media and the 2016 US presidential election' (Berkman Klein Center, Harvard University, 16 August 2017) <<https://cyber.harvard.edu/publications/2017/08/mediacloud/>>; Jones (n 177).

181 Confessore et al (n 119).

182 Bary S R Pradelski and Bernhard Clemm von Hohenberg, 'Online polls are everywhere: here's why we should be wary before trusting them' (*The Conversation*, 8 February 2018) <<http://theconversation.com/online-polls-are-everywhere-heres-why-we-should-be-wary-before-trusting-them-88964>>.

183 Darrell M West and John R Allen, 'How artificial intelligence is transforming the world' (Brookings Institute, 24 April 2018) <www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world>.

184 Wanless and Berk (n 29).

185 Mathew Sweezey, 'President Trump and the rise of a new public relations model' (*Forbes*, 30 November 2017) <www.forbes.com/sites/forbescommunicationscouncil/2017/11/30/president-trump-and-the-rise-of-a-new-public-relations-model/#29092b7451c8>.

186 Sam Petulla, 'Steve Bannon's target list' CNN (11 October 2017) <www.cnn.com/2017/10/11/politics/bannon-taking-on-republicans-regardless-of-conservatism-or-voting-history>.

187 Robin Stern, 'The gaslight effect: the history of gaslighting and its destructive power' (*Signature Magazine*, 8 January 2018) <www.signature-reads.com/2018/01/the-history-of-gaslighting-and-the-gaslight-effect>. A gaslighter insists on his own assertions of reality as the truth, spinning facts in such a way that the audience doubts her perception and sense of reality.

188 Amy Held, 'Steve Bannon takes anti-establishment message overseas: "Let them call you racists"' (NPR, 11 March 2018) <www.npr.org/sections/thetwo-way/2018/03/11/592702598/steve-bannon-takes-anti-establishment-message-overseas-let-them-call-you-racists>.

189 Natalie Nougayrède, 'Steve Bannon is on a far-right mission to radicalise Europe' *The Guardian* (London, 6 June 18) <www.theguardian.com/commentisfree/2018/jun/06/steve-bannon-far-right-radicalise-europe-trump>.

190 Tom McCarthy, 'Ivanka Trump photo with son sparks backlash over border separations' *The Guardian* (London, 28 May 2018) <www.theguardian.com/us-news/2018/may/27/ivanka-trump-tweets-photo-backlash-border-separation-policy>.

Melania Trump arrived at the US border wearing a jacket that read: ‘I really don’t care, do u?’¹⁹¹ Distracting national headlines gave the conservative majority in Congress an opening to press for an end to the Russia inquiry,¹⁹² as the bright orange Donald Trump Baby Blimp travelled across Europe accompanied by audio of crying babies seized by border patrol.

Cast as Bully-in-Chief, Trump repeatedly called for imminent violence on the campaign trail, while stoking contempt for immigrants and minorities.¹⁹³ Right-wing militias took note as he bragged that he could ‘shoot somebody in midtown Manhattan and not lose any political support’.¹⁹⁴ He surpassed Hillary Clinton’s infamous super-predator dog whistle where she promised supporters that black males would be ‘brought to heel’.¹⁹⁵ Trump’s first month in office saw the highest number of citizens killed by police in the USA since 2015.¹⁹⁶ Officers reluctant to merely gun a man down and more prone to enforcing the law while observing due process were admonished to ‘be sure to bang their head against the door frame when you shove them into the cop car’.¹⁹⁷ He rallied an entire nation to violence,¹⁹⁸ more than one, in fact. He startled allies and friends in the UK when he tweeted videos glorifying British militants in the lead up to Christmas.¹⁹⁹ David Lammy, the Member of Parliament for Tottenham, said Trump had gone ‘beyond the pale . . . promoting a fascist, racist, extremist hate group’. Rejecting him as neither friend nor ally, Lammy proclaimed: ‘You are not welcome in my country or my city.’²⁰⁰ After a planned State visit had been downgraded because of widespread anti-Trump protests, disseminating the videos and then cancelling the trip altogether were

191 Jaclyn Reiss, ‘On her way to border, Melania Trump wore jacket that said: “I really don’t care, do u?”’ *Boston Globe* (Boston, 21 June 2018) <www.bostonglobe.com/news/politics/2018/06/21/her-way-border-melania-trump-wore-jacket-that-said-really-don-care/cupbCpsEgxcSzyrSZEH75O/story.html>.

192 Kevin Breuninger, ‘Rod Rosenstein rejects GOP lawmaker’s call to “finish” Russia investigation, saying it should end “appropriately”’ *CNBC* (28 June 2018) <www.cnn.com/2018/06/28/rod-rosenstein-and-fbi-director-wray-to-testify-on-watchdogs-report.html>.

193 Nicole Hemmer, ‘Cruelty is the policy’ (*US News*, 6 February 2018) <www.usnews.com/opinion/thomas-jefferson-street/articles/2018-02-06/donald-trump-is-making-cruelty-toward-immigrants-official-government-policy>.

194 ‘Trump: “I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn’t lose any voters”’, *Real Clear Politics* Video (23 January 2016) <www.realclearpolitics.com/video/2016/01/23/trump_i_could_stand_in_the_middle_of_fifth_avenue_and_shoot_somebody_and_i_wouldnt Lose_any_voters.html>.

195 Heidi Gillstrom, ‘Clinton’s “superpredators” comment most damaging by either candidate’ (*The Hill*, 30 September 2016) <<http://thehill.com/blogs/pundits-blog/crime/298693-hillary-clintons-superpredators-still-the-most-damaging-insult-by>>.

196 Shaun King, ‘Donald Trump’s first month in office sees most people killed by police since 2015’ *New York Daily News* (New York, 2 February 2017) <www.nydailynews.com/news/national/king-trump-1st-month-deadliest-2015-killing-article-1.2966610>.

197 ‘Trump’s call for police brutality is no joke’ (3 Truth Dig, 3 August 2017) <www.truthdig.com/articles/trumps-call-for-police-brutality-is-no-joke>.

198 Julia Conley, ‘Study details link between Trump’s aggressive rhetoric at campaign rallies and increased violence’ (*Common Dreams*, 16 March 2018) <www.commondreams.org/news/2018/03/16/study-details-link-between-trumps-aggressive-rhetoric-campaign-rallies-and-increased>.

199 Natasha Lomas, ‘Twitter finally boots hate group that Trump retweeted off its platform’ (*Tech Crunch*, 19 December 2017) <<https://techcrunch.com/2017/12/19/twitter-finally-boots-hate-group-that-trump-retweeted-off-its-platform>>.

200 Lizzie Dearden, ‘Donald Trump retweets Britain First deputy leader’s Islamophobic posts’ *The Independent* (London, 29 November 2017) <www.independent.co.uk/news/world/americas/us-politics/donald-trump-britain-first-retweet-muslim-migrants-jayda-fransen-deputy-leader-a8082001.html>.

presumed to be acts of retaliation.²⁰¹ The need to exert authoritarian control, fear of protests and obvious lack of empathy converge in a typical early morning tweet storm.²⁰² Trump took to Twitter to criticise the mayor of London just hours after seven people were killed and 48 injured in a terror attack in the centre of the city.²⁰³

During his bid for office, Trump rallied crowds in friendly precincts with angry demands that they kick, punch and arrest those who came to protest his candidacy.²⁰⁴ He promised an Iowa crowd that he would pay their legal fees if they would just ‘knock the crap out’ of protesters.²⁰⁵ As one man was being removed from a town hall, the crowd cheered as he shrieked that he’d like to punch him in the face.²⁰⁶ Supporters began to follow his lead. The arrest of one facing hefty legal fees after he was caught on video attacking a protester led the man to speculate that the speech at a rally in Louisville, Kentucky, was calculated to incite violence as early as November 2015.

His candidacy is marked by eagerness to foment racial violence and on full display in President Barack Obama’s old stomping grounds.²⁰⁷ Faculty and staff at the University of Illinois, Chicago, petitioned administrators to cancel a planned campaign rally because of its potentially dangerous environment for students.²⁰⁸ There were simply not enough answers to the one question posed even by his supporters. Why that location? Following months of continuous vilification of minorities, why rally at a school known as an organising hub for civil and immigrant rights with a large minority student population? Trump then cancelled at the very last minute, leaving thousands of supporters and detractors agitated beyond reason in the same locale.²⁰⁹

A March 2018 study by Common Dreams correlates the violent rhetoric spewed by Trump during his campaign rallies and the increase in violent attacks during the summer of 2016, ultimately provoking the murder of Heather Heyer by neo-Nazis in the summer

201 Zoe Drewett, ‘Donald Trump confirms visit to UK is cancelled amid fears of protests’ *Metro* (London 12 January 2018) <<https://metro.co.uk/2018/01/12/donald-trump-confirms-visit-uk-cancelled-amid-fears-protests-7223298>>.

202 Amanda Wills and Alysha Love, ‘All the President’s tweets’ CNN (4 September 2018) <www.cnn.com/interactive/2017/politics/trump-tweets>.

203 Martin Pengelly, ‘Donald Trump berates London mayor over response to terror attacks’ *The Guardian* (London, 4 June 2017) <www.theguardian.com/uk-news/2017/jun/04/trump-berates-london-mayor-sadiq-khan-terror-attacks>.

204 Justin Wise, ‘“Morning Joe” plays montage of the many times Trump encouraged violence’ (*The Hill*, 26 June 2018) <<http://thehill.com/homenews/media/394128-morning-joe-plays-montage-of-the-many-times-trump-encouraged-violence>>.

205 Michael Finnegan and Noah Bierman, ‘Trump’s endorsement of violence reaches new level: he may pay legal fees for assault suspect’ *Los Angeles Times* (Los Angeles, 13 March 2016) <www.latimes.com/politics/la-na-trump-campaign-protests-20160313-story.html#>.

206 Ben Schreckinger, ‘Trump on protester: “I’d like to punch him in the face”’ (*Politico*, 23 February 2016) <www.politico.com/story/2016/02/donald-trump-punch-protester-219655>.

207 Fresh off his inauguration, Trump targeted Chicago relentlessly, threatening to send in federal troops to stop the violence. Julie Bosman and Monica Davey, ‘Trump’s raves about Chicago have become rants’ *New York Times* (New York, 29 March 2017) <www.nytimes.com/2017/03/29/us/donald-trump-chicago-rahm-emanuel-violence.html>.

208 Katie Lobosco, ‘College community wants Trump rally booted from campus’ (*Money*, 10 March 2018) <<http://money.cnn.com/2016/03/10/pf/college/donald-trump-uic-rally-protest>>.

209 Alexandra Sims, ‘Donald Trump: Chicago police deny advising republican to cancel violent campaign rally’ *The Independent* (London, 12 March 2016) <www.independent.co.uk/news/world/americas/us-elections/donald-trump-chicago-police-deny-advising-republican-to-cancel-violent-campaign-rally-a6927336.html>.

of 2017.²¹⁰ After days of silence following her death, he summarily announced that there were good people on both sides of the protest.²¹¹ In the style of an old gang leader he provoked clashes at events by stoking aggression, scapegoating discontent and spreading violence like a ‘social contagion’.²¹² ‘Let Them Call You Racist’, indeed. One Texas woman displayed a bumper sticker on her truck that read ‘Fuck Trump and fuck you for voting for him’.²¹³ When the sheriff posted a photo of her vehicle on Facebook and threatened to arrest her for disorderly conduct, she added a second bumper sticker with ‘Fuck Troy Nehls and all who voted for [the Sheriff] too’.²¹⁴ The incident brought the reality of First Amendment freedoms back into plain view. A billboard posted along a roadside in Maryland reads: ‘Hey liberals, Better get your guns if you try to impeach President Trump. From all of your deplorables in Calvert County.’²¹⁵ No profanity, but rather a literal call to arms, and *disorderly* indeed.

According to Susan Glasser, media matters in 2016 were not just another skirmish in the ‘eternal politicians versus the press tug of war, [they all] have the same tools to create, produce, distribute, amplify, or distort news as the news industry itself’.²¹⁶ This evaluation is significant in so far as it acknowledges coercive tendencies from all directions. The flip side is that creative design elements are also being deployed as a counter-balance. The American public has received assurances, largely from comedic platforms, that they can believe what they see and reject media bullshit; as defined by Professor Paul Bernal, although inspired by Harry Frankfurt.²¹⁷ The production team of talk show host Conan O’Brien compiled video footage of right-wing broadcasters simultaneously repeating phrases verbatim in dozens of local TV markets to highlight the prevalence of uniform repetition.²¹⁸

210 Harriet Sinclair, ‘Trump told white supremacists to attack protesters, so they did’ *Newsweek* (Atlanta, 14 August 2017) <www.newsweek.com/trump-told-white-supremacists-attack-protesters-so-they-did-650622>; Lauren Gill, ‘Charlottesville: Heather Heyers’ Mom says Trump to blame for her daughter’s death’ *Newsweek* (Atlanta, 14 December 2017) <www.newsweek.com/charlottesville-heather-heyers-mom-says-trump-blame-her-daughters-death-748090>. Cheri Jacobus writes: ‘Typically, the easily triggered leader of the free world, his finger seemingly perpetually poised in hover position over the nuclear button, uses a cannon when a BB gun will do. But, curiously, he seems to lose his voice and his nerve when it comes to taking on Russian President Vladimir Putin for intervening in US elections, or the white nationalists and Nazis – domestic terrorists – who marched with torches in Charlottesville, VA.’ ‘Trump’s Charlottesville disgrace white nationalists are not just another side’ (*USA Today*, 13 August 2017) <www.usatoday.com/story/opinion/2017/08/13/trump-charlottesville-disgrace-white-nationalists-not-another-side-cheri-jacobus-column/562740001>.

211 Ellis Cose, ‘One year after Charlottesville, Trump has normalized racism in America’ (*USA Today*, 10 August 2018) <www.usatoday.com/story/opinion/2018/08/10/white-supremacists-neo-nazis-charlottesville-unite-right-rally-trump-column/935708002>.

212 Conley (n 198).

213 Brianna Sacks, ‘Texas woman might sue the sheriff who went after her “fuck Trump” truck sticker’ (*Buzzfeed*, 20 November 2017) <www.buzzfeed.com/briannasacks/a-texas-woman-is-in-jail-after-a-sheriff-called-outer?utm_term=.xk0ykXxoy#.ytYM7zK8M>.

214 ‘A person uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace.’ Texas Penal Code 42.01 (enacted 9 February 2015) <<https://statutes.capitol.texas.gov/Docs/PE/htm/PE.42.htm>>.

215 Amanda Watts, ‘A sign in Maryland tells Liberals to get their guns if they try to impeach Trump’ CNN (10 May 2018) <www.cnn.com/2018/05/10/us/maryland-controversial-sign-trnd>.

216 Glasser (n 173).

217 Jack Mirkinson, ‘Jon Stewart is a more trusted news source than MSNBC, study says’ (*Huffington Post*, 6 December 2017) <www.huffingtonpost.com/2014/06/10/jon-stewart-more-trusted-msnbc-poll_n_5479859.html>; see Bernal (n 89) 5.

218 Adam Hochberg, ‘Conan’s comedy bit hints at serious issues for local TV news’ (*Poynter*, 1 January 2014) <www.poynter.org/news/conans-comedy-bit-hints-serious-issues-local-tv-news>.

3 Trumpocracy, privatisation and Russia-gate

A troupe of characters from journalists to co-authors,²¹⁹ to friends, critics and allies with long-standing relationships with Trump largely agree that we live in a Trumpocracy,²²⁰ a blend of Trump and Kakistocracy.²²¹ As analysts attempt to discover an overarching political strategy amid the chaos, they report that those closest to Trump see a man determined to bend the presidency to his will.²²² After stumbling into the White House ill-prepared for the new role,²²³ lacking knowledge of routine protocol, he relies upon Rupert Murdoch's news personalities and a small group of associates who frequent his golf resorts for perspective on domestic policy.²²⁴ He is most often portrayed as a callous, child-like narcissist,²²⁵ surrounded by white supremacists²²⁶ who are eager to dismantle democratic institutions,²²⁷ quash dissent, and fast-track corporate takeover of traditional public functions.²²⁸

3.1 DEREGULATION AND DEMOCRATIC INSTITUTIONS

US regulatory agencies have begun a marked 180-degree shift away from their original objectives under the current administration.²²⁹ Wealthy men with long records of opposition to each agency's goals have been placed at their helms in record numbers.²³⁰

Proposals to privatise the Bureau of Veterans Affairs and to merge the Departments of Labour and Education received the lion's share of reporting while the others run

219 Tony Schwartz, 'The truth about Trump' (Address to Oxford Union Society, 4 November 2016) <www.youtube.com/watch?v=qxF_CDDj0YI>. Schwartz was the ghostwriter for Trump's bestseller *The Art of the Deal*.

220 Deep criticism from high-profile conservatives. See David Frum, *Trumpocracy: The Corruption of the American Republic* (Harper Collins 2018).

221 Kakistocracy was government by the unskilled, unknowledgeable and unvirtuous; André Spicer, 'Donald Trump's "kakistocracy" is not the first, but it's revived an old word' *The Guardian* (London, 8 April 2018) <www.theguardian.com/commentisfree/2018/apr/18/donald-trump-kakistocracy-john-brennan-us-twitter>.

222 See Frum (n 220); Haberman (n 64)

223 See Goldsmith (n 65); David Smith, "'He is failing": Trump strikes out solo as friends worry and enemies circle' *The Guardian* (London, 15 October 2017) <www.theguardian.com/us-news/2017/oct/14/donald-trump-iran-healthcare-white-house-corker>; Harriet Sinclair, 'Six best quotes from Bob Woodward's new book on Trump's White House' *Newsweek* (Atlanta, 5 September 2018) <www.newsweek.com/six-best-quotes-bob-woodwards-new-book-trumps-white-house-1106869>.

224 Mirkinson (n 217).

225 Schwartz (n 219).

226 Ameer Hasan Loggins, 'Is it wrong to call Trump a white supremacist?' *The Guardian* (London, 16 September 2017) <www.theguardian.com/commentisfree/2017/sep/16/donald-trump-jemele-hill-ESPN-white-supremacist>.

227 David Morris, 'Steve Bannon says Trump's Cabinet picks are intended to "deconstruct" regulation and agencies' *Fortune*, 25 February 2017 <<http://fortune.com/2017/02/25/bannon-trump-cabinet-cpac>>.

228 Ben Tarnoff, 'How privatization could spell the end of democracy' *The Guardian* (London, 21 June 2017) <www.theguardian.com/technology/2017/jun/21/privatizing-public-services-trump-democracy>.

229 Gregory Korte, 'The 62 agencies and programs Trump wants to eliminate' *USA Today*, 16 March 2017 <www.usatoday.com/story/news/politics/2017/03/16/what-does-trump-budget-eliminate/99223182>. David Cay Johnston, *It's Even Worse than You Think: What the Trump Administration is doing to America* (Simon & Schuster 2018) <www.simonandschuster.com/books/Its-Even-Worse-Than-You-Think/David-Cay-Johnston/9781501174162>.

230 Meg Jacobs, 'Trump is appointing people who hate the agencies they will lead' CNN (12 December 2016) <www.cnn.com/2016/12/10/opinions/government-is-the-problem-jacobs>.

quietly in the background.²³¹ Outside of the details surrounding their lavish spending, ethical violations and conflicting interests there are virtually no details around distinctions between Trump appointees and their predecessors or parade of successors relative to departmental objectives.²³² Cited among the worst, Director Scott Pruitt promulgated disastrous policies at the Environmental Protection Agency while failing to enforce existing regulations. Prior to his forced resignation, media covered his pay-for-play corruption (i.e. one disgrace after another),²³³ with little or no reporting on the known or projected effects upon citizens directly impacted by the influx of toxins.²³⁴ Pruitt endured, according to the *New York Times*, because he delivered on the agenda.²³⁵ It is also worth noting that ethics rules were the very first target of the conservative congress once Trump assumed office.²³⁶ Moreover, Pruitt's persona of indifference ensured a temporary shift of national headlines.

Current levels of concern about the effects of global warming alongside brewing conflicts over development and regulation of nuclear power are skyrocketing.²³⁷ Tasked with distinguishing the critical from the irrelevant, journalists routinely fail to identify the costs in terms of individual rights coupled with injury to the public overall. We lack meaningful discourse and 360-degree analysis of the public harms flowing from unregulated carbon emissions, fracking, industrial farm waste, shale oil extraction and radioactive leaks from nuclear waste sites. Add to that anxiety over the sanctions, embargoes, proxy wars and regime change flowing from rejection of the petro-dollar and the largest hazard remains hidden in plain sight: potential global fallout when unprecedented climate events meet flawed infrastructure that result in nuclear explosions like Fukushima, whose reactors are still leaking as of this publication.²³⁸ Hurricane

231 Mel Leonor, 'The two-in-one cabinet agency' (*Politico*, 22 June 2018) <www.politico.com/newsletters/morning-education/2018/06/22/the-two-in-one-cabinet-agency-261569>.

232 Many articles about Trump appointees lack substance and are instead filled with gossipy details about personalities. Readers are left to wonder about the state of the agency in relation to public welfare. See e.g. Kevin Breuninger, 'Trump replaced 3 top advisors this month: here's how his new hires compare to their predecessors' CNBC (24 March 2018) <www.cnbc.com/2018/03/23/heres-how-trumps-new-hires-compare-to-their-predecessors.html>.

233 Sam Morris and Francisco Navas, 'The firings and fury, the biggest Trump resignations and firings so far' *The Guardian* (London, 29 August 2018) <www.theguardian.com/us-news/ng-interactive/2018/jul/05/donald-trump-firings-resignations-white-house-full-list-latest>; Coral Davenport, Lisa Friedman and Maggie Haberman, 'EPA chief Scott Pruitt resigns under a cloud of ethics scandals' *New York Times* (New York, 5 July 2018) <www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html>.

234 Aubrey Menardt and Luke Menard, 'Evaluating the environmental impacts of trump's presidency' (*Pacific Standard*, 6 February 2018) <<https://psmag.com/environment/trumps-impact-on-the-environment>>; Joe Romm, 'The EPA scandal that could kill 100,000 Americans: the media ignore Scott Pruitt's real crime: his immoral policies to poison our air and water' (*Think Progress*, 10 April 2018), <<https://thinkprogress.org/pruitt-dangerous-policies-are-the-real-crime-f45c3208a226>>.

235 Justin Worland, 'Scott delivered: EPA head Scott Pruitt has been embroiled in scandals. Here's how he's survived' *Time* (New York, 26 April 2018) <<http://time.com/5251206/scott-pruitt-scandals-epa-survived>>.

236 Amy Davidson Sorkin, 'Trump and the case of congressional ethics' *New Yorker* (New York, 3 January 2017) <www.newyorker.com/news/amy-davidson/trump-and-the-case-of-congressional-ethics>.

237 Garrett Graff, 'Closer to midnight: the Doomsday clock and the threat of nuclear war' (*Wired*, 25 January 2018) <www.wired.com/story/doomsday-clock-nuclear-war>.

238 Jeff Farrell, 'Fukushima nuclear disaster: lethal levels of radiation detected in leak seven years after plant meltdown in Japan, expert warns of "global" consequences unless the plant is treated properly' *The Independent* (London, 2 February 2018) <www.independent.co.uk/news/world/asia/fukushima-nuclear-disaster-radiation-lethal-levels-leak-japan-tsunami-tokyo-electric-power-company-a8190981.html>. The impact of Hurricane Florence which made landfall in the USA in mid-September 2018 flooded half of the state of North Carolina and damaged a nuclear waste facility at Duke Brunswick. E A Crunden, 'Nuclear plant declares emergency: second breach reported at Coal Ash Site amid Florence's rains' (*Think Progress*, 17 September 2018) <<https://thinkprogress.org/florence-coal-ash-nuclear-plant-emergency-92a71c9eaa89>>.

Florence made landfall in the USA on 14 September 2018, then flooded nearly half of the state of North Carolina causing a state of emergency at a nuclear waste facility. Why are *peaceful* nuclear power plants still in existence with the technological advances that have been made with renewable energy sources?²³⁹ Domestically, environmental protection measures have been rolled back. Wildfires rage coast to coast; a toxic algae bloom has overtaken Florida beaches;²⁴⁰ sink-holes have increased due to fracking;²⁴¹ and substantial flooding of interior waterways accompanies coastal erosion.²⁴² An emerging disaster with potable water throughout the USA relates to deteriorating infrastructure and industrial chemical discharge into rivers, lakes and streams.²⁴³ The scarce public debate on these topics is filled with partisan brinksmanship.²⁴⁴ News anchors in general have less credibility than late-night comedians.²⁴⁵ When truth emerges from the shadows, the offering lacks context and structured time for follow-up questions and is simply taken as one more opportunity to fabricate consensus.²⁴⁶

3.2 QUASHING POLITICAL DISSENT

A sense of urgency surrounds declining protection for whistle-blowers, investigative journalists and their confidential sources of information.²⁴⁷ Organisers of mass protests (around the globe) are as likely to become targets of the interests they oppose or suffer real-world consequences as to effect tangible change.²⁴⁸ Data protection and similar

239 Akshat Rathi, 'Europe keeps setting clean-energy records' (*Quartz*, 14 July 2018) <<https://qz.com/1328344/renewable-energy-europe-keeps-setting-new-records-and-killing-off-coal/>>.

240 Mallory Pickett, 'Toxic "red tide" algae bloom is killing Florida wildlife and menacing tourism' *The Guardian* (London, 14 August 2018) <www.theguardian.com/us-news/2018/aug/13/florida-gulf-coast-red-tide-toxic-algae-bloom-killing-florida-wildlife>.

241 Josh Gabbatiss, 'Oil and gas drilling blamed for sinkholes threatening to swallow parts of Texas' *The Independent* (London, 30 March 2018) <www.independent.co.uk/environment/fracking-oil-gas-drilling-blamed-sinkholes-threatening-swallow-texas-earthquakes-a8281281.html>.

242 John Vidal, 'World's beaches being washed away due to coastal development' *The Guardian* (London, 15 December 2014) <www.theguardian.com/environment/2014/dec/15/worlds-beaches-being-washed-away-coastal-development>.

243 'Researchers to study chemical contamination of US waters' (*VOA*, 15 August 2017) <www.voanews.com/a/researchers-to-study-chemical-contamination-of-us-waters/3986542.html>.

244 Dana Nuccitelli, 'Let's be honest – the global warming debate isn't about science' *The Guardian* (London, 4 October 2013) <www.theguardian.com/environment/climate-consensus-97-per-cent/2013/oct/04/global-warming-debate-not-about-science>.

245 Nicholas Ferroni, 'We take our comedians more seriously than our news anchors' (*Huffington Post*, 19 September 2012) <www.huffingtonpost.com/nicholas-ferroni/why-we-take-our-comedians_b_1672758.html>.

246 This sophisticated type of diversion utilises the appearance of lively debate within what is actually a carefully focused spectrum to generate and justify deliberately conceived assumptions. This technique avoids the distinctively biased appearance of one-sided rhetoric and works by presenting a contrived premise for an argument as if it were a universally accepted and obvious truth, so that the audience naturally assumes it to be correct. By maintaining the range of debate in such a way that it appears inclusive of differing points of view, so as to suggest fairness and balance, the suppositions suggested become accepted as fact.

247 Jason Zuckerman and Tom Devine, 'Draining the swamp requires robust whistleblower protections and incentives' (2017) 4 Emory Corporate Governance and Accountability Review <<http://law.emory.edu/ecgar/content/volume-4/issue-special/essays-interviews/draining-swamp-whistleblower-protections-incentives.html>>.

248 See story of Jeremy Hammond and Kevin Poulsen, 'Anonymous hactivist sentenced to ten years' (*Wired*, November 2013) <www.wired.com/2013/11/hammond-sentence>.

regulations²⁴⁹ might be ill-equipped to mitigate the risk identified in *The Circle*: the willingness to give over personal power, to be controlled and manipulated into believing that human value is linked to digital visibility, while ignoring exposure to harm or personal chaos.²⁵⁰ The forces of restraint are vast.²⁵¹

Pundits who are ardent in their defence of free speech principles are lacklustre in their response to large-scale public injury. State and federal governments are dismantling agencies,²⁵² stripping resources for reproductive freedom²⁵³ and impeding the work of long-established democratic institutions.²⁵⁴ The US president declares enemies,²⁵⁵ imposes austerity,²⁵⁶ disseminates neo-Nazi propaganda to millions around the world,²⁵⁷ levels tariffs and sanctions,²⁵⁸ and hints at the nuclear option and Libyan model during tweet storms.²⁵⁹ Activists have been arrested²⁶⁰ and bombed,²⁶¹ and organise in a sea of

249 'GDPR: US news sites unavailable to EU users under new rules' (*BBC News*, 25 May 2018) <www.bbc.com/news/world-europe-44248448>. All EU citizens now have the right to see what information companies have about them, and to have that information deleted. Companies must be more active in gaining consent to collect and use data too, in theory spelling an end to simple 'I agree with terms and conditions' tick boxes. Companies must also tell all affected users about any data breach, and tell the overseeing authority within 72 hours. Each EU member state must set up a supervisory authority, and these authorities will work together across borders to ensure companies comply. Misusing or carelessly handling personal information will bring fines of up to €20 million (\$23.4 million; £17.5 million), or 4 per cent of a company's global turnover.

250 Eggers (n 1) 190–205. Employees of US-based Three Square Market had microchips injected into their hands for convenience, following a trend that has taken off in Sweden. Rachel Metz, 'This company embeds microchips in its employees, and they love it' *MIT Technology Review* (17 August 2018) <www.technologyreview.com/s/611884/this-company-embeds-microchips-in-its-employees-and-they-love-it>.

251 See Jacobs (n 230).

252 Korte (n 229).

253 Anna North, 'How Trump helped inspire a wave of strict new abortion laws' (*Vox*, 4 May 2018) <www.vox.com/2018/3/22/17143454/trump-iowa-heartbeat-bill-abortion-ban-mississippi-roe-v-wade>; Anna North 'The Trump administration is quietly helping states defund planned parenthood' (*Vox*, 20 February 2018) <www.vox.com/identities/2018/2/20/17008402/trump-planned-parenthood-abortion-birth-control-alliance-defending-freedom>.

254 Tucker Higgins, 'White House announces plan to merge Education and Labor Departments' *CNBC* (21 June 2018) <www.cnn.com/2018/06/21/white-house-announces-plan-to-merge-departments-of-education-and-labor.html>.

255 Daniel Lavelle, 'From "Slimeball Comey" to "Crooked Hillary", why Trump loves to brand his enemies' *The Guardian* (London, 17 April 2018) <www.theguardian.com/us-news/shortcuts/2018/apr/17/presidents-nicknames-slimeball-comey-former-fbi-director>.

256 Richard A Greenwald, 'Austerity rules as Trump claims "success" in war on poverty' (*Daily Beast*, 13 July 2018) <www.thedailybeast.com/austerity-rules-as-trump-claims-success-in-war-on-poverty>; see also, Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013).

257 Eric Levitz, 'Trump echoes neo-Nazi propaganda about South Africa (that he heard on Fox News)' *New York Magazine* (New York, 23 August 2018) <<http://nymag.com/daily/intelligencer/2018/08/south-african-farmers-land-trump-tweet-white-genocide.html>>.

258 Nick Wadhams, 'Trump wields a tariffs-and-sanctions hammer in risky strategy' (*Bloomberg*, 13 August 2018) <www.bloomberg.com/news/articles/2018-08-13/trump-wields-a-tariffs-and-sanctions-hammer-in-risky-strategy>.

259 Ryan Bort, 'Trump threatens use of nukes while cancelling North Korean nuke summit' *Rolling Stone* (24 May 2018) <www.rollingstone.com/politics/politics-news/trump-threatens-use-of-nukes-while-canceling-north-korean-nuke-summit-629390>.

260 Tania Unzueta Carrasco, 'Trump is going after immigration activists like me. Will you be next?' (*USA Today*, 7 February 2018) <www.usatoday.com/story/opinion/2018/02/07/trumps-ice-going-after-immigration-activists-like-me-whos-next-tania-unzueta-carrasco-column/1080396001>.

261 Max Blau, 'Dakota access pipeline: protester nearly loses arm after explosion' *CNN* (23 November, 2016) <www.cnn.com/2016/11/23/us/north-dakota-pipeline-conflict>.

conflict.²⁶² Individuals are being detained and imprisoned in democratic countries without regard to their rights under habeas corpus, human rights conventions or international treaties.²⁶³

In the past 18 months, 58 Bills in 31 states have been enacted to punish protesters since an activist's arm was nearly blown off with a hand grenade during a *peaceful* protest at Standing Rock.²⁶⁴ Private military contractors – Tiger Swan, formerly known as Black Water – hired by a private corporation, caused the incident which the international media allowed to quietly pass without an arrest.²⁶⁵ In the past, Blackwater mercenaries fought alongside the US military without regard for conventions, treaties or official rules of engagement.²⁶⁶ Through several incarnations, originally Black Water, then Academi and now Tiger Swan, they remain close allies of the Trump administration and available for hire around the world.²⁶⁷ They first wreaked havoc in Iraq,²⁶⁸ before they were called in to deal with a couple of dozen residents seeking to protect an aquifer that irrigates much of the nation's fruits and vegetables from oil pipeline contamination.²⁶⁹

In contrast, at the time of the expulsion of Russian diplomats from the UK over the Skripal poisoning case,²⁷⁰ a prominent Member of Parliament spoke of the harsh trends of exaggerated responses: invoking the wisdom of refrain in getting too far out ahead of an ongoing inquiry, while pushing phrases like 'military-grade chemicals encourage hysteria'.²⁷¹ So, in the UK there was a televised parliamentary discussion about exaggerated use of militarised language, while the US government has no official inquiry into the use of military-style weapons against peaceful protesters on US soil, and the media has barely noticed.

3.3 CORPORATE COLONIALISM

Tropical hurricanes were devastating in 2017, particularly for the US island of Puerto Rico where millions were stranded without food, water, power and medical care for months on end. During a long weekend at his New Jersey golf course, Trump responded

262 Sophia Sadinsky, 'At resistance school, Trump-era activists learn to get down to the root of things' (*The Nation*, 18 April 2017) <www.thenation.com/article/at-the-resistance-school-trump-era-activists-learn-to-get-down-to-the-roots-of-things>.

263 Esther Addley, Owen Bowcott, Jessica Elgot, Paul Farrell and David Crouch, 'Julian Assange is in arbitrary detention, UN panel finds' *The Guardian* (London, 4 February 2016) <www.theguardian.com/media/2016/feb/04/julian-assange-wikileaks-arrest-friday-un-investigation>.

264 Traci Yoder, 'Conservative-led anti-protest legislation already doubled since last year' (National Lawyers Guild, 15 February 2018) <www.nlg.org/conservative-led-anti-protest-legislation-already-doubled-since-last-year>.

265 John Hageman, 'Dakota Access security firm operated in ND without license, board says' *Bismarck Tribune* (Bismarck, 27 June 2017) <https://bismarcktribune.com/news/state-and-regional/dakota-access-security-firm-operated-in-nd-without-license-board/article_71b32e07-0b58-54f6-a6e1-e60c085051db.html>.

266 Blau (n 261)

267 Nick Visser, 'Here's what you should know about that secret Seychelles meeting' (*Huffington Post*, 8 March 2018) <www.huffingtonpost.com/entry/erik-prince-seychelles-meeting_us_5aa0be4ae4b0d4f5b66d566d>.

268 A massacre in Nisour Square Baghdad killed 17 civilians and injured 20 more. Peter W Singer, 'The dark truth about Blackwater' (Brookings Institute, 2 October 2007) <www.brookings.edu/articles/the-dark-truth-about-blackwater>.

269 Jenni Monet, 'What Standing Rock gave the world' (*EcoWatch*, 19 March 2018) <www.ecowatch.com/what-standing-rock-gave-world-2549906333.html>.

270 'Spy poisoning is latest in string of suspicious cases in UK' NBC (10 March 2018) <www.nbcnews.com/news/world/spy-poisoning-latest-string-suspicious-cases-u-k-n855441>.

271 Salisbury Incident, HC Deb 14 March 2018, vol 637 <<https://hansard.parliament.uk/commons/2018-03-14/debates/071C37BB-DF8F-4836-88CA-66AB74369BC1/SalisburyIncidentFurtherUpdate>>.

to media-led complaints by attacking Puerto Ricans: calling them lazy and ungrateful.²⁷² The bids for privatisation swiftly followed. Small mid-West firms with little or no expertise were awarded multimillion-dollar contracts to rebuild the power grid.²⁷³ Thereafter, a weakened Puerto Rico Energy Commission, crony governing board and secrecy around budgetary appropriations spelled disaster for the commonwealth.²⁷⁴ Simultaneously, there was a notable influx of Bitcoin rich kids who envision Puerto Rico as the new crypto-utopia. Others saw ‘behaviour that reeked of disaster capitalism – the use of a natural or economic calamity to reshape and mould a society into one which entrenches a libertarian, hypercapitalistic worldview’.²⁷⁵

In 2018, Nation reporter John Washington notes that US immigration officials are sending a message to the world’s asylum seekers: ‘The US is no place of refuge’, citing family separations, excessively long detention, and ‘other ways the immigration bureaucracy is making life impossible for asylum seekers’.²⁷⁶ In early June 2018, a seemingly coordinated assault on migrants washed over the US and EU like a tidal wave.²⁷⁷ The national and international news alternated between discussions about the plain cruelty of luring children away from their parents at the border, placing their physical and mental health in jeopardy by inhumane separations,²⁷⁸ and leading European countries denying docking privileges to boats carrying migrants rescued off the Italian coast.²⁷⁹ Drowning asylum seekers and toddlers being thrust into cages, or transported to strange new environments and denied physical contact with any caregiver, created a chilling spectre of toxic disruption of civil society and the end of decency full-stop.²⁸⁰

272 Dee Parvaz, ‘Trump attacks hurricane-ravaged Puerto Ricans as lazy and ungrateful’ (*Think Progress*, 30 September 2017) <<https://thinkprogress.org/trump-attacks-puerto-rico-lazy-49cff500c154>>.

273 Clark Mindock, ‘Tiny Energy firm awarded \$300m Puerto Rico electricity contract bars government from auditing agreement’ *The Independent* (London, 27 October 2017) <www.independent.co.uk/news/world/americas/us-politics/puerto-rico-whitefish-electricity-contract-deal-audit-fema-a8023956.html>.

274 Javier Balmaceda, ‘Puerto Rico’s PREPA privatization: a sale too private’ (*Forbes*, 3 April 2018) <www.forbes.com/sites/debtwire/2018/04/03/puerto-ricos-prepa-privatization-a-sale-too-private/#29784b667490>.

275 Naomi Klein, ‘How power profits from disaster’ *The Guardian* (London, 6 July 2017) <www.theguardian.com/us-news/2017/jul/06/naomi-klein-how-power-profits-from-disaster>.

276 John Washington, ‘ICE is sending a message to the world’s asylum seekers: the US is no place of refuge’ (*The Nation*, 29 May 2018) <www.thenation.com/article/ice-is-sending-a-message-to-the-worlds-asylum-seekers-the-us-is-no-place-of-refuge>.

277 Caitlin Dickerson, ‘Hundreds of immigrant children have been taken from parents at US Border’ *New York Times* (New York, 20 April 2018) <www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>; Bethany Carson and Eleana Diaz, ‘Payoff: how Congress ensures private prison profit with an immigrant detention quota’ (*Grassroots*, April 2015) <<https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota>>.

278 Chas Danner, ‘Separating families at the border was always part of the plan’ *New York Magazine* (New York, 17 June 2018) <<http://nymag.com/daily/intelligencer/2018/06/separating-families-at-border-was-always-part-of-the-plan.html>>; the policy has long been in effect in China separating Muslim children from their parents. Sigal Samuel, ‘China’s jaw-dropping family separation policy’ (*The Atlantic*, 4 September 2018) <www.theatlantic.com/international/archive/2018/09/china-internment-camps-uighur-muslim-children/569062/><<https://www.theatlantic.com/international/archive/2018/09/china-internment-camps-uighur-muslim-children/569062>>.

279 Matteo Civillini, ‘EU paid Italy at least €200,000 for migrant stunt’ (*EU Observer*, 22 August 2018) <<https://euobserver.com/migration/14264>>.

280 Dominique Mosbergen, ‘Trump administration holding babies and toddlers in multiple “tender age” shelters’ (*Huffington Post*, 20 June 2018) <www.huffingtonpost.com/entry/tender-age-shelters-trump-border-family-separations_us_5b29d2d0e4b05d6c16c8c122>. There are three shelters running in South Texas, with a fourth one planned for Houston, the report said.

One obvious flaw in ceding key public functions to private control is the expansion of unfettered decision-making by corporate elites, where citizens could get their arm blown off for holding a sign. ‘The relationship between US Immigration policies and private contractors has been disastrous for immigrants,²⁸¹ as well as for American taxpayers, who pay more than \$2 billion each year to maintain the detention system.’ The Detention Watch Network summarised a recently released report: ‘Although a lack of due process, inhumane and sometimes fatally inadequate conditions,²⁸² and a woeful lack of both oversight and transparency are endemic to the entire system, privatization has exacerbated each of these problems.’²⁸³

As private contractors build cages for pre-schoolers,²⁸⁴ we endure endless academic debates about whether adjustments in our regulatory apparatus would be sufficient to curb abuses, as if enforcement is anything less than a matter of willpower. In the meantime, activists and journalists have been threatened,²⁸⁵ censored and detained in record numbers. Whistle-blowers are targeted for retribution, and even imprisoned without charge as public figures openly call for their assassination.²⁸⁶ Without sufficient public oversight and safeguards for those who take great risks to uncover corruption, we would be forced to rely upon politicians, tainted commissions²⁸⁷ and oligarch-owned news agencies²⁸⁸ for the preservation of democracy.

3.4 ALL RUSSIA, ALL-THE-TIME!

It is much more difficult to see a propaganda system at work where the media is private and formal censorship is absent. This is especially true where media outlets actively compete, periodically attack and expose corporate and governmental malfeasance, and aggressively portray themselves as spokespersons for free speech and the general community interest:

281 ‘The real alternatives to detention’ (*Justice For Immigrants*, 27 June 2017) <<https://justiceforimmigrants.org/what-we-are-working-on/immigrant-detention/real-alternatives-detention>>.

282 Critics often contend private companies make their services more attractive by cutting corners on essentials, like qualified staff, quality food, or care for mental health and physical health. Blake Ellis, Melanie Hicken and Bob Ortega, ‘Handcuffs, assaults, and drugs called “vitamins”: children allege grave abuse at migrant detention facilities’ *CNN Investigates* (21 June 2018) <www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs>.

283 Elise Foley and Roque Planas, ‘Homeland Security panel wants to quit for-profit immigrant detention’ (*Huffington Post*, 1 December 2016) <www.huffingtonpost.com/entry/homeland-security-immigration-detention-for-profit_us_58406afce4b09e21702d587c>.

284 ‘Senator turned away at facility holding immigrant children’, *New York Post* (New York, 5 June 2018) <<https://nypost.com/2018/06/05/senator-turned-away-at-facility-holding-immigrant-children>>.

285 Davis Richardson, ‘Milo Yiannopoulos encourages vigilantes to start gunning journalists down’ *The Observer* (London, 26 June 201) <<https://observer.com/2018/06/milo-yiannopoulos-encourages-vigilantes-start-gunning-journalists-down>>; Zeeshan Aleem, ‘A Russian journalist faked his own death to track down his would-be assassins’ (*Vox*, 30 May 2018) <www.vox.com/world/2018/5/30/17408960/arkady-babchenko-russian-journalist-kiev-ukraine-putin>.

286 ‘Assange lawyer condemns calls for assassination of WikiLeaks’ founder’ NBC (28 June 2013) <www.nbcnews.com/id/40467957/ns/us_news-wikileaks_in_security/t/assange-lawyer-condemns-calls-assassination-wikileaks-founder/#.W4_20tjZRjp>.

287 See e.g. Professor Jerry Kroth, *Coup d’etat: The Assassination of President John F Kennedy* (Genotype 2013).

288 John Pilger, ‘Murdoch is but one player in the media junta’ ABC News (2 July 2012) <www.abc.net.au/news/2012-07-02/pilger-media-junta/4105038>.

What is not evident (and remains undiscussed in the media) is the limited nature of such critiques, as well as the huge inequality in command of resources . . . [which impedes] access . . . and [ability to influence] its behaviour and performance.²⁸⁹ (Professor Noam Chomsky)

Potential for proving that Vladimir Putin rigged the 2016 presidential election, with the knowledge and cooperation of Trump and his campaign aides, continues to dominate the news cycle.²⁹⁰ The saga of Russian culpability for cyber-hacking farms that disrupt global electoral politics, target critical infrastructure, and the poisoning of its declared enemies knows no bounds.²⁹¹ A student-organised protest, March for Our Lives, was held in the wake of the 17th school shooting across the US in the first quarter of 2018 alone. Most shootings were targeted hits on one or more individuals, and while there have been one to two school shootings every week this year, it takes a mass shooting to garner national media attention.²⁹² Students in Parkland, Florida, were featured on the news after a neo-Nazi-identified former student went on a shooting rampage in March 2018, making it the 56th mass shooting this calendar year.²⁹³ To report it in the context of school shootings missed the larger significance.²⁹⁴ Surviving students organised multiple national days of protest and were roundly praised for their vigilance and courage while analysts conveniently ignored how little they received in return for their monumental efforts.²⁹⁵ This shooting became the touchstone that sparked nationwide protests leading to a new Bill in the state of Florida with reports that more states are slated to follow suit.²⁹⁶ Legislation was long overdue and painfully strained against a backdrop of politicians cowering at the prospect of challenging the pro-gun political super-pac known as the National Rifle Association (NRA).

Fox News show host Laura Ingraham labelled student protest leader David Hogg a loser, accusing him of whining after failing to enter university.²⁹⁷ Seventeen-year-old

289 Edward Herman and Noam Chomsky, 'A propaganda model' excerpted from *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon 1988) <<https://chomsky.info/consent01>>.

290 'Noam Chomsky on mass media obsession with Russia and the stories not being covered in the Trump era' (*Democracy Now*, 27 July 2018), interview with Noam Chomsky <www.democracynow.org/2018/7/27/noam_chomsky_on_mass_media_obsession>.

291 Fontanella-Khan and Gambino (n 154); Ewen MacAskill, 'Former Bush press secretary claims Iraq War fuelled by propaganda' *The Guardian* (London, 28 May 2008) <www.theguardian.com/world/2008/may/28/georgebush.usa>.

292 Saeed Ahmed and Christina Walker, 'There has been, on average, 1 school shooting every week this year' CNN (25 May 2018) <www.cnn.com/2018/03/02/us/school-shootings-2018-list-trnd>

293 Melia Robinson, Skye Gould and Samantha Lee, 'There have been 154 mass shootings in the US so far in 2018 – here's the full list' (*Business Insider*, 28 June 2018) <www.businessinsider.es/how-many-mass-shootings-in-america-this-year-2018-2?r=US&IR=T>.

294 Courtland Jeffrey, 'Mass shootings in the US: when, where they have occurred in 2018' ABC News (27 August 2018) <www.abc15.com/news/data/mass-shootings-in-the-us-when-where-they-have-occurred-in-2018>.

295 Rick Hampson, 'Can March for our Lives rally avoid the fate of the Million Mom March?' (*USA Today*, 22 March 2018) <www.usatoday.com/story/news/2018/03/22/millions-moms-never-again-different-effect-march-our-lives/440961002>.

296 Jenny Jarvie, 'Bucking the NRA, Florida governor signs landmark gun control legislation' *Los Angeles Times* (Los Angeles, 9 March 2018) <www.latimes.com/nation/la-na-florida-gun-law-20180309-story.html>. Matt Vasilogambros, 'After Parkland, states pass 50 new gun-control laws' (*Huffington Post*, 2 August 2018) <www.huffingtonpost.com/entry/parkland-shooting-gun-control-laws_us_5b630dd8e4b0cb29100e59d1>. The Marjory Stoneman Douglas High School Public Safety Act raises the minimum age to purchase a firearm from 18 to 21, imposes a three-day waiting period for most gun purchases, and bans the sale or possession of 'bump e.stocks', which allow semi-automatic rifles to mimic machine guns.

297 Bryan Logan, 'Fox News host mocked a Parkland shooting survivor – now he's going after her advertisers' (*Business Insider*, 29 March 2018) <<http://uk.businessinsider.com/laura-ingraham-david-hogg-college-rejection-letters-2018-3>>.

Hogg immediately tweeted a list of a dozen companies that sponsored her show and urged his supporters to demand that they cancel their ads.²⁹⁸ And they did. Ingraham tweeted an apology – ‘sorry for any hurt or upset caused Hogg or any of the “brave victims” of Parkland’. The departures continued.²⁹⁹ The story within the story, vividly demonstrated by a 17-year-old, is that boycotts work. Legendary boycotts led by students, ministers, celebrities and musicians have been a time-honoured means of hitting tone-deaf political figures where it hurts.³⁰⁰ When the protests subsided, we witnessed a return to Russia-gate.

In the rush to curtail fake news, outlets critical of US policy are now required to register as foreign agents,³⁰¹ without qualitative analysis of how they are much different from US nationals famous for highlighting our hypocrisy.³⁰² Russia Today (RT) was sanctioned by media watchdogs for ‘misleading’ coverage, even as it gathered five Emmy nominations for its investigative reporting.³⁰³ Excess focus upon critics’ flawed analysis lulls the electorate into believing that waving the flag with the nation’s anthem quietly playing in the background translates into news it can use.³⁰⁴ Conscious devotees of nightly news coverage have witnessed ever-thickening plots where implausibility competes with irrelevancy for those seeking serious explanations for what is actually happening in what are proudly hailed as First-World governments.³⁰⁵ One could hardly discern if or how the much-touted justifications for press freedom on behalf of the public interest is being served by the onslaught of nightly *Breaking News*. Star journalists may be hindered from production and delivery of the news they believe to be most relevant and steered toward buzzwords: *you heard it here first*.³⁰⁶ Reflective programming is

298 Natasha Bach, ‘Why Fox News’s Laura Ingraham is facing an advertiser boycott - again’ (*Fortune*, 22 June 2018) <<http://fortune.com/2018/06/22/laura-ingraham-david-hogg-advertising-boycott-migrant-families>>.

299 Tom Kludt, ‘Laura Ingraham’s apology to David Hogg has not stemmed the advertiser exodus’ (*Money*, 30 March 2018) <<https://money.cnn.com/2018/03/29/media/laura-ingraham-apologizes-david-hogg>>.

300 Adam Behr, ‘Boycotts by celebrities and musicians hit Trump where it hurts’ (*The Conversation*, 23 January 2017) <<https://theconversation.com/boycotts-by-celebrities-and-musicians-hit-trump-where-it-hurts-71743>>.

301 Josh Gerstein, ‘Lawmakers push for Al Jazeera to register as foreign agent’ (*Politico*, 5 March 2018) <www.politico.com/story/2018/03/05/al-jazeera-press-foreign-agent-437072>.

302 The tone is much different in the UK. One MP addressing a statement from Teresa May read: ‘I would like to draw her attention to something she said in her statement that I would not want to get lost, which is that although our response must be robust it must also remain true to our values. As such, will she say, as I think she has already, not that we will ban Russia Today, which is a strong point to make, but that this country believes in a free media, that we are not frightened of it, even though we hear opinions that are against us, and that we also believe in the rule of law and democracy? See Salisbury Incident (n 271).

303 Precious N Chatterje-Doody, ‘“Post-truth” media really is shifting the news agenda – and more subtly than it seems’ (*The Conversation*, 1 September 2017) <<https://theconversation.com/post-truth-media-really-is-shifting-the-news-agenda-and-more-subtly-than-it-seems-82349>>.

304 Aleks Krotoski, ‘What effect has the internet had on journalism?’ *The Guardian* (London, 19 February 2011) <www.theguardian.com/technology/2011/feb/20/what-effect-internet-on-journalism>.

305 Jon Michaels, ‘How Trump is dismantling a pillar of the American state’ *The Guardian* (London, 7 November 2017) <www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state>: ‘Donald Trump is presiding over the most withering, devastating, and trenchant attack on the American administrative state this nation has ever known.’

306 Megan Garber, ‘Stop calling everything “breaking news,” please (Part 5,264): ‘Important tweet from the Associated Press: a plane landed safely this morning’ *The Atlantic* (23 July 2014) <www.theatlantic.com/technology/archive/2014/07/the-tweet-that-should/374903>.

commandeered by reports from three major newspapers which routinely time the posting of their Russian collusion-related articles to coincide with the start of key broadcasts.³⁰⁷ Cable news journalists are thereby discouraged from developing higher levels of interaction with their viewers, staff and even experts who may wish to influence topics of coverage.³⁰⁸

What is immediately lost in the shuffle in this chain of custody in the presentation of the news itself? Reuters declares what is important, then the *New York Times* and *Washington Post* engage in some mixture of reporting on the top stories (according to Reuters or the Associated Press) in the rush to deliver some new detail.³⁰⁹ The articles are time-released for maximum effect.³¹⁰ Planning and preparation for one line of inquiry and reporting is often, on MSNBC for example, shelved for an emerging system of chat and interruption: ‘wait this just in from . . . the _____ has just reported that . . .’. It resounds like a ride on a merry-go-round with that godawful music from which there is no escape. Never mind rumours of government intelligence *insider influence* on the national papers that shape nightly news content with well-timed commotion.³¹¹ One media watchdog alleges that dozens of democratic candidates for the 2018 mid-term elections, whom media personalities eagerly imply would oust corrupt politicians (i.e. impeach Trump), have backgrounds working in and around US intelligence.³¹²

As Russia-gate spreads like a contagion across public discourse on both sides of the Atlantic, diligence is required for inspecting the integrity of electoral processes and evaluating the nature and viability of government responses to threats. Former UK Prime Minister David Cameron established a Behavioural Insights Team, or ‘nudge unit’ during his premiership in order to better influence society’s behaviour. Seen as a low-cost and simple tool that has the potential to positively alter the behaviours and decisions of millions, the ‘nudge’ has been presented as a benign and effective tool for future governments.³¹³ Yet it has deep roots, reminiscent of theories developed in the 1920s by organisations such as the Tavistock Institute, a centre for the study of human behaviour, mind control, propaganda and social manipulation.³¹⁴ Created in London, it spread overseas with the financial help of the Rockefeller Foundation. Its influence increased

307 Darren Samuelsohn and Jason Schwartz, ‘Meet the Mueller pundits’ (*Politico*, 2 July 2018) <www.politico.com/story/2018/07/02/robert-mueller-cable-news-pundits-686877>: ‘Former federal prosecutors are collecting five- or even six-figure salaries as cable news networks clamor to find talking heads who can opine on every aspect of special counsel Robert Mueller’s investigation.’

308 Lisa Wade, ‘How our media bubble protects our ideologies’ (*Society Pages*, 12 September 2016) <<https://thesocietypages.org/socimages/2016/09/12/blue-feed-red-feed-how-our-media-bubble-protects-our-ideologies>>.

309 Amar Too, ‘Reuters built an algorithm to flag and verify breaking news on Twitter’ (*Verge*, 1 December 2016) <www.theverge.com/2016/12/1/13804542/reuters-algorithm-breaking-news-twitter>.

310 Ashley Muddiman and Natalie (Talia) Jomini Stroud, ‘10 things we learned by analyzing 9 million comments from the New York Times’ (University of Texas Center for Media Engagement, 21 June 2016) <<https://mediaengagement.org/research/10-things-we-learned-by-analyzing-9-million-comments-from-the-new-york-times>>.

311 Carl Bernstein, ‘How America’s most powerful news media worked hand in glove with the Central Intelligence Agency and why the Church Committee covered it up’ <http://www.carlberstein.com/magazine_cia_and_media.php>.

312 Tim Hains, ‘Jimmy Dore Show: dozens of CIA agents running as Democrats in 2018 elections’ (*Real Clear Politics*, 15 March 2018) <www.realclearpolitics.com/video/2018/03/15/jimmy_dore_show_dozens_of_cia_agents_running_as_democrats_in_2018_elections.html>.

313 Smith (n 10).

314 Daniel Estulin, *Tavistock Institute: Social Engineering the Masses* (Trine Day 2015).

when it combined the study of anthropology, economy, organisations, politics, psychology, psychoanalysis, psychiatry and sociology. Professor Jerry Kroth continues to issue prescient warnings³¹⁵ about the potential for being duped. Claims that the electorate may be engulfed in a series of false ideas has been dismissed as alarmist and typically ignored.³¹⁶ At this point in time, careless speculation over our collective mental instability is unproductive for the masses subject to the current state of affairs.³¹⁷ Trumpocracy coupled with our collective delusions and denials, supported by misuse of personal data surreptitiously gathered through mass surveillance, monitors, tracking and profiles have risen like a giant Pillsbury Dough Boy seeking to devour national resources.³¹⁸

4 Conclusion: the beating drum

According to most dictionaries, the phrase ‘wag the dog’ denotes a strategy to divert attention away from political scandal through use of military action.³¹⁹ A Forbes foreign affairs correspondent offers a detailed description of the phenomena in an article titled ‘Iran to ditch the dollar in wake of Trump’s “Muslim ban”’.³²⁰ The US Supreme Court has upheld the ban, disrupting numerous lower court rulings outlining its constitutional violations, while the global community must brace for extended military actions and an even larger influx of refugees across Europe.³²¹

As these events unfold, the future role of media will come under greater scrutiny.³²² A case study of Australia has led to its designation as the world’s first Murdochcracy: ‘a dominant force online, in pay-TV and publishing, Rupert controls seventy per cent of Australia’s metropolitan press.’³²³ With monopolies in state capitals and provincial centres, he owns the country’s only national newspaper.’ Media monopoly is described here as propagating a brand of political extremism. It has nothing to do with facism per se, but thrives on the continuing concentration of the world’s wealth in a few hands coupled with accelerating impoverishment of the majority.³²⁴ Their ideological message is a ‘drumbeat of global and domestic economic piracy and the cult of perpetual war’.³²⁵ All of this was

315 Jerry Kroth, ‘Implosion: delusion, denial, and the prospect of collapse’ (NOOK 2017).

316 See, Naomi Wolf, *The End of America: Letter of Warning to a Young Patriot* (Chelsea Greene 2007).

317 See William W Bostock, ‘Collective mental state and individual agency: qualitative factors in social science explanation’ (2002) 3(3) Forum: Qualitative Social Research, Article 1 <www.qualitative-research.net/index.php/fqs/article/view/835/1814>.

318 Tracking these trails is behavioural advertisers’ bread and butter. The type of information tracked and collected can include IP addresses, pages visited (on a single site or across sites), length of time spent on pages, advertisements viewed, articles read, purchases made, search terms used, user preferences such as language and web browser type, operating system and geographical location.

319 <www.dictionary.com/e/slang/wag-the-dog>

320 Dominic Dudley, ‘Iran to ditch the dollar in wake of Trump’s “Muslim ban”’ (*Forbes*, 30 January 2017) <www.forbes.com/sites/dominicdudley/2017/01/30/iran-to-ditch-dollar/#6362872c6715>.

321 Trita Parsi, ‘In Europe, fears loom that the US is seeking regime collapse in Iran’ (*Axios*, 20 August 2018) <www.axios.com/in-europe-fears-loom-that-the-us-is-seeking-regime-collapse-in-iran-72071dd4-ad88-451a-9dcf-cff44b9602f3.html>.

322 ‘He said, she said journalism: lame formula in the land of the active user’ (*Press Think*, 12 Apr 2009) <http://archive.pressthink.org/2009/04/12/hesaid_shesaid.html>.

323 Pilger (288).

324 Kate Vinton, ‘These 15 billionaires own America’s news media companies’ (*Forbes*, 1 June 2016) <www.forbes.com/sites/katevinton/2016/06/01/these-15-billionaires-own-americas-news-media-companies/#778dbed4660a>.

325 Pilger (n 288); the US-backed Saudi invasion of Yemen has produced an epidemic that threatens the Middle East. Pallab Ghosh, ‘Yemen cholera epidemic “controlled” by computer predictions’ (*BBC News*, 27 August 2018) <www.bbc.com/news/health-45259922>.

made possible through the transformation of Western societies by the ‘invisible’ power of public relations and lobbying.³²⁶

The wasteland that divides the public interest from the role of broadcast media as a Fourth Estate – justified from a constitutional perspective for service as watchdogs over governments, big business and transactions between them – has rarely been more vast. Many factors contribute to declining public confidence in the news media. Hyper-focus upon minutia, vitriolic debates and prurient distractions present greater risks than currently acknowledged. Nightly news delivered as propaganda leaves the core of the public’s interest in an ill-defined space with a proliferation of journalists who lack the capacity to structure intelligent public debate. Leeds University professor Paul Wragg delivered closing remarks at the end of a day-long conference which featured the papers that form this special edition. Thanks to his insightful observation, it has become difficult to enjoy a full night’s sleep. He politely informed the participants that ‘democracy may be coming to an end and there’s nothing we can do about it’.³²⁷ Jack Goldsmith, senior fellow at the Hoover Institution, and former assistant attorney general in the George W Bush administration has made a similar suggestion.³²⁸ However, the former Finance Minister of Greece, Yanis Varoufakis, holds a different vision of future prospects. Rejecting feckless capitulation, he is currently organising for a more democratic Europe under DiEM25 (Democracy in Europe Movement 2025).³²⁹ Varoufakis has teamed up with US Senator Bernie Sanders in calling on progressives worldwide to unite around a vision of shared prosperity, security and dignity. Unsurprisingly, details of their plan have been essentially ignored by both academics and mainstream media.³³⁰

326 Pilger (n 288).

327 See Grayling (n 28). I have since joined the chorus of support for a Human Knowledge Project, establishing a 50-year goal to create a global digital library and information resource that every child anywhere in the world can tap into. The technology exists, but not the political will. Siva Vaidhyanathan asks: ‘Do we have to wait for the world to be civilised enough for a Human Knowledge Project to become feasible, or would it only become civilised enough if such a project existed? I suspect the latter: and therefore think that all those who are interested should put their shoulders to the wheel and create it. That would be a true search for knowledge, and the most liberating thing we could ever do.’

328 Goldsmith (n 64).

329 <<https://diem25.org>>

330 Atossa Araxia Abrahamian, ‘Saving the sacred cow, Yanis Varioufakis’s *Vision for a More Democratic Europe*’ (*Nation*, 28 May 2018). See also, Paul O’Connell, ‘Human rights: contesting the displacement thesis’ (2018) 69(1) Northern Ireland Legal Quarterly 19–35. Offering a re-joiner to the left-progressive critique of human rights discourse as embracing rights language with moderating influence at a time when injustice spawned by global capitalism and hyper-imperialism seem all-pervasive. A similar linguistic critique was under taken by Marian Duggan in a section titled ‘Homophobic victimization from rhetoric to reality’. Language around sexual orientation determines whether it can merge with other driving factors ‘underpinning a move towards a “post-conflict” society’. Duggan queries heteronormative cultural dynamics that exacerbate homophobic victimisation despite the discourse of cohesion, inclusion and integration. Marian, Duggan, ‘Lost in transition? Sexuality and justice in post-conflict Northern Ireland’ (2017) 68(2) Northern Ireland Legal Quarterly 159–80.

Fakebook: why Facebook makes the fake news problem inevitable

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Abstract

The current 'fake news' phenomenon is a modern manifestation of something that has existed throughout history. The difference between what happens now and what has happened before is driven by the nature of the internet and social media – and Facebook in particular. Three key strands of Facebook's business model – invading privacy to profile individuals, analysing mass data to profile groups, then algorithmically curating content and targeting individuals and groups for advertising – create a perfect environment for fake news. Proposals to 'deal' with fake news either focus on symptoms or embed us further in the algorithms that create the problem. Whilst we embrace social media, particularly as a route to news, there is little that can be done to reduce the impact of fake news and misinformation. The question is whether the benefits to freedom of expression that social media brings mean that this is a price worth paying.

Keywords: fake news; Facebook; social media; internet; privacy; freedom of expression

1 Fake news

On 3 November 2016, Craig Silverman and Lawrence Alexander wrote a piece for BuzzFeed, identifying 'more than 100 pro-Trump websites being run from a single town in the former Yugoslav Republic of Macedonia'.² Their headline read 'How teens in the Balkans are duping Trump supporters with fake news'. This appears to have been the first time the words 'fake news' were used – but the phenomenon that it illustrates is something that has existed for a very long time, perhaps as long as history itself.³ Silverman and Alexander's story covered one very specific form of fake news – websites that purported to be US news and political websites providing information and analysis, but were in fact created in Macedonia and full of stories that, in essence, were not true. The Macedonian teens were doing it entirely for financial gain – they had quickly discovered that they could make advertising money through Google AdSense because of the numbers of

1 Dr Paul Bernal, Senior Lecturer in IT, IP and Media Law, UEA Law School.

2 See www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.copGOX3Rpo#.jmXg3vJm0R.

3 Herodotus, known as the 'father of history' is also known as the 'father of lies' (see e.g. J A S Evans, 'Father of history or father of lies: the reputation of Herodotus' (1968) 64(1) *The Classical Journal* 11–17). Fake news may be even older: there is no real reason to believe that misinformation, disinformation and other phenomena related to 'fake news' did not occur in prehistory, and plenty of reason to believe that they would have.

people visiting their sites. Their ‘fake news’ was popular and successful – and its success provided a number of clues to why the age-old problem of misinformation had gained a new and spectacular lease of life. Those clues need to be understood by those who wish to do something against ‘fake news’ – because they were understood by those who wished to harness its effects and effectiveness. Fake news moved from being a small nuisance, a few Macedonian teenagers making money, to something that might have the potential to aid in the undermining of democracy in many places around the world.

A large part of why this is the case relates to the way that the social media – and Facebook in particular – functions. Though, as shall be shown, fake news has existed for a very long time, with varying degrees of success, the ‘new world’ of social media is ideally suited to its propagation and effectiveness, bringing it to a whole new level. Many different aspects of Facebook in particular contribute to this: the aggregation and analysis of data, the profiling and the targeting. These start with the ‘natural’ tendencies of the internet towards polarisation, where ‘like-minded’ people come together, act as echo chambers and reinforcers – as noted by Sunstein as early as 2001,⁴ and taken further by Bernal and Pariser in 2010 and 2011 respectively, through the concepts of ‘back-door Balkanisation’ and ‘filter bubbles’⁵ – and magnifies and builds upon them. There are both ‘automatic’ phenomena – a tendency for fake news to spread by its nature and the structures of social media – and deliberately instigated phenomena through which malicious actors can cause fake news to spread for their own purposes, whether these be political, for financial gain (as for the Macedonian teenagers) or simply out of amusement (as for some of the original ‘trickster’ internet trolls).⁶

The way that these phenomena are supported and, in some ways, driven by some of the fundamental aspects of Facebook and other social media means that the current attempts to address the fake news problem are highly unlikely to be successful in any meaningful way. Most address the fake news itself rather than the way that it is spread or the reasons it is effective – and as fake news has always existed and has become remarkably easy to create, particularly in the social media, this is likely to be at best a futile game of whack-a-mole.

If the problems of fake news are really to be addressed, something more fundamental needs to happen. Either the way we use social media has to change – most importantly the use of Facebook and similar social media as a source of news – or the structure and business models of social media have to change fundamentally. The first seems unlikely; the second all-but impossible, as without data analysis, profiling and targeting it is hard to see a business model for Facebook and other social media enterprises. Whilst Facebook and similar social media exist, there will be a problem with fake news – and as the public seems to have little appetite for leaving Facebook, that means that the problems associated with fake news are just going to grow, no matter what lawmakers and technologists try to do about them.

4 In Cass Sunstein, *Republic.com* (Princeton University Press 2001) and further developed in Cass Sunstein, *Republic.com 2.0* (Princeton University Press 2007).

5 ‘Back-door Balkanisation’ is discussed in P A Bernal, ‘Web 2.5: the symbiotic web’ (2010) 24 (1) *International Review of Law, Computers and Technology* 25–37, and ‘filter bubbles’ in Eli Pariser, *The Filter Bubble: What The Internet is Hiding from You* (Viking 2011). It should be noted that there has been some questioning of the polarisation effects – see e.g. L Boxell, M Gentzkow and J M Shapiro ‘Is the internet causing political polarization? Evidence from demographics’ (NBER Working Paper Series, Working Paper 23258, 2017) <www.nber.org/papers/w23258>.

6 See P A Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press 2018), ch 8, particularly 196–9.

1.1 WHAT IS FAKE NEWS?

The concept of ‘fake news’ is somewhat nebulous: a precise definition is neither easy nor necessarily useful. Journalist Matthew D’Ancona defined fake news as ‘the deliberate presentation of falsehood as fact’⁷ which captures the ‘fakeness’ but not necessarily the ‘news’ part of the concept. What characterised the stories of the Macedonian teenagers was in part that they were presented as though they were conventional – ‘real’ – news, on sites that looked like news sites. Fake news in its purest form is not just falsehoods pretending to be true (essentially just lies), but falsehoods presenting themselves as both real and ‘news’, in the sense that they are new, relevant and important enough to be ‘newsworthy’.

The nature of how we now consume news means that fake news does not necessarily have to be presented that way. A Facebook page or even a tweet could count – so long as the Facebook page or tweet was both ‘fake’ and ‘news’. Tweeting something untrue about what you had for breakfast would not count, for example, but tweeting that you saw a politician in a compromising situation could: it would be *newsworthy*. Similarly, YouTube videos taking footage of one event and labelling it as another – a protest march in one country at one time presented as coming from another country at another time, protesting about something quite different – would count as fake news.

Concentrating on what exactly constitutes ‘fake news’, however, misses much of the point. The European Commission’s ‘independent High Level Group on fake news and online disinformation’⁸ gets part of the way to seeing this. ‘The threat is disinformation, not fake news’ is the headline in its ‘problem definition’ section. It goes on to say that ‘the term is inadequate to capture the complex problem of disinformation, which involves content that is not actually or completely “fake” but fabricated information blended with facts’ and that this includes ‘practices that go well beyond anything resembling “news” to include some forms of automated accounts used for astroturfing, networks of fake followers, fabricated or manipulated videos, targeted advertising, organized trolling, visual memes, and much more’.⁹

Whilst the High Level Group is right that the fake news itself is not the real problem – and that it has always existed – and right that what might be called the disinformation campaigns use a wide range of tactics, it does not look in any depth into the role that the systems and business practices of the social media play in this. The disinformation campaigns are not accidents or exceptions, nor are they the result of rogues misusing systems in a way that they were not intended, but are a ‘natural’ extension of the way that those systems are designed. Data analysis, profiling and targeting in order to persuade and manipulate is precisely the way that Facebook in particular works.

1.2 FAKE NARRATIVES

What is also missed in most discussions of fake news – and in the High Level Group’s report – is the role of the conventional media and of what might loosely be described as ‘mainstream’ politicians in disinformation. In particular, in pushing fake *narratives*.¹⁰

7 See <www.gq-magazine.co.uk/article/fake-news-inquiry> and, for a more general discussion, Matthew D’Ancona, *Post Truth: The New War on Truth and How to Fight Back* (Ebury Press 2017).

8 European Commission HLEG, *A Multi-dimensional Approach to Disinformation* (Report of the Independent High Level Group on Fake News and Online Disinformation 2018) <<https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>>.

9 Ibid 11.

10 See Bernal (n 6) ch 9, 234–9.

Disinformation is not just about individual facts being false, but about the interpretation or analysis of those facts being used to draw false conclusions, to paint false pictures and thus to persuade people to make decisions that have very different effects to the ones they think.

This is not something new: it is a classical tactic of both politics and the media to persuade people to vote against their own interests and in favour of the interests of the politicians or their backers. The misinformation campaigns run on the internet can feed from and at the same time bolster similar campaigns in the conventional media, driven by conventional politicians. In the UK, for example, the idea that immigration is damaging to the economy and to jobs, and a drain on the health service and the welfare system, though contradicted by substantially all the empirical and academic evidence,¹¹ has been pushed for many years by both the media and politicians. That ‘immigration is damaging’ narrative can then be exaggerated and spread through the online disinformation campaigns – and indeed spread automatically by the social media’s polarisation tendencies.¹²

For the purposes of spreading a fake narrative, it is not just the clearly fake news that can have the effect. ‘Real’ news that fits the same narrative would work just as well, as would information that is neither entirely real nor entirely fake. This mirrors the difference between lying and *bullshitting*, as memorably set out in philosopher Harry Frankfurt’s essay *On Bullshit*.¹³ To Frankfurt, lying is saying something you know to be false, while bullshitting is not caring – and perhaps not even knowing – whether what you say is true or false. Those spreading fake narratives are, in Frankfurt’s terms, *bullshitters*, whilst those spreading straightforward fake news are liars. As Frankfurt notes, ‘bullshit is a greater enemy of the truth than lies are’,¹⁴ as those spreading it have no regard for the truth at all. In practical terms it is easier to oppose fake news than fake narratives. Facts can be disproven, perpetrators of lies challenged through laws from fraud to defamation. Narratives, as interpretations of facts, are more like opinions – given much more protection under freedom of speech laws, and quite rightly so. In terms of political manipulation, however, they may be every bit as damaging.

1.3 HISTORICAL FAKE NEWS

Though fake news is presented as something ‘new’, there have been forms of it throughout history. Making up stories about current events, or about particular people or groups of people, and using whatever was the most popular or effective method of spreading those stories at the time, appears a ‘natural’ thing to do if you want to persuade people to do something. Using this approach to writing history, for example, has a long history itself. The twelfth-century monk Geoffrey of Monmouth’s ‘The History of the Kings of Britain’ which claimed to trace the lineage of Britons to the Trojan Aeneas, included the mythical King Arthur, creating a narrative of ancient nobility and glory to support his current masters. Evidence to support this narrative was not the point: the effect on the events of the time was.

A closer parallel to the current fake news phenomenon comes from the fifteenth century and the case of Vlad Tepeş: Vlad the Impaler.¹⁵ Vlad, the ruler of the Principality of Wallachia, in current-day Romania, made a large number of enemies through his

11 See <<http://blogs.lse.ac.uk/politicsandpolicy/immigration-demons-and-academic-evidence>>.

12 See Section 2.3 below.

13 Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005).

14 *Ibid* 55.

15 More details of this story can be found in Bernal (n 6) ch 9, 231–4.

various political activities and actions, and those enemies sought to blacken his name at the time, and his memory after he was dead – to damage his image as a hero to many of the people of the principality. The narrative they created was that of Vlad as a vicious, evil and almost demonic figure. The means they used were those current at the time – from manuscripts in Russian Orthodox monasteries and chronicles in the court of the Turkish sultan to records written for the then King of Hungary, Matthias Corvinus. The most interesting and most relevant to the current ‘fake news’ issues was a series of pamphlets prepared by ethnic Germans in the region, between 1488 and 1530. These were particularly gruesome, illustrated with graphic woodcuts. One notable example depicted Vlad eating his dinner with a smile on his face, many people impaled on long sticks in front of him as he ate. Did he actually eat dinner, surrounded by his victims? Was he actually more brutal than other rulers of the times? The facts did not really matter to those presenting them – and when examined by historians from this distance, it appears he was not that remarkable in his brutality but an effective leader and warrior:

Vlad was a man of his times – a capable leader, driven by clear objectives, yet flawed, as men are. Had he been the degenerate, inhuman creature that some have transformed him into, Dracula would never have regained his throne in 1476, supported by the Christian leaders of Southeastern Europe. Unfortunately, the propaganda of the time distorted the image of this brave prince whose role in history deserves reconsideration.¹⁶

The truth of the details was not important to the German creators and distributors of the pamphlets. They had a narrative to support, a story to spread, and they used the methods of the time. Pamphlets distributed by hand, with graphic images to help those who could not read, were as good and quick a method of spreading a story as was available at the time: the Facebook pages of the fifteenth century. They reached the communities the creators wanted them to reach, in the Saxon towns in Wallachia and Transylvania, provided them with ammunition to push the ideas they supported, the ‘facts’ to ‘prove’ that they were right about Vlad. The pamphlets were part of a bigger phenomenon – one that worked so well that though the facts of his history are known by very few, ‘Vlad the Impaler’ is well ‘known’ as one of the worst villains in history and a byword for brutality.

In a similar way, Richard III had his name thoroughly blackened by Tudor propaganda – the relationship between fake news and propaganda is very close – most directly through Shakespeare’s memorable play. Oliver Cromwell’s reputation was attacked by restoration royalists in amongst other things ‘hostile biographies, written just after the Restoration, which gleefully printed invented, scandalous stories about him in order to blacken his character’.¹⁷ In seventeenth-century France, misinformation was spread using pamphlets called *affiches* and tiny *billets* – card-sized reports that could easily be concealed and then discarded, or sung or spoken by roaming *colporteurs*. As historian Linda Kiernan describes it:

News was relayed (and redrafted) often by word of mouth – the social media of the age. Colporteurs peddled songs and stories on the streets, often scribbled down on notes, or sung aloud to an already well-known tune. Making the

16 Kurt W Treptow, *Vlad III Dracula: The Life and Times of the Historical Dracula* (Center for Romanian Studies 2000) 178, quoted in Bernal (n 6) 234.

17 Barry Coward, *Cromwell: Profiles in Power* (Pearson Education 1991) 7. Amongst other things, stories related to sexual, political, religious and other aspects of Cromwell’s life.

message memorable was half the battle – the other half could be covered by the outlandish or scandalous nature of the material.¹⁸

The nineteenth century demonstrates that, as in the current era, the motivation for those producing and distributing fake news can be financial as well as the more obviously manipulative. In Germany, a fashion grew for foreign news, driven by technological developments from printing to the telegraph. To differentiate themselves from those using standardised news agency reports, some sent foreign correspondents abroad, to give first-hand reports and provide local details and colour. That cost money, and a new strategy arose: the ‘*unechte Korrespondenz*’ or ‘fake foreign correspondent’s letter’.¹⁹ These used techniques instantly recognisable to current creators and distributors of fake news. McGillen describes how one of the most noted fake foreign correspondents, Theodor Fontane, put together his report on London’s Tooley Street fire in 1861:

He had gleaned lots of passages from older articles about the fire, partially revised them, added a translated section from a current story in the London Times, and had dressed it all up with a feigned first-person perspective and some very creative additions, such as the ‘companion’ who had allegedly helped him pass the police cordon.²⁰

The point, as McGillen notes, is to fit in with the expectations of the reader. Use familiar ideas and images, match a narrative that the reader expects and perhaps supports, and add colour and flavour to make it more attractive. It used the most readily available and effective form of communication of the time – just as the enemies of Vlad Tepeş had used the most readily available forms of their time. The motivations for the *unechte Korrespondenz* were at least partially financial, just as those of the Macedonian teens identified by Silverman and Alexander were financial, but they also had a distinctly political edge:

... false correspondences provided a steady trickle of misinformation, with every convincing false account – even those on ‘soft,’ non-political topics – incrementally increasing the readers’ belief in the overall trustworthiness and competence of a given newspaper. This steady work on a paper’s reputation, and the gradual chipping away at the competence and credibility of competing papers, helped prepare the soil on which the less subtle propaganda messages could flourish.²¹

As different media become more important and have bigger audiences and impacts, those wishing to spread disinformation – including specifically fake news – embrace them and adapt to them. William Joyce – Lord Haw-Haw – and the so-called Tokyo Roses – used radio broadcasts in the Second World War, from Germany to the UK and Japan to the USA respectively. Anna Wallis Suh – Seoul City Sue – and Trinh Thi Ngo – Hanoi Hannah – did the same from North Korea and North Vietnam and to US troops in the Korean and Vietnam wars respectively. Muhammad Saeed al-Sahhaf – labelled as Comical Ali – used television interviews during the 2003 war in Iraq. All used combinations of fact and fiction, weaving them together to support a particular narrative and have a political effect. The medium chosen in each case was what was most easily available and most

18 See <<https://theconversation.com/frondeurs-and-fake-news-how-misinformation-ruled-in-17th-century-france-81196>>.

19 See Petra McGillen, ‘From our own false correspondent: armchair reporting in the Kreuzzeitung as a means of early information warfare, ca. 1860–1870’ in Hansjakob Ziemer (ed), *Observing the Everyday: Journalistic Practices and Knowledge Production in the Modern Era* (forthcoming).

20 Ibid.

21 Ibid.

likely to have an effect. In the Second World War and for the troops in the Korean and Vietnam wars, radio worked best. By the time of the invasion of Iraq, it was television. In the current era, it is the social media that is both the most popular and the most likely to have an effect.

2 Facebook

Facebook is not only one of the fastest and most efficient forms of communication available, it is also tailor-made for the spreading of fake news and for political manipulation. It brings with it the largest possible audience – well over 2 billion people are now on Facebook. It has also become a key place for accessing news. In 2017, the Pew Research Center reported that 67 per cent of Americans got at least some of their news from social media, whilst 68 per cent of Facebook users used Facebook to access news.²² This is on the increase, and spreading amongst different and critical demographics: Pew also report a notable increase in the use of social media for news amongst older, non-white and less educated people. In particular, Pew noted that 55 per cent of Americans over 50 reported getting their news from social media sites, an increase of 10 per cent over the previous year. Pew's data concerns Americans, but social media and Facebook in particular are a major source of news through much of the world – including most of the key places for potential political manipulation.²³

The audience is just the starting point. Just as Facebook combines many different forms of communication – from keeping families updated and friends sharing personal updates to romance, job-searching and information-seeking, from the intimate to the broadcast – it also combines all the key elements for the design, creation, targeting and propagation of fake news.

There are lessons to learn from both the historical examples and the more recent manifestations to show how this works. Firstly, that for fake news to be successful, it has to have a potential audience. Secondly, that it has to match at least some of the expectations of that audience. Thirdly, in terms of measuring what constitutes success, that it has to produce the results that the person creating or spreading the news desires. That may mean producing a political or propaganda success – blackening the name of Vlad the Impaler, Oliver Cromwell, Hillary Clinton or Jeremy Corbyn for example – or generating income, as for the German fake foreign correspondents or the Macedonian teens producing fake stories aiding Trump.

2.1 CRAFTING FAKE NEWS ON FACEBOOK

Facebook not only aids those wishing to spread 'fake news', but provides them with tools and incentives to do so. The starting point is the creation of fake news. In the past this was relatively difficult. Neither printing presses nor paper were cheap or easily available until comparatively recently. They were often large and hard to conceal – government censors could find dissident printers and destroy their presses. The stage-by-stage technological developments, from commonly available computers to desktop publishing to webpages to Facebook pages has made this progressively easier – mostly in ways distinctly beneficial to freedom of speech, but also enabling the production of fake news. With Facebook, this has reached a particular extreme: two Facebook pages look much like each other, regardless of whether they are made by a major news provider or a Macedonian teenager. Making your 'fake' news look like the real thing has never been

22 See <www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017>.

23 See Reuters Institute Digital News Report 2017, Reuters Institute for the Study of Journalism <www.digitalnewsreport.org>.

easier. Moreover, the costs involved are negligible – the technology is universal, Facebook is ‘free’ to those using it to create pages, and distribution costs are minimal.

Facebook also makes the crafting of the *content* of fake news easier – and this begins the critical point about its business model. Facebook’s systems for data analysis and for profiling create means for the advertisers (and fake news providers) to discover what people are interested in – both in general terms, following large groups, and in specific terms, profiling individuals. Given the mass of people on Facebook and the mass of data provided by them, the opportunities for analysis are of an unprecedented level and the quality of the profiling is improving all the time. As Kosinski et al revealed through their 2013 study,²⁴ Facebook ‘likes’ in particular ‘can be used to automatically and accurately predict a range of highly sensitive personal attributes including: sexual orientation, ethnicity, religious and political views, personality traits, intelligence, happiness, use of addictive substances, parental separation, age, and gender’. Specifically, their study was remarkably accurate on race, sexuality and political views, discriminating between ‘homosexual and heterosexual men in 88% of cases, African Americans and Caucasian Americans in 95% of cases, and between Democrat and Republican in 85% of cases’.

This is not through explicit information about these subjects by the relevant people, but through an analysis of their likes, including the most mundane. When the study was released, the headlines included that intelligence could be indicated by ‘liking’ curly fries, and a lack of intelligence by ‘liking’ motorcycles – the enormous amount of data available through Facebook allows seemingly random correlations to be found and used as predictors, through mathematical analysis rather than psychological insight. The sheer scale of Facebook is what gives this its power. The more data that is available about a population, the more easily traits can be determined. The more data that is available about the population *as a whole*, the less data is needed about a particular individual in order to profile and categorise them.

For the malicious crafter of fake news this provides many benefits, but the point at this stage is that it can be used to choose which issues to focus on within the stories. If people are worried about immigration, and about Eastern European immigration in particular, and are worried by particular issues such as the use of health services, then creating a story about this is easy. Through the data-mining and analysis, Facebook can allow people to identify the issues much more precisely than that. Perhaps specifying particular hospitals. Perhaps finding that people are more worried about Bulgarians than Romanians, or Poles rather than Czechs. Trying to make a story that is more likely to be believed and is also more likely to persuade, starts with an analysis of people’s existing beliefs.

2.2 DELIVERING FAKE NEWS VIA FACEBOOK

At the same time as enabling the creator of fake news to find what kind of fake news is likely to attract an audience, it immediately helps the fake newsmonger to deliver that fake news to precisely that audience. This would have been far harder even in the recent past: finding people who share particular religious beliefs, for example, or views on politics, was a challenge. Now it is a matter of a few clicks. As noted above, very little mundane information is needed on one particular individual in order to be able to make some specific assessments in very much more intimate areas. In politics and fake news, just as in advertising, it does not matter whether every ‘guess’ is accurate: it is a matter of getting

24 Michal Kosinski, David Stillwell and Thore Graepel, ‘Private traits and attributes are predictable from digital records of human behaviour’ (2013) 110(15) Proceedings of the National Academy of Sciences.

enough ‘hits’ to produce a result. The rates noted above for assessments of race, sexuality and political leanings are remarkably good in this context.

Facebook does not just help with identifying the potential audience but also provides the mechanisms to target them – from the tools for advertisers to the various groups, pages and so forth where they can be found. Paid political advertisements are only a small part of this – the spreading of information in other ways is a critical part of the way that fake news works. Critically, much of this happens without those behind the fake news needing to take any action: Facebook’s whole ‘sharing’ system does much of this automatically. It is not just that the creators of fake news are able to find an audience, using tools provided by Facebook, but that the consumers of fake news – willing and aware or unwilling and unaware that what they are consuming is fake – are able to find that fake news, also using tools provided by Facebook. ‘News’ tailored to individuals, searching for news on particular subjects (using terms that the providers of fake news will know are likely to be searched for) and so forth all work in the same direction: to ensure that what people are looking for is available to them, and that they can find it. Once people have found the items of fake news, they will share them – and Facebook’s social network will ensure that it is spread without the creators of the fake news having to do any more about it: an electronic grapevine more effective than anything previously imaginable, and one particularly suited to fake news, for a series of reasons.

Perhaps most importantly, fake news can be more believable than ‘real’ news. It fits in with people’s prejudices. This could be by design, for carefully crafted fake news, as noted above. It could be because the person has been seeking out a particular kind of news – searching, for example for ‘Bulgarian immigrant crime’, when they have a preconception that Bulgarian immigrants are committing a lot of crime in the UK. It could also be because Facebook – or Google, Twitter etc. – are pushing those kinds of stories at the people who are predisposed to believe them. Facebook has been tailoring its ‘news feed’ since it was introduced in 2006,²⁵ and that tailoring has been based on Facebook’s algorithmic assessment of the individual’s preferences. This will automatically *push* stories on the subjects that a person is interested in directly to that person. For the fake news provider, this is perfect: create the fake news, and Facebook will push it to people predisposed to sympathise with the message and indeed to believe the story. In turn, those people will then share it with their own networks of similar-minded people, transfer it from Facebook onto their other social networks and so forth.

With fake news, ‘plot holes’ in stories can be plugged, consistency both internally and with other fake news can be ensured – and as with the work of Fontane, familiar and known ‘facts’ can be put in to help readers along. Well-known places, recognisable public figures and so forth can be strategically placed to help the reader along. Things can be made more dramatic or exciting than ‘real’ news, making people more likely to read and enjoy:

Fontane’s false correspondences at times simply provided the better stories in terms of their dramaturgy, aesthetic and intellectual appeal, and entertainment value.²⁶

This makes fake news more likely to be believed *and shared*. There is empirical evidence to support this, from more than one direction, that hits at the heart of the way that Facebook works, and the way that its business model works. What is also clear is that Facebook knows this, and in some ways wants people to know this – because it both commissioned and publicised some of the research that demonstrates it.

25 See the official launch notification of Facebook’s News Feed and Mini Feed <www.facebook.com/notes/facebook/facebook-gets-a-facelift/2207967130>.

26 McGillen (n 19).

2.3 FAKE NEWS AND FACEBOOK'S MODEL

Facebook's controversial 'emotional contagion' experiment from 2014 is perhaps the best known.²⁷ It involved the manipulation of the news feeds of 689,003 Facebook users in an attempt to manipulate their emotions. Through the use of 'sentiment analysis', they assessed whether items on people's news feeds were happy, sad, or neither happy nor sad. They then divided the group into three and manipulated their news feeds in an attempt to influence their emotions. For one group, they promoted happy posts and suppressed sad ones, for the second they promoted sad posts and suppressed happy ones, and for the third they suppressed both happy and sad posts, leaving the posts without emotional content prominent. Then, using a similar sentiment analysis on subsequent posts by the users, they assessed whether this manipulation of their news feeds had any effect on the users' emotions. The result that seemed to gather the most interest was that, to a statistically significant degree, users whose feeds were made 'happier' became happier, whilst those whose feeds were made 'sadder' became sadder. What was just as interesting, however, was what happened to the third group, given feeds with less emotional content. They engaged less with Facebook. For Facebook, that matters – and it means that Facebook has a direct incentive to prioritise emotional over non-emotional content, and not just in their news feed. It also suggests that users who receive more emotional content, because they are more likely to engage, are also more likely to share that or related content – and is part of what supports the 'automatic' generation of fake news already mentioned and discussed further below. Facebook offered the academics who performed this experiment 'encouragement and support'.²⁸ It is easy to see how the dissemination of this research is in Facebook's interest: to be able to prove to advertisers that you can have an emotional effect on your users is to demonstrate great power.

The next piece of research, that feeds directly into this, is Blaine and Boyer's 2018 study that showed that people were more likely both to show interest in *and to share and spread* rumours that contain threatening content.²⁹ Further research shows that simply 'reading a fake news headline once is sufficient to increase perceptions of its accuracy',³⁰ whilst repeating a story makes it more likely to be believed.³¹ Facebook's tailoring of news feeds according to interests plays into both of these effects where interests fit with either a fake narrative or a narrative being played upon by fake news providers. Combine this with the way that communities of like-minded people build on Facebook and other similar social media and you have a ripe and ready environment for the automatic spreading of fake news and for the polarisation and generation of extreme views. These communities also become perfect places for the malicious actors who wish to spread their fake news to 'seed'. Plant an appropriately crafted story in the midst of these communities and they will spread it for you. As before, some of them may be spreading it whilst knowing that it is fake, because they know it will have the kind of political impact

27 Adam D I Kramera, Jamie E Guillory and Jeffrey T Hancock, 'Experimental evidence of massive-scale emotional contagion through social networks' (2014) 111(24) *Proceedings of the National Academy of Sciences*.

28 *Ibid*, in the acknowledgments to the paper.

29 Timothy Blaine and Pascal Boyer, 'Origins of sinister rumors: a preference for threat-related material in the supply and demand of information' (2018) 39(1) *Evolution and Human Behavior* 67–75.

30 G Pennycook, T D Cannon and D G Rand, 'Prior exposure increases perceived accuracy of fake news' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958246>.

31 See, for example, Lisa K Fazio, Nadia M Brashier, Keith B Payne and Elizabeth J Marsh, 'Knowledge does not protect against illusory truth' (2015) 144(5) *Journal of Experimental Psychology: General* 993–1002. This is part of what is referred to as 'the illusory truth effect'.

they want to see, out of a sense of amusement or for some other reason. Many others, however, will genuinely believe that the fake news is true because the fake news is designed – effectively – to be believable specifically to people like them.

Another key concept comes into play here: astroturfing. Astroturf is fake grass – astroturfing, a term coined by Senator Lloyd Bentsen in relation to the activities of PR firms in the 1990s,³² is the creation of a fake grassroots movement. This is particularly easy on Facebook – using ‘fake people’ and fake pages to make it look as though there is a big and important movement on the ground, though in reality it is not at all what it seems, but something designed specifically to manipulate.

2.4 FINDING FAKE NEWS VIA FACEBOOK

Facebook does not just help those who wish to spread (fake) news, it helps those who seek to *find* news. It provides a number of different routes, some of which have already been noted from the other direction: ‘pushed’ personalised news through the news feed, in a form designed to be as attractive as possible to the user and encouraging the user to use their news feed more and more; the ‘social’ aspects of the network – groups, pages, networks of ‘friends’ – as a route to news; the ‘friends’ themselves, whose ‘Mini Feeds’ (how friends see their timelines) are also curated by Facebook in a way to make those friends seem as attractive as possible to like-minded people;³³ and direct searching for news, yet again algorithmically curated by Facebook.

All of this is designed to help users find the kind of stories they want to read – and there is empirical evidence to suggest that this can lead directly to the spread of fake news. This is Kahan: ‘[a] considerable body of research concludes that people’s cultural and political predispositions are the source, not the outcome, of the information they consume. Identity protection, not correction, is their goal . . . armed with evidence, people are less vulnerable to succumb to opposing arguments’.³⁴ On social media people want to bolster their positions, not to find the truth – and to ‘prove’ that they are in the right. Both Kahan and Pennycook and Rand also suggest that more analytical or numerate people are in some ways both particularly vulnerable to fake news and particularly likely to find it (using the various tools provided by Facebook and others) and hence spread it. This is Pennycook and Rand:

. . . the disposition to think analytically leads people to use deliberative reasoning to justify their prior beliefs and protect their political (or otherwise) identity.³⁵

This is Kahan:

. . . the more numerate people are even more likely than the least numerate ones to construe such evidence as supporting the factual beliefs that prevail among people who share their political identity no matter what its true import.³⁶

That is, numerate and analytically minded people will have both the propensity to believe news supporting their beliefs (whether it is ‘real’ or ‘fake’ news) and have the ability to

32 See e.g. Thomas P Lyon and John W Maxwell, ‘Astroturf, interest group lobbying and corporate strategy’ (2004) 13(4) *Journal of Economics and Management Strategy* 561–97.

33 Mini Feed, like ‘News Feed’, has been tailored since its launch in 2006. See n 25.

34 Dan M Kahan, ‘Misinformation and identity-protective cognition’ (2 October 2017) 4 <<https://ssrn.com/abstract=3046603>>.

35 G Pennycook and D G Rand, ‘Who falls for fake news? The roles of analytic thinking, motivated reasoning, political ideology, and bullshit receptivity’ (Yale University Working Paper, September 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023545>.

36 Kahan (n 34) 2, citing Dan M Kahan, E Peters, E C Dawson and P Slovic, ‘Motivated numeracy and enlightened self-government’ (2017) 1 *Behavioural Public Policy* 54–86.

find it and use it in a logical way to ‘win’ arguments. ‘Winning’ arguments is one of the keys to political interactions on social media – and Facebook and Twitter in particular. Moreover, there is a strong community of numerate and analytically minded people on the internet, and in particular amongst those very active on social media: the role of the gaming and hacking communities and others with a strong interest in computing is one of critical importance. The popularity of conspiracy theories, for example, in many areas of the internet, fits well with this observation. Rational arguments can be constructed for some of the most bizarre of ideas – and ‘evidence’ found easily and quickly to support it. That evidence then spreads, as do the ‘news’ stories themselves.

Facebook aids and abets the spread of fake news through its basic principles – data-mining and analysis, profiling, personalising, targeting and the encouragement of sharing are all direct supporters of the spread of fake news and the bolstering of fake narratives. It is through Facebook’s basic systems that fake news has become a qualitatively different and quantitatively more significant problem – not just through the actions of rogue actors who can be hunted down and removed. Those who spread fake news on Facebook are the ordinary users, and for a wide variety of reasons. Many, and perhaps most, of those reasons are nothing to do with conspiracies or an attempt to undermine the truth or the political system: people are simply sharing stories that interest them or that they think are important. They may share them maliciously – but they may also share them just because they want to keep their ‘friends’ and other connections informed. They may want to help people to see what they consider the truth – or to help them in their arguments with their ‘opponents’ – conservatives arming other conservatives for their battles with liberals; and liberals arming other liberals for their battles with conservatives. It is part of the polarisation process – and the social media, and Facebook in particular, is perfectly designed to help it to happen.³⁷

2.5 FACEBOOK AND POLITICS

That social media is well suited for ‘real world’ politics might have come as a bit of a surprise to some of the early adopters of the internet – John Perry Barlow’s 1996 Declaration of Independence of Cyberspace³⁸ asserted that ‘old world’ politics had neither the place nor the power to have any influence over the internet. Many believed him then and some still believe him now – but the influence of politics over the internet and the ability for ‘real world’ politicians and political movements to use the internet for their own purposes has become all too clear in recent years. This is particularly true for the social media – and both the politicians and the social media companies have seen this as a great opportunity and seized it with both hands.

Social media gives politicians a chance to reach and influence their supporters and potential voters – and increasingly as an analytical tool to understand and target those potential voters. The social media companies see it as an opportunity to make money. As Kreiss and McGregor note in their detailed analysis of how the technology firms worked during the 2016 US presidential election:

. . . the growth of their work in electoral politics was driven by the desire for direct revenues from their services and products, for candidates to give their

³⁷ See n 5 above.

³⁸ John Perry Barlow, ‘A declaration of the independence of cyberspace’ (Electronic Frontier Foundation 1996) <www.eff.org/cyberspace-independence>.

services and platforms greater public visibility, and to establish relationships with legislators.³⁹

It is at least on the surface a mutually beneficial relationship – but one with consequences. Politicians use the analytical tools and immense amount of data available in order to shape their campaigns – paying the technology companies for the opportunity. The technology companies go much further, in working with the political campaigns directly. They have developed specifically partisan teams to do so. This is Kreiss and McGregor again:

Microsoft, Google, Twitter, and Facebook all came to adopt and currently have organizational structures and staffing patterns that are organized along partisan lines. These firms have partisan teams, often made up of practitioners with backgrounds in Democratic and Republican politics, which work with campaigns and parties of the same political affiliation.

This is more than just letting politicians use the services and systems: it is actively encouraging them to do so, developing products and services specifically to help them. On the surface this does not necessarily seem to be a problem – it could look as a positive contribution to democratic processes. As recent events in politics – notably the Brexit referendum and the election of Donald Trump – have shown, the relationship between politics and truth is often troublesome. The use of Facebook and other social media, with their polarising effects and possibilities for fake news and other misinformation, brings this particularly into focus. Having partisan teams driving further uses of social media for politics brings these negative possibilities out even further.

What is abundantly clear is that Facebook, Twitter and other forms of social media are now part of the political sphere. Politics *does* happen on the social media – and this is not a genie that can be easily coaxed back into its bottle. That means that all those who want to be involved in political activities will look at the possibilities – including those who wish to use fake news for these purposes. Boundaries can be and are blurred between what counts as political and what does not. When does an individual sharing an opinion or spreading a new story (real or fake) become a political act? Campaigning groups of various kinds all use the social media – and Facebook in particular – in similar ways to direct and official political campaigns. Tools developed for the ‘real’ politicians can easily be used by the various shades of grey between them and the worst of the political manipulators. There is a financial incentive to the social media companies not only to develop those tools but to develop the markets for those tools. This is just one of the ways that they make money from fake news and related forms of misinformation: it is an incentive that is not going to easily disappear.

2.6 FACEBOOK, FAKE NEWS AND THE TRADITIONAL MEDIA

At one level, the traditional media seeks to portray itself as providing the ‘real’ news, as opposed to the fake stuff to be found on the internet. At another level, it has played its part in misinformation and disinformation campaigns throughout the ages – Fontane worked for the mainstream media in Germany, for example, whilst in the UK the print media is notably and unashamedly partisan and has pushed fake narratives and attempted to influence politics on a significant scale. Whilst the broadcast media in the UK is required by law to present its news with ‘due impartiality’ and ‘due accuracy’,⁴⁰ the extent

39 Daniel Kreiss and Shannon McGregor, ‘Technology firms shape political communication: the work of Microsoft, Facebook, Twitter, and Google with campaigns during the 2016 US presidential cycle’ (2018) 35(2) *Political Communication* 155–77 doi: 10.1080/10584609.2017.1364814.

40 The Ofcom Broadcasting Code, s 5 <www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy>.

to which it achieves that is often open to question. In a content analysis in 2013, the BBC's coverage of politics was shown to be dominated by the ruling party's voices.⁴¹ Certain particular topics were framed in ways that could be seen as distinctly partial: coverage of the UK's relationship to Europe was 'frequently framed as a problem' whilst the debate over immigration was 'framed by politicians, whose statements were often presented as "facts"'.⁴² In both of these areas, this plays directly into the arguably fake narratives pushed by the partisan print media.

The relationship between the traditional media and the social media is similarly not simple: the two are not separate and offering alternatives, but intrinsically and inextricably interlinked. The traditional media uses the social media as a way to reach its audience, with pages on Facebook not just for the media operations themselves but for the individual programmes and journalists. It is a rare journalist that does not have a presence on Facebook and an active Twitter account. Links to key stories are posted on Facebook and Twitter, images of front pages sent around and much more. Traffic is driven to the websites of the relevant news sources, potentially providing advertising revenue for the media. The social media similarly benefits through traffic and advertising revenues, as well as through the data gathered and profiling made possible through the users' access to news sources. Potentially even more importantly, Facebook gains by becoming even more *the* place to go on the internet: not just for sharing family photographs and a few personal stories, but for news, for politics and more. Facebook becomes part of the infrastructure for everyone.

For the news media it is a feedback loop. If Facebook is the most important way people consume news media, then the media must be on Facebook, which makes Facebook the best place to consume news media. Though that might seem to be mutually beneficial, there are a number of potentially negative consequences for the news media. It creates a dependency, which puts the news media in a position of weakness in relation to Facebook. Facebook can change how it deals with the media – terms and conditions, how it curates news and so forth – and there is very little that the news media can do about it. It also means that the more that news media is consumed through Facebook, the more Facebook takes the advertising revenue from news consumption. Thirdly, news *stories* can be spread individually and selectively, meaning that the news media editorial teams have less control, and news can be seen *and shared* out of context, making it easier for others to manipulate how news is consumed, to use it to shape their own narratives.

The narratives may be the most important point. A fake narrative may be more damaging than fake news – and this is another key angle to the relationship between the traditional and social media worlds. Narratives created by the traditional media can be fed and fostered in the social media – and form the basis for fake news that uses both the stories in the traditional media and purely invented material, further feeding the narratives. In its turn, the traditional media feeds off the social media, using it as sources and attempting to harness its power. It is a kind of symbiotic relationship, though which is the more parasitic of the partners is sometimes hard to tell.

For specific pieces of fake news there are legal and regulatory mechanisms in place for the traditional media – in the UK, including the self-regulation of the press via the Independent Press Standards Organisation and IMPRESS and the statutory regulation of

41 Karin Wahl-Jorgensen, Richard Sambrook, Mike Berry, Kerry Moore, Lucy Bennett, Jonathan Cable, Inaki Garcia-Blanco, Jenny Kidd, Lina Dencik and Arne Hintz, 'Content Analysis: BBC Breadth of Opinion Review' (Cardiff School of Journalism, Media and Cultural Studies 2013) <http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/breadth_opinion/content_analysis.pdf>.

42 Ibid 5.

the broadcast media through Ofcom and the Communications Act 2003. Errors can be ‘corrected’ – though the form of the correction is often far less prominent than the original story. Corrections to false stories in the media are even less likely to have an effect through Facebook and the rest of the social media: the corrections will not be spread as the original stories were and will not be found by those looking for confirmation of their prejudices and as support for their arguments, rendering this kind of way of dealing with problematic – and effectively fake – news almost entirely ineffective for those who access their news through social media.

3 Solutions and conclusions

Many of the legal and regulatory solutions offered to the fake news problems in the new environment are direct descendants of ideas that existed in the old environment: fact-checking; complaints mechanisms; obligations on ‘platforms’ to check and remove fake news. Laws against fake news have existed in many places for a very long time indeed: in England, the First Statute of Westminster in 1275 included ‘none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander may grow between the King and his people, or the great men of the realm’.⁴³ That statute laid the responsibility on the person who ‘was the first author of the tale’ – and to an extent the same pressure is still being suggested today. Creators of fake news are to be rooted out – and the responsibility, both legal and in how much of the debate is being framed, placed upon them. ‘Russian trolls’ or Macedonian teenagers are suggested as the basis of the problem – and there are creators of fake news who do fit that stereotype. Pressure is put on the social media companies both to ban these kinds of creators and to take down the news that they create.

3.1 PROBLEMATIC SOLUTIONS

There are a number of immediate problems with this kind of solution. The first is locating these creators – though not insoluble, it is not necessarily easy. The second is that there is no shortage of people like this. Shut down one and another will immediately take their place. Those who benefit from the results of the disinformation will simply get others to do the job. It is easy to do, quick and relatively cheap at all stages – from the creation of identities to the building of website and Facebook pages. In the past, printing a pamphlet required a bulky printing press, and distributing that pamphlet required a network of trusted individuals. Presses could be found and smashed, networks infiltrated and key members arrested or worse. Now there are few such problems: the mass of the population of most nations have sufficient technology (a PC or a smartphone) to produce fake news, whilst distribution is largely automatic. The people who share fake news are not part of a secret conspiracy, they are just using social media as it is intended to be used: sharing links and stories, engaging in political debate and so forth.

Addressing fake news at its source is therefore, though useful in some ways, unlikely to do more than scratch at the surface of the problem – and is likely to have unforeseen consequences that may cause more problems than they solve. Governments can – and already seem to be – use dealing with fake news as a way to introduce censorship and to silence dissent or opposition.⁴⁴ Enemies of a particular perspective will use the weapons

43 See for example <<https://babel.hathitrust.org/cgi/pt?id=pst.000017915496;view=1up;seq=157>> 35.

44 See e.g. <www.theguardian.com/media/2018/apr/24/global-crackdown-on-fake-news-raises-censorship-concerns>, mentioning approaches in France and Germany, and more directly Malaysia and Thailand. The Malaysian law, the Anti-Fake News Act 2018, has been particularly criticised by human rights groups. See e.g. <www.amnesty.org/en/latest/news/2018/04/malaysia-fake-news-bill-hastily-approved-amid-outcry>.

created to fight such fake news to shut down or undermine their opponents: the way that Donald Trump labels the people in the mainstream media who oppose him as ‘fake news’ is just one example.⁴⁵ In trolling ‘flame wars’ it is a common tactic: trolls report their victims as trolls as a way to getting them banned or entangled in regulatory messes. The same will be true of any mechanisms put forward to tackle fake news in this way.

Labelling potential fake news as unreliable is unlikely to help either. Highlighting potentially untrustworthy headlines may make them more likely to be read, and as noted above⁴⁶ even reading a headline makes people more likely to believe it. Facebook abandoned its ‘fake news labelling’ system in December 2017, noting:

Academic research on correcting misinformation has shown that putting a strong image, like a red flag, next to an article may actually entrench deeply held beliefs – the opposite effect to what we intended.⁴⁷

Instead Facebook put in place a ‘related stories’ system, trying to put particular news into context – but again it is hard to see how this will have any significant impact. Facebook cites its own research that doing so produces ‘fewer shares’, but that does not say anything except that it is less damaging than the labelling system. Moreover, it gives another route for fake news creators to approach: spread variants of the same story and they can all be put in place by Facebook’s ‘related stories’ system, making it look even more as though there is a big underlying story supporting their narrative.

Other proposed solutions to the fake news problems will suffer similar fates. The idea that Facebook or Google should use artificial intelligence (AI) to detect fake news, then use their algorithms to demote it in their search results or news feeds, making it less prominent,⁴⁸ is attractive on the surface, but is also flawed. As Anjana Susarla notes, ‘[d]espite some basic potential flaws, AI can be a useful tool for spotting online propaganda – but it can also be startlingly good at creating misleading material’.⁴⁹ Susarla goes on to say, ‘using AI to detect fake news . . . puts technology in an arms race with itself’. The creators and spreaders of fake news learn the tactics and methods of those trying to block them, then turn those tactics on their heads, designing news that will not only beat the ‘fake news detectors’ but get their own news to the top of the pile. Algorithms can be and are gamed in this way in other contexts – the search engine optimisation industry works in precisely this way – and the kind of people wishing to spread fake news tend to have exactly the kinds of skills to do this, or the resources to employ those who do. In a technological arms race, ‘truth’ is highly unlikely to be a winner. When Facebook, facing criticism from conservatives that its ‘trending news team’ of human editors was biased against them, fired the human editors in 2016 and let the algorithms do the work: the result was predictably bad, with fake news rising right to the top.⁵⁰ Two years later, Facebook abandoned its trending news project entirely.⁵¹

All this, however, is missing the key point. It is the very nature of the way that social media, and Facebook in particular, enables fake news and related misinformation to have its

45 Echoing some of the tactics of Fontane, who sought to denigrate his ‘real’ competitors. See McGillen (n 19).

46 See n 30.

47 See <<https://newsroom.fb.com/news/2017/12/news-feed-fyi-updates-in-our-fight-against-misinformation>>.

48 As suggested, for example, by Mark Zuckerberg in his hearing before a joint congressional committee in April 2018. See e.g. <www.washingtonpost.com/news/the-switch/wp/2018/04/11/ai-will-solve-facebooks-most-vexing-problems-mark-zuckerberg-says-just-dont-ask-when-or-how>.

49 See <<https://theconversation.com/how-artificial-intelligence-can-detect-and-create-fake-news-95404>>.

50 See e.g. <www.theguardian.com/technology/2016/aug/29/facebook-fires-trending-topics-team-algorithm>.

51 See <<https://newsroom.fb.com/news/2018/06/removing-trending>>.

effect. If specific fake news is stopped – which in itself is highly unlikely – it will not stop the spreading of fake narratives, the construction of further fake news, and the use of individual ‘true’ stories out of context to manipulate and obscure. Truth, insofar as it is possible to identify, becomes lost in the spreading morass of stories, shaped and crafted both by malicious individuals and by unknowing groups coming together to support their beliefs.

What methods could actually work are another matter. Whilst Facebook and similar mechanisms are used as a primary source of news it is hard to see how – and it is important to recognise that though Facebook is the most prominent, it is far from the only network or system involved. Twitter is used to spread stories, Instagram to illustrate them, and YouTube to provide ‘evidence’ – the way that ‘false flag’ and similar stories were spread through YouTube and via Google immediately after the 2017 shootings in Las Vegas and Texas are cases in point.⁵² YouTube is a key location for conspiracy theorists: there is a large community of ‘flat-earthers’, for example.⁵³ They all have the same symptoms: ease of creation, algorithmic curation, community ‘sharing’ and targeting. Again, it is not just that fake news will always find an audience, but that the audience will always find fake news.

3.2 FAKEBOOK

None of this should be very surprising. Truth was never a key point for Facebook. It was born from the idea of presenting yourself in positive ways – the college ‘facebook’ was always much more about making an impression than in revealing an underlying truth. Its business essence is about advertising – and truth has never been the key to advertising either. What is more, Facebook’s advertising model is based on data-mining, profiling and targeting, three things that underpin the effective creation and distribution of fake news, both for political manipulation and for financial gain. Facebook’s attraction to users is based on sharing, and on finding people with common interests – two more keys to the effectiveness of fake news, fake narratives and related forms of misinformation. Unless Facebook breaks both its business model for advertisers and its attraction for users, therefore, it will remain not just ripe territory and a magnet for fake news, but will actively aid in both the generation and spread of this news.

Facebook has no particular interest in truth. If spreading true stories makes Facebook money, or being known for truthfulness makes it money, then it will do both. If spreading fake news or other forms of misinformation (or allowing that fake news or misinformation to be spread) makes Facebook more money, then it is its interest to do that. More importantly, if measures that might actually have an impact on the spreading of fake news, or other political manipulation, would mean Facebook made less money, then it would be in its interest *not* to take those measures. The evidence so far suggests both of these are true. That is, allowing fake news and political misinformation makes it more money than focusing on the truth.

Whether anything can realistically be done to reduce the political impact of fake news and related misinformation in the social media era is another matter. There are some possible approaches that might have some impact. Reducing the amount that people get news from Facebook and similar sources might be a key. There are some signs this might be happening: there are indications that people are looking for different sources. Reuters

52 See e.g. <www.theguardian.com/us-news/2017/oct/02/las-vegas-shooting-facebook-google-fake-news-shooter> and <www.theguardian.com/us-news/2017/nov/06/google-youtube-texas-shooting-fake-news>.

53 See e.g. www.newyorker.com/science/elements/looking-for-life-on-a-flat-earth>.

reports a rise in the use of messaging applications for news⁵⁴ – and where those applications use encryption this could reduce both the level of surveillance and of gaming of news. It will not, however, reduce the network and polarisation effects, the automatic spreading of fake news and so forth. Further, as Reuters also notes, Facebook ‘dominates both social networking and messaging’ – owning both Whatsapp and Messenger, the two most popular messaging apps.

That might provide part of the answer. Reducing dependency on a particular source, supporting rather than undermining encryption, limiting data-sharing and data-mining to make profiling and targeting harder, as well as a significant effort into public awareness of the role that the social media plays in the spread of fake news and other misinformation could be part of a way forward. All that does not seem likely to make a significant difference so long as we as a culture continue our embrace of systems like Facebook. Whilst we do so, fake news will remain an inevitable problem – and a problem that is likely to increase. The question is whether the benefits of our embracing social media – to freedom of expression in particular – make it a problem that is worth living with.

At every age, technological developments have brought advances in freedom of speech – and at the same time allowed or supported damaging uses of that freedom of speech. It was true for the pamphleteers, the newspapers, for radio and television – and it is true for Facebook and other social media now. Whilst there is money to be made – both by the fake news providers and by Facebook – and whilst there’s political gain to be made by those who desire it, there is no reason to believe that the problems caused by fake news will lessen, and many reasons to believe that they will continue. Facebook’s business model ensures that the first will remain true, whilst human and political nature mean that the latter will never go away. It is not possible to find a ‘clean’ solution. Instead, messy, imperfect ways ahead may be the best way forward. This is not a problem that is going to go away any time soon.

54 Reuters (n 23) 13.

Stealing ‘souls’? Article 8 and photographic intrusion

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Abstract

In Article 8 ECHR privacy right jurisprudence, photographs are deemed distinct forms of information that are particularly intrusive in nature. This article is concerned with explaining why this is so. Part 1 examines the notion of ‘intrusion’ itself. It argues that ‘intrusion’ functions as a legal metaphor and plays an important role in constructing a binary between an outer self presented to the world and a ‘spiritual’, emotional interior that privacy purports to protect from transgression. Part 2 argues that this ‘spiritual intrusion’ metaphor is influential in the continental personality right that informs the ECtHR’s approach to Article 8 protection for photographed individuals. This leads to potentially stronger protection for image, including a basic Article 8 right to control one’s image. Yet there is a divergence of approach in the English courts, where personality theory has limited influence; here there is traditional scepticism towards an image right and photographic capture is largely neglected. Part 3 argues that photography becomes a relevant factor at publication stage, where courts agree that the distinctive features of the medium may cause or exacerbate intrusion. This is because photography creates a permanent, infinitely replicable ‘truthful’ record of the individual’s image that can be disseminated to the objectifying gaze of a mass audience. But the medium also leads viewers to overlook its inherent complexities and ambiguities. Ultimately, Article 8 jurisprudence, particularly in the ECtHR, occasionally adopts reasoning that contains echoes of the ‘photographs steal souls’ mythology.

Keywords: privacy; Article 8; media; photographs; misuse of private information; image

Introduction

Photography: an art form; an industry; a ubiquitous social practice and a ‘tool of power’.¹ Susan Sontag, the cultural commentator who coined this latter term, noted the mass proliferation of photographs, claiming they ‘alter and enlarge our notions of what is worth looking at and what we have a right to observe’.² Yet as early as 1931, Walter Benjamin claimed that the social functions of photography, rather than its aesthetic implications, warranted investigation.³ It is photography’s social and ethical implications, its effects as a

* I would like to thank Ian Cram, Adam Ramshaw and an anonymous reviewer for their helpful comments on an earlier version of this piece. The usual disclaimers apply.

1 Susan Sontag, *On Photography* (Penguin 1979) 8.

2 *Ibid.* 3.

3 Walter Benjamin, *A Short History of Photography* (Penguin) 22.

'tool of power', that Article 8 European Convention on Human Rights (ECHR) privacy case law has had to address. It is perhaps inevitable that the practice of photography, which 'began, historically, as an art of the Person: of identity, of civil status',⁴ should have come to engage issues regarding the Article 8 right to respect for private and family life,⁵ which encompasses a person's image,⁶ identity⁷ and control over personal information.

This article investigates photographs of people in Article 8 case law in the European Court of Human Rights (ECtHR) and English courts. It particularly draws upon misuse of private information (MPI), a common law tort where courts balance the Article 8 privacy rights of claimants who wish to prevent publication of private information (including photographs) against the Article 10 free expression rights⁸ of media defendants. The action is thus concerned with the rights that Article 8 may afford the subject of a photograph, as distinct from the rights of the photographer and/or copyright owner.⁹ The privacy right analysed here can also be distinguished from the commercial interest in exploiting one's image.¹⁰

Though both the medium of photography and the legal protection of image have been subject to a good deal of academic attention, much of the latter is American and tends to focus on historical matters and/or commercial image rights.¹¹ More importantly, no sustained attention has been paid to ascertaining *why* the photographic medium is deemed distinct from, and more intrusive than, other forms of information. This article analyses judicial approaches to photographs in Article 8 case law to address this very issue. Though it identifies diverging approaches to the degree of protection that Article 8 may afford the subjects of photographs, it does not seek to advance any argument in this regard (though, of course, it may be used as basis for such future work). Instead, this article's contribution lies in opening up privacy law discourse to reveal the cultural-historical influences that shape legal understandings of both intrusion and the medium of photography. In doing so, it seeks to uncover the non-rational elements that remain sedimented in the history of contemporary rational legal discourse, and to ascertain whether such traces which have legal influence.

Part 1 discusses the terminology of 'intrusion', and how this crucial metaphor in privacy discourse evolved in the late nineteenth century, partly in response to concerns about new photographic technology. Of particular interest is the intrusion metaphor's role in constructing the notion of an inner spiritual sanctum that may be invaded. Part 2

4 Roland Barthes, *Camera Lucida* (Vintage 2000) 79.

5 Article 8(1) ECHR.

6 *Schussel v Austria* [2002] App 42409/98, Complaints [2]; *Sciaccia v Italy* (2006) 43 EHRR 20, [29].

7 '[P]rivate life extends to aspects relating to personal identity, such as a person's name, photo or physical and moral integrity.' *Rothe v Austria* [2012] ECHR 6490/07, [42]. See also: *Reklos and Another v Greece* [2009] 27 BHRC 420, [39].

8 Article 10 ECHR.

9 The photographer who takes a photograph is the author and (in most cases) owner of copyright in that work: ss 9 and 11 Copyright Designs and Patents Act 1988. The owner of a copyright work has the exclusive right to commercially exploit the work (s 16).

10 Protection for commercial image rights varies across jurisdictions. In the UK, a celebrity's image can be protected by intellectual property laws, most notably copyright, passing-off and breach of confidence. In US law there is an additional commercial appropriation tort. In continental jurisdictions, such as Germany, rights to control commercial exploitation of image are covered by the personality right.

11 Though some articles involve discussion or comparison of privacy and commercial publicity rights: Jeffrey Malkan, 'Stolen photographs: personality, publicity, and privacy' (1997) 75 *Texas Law Review* 779; Jonathan Kahn, 'Bringing dignity back to light: publicity rights and the eclipse of the tort of appropriation of identity' (1999) 17 *Cardozo Arts and Entertainment Law Journal* 213; Robert C Post, 'Rereading Warren and Brandeis: privacy, property, and appropriation' (1991) 41 *Case Western Reserve Law Review* 647.

proceeds to argue that this ‘spiritual intrusion’ metaphor informs the ECtHR’s approach to Article 8 and photography. Its approach, rooted in the continental personality right, sees an individual’s image as closely correlating to – indeed determining – their ‘inner’ self or spirit; as such, it suggests greater protection for an individual’s image, even at capture stage. In contrast, the English courts, less influenced by notions of personality and the ‘spiritual intrusion’ metaphor, are wary of protecting image and neglect photographic capture. Part 3 analyses the characteristics of photography which mark it out as a distinctive medium that can cause or exacerbate intrusion at publication stage. It finds that courts treat photographs as particularly intrusive because they create a permanent, detailed visual record of an individual at a given moment, and can enable that person to be subjected to the actual or potential gaze of multiple spectators. Furthermore, such images generally enjoy the status of ‘truth’ despite their limited constructed nature.

THE PHOTO/TEXT DISTINCTION

In Article 8 disputes judges employ a photo/text distinction, viewing photographs as a form of information that is innately *different* to text-based information. When considering whether a disputed story violates Article 8, the courts split the material into discrete categories, and may allow publication of certain features (e.g. the bare facts of a story) whilst restricting others (e.g. the claimant’s identity or salacious details). For these purposes, stories are routinely split into textual and photographic elements. For example, *Theakston* concerned a claimant television presenter’s attempt to prevent publication of a story about his visit to a brothel, including photographs of him taken whilst there.¹² Ousley J split the proposed story into three elements – the bare fact of the brothel visit, details of the sexual activity in the brothel and the accompanying photographs – claiming that different considerations applied to each.¹³ He granted an injunction to restrict the details and photographs, but not the bare fact of the story which had a public interest dimension. Similarly, in the leading case of *Campbell*, the Law Lords dealt with photographs of the claimant on a street leaving a Narcotics Anonymous meeting separately to the main story, seeing the photographs as the last of five categories of information.¹⁴ This text/image distinction has been explicitly confirmed by the highest English courts. In *Douglas* the Court of Appeal stated:

Special considerations attach to photographs in the field of privacy. They are *not merely a method of conveying information* that is an alternative to verbal description . . .

As a means of invading privacy, a photograph is *particularly intrusive*.¹⁵

A text/photograph distinction was also acknowledged when *Douglas* reached the House of Lords; despite his dissenting judgment, Lord Walker acknowledged that ‘English law has . . . recognised that there may be something special about photographs.’¹⁶ The recent case of *Ali* confirmed that these points about photography are equally applicable to the visual medium of film.¹⁷ The ‘special’ nature of photographic information has also been

12 *Theakston v MGN* [2002] EWHC 137, [77].

13 *Ibid* [24].

14 Lord Nicolls (dissenting) accepted the claimant counsel’s splitting up of the *Campbell* story into various elements, the fifth of which was the ‘visual portrayal of her leaving a specific meeting with other addicts’: *Campbell v MGN Ltd* [2004] UKHL 22, [23] (Lord Nicholls). See also [88] (Lord Hope).

15 Emphasis added. *Douglas and Others v Hello!* [2005] EWCA Civ 595, [84]. Quoted in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, [19]. See also: *Rotbe* (n 7) [74]; *Jagger v Darling and Others* [2005] EWHC 683, [11], [14], [15].

16 *Douglas and Others v Hello!* [2007] UKHL 21, [287]. See also [288].

17 *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298, [150]–[151]. Though this article focuses on photographs, much of the analysis is thus also broadly applicable to related visual media such as film and video.

noted by the ECtHR in *Von Hannover (No 1)* which involved photographs of the applicant, Princess Caroline of Monaco, going about her daily life, for example eating in restaurants, shopping and participating in sports. Here the court stated that the

... publication of photos ... is an area in which the protection of the rights and reputation of others takes on *particular importance*. The present case does not concern the dissemination of 'ideas', but of *images containing very personal or even intimate 'information' about an individual*.¹⁸

Later, in *Rothe v Austria* the ECtHR upheld the national court's findings that an exposé of homosexual activity in the Catholic church with accompanying photographs did not violate Article 8 because the story contributed to a debate of general interest. It nonetheless held that the national courts did not sufficiently distinguish between the text and photographs in the report, and that the rights at stake should have been balanced separately, particularly as the publication of photographs was a more borderline issue.¹⁹

In summary, a key principle guiding judicial treatment of photographs in Article 8 cases is that they are distinct and separable forms of information that are 'special' and raise profound privacy issues due to their intrusive nature. Before considering the specific features of photographs that make them more intrusive than equivalent textual accounts in Part 3, it is necessary to examine the notion of 'intrusion' itself.

1 What is intrusion?

Though intrusion occupies a central role in the vocabulary of privacy discourse, it is a phenomenon that the law finds difficult to articulate, though leading academics have provided recent valuable doctrinal analyses.²⁰ Taking an alternative approach, this part demonstrates how 'intrusion' operates as a metaphor across privacy literature to represent a range of activities as the transgression of a protected, bounded 'inner'.

The term 'intrusion' originated from the Latin words '*trudere*' or '*trusum*' (to thrust) and '*in*' (in) and these essential meanings endure. The *Chambers Dictionary* offers the following definitions:

Intrude: (intransitive verb) to thrust oneself in; to enter uninvited or unwelcome. ... to force in.

Intrusion: (noun) an act of intruding; encroachment.

Intrusive: (adjective) tending or apt to intrude; intruded; inserted without etymological justification; entering without welcome or right.²¹

Across these meanings it is clear that intrusion entails some form of unwanted (*uninvited, unwelcome, without justification*) movement (*entry, force in, insert, encroachment*) to an inside (*in*). Such an understanding necessarily entails two assumptions; first, that there is some form of 'outer' or other distinct from the 'inner'; second, that there is some form of boundary or border that is transgressed in the process of 'moving' 'in'. These features of 'intrusion' map harmoniously on to physical activities that historically impacted upon individual

18 *Von Hannover v Germany (No 1)* [2004] EMLR 21, [59]. Quoted in *Douglas* (n 15) [87]. This point was reiterated in *Von Hannover v Germany (No 2)* [2012] ECHR 40660/08. See also *Rothe* (n 7) [47]; *Eerikainen and Others v Finland* [2009] ECHR 3514/02, [70]; *Egeland and Hanseid v Norway* (2010) 50 EHRR 2, [59].

19 *Rothe* (n 7) [73], [77]

20 See e.g. Nicole Moreham, 'A conceptual framework for the New Zealand tort of intrusion' (2016) 47(2) *Victoria University of Wellington Law Review* 265–86. <www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/volume-47,-issue-2/Moreham-.pdf>; Paul Wragg, 'Recognising a privacy-invasion tort: the conceptual unity of informational and intrusion claims' (forthcoming).

21 *Chambers Dictionary* 10th edn (Chambers 2006) 783.

privacy, for instance trespass on to land or the home. For example, in *Semayne's Case* (1604) the court stated 'the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose'; it set up the front door of a dwelling as a boundary that should not be crossed except in limited circumstances.²²

Across the latter half of the nineteenth century the intrusion-based terminology employed for physical land came to be applied to the physical person. Samuel Warren and Louis Brandeis' seminal 1890 article made an important contribution to this development. It called for the legal recognition of privacy rights, drawing upon select cases in copyright and confidence to argue that the underlying interest at stake was not property, but privacy.²³ In presenting it as a free-standing interest they 'disentangled' privacy from property.²⁴ Yet, in the process, Warren and Brandeis nevertheless retained property-based terminology:

The common law has always recognised a man's house as his castle, impregnable, often, even to its own officers engaged in execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?²⁵

Similar use of property-based terminology is evident in *Pavesich* (1905), the first US case to explicitly recognise the right to privacy. Here, the overlap between privacy and property rights in early common law was noted by Cobb J, who held that unauthorised use of a photograph of the plaintiff for the defendant's newspaper advert was 'a trespass upon his right of privacy'.²⁶ Cobb J quoted *Semayne's Case* above and, in light of 'new conditions' such as modern 'instantaneous photography', advocated extending such legal principles that protected persons from 'attack'.²⁷

It is arguably no coincidence that the first case to explicitly acknowledge a privacy right involved photography, or that the development of privacy doctrine broadly corresponded with the emergence of this new technology in the late nineteenth century. During this time US courts dealt with a spate of disputes over photographic material,²⁸ and indeed Warren and Brandeis identified 'instantaneous photographs' as one of the new technological advances that posed a threat to privacy.²⁹ Various commentators have also noted the era's growing concern about the effects of unmitigated market forces and the perceived risks of commodifying one's person.³⁰ The mass uptake of photography – and particularly the activities of amateur photographers – prompted widespread censure, with critics expressing 'lurking feelings of fascination, discomfort, and anxiety provoked by photography'.³¹ Mensel cites this as one factor leading to the emergence of New

22 5 Co Rep 91, 91b.

23 S Warren and L Brandeis, 'The right to privacy' (1890) 4(5) *Harvard Law Review*, 193–220, 211, 205.

24 *Post* (n 11) 648.

25 Warren and Brandeis (n 23) 220.

26 *Pavesich v New England Life Insurance Co et al* (1905) Ga LEXIS 156, 222 (Cobb J).

27 *Ibid* 197–8, 214–15.

28 A useful overview of nineteenth-century US photograph cases (and the influence of notions of property therein) is provided by John R Fitzpatrick, 'The unauthorized publication of photographs' (1932) 20 *Georgetown Law Journal* 134.

29 'Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life'. Warren and Brandeis (n 23) 195–6. See also 206.

30 Edward Bloustein, 'Privacy as an aspect of human dignity: an answer to Dean Prosser' (1964) 39 *New York University Law Review* 964, 988; Kahn (n 11) 216; Samantha Barbas, 'The laws of image' (2012) 47 *New England Law Review* 23, 64.

31 Robert E Mensel, "'Kodakers lying in wait': amateur photography and the right of privacy in New York, 1885–1915' (1991) 43(1) *American Quarterly* 24–45, 29. See also 32, 33.

York's privacy laws at the turn of the twentieth century.³² Barbas similarly notes the 'visual revolution' initiated by cameras and other visual technologies. Between 1880–1920 this combined with urbanisation, mass media and 'aggressive Gilded Age individualism' to create a cultural shift that placed emphasis on successful self-presentation in public.³³ Against this cultural backdrop, Barbas sees the privacy tort as 'the legal manifestation of a nascent appearance-conscious, image-conscious culture'.³⁴

As a result of these early developments the term 'intrusion' came to be employed more widely than the limited context of physical trespass onto land. 'Intrusion' is now used in privacy discourse in relation to a range of activities that engage privacy interests, including photography. When used in this wider sense, 'intrusion' operates as a legal metaphor which has been rarely noted, though not subjected to further examination.³⁵ The 'intrusion' metaphor orients and structures our understanding of phenomena (e.g. being photographed without our knowledge) in more delineated and concrete ways (e.g. as a spatial transgression of a boundary). In doing so, it shapes or constructs our experience of reality.³⁶ The intrusion metaphor, rooted in property, is an enduring influence in this area. In the process of 'disentangling' privacy from property, Warren and Brandeis ironically extended property-based terminology to the individual. The legacy of this development is that the metaphorical transgression from an 'inner' to an 'outer' recurs across academic literature on privacy in various forms.

Hughes, for example, claims that mixed boundaries *create* privacy; it occurs when an individual or group 'successfully employ barriers to obtain or maintain a state of privacy'³⁷ These barriers can take three forms: first, physical (non-metaphorical) ones, such as walls and doors; second, behavioural barriers that communicate our wishes to others by words or actions, for example asking to be left alone or putting one's hand over a camera lens; third, normative barriers, for instance social norms or laws that prohibit certain activities. According to Hughes, 'an invasion of privacy occurs when physical and behavioural barriers are penetrated'³⁸ and access to the privacy seeker is obtained, though such transgressions are highly context-specific and may occur in different ways. Descheemaeker's analysis of privacy harms also utilises the transgression of boundaries. He identifies three categories of harm that may arise when privacy is breached: financial loss, mental harm (both of which involve concrete, discernible harms) or loss of privacy per se (where violation of the right *is* the loss, albeit an abstract one).³⁹ He cites *Gulati* as an example of the law recognising the latter. Here the court awarded damages to claimants whose phones had been hacked by the *News of the World* despite the fact they had been unaware of the intrusion.⁴⁰ This approach sees the violation of a right as wrong

32 Ibid 24–5.

33 Barbas (n 30) 28–38. A similar cultural shift towards self-presentation is identified by Mensel (n 31) 26.

34 Barbas (n 30) 26.

35 James Whitman, 'Two Western cultures of privacy: dignity versus liberty' (2004) 113 *Yale Law Journal* 1151, 1194. See also Jonathan Kahn, 'Privacy as a legal principle of identity maintenance' (2003) 33 *Seton Hall Law Review* 371, 379, 393, 383, 394.

36 I have examined the effects of metaphors, such as rights-balancing, in privacy law elsewhere. 'A just balance or just imbalance? The role of metaphor in misuse of private information' [2015] 7(2) *Journal of Media Law* 196–224, 208–10, 213.

37 Kirsty Hughes, 'A behavioural understanding of privacy and its implications for privacy law' (2012) 75(5) *Modern Law Review* 806–36, 807.

38 Ibid 812, 814.

39 Eric Descheemaeker, 'The harms of privacy' (2015) 7(2) *Journal of Media Law* 278, 279, 286. Descheemaeker claims that harms to dignity can be understood within his second and third categories: 284–5.

40 *Gulati v MGN Ltd* [2015] EWHC 1482, [168].

in itself, irrespective of other concrete losses that might flow from it. In this context, Descheemaeker claims, rights such as privacy 'form a *sphere* of protection around the plaintiff' to protect certain social goods or interests. Where 'His interests have been *invaded* . . . that *is* the detriment, harm or loss that he has suffered' and the right must be restored.⁴¹ In doing so, Descheemaeker extends spatial terminology such as 'invasions' of 'spheres' to abstract rights.

Elsewhere, at doctrinal level, there is emerging academic consensus that the English common law should develop to recognise intrusion as a legal wrong in itself, as in New Zealand and the USA.⁴² Moreham advocates an intrusion tort distinct from information misuse, conceiving 'intrusion' in physical terms as 'unwanted access to one's physical self'. This would cover intrusion into physical privacy by watching, listening and/or recording an individual when they have a reasonable expectation of privacy; such activities violate dignity, autonomy and cause real emotional harm in themselves, irrespective of what might be done with any information obtained as a result.⁴³ Implicit in Moreham's definition is that to obtain physical access to an individual against their wishes, the intruder must cross either physical or metaphorical (e.g. behavioural) barriers. These select examples show sophisticated, technical uses of the 'intrusion' metaphor, but an alternative use of this metaphor in privacy discourse is particularly pertinent to photography; the notion of a transgression *into* a person's 'spiritual' interior. This intriguing and important example thus warrants further attention.

1.1 THE 'SPIRIT' AND THE INTRUSION METAPHOR

Reflecting the more fundamental mind/body dualism, the intrusion metaphor is also employed in privacy literature to represent the crossing of a boundary into a person's 'inner' life, though this 'inner' aspect is articulated in various ways. Select liberal theorists draw a distinction between the 'outer' self presented to the world and one's 'inner' life or feelings which privacy is ultimately concerned with protecting.⁴⁴ For example, Nagel explores the boundaries between what individuals conceal and expose publicly. He argues concealment is an important aspect of civilisation, and a degree of control over what we reveal is crucial.⁴⁵ In doing so, he sees the public 'self' as a sort of shield so that the inner life can be free and protected 'from the crippling effects of the external gaze'.⁴⁶ Elsewhere, Simmel claims that a private sphere of unknowability surrounds every human; his writing is replete with references to a 'sphere' or 'boundary' that we cannot 'cross', 'invade' or 'penetrate without disturbing the personal value of the individual'.⁴⁷ Simmel's argument is based on the notion that our body is our 'property' and thus 'every invasion of this possession is resented as a violation of the personality; so that there is a spiritual private property, to invade which signifies violation of the ego at its centre'.⁴⁸ Bloustein

41 Descheemaeker (n 39) 279, 288, 289–90.

42 Nicole Moreham, 'Beyond information: physical privacy in English law' (2014) 73(2) Cambridge Law Journal 350–77; Wragg (n 20).

43 Moreham (n 42) 352–5. See also Moreham (n 20) 4–5, 10–11, 16.

44 Commentators on intrusional privacy law agree that it is concerned with addressing harms, including harm to feelings, emotional harm and mental distress: Wragg (n 20); Moreham (n 20) 10–11.

45 Thomas Nagel, 'Concealment and exposure' (1998) 27(1) Philosophy and Public Affairs 3–30, 4.

46 Ibid 17.

47 Georg Simmel, 'The sociology of secrecy and secret societies' (1906) 11(4) American Journal of Sociology 441–98, 453–4.

48 Emphasis added. Ibid 454. Then later: 'The right of that spiritual private property.'

similarly claims that though legal vocabulary is ‘exceedingly limited’, privacy deals with ‘in some sense a spiritual interest’.⁴⁹

Consistent with the view that privacy laws are concerned with a spiritual ‘inner life’ we even see explicit references to the ‘soul’, for example, in the work of Marx⁵⁰ and Shils,⁵¹ and, on occasion, case law.⁵² The idea of ‘the soul’ is tied to the Judeo-Christian view of the sanctity of life, a ‘religionist’ ethos which holds that ‘Human life is divinely valued and valuable; we are all sacred. We all have the spark of the divine.’⁵³ This ancient, religious reverence for the soul-bearing person was a background influence at the very outset of the emergence of privacy discourse in the nineteenth century. Warren and Brandeis’ primary concern for ‘man’s spiritual nature’⁵⁴ and ‘inviolable personality’,⁵⁵ including thoughts, feelings and intellect, is widely noted. Elsewhere they lament invasions of the ‘sacred precincts’ of private life.⁵⁶ In doing so, the authors were also arguably articulating subtle cultural shifts in the late Victorian American bourgeoisie regarding ‘the enhanced role of feeling, emotion, or sentiment as aspects of selfhood’ and a ‘fascination with inner feeling’.⁵⁷ Furthermore, they were also arguably seeking to protect this inviolable personality from rapidly expanding market forces. Kahn writes:

In a world where everything was being turned into a commodity, champions of privacy felt a pressing need to identify and *protect the non-fungible ‘spiritual nature’ of man*. ‘Identity’ in particular was increasingly becoming subject to commodification.⁵⁸

Traces of a spiritual or sacred aspect to being human continue in modern secular privacy discourse in the form of dignity, the notion that ‘each human being possesses an intrinsic worth that should be respected’.⁵⁹ McCrudden’s account of the concept’s history shows that its development involved a combination of religious and non-religious influences, for instance, from Roman law and later Kant.⁶⁰ Naffine explains that the ‘religionist’ veneration of the sanctity of human life ‘is sometimes expressed as innate or inherent

49 Emphasis added. Bloustein (n 30) 1002.

50 ‘Surveillance abuse . . . can be seen as an assault on the soul – the very essence of the self beyond the tangible.’ Gary T Marx, *Windows into the Soul, Surveillance and Society in an Age of Technology* (University of Chicago Press 2016) 318, 319.

51 ‘The ‘social space’ around an individual, the recollection of his past, his conversation, his body and its image, all belong to him. . . . He possesses them and is entitled to possess them by virtue of the charisma which is inherent in his existence as an individual soul – as we say nowadays, in his individuality’. Edward Shils, ‘Privacy: its constitution and vicissitudes’ (1966) 31 *Law and Contemporary Problems* 281, 306.

52 See e.g. *X County Council v C* [2007] EWHC 1771 (Fam), [38] (Munby J); *R (Johns) v Derby City Council and Another* [2011] EWHC 375 (Admin), [97] (Munby LJ). These examples are offered by Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014). See also *Onassis v Christian Dior* 122 Misc 2d 603 (1984). In this US image rights dispute, the court stated that the relevant New York statute ‘is intended to protect the *essence* of a person, his or her identity or persona from being unwittingly or unknowingly misappropriated for the profit of another’ (emphasis added).

53 Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford 2009) 23, 25. See also ch 7.

54 Warren and Brandeis (n 23) 193.

55 *Ibid* 211, 205.

56 *Ibid* 195.

57 Mensel (n 31) 24, 26. See also: 40.

58 Emphasis added. Kahn (n 11) 221, 222.

59 Christopher McCrudden, ‘Human dignity and judicial interpretation of human rights’ (2008) 19(4) *European Journal of International Law* 655–724, 723. See also Charles R Beitz, ‘Human dignity in the theory of human rights: nothing but a phrase?’ (2013) 41(3) *Philosophy and Public Affairs* 259–90, especially 272.

60 A good overview of the history of dignity is set out at: McCrudden (n 59) 656–63.

dignity or human inviolability, but the message is largely the same'.⁶¹ In this sense, dignity can be seen as representing an alternative means of expressing concern for the human 'spirit' or 'soul', albeit one that is not necessarily reliant on religious faith. Indeed, Marshall claims that dignity is 'the modern day successor to the soul',⁶² and that:

This soulish self is often presented as a unitary, whole, apparently unchanging core or essence of who we are. Notions of the soul, as the core of our essence, remain strong in human rights law.⁶³

One likely reason for this influence is dignity's crucial foundational role in the drafting of international human rights (IHR) treaties in the post-Second World War era. Dignity was adopted as a basis for human rights; its utility was that it enabled parties of very different religions and political stances to agree the texts of IHR treaties whilst holding different understandings of what 'dignity' meant: 'Everyone could agree that human dignity was central, but not why or how.'⁶⁴ Dignity thus supplanted 'God' or 'nature' as the basis of rights.⁶⁵ But one crucial consequence of dignity's enhanced role was, according to Naffine, a 'fortification of the tendency among lawyers to ascribe inherent (and necessarily pre-legal) spiritual value to human beings'.⁶⁶

Privacy and dignity are closely entwined, and the courts have acknowledged that dignity underlies Article 8 in cases such as *Campbell*,⁶⁷ *PJS*,⁶⁸ *Mosley*,⁶⁹ *Richard*⁷⁰ and particularly *Gulati*.⁷¹ Dignity also forms the basis of numerous academic accounts of privacy. For example, it occupies a central role in the work of Bloustein, who sees dignity and the inviolate personality as intrinsically connected, claiming:

I take the principle of 'inviolate personality' to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being.⁷²

For Bloustein, instances of intrusion specifically undermine one's dignity, 'assault' one's personality and treat one as less than a person.⁷³ Fried provides another prominent example, arguing in Kantian terms that everyone is equally entitled to the basic privacy right simply because they are persons and therefore ends in themselves.⁷⁴ Elsewhere, Whitman notes the great influence of dignity in European understandings of privacy.⁷⁵

61 Naffine (n 53) 102.

62 References include: 'A modern day successor to the soul', ch 1; 'This is the modern successor to the soul', conclusion; 'The concept of the self has been described [by Martin and Barresi] as a replacement for the soul and the contemporary descendent of the soul', ch 3. Marshall (n 52).

63 Ibid ch 3.

64 McCrudden (n 59) 678. Also 698, 710, 712. Though McCrudden does claim that a 'basic minimum content of the meaning of dignity can be discerned: that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa' 723.

65 Francesca Klug, 'The human rights act – a "third way" or "third wave" Bill of Rights' [2001] (4) *European Human Rights Law Review* 361, 365.

66 Naffine (n 53) 102. See also 105.

67 *Campbell* (n 14) [50]–[51] (Lord Hoffmann). Quoted in *Ali v Channel 5* (n 17) [148].

68 *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 393, [34].

69 *Mosley* (n 15) [7], [214]–[216].

70 *Sir Cliff Richard v BBC and Chief Constable of South Yorkshire Police* [2018] EWHC 1837, [350], [352].

71 *Gulati* (n 40) [110]–[111], [168]–[169].

72 Emphasis added. *Bloustein* (n 30) 971. See also 994, 995.

73 Ibid 973, 974. See also 1000.

74 Charles Fried, 'Privacy' (1968) 77(3) *Yale Law Journal* 475, 478.

75 Whitman (n 35) 1151.

So in an influential strand of privacy literature the intrusion metaphor manifests as a spiritual ‘inner’ self that warrants protection from invasion. As well as numerous explicit references to ‘spirits’, and ‘souls’, the foundational concept of ‘dignity’ acts as a floating signifier that can embrace both secular and religious possibilities, as well as connotations of the ‘soul’, spirit and innate human value.

1.2 SUMMARY

This part has established that ‘intrusion’, the transgression of a boundary into an inner, has its origins in physical property, but came to be extended to the person with the emergence of privacy laws and discourse in the late nineteenth century. This development was at least partly in response to anxieties raised by the mass spread of photography. Intrusion now functions as a legal metaphor that structures our experiences and understandings of privacy. In particular, this metaphor plays an important role in constructing a binary between an outer self presented to the world and a ‘spiritual’ interior that privacy purports to protect from transgression. This inner ‘essence’, a ‘deeper’, unique ‘true self’, may be expressed as a soul, spirit, inviolate personality or innate human dignity. But across these various accounts emerges an incorporeal, amorphous, almost mysterious, precious ‘inner’ life. It pertains to the emotional, though it cannot be reduced to this and case law clearly indicates that emotional harm is not necessary for an Article 8 infringement.⁷⁶ As the remainder of this article demonstrates, this manifestation of the intrusion metaphor is pertinent to photography as it informs judicial approaches to the medium, particularly at ECtHR level.

2 Article 8: personality, image and capture

Article 8 protection for the subjects of photographs is based upon the need to foster personality development. This is influenced by the continental personality right which, as this part argues, shares many features with the spiritual intrusion metaphor. But this part also identifies an apparent divergence in English courts where such personality notions are less influential, particularly in judicial approaches to photographic capture.

2.1 FROM PRIVACY TO PERSONALITY?

The starting point for Article 8’s capacity to potentially protect an individual vis à vis photography is its concern for ‘personality’. The ECtHR has stated that Article 8 includes a person’s ‘physical and psychological integrity’,⁷⁷ and that it is ‘primarily intended to ensure the *development*, without outside interference, of the *personality* of each individual in his relations with other human beings’.⁷⁸ The introduction of this terminology is significant because the right to develop one’s personality was originally explicitly omitted from the ECHR text.⁷⁹ Furthermore, it lends support to claims that the ECtHR has transformed Article 8 into a European civil law-style ‘personality right’, which entails a

76 *Murray v Express Newspapers* [2008] EWCA Civ 446, [16]–[17]; *Gulati* (n 40) [137], [143]; *Weller v Associated Newspapers Ltd* [2014] EWHC 1163, [196]. For an analysis of Dingeman J’s approach in *Weller* see: Kirsty Hughes, ‘Publishing photographs without consent’ (2014) 6(2) *Journal of Media Law* 180–92.

77 See also *A v Norway* [2009] ECHR 28070/06, [63].

78 *Pfeiffer v Austria* (2009) 48 EHRR 8, [33]. See also *X v Iceland* (1976) 6825/74; *Pretty v United Kingdom* [2002] ECHR 2346/02, [61]; *Bensaid v United Kingdom* (2001) 33 EHRR 10, [47]; *Varapnickaite-Mazyliene v Lithuania* (2008) 20376/05, [43].

79 Bart van der Sloot, ‘Privacy as personality right: why the ECtHR’s focus on ulterior interests might prove indispensable in the age of “Big Data”’ (2015) 31(80) *Utrecht Journal of International and European Law* 25, 28.

positive, broader framing, in contrast with the traditional negative, narrower US account of privacy as merely the 'right to be let alone'.⁸⁰

The concept of 'personality' has its origins in the Enlightenment, and particularly the philosophies of Emmanuel Kant and Georg Hegel whose ideas were utilised by German legal scholars in the late nineteenth century to create a new legal category, '*persönlichkeit*'.⁸¹ The concept involves the free development of personality⁸² by the exercise of free will or autonomy. In Whitman's terms:

. . . the defining characteristic of creatures with free will was that they were unpredictably *individual*, creatures whom no science of mechanics or biology could ever capture in their richness . . . the purpose of 'freedom' was to allow each individual to fully realise his potential *as* an individual: to give full expression to his peculiar capacities and powers.⁸³

This entailed 'deeper and more complex' notions of freedom than negative liberty because the full development of one's personality necessitated social engagement, not simply seclusion.⁸⁴ Nonetheless, the German-based personality right shares four related common features with the privacy literature discussed in Part 1. First, it is intrinsically linked to dignity, the central value of the German Constitution as influenced by Christian natural law, secular theories of autonomy and especially Kant.⁸⁵ Second, due to its basis in dignity, the personality right is explicitly concerned with matters of the human spirit; humans are characterised as 'spiritual-moral beings' with an 'intellectual and spiritual identity and integrity'.⁸⁶ Third, German personality discourse also relies heavily on boundary metaphors, particularly in relation to this inner-oriented spiritual-moral 'core' or 'Inner Space' (*Innenraum*), though there is no clear divide between inner and outer aspects; 'both are components of an integrated, whole person'.⁸⁷ Finally, the personality right also represents a safeguard against the commodification of individuals.⁸⁸ As Whitman has shown, these German ideas were an important influence on Warren and Brandeis' advocacy of the 'inviolable personality', even if their attempted 'continental transplant' to US law proved ultimately unsuccessful.⁸⁹

Yet one crucial difference is the additional 'outward'-facing, communal aspect of the personality right.⁹⁰ Its 'focus . . . on the capacity of the individual to develop his identity, create his persona and flourish as a unique individual' leads it to encompass a bundle of rights that foster self-determination, self-development and self-presentation.⁹¹ Thus, personality rights recognise the possibility of a more complex, reciprocal relationship

80 Ibid 44.

81 Whitman provides an excellent overview of the emergence of the personality right in German law: (n 35) 1180–9. See also Giorgio Resta, 'Personnalite, personlichkeit, personality' (2014) 1 *European Journal of Comparative Law and Governance*, 215, 228–35.

82 Article 2(1) German Basic Law.

83 Whitman (n 35) 1181.

84 Resta (n 81) 237–8. For a general account of personality right, see also Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer Verlag 2013) 16–17, 32–46.

85 Edward Eberle, 'Human dignity, privacy, and personality in German and American constitutional law' (1997) 4 *Utah Law Review* 963, 971–3.

86 Ibid 973, 975, 982.

87 Ibid 980–94. Note terminology like sphere, barricade, penetrate. See also account of the abandoned 'Sphere Theory' 997–8.

88 Whitman (n 35) 1181–2; Resta (n 81) 226–7.

89 Whitman (n 35) 1203–8.

90 Eberle (n 85) 966–7; 974–5; 979; O'Callaghan (n 84) 44–6.

91 van der Sloot (n 79) 25, 26, 27, 44. See also Resta (n 81) 238; Whitman (n 35) 1161.

between ‘outer’ and ‘inner’ aspects of personhood; this nuance is also present in the work of select privacy academics,⁹² most notably Goffman.

Goffman’s influential work also entails distinctions between an inner and outer, albeit in a more sophisticated form. In Goffman’s work on ‘face’, a form of positive identity or reputation is generated via social interactions.⁹³ Goffman writes that:

. . . face clearly is something that is not lodged in or on [one’s] body, but rather something that is diffusely located in the flow of events in the encounter and becomes manifest only when these events are read and interpreted.⁹⁴

In this sense, self-image depends upon the conduct and views of other people; it is ‘on loan to [one] from society’.⁹⁵ Goffman’s work thus entails the proposition that the individual ‘self’ (which may seek to claim privacy) is not a singular, discrete unit, but instead a creation of social interactions.⁹⁶ For Goffman, despite appearances, the self does not solely or even primarily emanate *from* the individual. Instead, the self arises via a process of ‘joint ceremonial labor’ with others,⁹⁷ namely from the outside-in, as transient, shifting and multiple selves are projected *onto* the individual:

In analysing the self, then, we are drawn away from its possessor . . . for he and his body merely provide the peg on which something of collaborative manufacture will be hung *for a time*. And the means for producing and maintaining selves do not reside inside the peg . . . But, well oiled impressions will flow from it fast enough to put us in the grip of one of our types of reality – the performance will come off and the *firm self* accorded each performed character will *appear* to emanate intrinsically from its performer.⁹⁸

Yet, despite its scepticism of a concrete unitary coherent self, Goffman’s analysis still rests on a broad dichotomy between ‘face’, the constructed identity created by other people’s interpretations of the behaviour and information one presents to the world, and something else behind or within it. For example, Goffman states that personal and social identities can be ‘contrasted with the ‘ego’ or ‘felt’ identity, namely the subjective sense of [one’s] own situation and [one’s] own continuity and character that an individual comes to obtain as a result of [one’s] various social experiences’.⁹⁹ Elsewhere, Goffman acknowledges a distinction between an individual’s (outer) ‘face’ and his (inner) ‘felt identity’, whilst simultaneously noting that the ‘face’ comes to form part of one’s ‘felt identity’:

92 Schoeman, for example, emphasises selfhood and personality in his account of privacy, drawing an analogy between the private and ‘the sacred’. He argues that various (outer) guises protect an individual’s (inner) core self or, drawing on Goffman’s work, multiple selves; nevertheless, there is a need for privacy. F Schoeman, ‘Privacy and intimate information’ in F Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press 1984) ch 17, 406, 408–10.

93 Goffman defines ‘face’ as ‘the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact. Face is an image of self delineated in terms of approved social attributes – albeit an image others may share.’ Erving Goffman, *Interaction Ritual, Essays on Face-to-Face Behaviour* (Pantheon 1967) 5.

94 *Ibid* 7.

95 *Ibid* 42, 10.

96 ‘A correctly staged and performed scene leads the audience to impute a self to a performed character, but this imputation – this self – is a product of a scene that comes off, and is not a cause of it. The self, then, as a performed character, is not an organic thing that has a specific location . . . it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.’ Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin 1990) 244–5. See also: Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1990) 138.

97 Goffman (n 93) 85.

98 Goffman, *Presentation of Self* (n 96) 245.

99 Author’s addition. Goffman, *Stigma* (n 96) 129.

... the word person, in first meaning, is a mask ... insofar as this mask represents the conception we have formed of ourselves – the role we are striving to live up to – this *mask is our truer self*, the self we would like to be. In the end, our conception of our role becomes second nature and an *integral part of our personality*.¹⁰⁰

Though Goffman does not explicitly deal with intrusion, his work provides insights that are highly pertinent to privacy and intrusion, particularly in the context of photographs. His work offers a sophisticated account of the relationship between outer 'face' and inner 'felt identity'.

Both continental personality theory and Goffman emphasise the importance of social outward-facing aspects of selfhood. Both show how these 'outer' elements profoundly impact upon one's inner 'spirit' or 'felt identity', albeit in different ways. Personality theory assumes a unified, autonomous core 'inner' that seeks to express itself in the world in order to flourish. Goffman suggests an even closer relation between outer 'face' and inner 'felt identity'. In particular, it reverses narrow liberal assumptions that the self originates from 'within' the individual, and helps us see that external social inputs play a crucial role not only in determining one's outer 'face', but in the process also constitute an important part of one's 'inner' self or selves. In this sense, both theories lend potential support for the proposition that if Article 8 is concerned with protecting a dignitary, spiritual inner life, then it should provide *some* form of protection, where appropriate, for outward-facing activities involving self-presentation and social engagement. The ECtHR's continental-influenced interpretation of Article 8 as primarily intended to foster personality development provides such recognition.

2.2 IMAGE AND PHOTOGRAPHIC CAPTURE

Its personality rights-influenced approach has led the ECtHR to repeatedly confirm that Article 8 includes a right to one's visual image,¹⁰¹ on occasion categorising it as an aspect of 'personal identity'.¹⁰² Though an individual's 'image' may be understood to cover a range of attributes in its public presentation akin to Goffman's 'face', the ECtHR's use of the term refers specifically to the individual's physical appearance as captured by photographs. In *Reklos* the ECtHR stated:

A person's *image* constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his peers. The right of protection of one's image is thus one of the essential components of *personal development* and presupposes the right to control the use of that image.¹⁰³

So one's visual image is relevant in privacy terms because it is a facet, indeed a *primary* attribute, of the personality that Article 8 is concerned with protecting. This assumes that one's physical appearance reveals or expresses *something* about one's personality; that there is some sort of inherent link between the two. Kahn's comment that the *Pavesich* judgment 'assumes a very special relation between one's image and one's self' and sees image as an 'external manifestation' of personality¹⁰⁴ is equally applicable here.

100 Emphasis added. Park quoted with approval by Goffman, *Presentation of Self* (n 96) 30.

101 *Eerikainen* (n 18) [61].

102 *Pfeiffer* (n 78) [33]–[34]. See also *Bogomolova v Russia* [2017] ECHR 13812/09, [51]; *Schussel* (n 6); *Couderc v France* 40454/07 [2015] BHRC 40, [83].

103 Emphasis added. *Reklos* (n 7) [40]. See also *Rothe* (n 7) [42]; *Bogomolova* (n 100) [52]; *Couderc v France* 40454/07 [2015] BHRC 40, [85]; *Von Hannover (No 2)* (n 18) [95].

104 Kahn (n 11) 271.

But English case law sets out a more qualified position on image than the *Reklos* passage above. In the pre-*Reklos Campbell* Baroness Hale stated that English Law ‘[does] not recognise a right to one’s own image . . . The activity photographed must be private.’¹⁰⁵ This broad approach has been applied in subsequent cases, for instance *John*¹⁰⁶ and *Ferdinand*,¹⁰⁷ where claimants unsuccessfully argued that photographs violated their Article 8 right. Yet the *Reklos* passage above has nevertheless been quoted in *Weller*¹⁰⁸ and by the partially dissenting Lords Kerr and Wilson in *JR38*.¹⁰⁹ So it seems there is a potential divergence between the ECtHR and English courts, as highlighted by their respective approaches to photographic capture.

2.2.1 A DIVERGENCE REGARDING PHOTOGRAPHIC CAPTURE?

Photographs fix or capture a moment. In Berger’s terms, a photograph ‘isolates, preserves and presents a moment taken from a continuum’.¹¹⁰ Most of the Article 8 cases discussed here involve disputes over the publication of photographs (to be discussed further in Part 3) rather than the initial capture of the shot. The initial recording of an individual’s image is afforded relatively little attention in case law. The marginalisation of capture is epitomised by Lord Hoffmann’s distinction in *Campbell* between the mere taking of a photograph and its publication, and his claim that in contemporary society people may be photographed without their permission, but this is not an invasion of privacy per se;¹¹¹ this influential rationale runs through various cases.¹¹²

The ECtHR’s personality-based approach holds that Article 8 may be engaged by the basic act of taking a photograph. In *Reklos* the ECtHR claimed that the right to control one’s image may enable the publication of a photograph to be prevented. But, crucially, ‘it also covers the individual’s right to object to the recording, conservation and reproduction of the image by another person’. Rejecting the government’s arguments that Article 8 was not engaged because the photograph remained unpublished, the ECtHR indicated that the capture was significant per se because:

. . . an *essential attribute of personality* would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.¹¹³

The ECtHR’s judgment must be seen in light of the particular facts of the case, which involved a photograph of a newborn baby taken on a baby unit without parental permission. The court qualified its judgment by distinguishing these facts from a situation where an individual lays themselves open to the possibility of having their photograph

105 *Campbell* (n 14) [154]. Though this should be viewed in light of subsequent ECtHR jurisprudence discussed in this article.

106 *Elton John v Associated Newspapers Ltd* [2006] EWHC 1611, [15], [21].

107 *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [101]–[102].

108 *Weller* (n 76) [61], [62]. See also: *Weller v Associated News* [2015] EWCA Civ 1176, [28].

109 *Re JR38’s application for Judicial Review (Northern Ireland)* [2015] UKSC 42, [40]–[41] (Lord Kerr). Lords Kerr and Wilson claimed that the taking of a photograph could engage Article 8, and dissented from the majority Supreme Court finding that Article 8 was not engaged by the police publication of photographs of the 14-year-old appellant involved in rioting.

110 John Berger, *Understanding a Photograph* (Penguin 2013) 20. See also: John Berger, *About Looking* (Bloomsbury 2009) 54–5; Marshall McLuhan, *Understanding Media* (Routledge 2001) 204; Barthes (n 4) 4.

111 *Campbell* (n 14) [73]–[74]. Quoted in *Murray* (n 76) [31]–[32].

112 *Campbell* (n 14) [122] (Lord Hope); *Weller* (n 108) [18]; *Peck v United Kingdom* [2003] EMLR 287, [58]–[59]. See also *Murray* (n 76) [54] (‘the focus should not be on the taking of a photograph in the street, but on its publication’).

113 Emphasis added. *Reklos* (n 7) [40].

taken.¹¹⁴ Nevertheless, the rationale in *Reklos* is potentially important because it seems to accept the potential privacy implications of taking a person's photograph, and it sets out a basic right to control one's image in principle. Examples from other jurisdictions illustrate this rationale in practice. In the German case of *Urteil* the Bundesgerichtshof ordered a man who had intimate photographs of his ex-partner to delete them, despite his claims that he did not intend to disseminate them.¹¹⁵ But the Canadian Supreme Court judgment in *Aubry* (1998) encapsulates this rationale at its strongest. Finding in favour of a young claimant who objected to the magazine publication of a photograph of her sitting on town hall steps, it claimed:

[F]eeling is likely to be offended each time a photographer invades someone's privacy *or* serves it up to the public. The camera lens captures a human moment at its most intense, and the snapshot 'defiles' that moment. The privileged instant of personal life becomes 'this object image offered to the curiosity of the greatest number'. A person surprised in his or her private life by a roving photographer is stripped of his or her transcendence and human *dignity*, since he or she is reduced to the status of 'spectacle' for others . . . This 'indecenty of the image' deprives those photographed of their *most secret substance*.¹¹⁶

This rhetorically loaded passage seems to *almost* suggest that photographs steal one's soul. It also expressly indicates that this may arise at capture stage, irrespective of subsequent publication. Yet the *Aubry* dispute focused on publication and the judgment elsewhere implies that the image right arises at this stage.¹¹⁷ In any event, the broad protection for image in *Aubry* was distinguished from the English position by Baroness Hale in *Campbell*.¹¹⁸

To date, English law has paid limited attention to photographic capture, and it has been deemed intrusive *per se* only in very limited circumstances. Extracting and articulating the legal principles relevant to capture alone is difficult for two reasons. First, as the title of the action implies, 'misuse of private information' assumes that some form of information (e.g. a photograph) already exists, and the doctrine is solely concerned with preventing or remedying its misuse. It is therefore relatively silent on information-gathering actions such as photographic capture¹¹⁹ because it assumes they have already occurred. Consistent with this, MPI's reasonable expectation test *tends* to entail courts asking whether the claimant has a reasonable expectation of privacy in relation to *information about* their activities, for example a photograph,¹²⁰ as distinct from a reasonable

114 Ibid [37]. The ECtHR offers no further elaboration on the kinds of circumstances in which one may do so, but this is potentially consistent with Lord Hoffmann's *Campbell* point (above). This *Reklos* caveat was cited by the Court of Appeal in *Weller* (n 108) [27]. Hughes criticises the *Reklos* judgment over its failure to clarify whether Article 8 was engaged by photographic capture *per se* or the specific circumstances of capture: Kirsty Hughes, 'Photographs in public places and privacy' (2009) *Journal of Media Law* 1(2) 159–71, 164–5.

115 BGH, *Urteil vom* 13.10.2015 VI ZR 271/14 <<https://openjur.de/u/868417.html>>. A summary of the case in English is available at <www.bbc.com/news/world-europe-35159187>.

116 Emphasis added. Quoting Ravanis, *Aubry v Les Editions Vice-Versa Inc* [1998] 1 RCS 591, [69].

117 Ibid [53]. It is unclear whether this is due to practical reasons – that the overwhelming majority of disputes arise at publication stage – or doctrinal reasons. The quoted passage would indicate the former.

118 *Campbell* (n 14) [154]. Different aspects of the *Aubry* case are also referred to at [120], [122]–[123] (Lord Hope).

119 Moreham (n 42) 360.

120 '[T]he touchstone of private life is whether *in respect of the disclosed facts* the person in question had a reasonable expectation of privacy.' Emphasis added. *Campbell* (n 14) [21], [25] (Lord Nicholls); [137] (Baroness Hale). See also *Weller* (n 108) [15]; *Hutchison v News Group* [2011] EWCA Civ 808, [8], [38]–[39]; *RocknRoll v News Group* [2013] EWHC 24, [5], [27], [28]; *Ali v Channel 5* (n 17) [141], [169], [210].

expectation of privacy in relation to their *activities* per se.¹²¹ The former phrasing assumes photographic capture has already occurred and potentially vests a prima facie privacy right in that information; in contrast, the latter vests a prima facie privacy right in the activities, thus leaving open the possibility that photographic capture of them *may* engage Article 8. Second, difficulties are caused by vagueness in the reasonable expectation test.¹²² This is strongly context-based, involving an ‘intense focus’ on relevant facts as listed in *Murray*,¹²³ but many of these factors are arguably relevant to both capture *and* publication.

Despite such difficulties, it can be discerned that photographic capture assumes a legal significance in four limited circumstances in English law. First, photographs of children as a blanket category are subject to tighter Article 8 restrictions.¹²⁴ The explicit aim is to protect children from intrusive media attention, and the Court of Appeal in *Murray* expressly indicated that this includes capture as well as publication.¹²⁵ Second, photographs of an individual engaged in intimate sexual activity are viewed by courts as highly sensitive.¹²⁶ The illicit capture of such images is viewed as very intrusive,¹²⁷ and even if initially taken with consent, publication of such images will be restricted in the event of a later privacy dispute.¹²⁸ Third, capture becomes a relevant factor where the disputed photograph has been taken in circumstances of paparazzi harassment.¹²⁹ Fourth, ‘the absence of consent and whether it was known or could be inferred’ is a *Murray* factor that expressly refers to consent at the time of photographic capture,¹³⁰ though this factor may also be relevant at rights-balancing stage.¹³¹ Eady J in *Mosley* provided isolated recognition of the Article 8 implications of covert capture in itself, stating that ‘the clandestine recording of sexual activity on private property must be taken to engage Art.8’.¹³² Yet other cases indicate that the presence or absence of consent to recording is afforded variable weight in English law.¹³³

121 But courts do on occasion use this ‘reasonable expectation’ in this latter sense; *Murray* (n 76) [14], [36]. Or they switch between a reasonable expectation regarding information and activities: *Douglas* (n 15) [100] (Lord Phillips); *Mosley* (n 15) [7], [24], [232]. See also: *JR38* (n 109) [36], [41], [50], [54] (Lord Kerr), though this case did not involve MPI.

122 See e.g. the criticisms of Eric Barendt, ‘Problems with the reasonable expectation of privacy test’ (2016) 8(2) *Journal of Media Law* 129–37.

123 *Murray* (n 76) [36].

124 *Ibid* [57]; *Weller* (n 76) [64]; *Weller* (n 108) [23]–[25], [29]–[31]; *AAA v Associated Newspapers Ltd* [2012] EWHC 2103, [122], [127].

125 *Murray* (n 76) [39], [46], [57]. Yet despite this, the Court of Appeal claimed elsewhere in the judgment that the focus should be on publication of the photograph rather than its capture [54].

126 Theakston (n 12) [114] (‘publication of such photographs would be particularly intrusive into the claimant’s own individual personality’); *AMP v Persons Unknown* [2011] EWHC 3454, [27]; *Contostavlos v Mendabun* [2012] EWHC 850, [25].

127 *Mosley* (n 15) [17], [104].

128 *Contostavlos* (n 126).

129 This factor was initially cited in *Von Hannover (No 1)* (n 18) [59]. Harassment was cited as a relevant factor, albeit not present on the facts, in *Elton John* (n 106) at [16]. Harassment laws can also be used to protect individuals from paparazzi harassment as in *Hong and Another v XYZ and Another* [2011] EWHC 2995.

130 *Murray* (n 76) [39].

131 *Von Hannover (No 2)* (n 18) specifies the covert nature of photography that captures the subject without their knowledge or consent is also a factor to be considered at rights-balancing publication stage; [113]. See also: *Conderc* (n 103) [86], [135].

132 *Mosley* (n 15) [104]. Note that this example involves an overlap of covert recording and sexual activity.

133 *Ferdinand* (n 107) [101] (the non-covert nature of an unexceptionable photograph was one factor that favoured publication); *Ali v Channel 5* (n 17) [171]–[178] (initial consent of claimants to filming did not amount to true consent); *Elton John* (n 106) [21] (claimant’s lack of consent to being photographed was of ‘little weight’).

2.3 SUMMARY

The continental starting point is that Article 8 provides a right to control one's image in principle, whilst the traditional British starting point has been that one does not generally have such a right. This apparent potential divergence of approach between ECtHR and English jurisprudence remains to be further tested or clarified in the courts, and in any event may fall within the margin of appreciation allowed to member states, particularly in the light of the consistency of ultimate outcomes in many cases. The potential discrepancy is apparent at photographic capture stage, though very few disputes concern capture alone because in practice they tend not to be litigated at this stage; judicial attention is thus inevitably more focused upon the Article 8 implications of publication. Yet photographic recording – as distinct from publication – may become an increasingly important issue with the ubiquity of mobile phone cameras and accompanying 'capture' culture.

The continental personality-based approach is evidently more influenced by the 'spiritual' intrusion metaphor; there is something about the photographic capture of an individual's appearance that may transgress their 'inner' self, spirit or dignity, aside from any emotional harm that may be caused. The *Reklos* court acknowledged the power/knowledge implications of the photograph as a record, irrespective of what is done with it. Capture records an attribute of the subject's personality; furthermore, this record of personality is beyond the control of the subject. More generally, the personality-based approach assumes a continuous intrinsic link between one's visual image (as an expression of personality) and one's inner self. This tends towards potentially stronger protection for image as photographs are more likely to transgress upon one's inner self.

The English position towards image appears more qualified; English privacy law largely chooses to ignore photographic capture. Notions of personality have a limited influence and, aside from occasional fleeting references to dignity, any express 'spiritual' references or connotations are entirely absent. Judges also express concern that greater protection for subjects of photography entails the creation of an 'image right'.¹³⁴ However, English law also appears less clear on the issue of capture. Capture per se may be deemed intrusive in limited circumstances, for example where there is paparazzi harassment or covert capture of intimate activity. Beyond this, select circumstances surrounding photographic capture may influence both stages of the MPI test, but the weighting of these factors is highly variable. Further clarification on this issue of capture in English law is needed.

3 Photographs and Article 8: the intrusion of publication

Despite the apparent divergence in approach to Article 8 protection for image discussed in Part 2, the medium of photography is a relevant factor for both the ECtHR and English courts at publication stage. Upon publication, photography is viewed as a medium that exacerbates an intrusion, or even in certain circumstances creates an intrusion that would not otherwise arise. As Nicol J stated in *Ferdinand*:

*Publication of photographs can constitute an unacceptable intrusion into privacy even if a verbal report of the same occasion would not. Von Hannover, Campbell, and Murray are all examples.*¹³⁵

¹³⁴ In *Murray* (n 76) the Court of Appeal disagreed that finding in favour of the claimant would create an *image* right because focus should be on publication of the photograph rather than its capture [54]. See also: *Douglas* (n 16) [293], though here Lord Walker was referring to a commercial image right.

¹³⁵ Emphasis added. *Ferdinand* (n 107) [101].

What are the unique features of photography as a medium that make it intrusive when an alternative medium would not be? The remainder of this article analyses depictions of the medium by judges and cultural commentators to articulate *why* the medium is deemed ‘special’ and particularly intrusive when published, as well as considering the impact of digital technologies in this area.

But two points about the courts’ approach to publication should be initially noted. First, the photographic medium, though relevant, is just one of a range of factors that courts consider when balancing the Article 8 rights of the photographed individual against the Article 10 free expression rights of the publisher. In such cases each competing right is ‘weighted’ according to the specific circumstances, and the strength of the Article 10 right to disseminate a photograph depends upon the extent to which it forms a necessary part of a story that has a public interest justification, for instance by contributing to a debate of general interest.¹³⁶ Many of the disputed photographs in the cases discussed here form part of stories that do not have this dimension and are thus deemed ‘lower quality’ tabloid expression,¹³⁷ or they are seen as extraneous to a story that does have a public interest justification.¹³⁸ Second, though cases discussed here primarily concern media publication of photographs for news or tabloid ‘entertainment’ purposes, other forms of photography may raise different Article 10 issues. For example, privately commissioned photographs, such as professional wedding shots, are automatically barred from publication without consent by UK statute.¹³⁹ Additionally, artistic expression is afforded intermediate importance in Article 10 jurisprudence,¹⁴⁰ so photographs exhibited or published for such purposes would be afforded greater weight than tabloid-type claims, though MPI has not dealt with any such art-based disputes to date.¹⁴¹

3.1 DISTINCTIVE FEATURES OF THE MEDIUM

The dissemination of photographic images, as distinct from capture, is the focus of dispute in nearly all Article 8 cases. Claimants seek injunctions to prevent publication or damages where publication has already occurred. According to judges, three related characteristics of photography mark it out as a distinctive, intrusive medium at publication stage. First, photographs capture appearances in great detail; second, they

¹³⁶ I have provided an account and analysis of the legal principles in this area elsewhere: Rebecca Moosavian, ‘Deconstructing ‘public interest’ in the Article 8 vs Article 10 balancing exercise’ [2014] 6(2) *Journal of Media Law* 234–68, 243–8.

¹³⁷ *Von Hannover (No 1)* (n 18) [65]; *Campbell* (n 14) [149] (Baroness Hale); *Rocknroll* (n 120) [30].

¹³⁸ *Theakston* (n 12); *Campbell* (n 14); *Ali v Channel 5* (n 17); *Richard* (n 70). See Part 3.1 (‘Truth status of photographs’) for further discussion.

¹³⁹ Section 85(1) of the Copyright Designs and Patents Act 1988 states that a person who commissions photographs or filming for private purposes has a right not to have those works published. Note that this only provides a privacy right to the commissioning party and will not protect any other individuals who may be captured in the professional photographs. Furthermore, this provision only applies to photographs that are commissioned for money or money’s worth; *Trimingham v Associated Newspapers* [2012] EWHC 1296.

¹⁴⁰ *Campbell* (n 14) [117] (Lord Hope); [148] (Baroness Hale). For further discussion of the ECtHR’s approach to artistic expression under Article 10 see: Eleni Polymenopoulou, ‘Does one swallow make a spring? Artistic and literary freedom at the European Court of Human Rights’ (2016) 16 *Human Rights Law Review* 511–39, 516, 528.

¹⁴¹ Some such disputes have arisen in the USA, e.g. *Foster v Svenson* (2015) NY Slip Op 03068, 128 AD3d 150. Here a critically acclaimed artist exhibited long-lens photographs of his neighbours (including children) that he had covertly taken through the large windows of their apartments. Strong First Amendment protection for artistic speech overrode the cogent privacy claims, prompting the New York State Appellate Division to call for legislative intervention. The *Foster* judgment provides an overview of similar US cases concerning conflicts between image rights and artistic expression.

make the audience spectators; and, third, they generally enjoy the status of truth. Aided by leading cultural theorists, these features are now analysed in turn.

3.1.1. Photographic appearances: worth a thousand words?

Photographs capture what a person or events looked like. In doing so, according to Sontag, 'the camera has . . . [effected] a tremendous promotion of the value of appearances. Appearances as the camera records them'.¹⁴² Berger also makes the point that photographs depict appearances, 'with all the credibility and gravity we normally lend to appearances – prised away from their meaning'.¹⁴³ Both critics seem to employ an implicit distinction between the 'appearances', the surface depicted by photographs and an (unspoken) 'reality' to which the medium is applied. By privileging 'appearances', they suggest that photographs change *how* we see and what we value, matters afforded further discussion in this part.

Furthermore, photographs are 'information rich' and provide more detail than text-based information. Judicial acknowledgment of this is evidenced by recurring judicial use of the commonplace maxim 'a picture is worth a thousand words'. For example, when the Court of Appeal discharged an interim injunction to restrain the publication of surreptitiously taken wedding photographs in *Douglas*, Keene LJ stated:

The photographs conveyed to the public *information not otherwise truly obtainable*, that is to say, what the event and its participants looked like. It is said that a picture is *worth a thousand words*. Were that not so, there would not be a market for magazines like 'Hello!' and 'OK!' The same result is not obtainable through the medium of words alone, nor by recollected drawings with their inevitable inaccuracy.¹⁴⁴

Later in *Campbell*, Lord Nicolls (dissenting) stated: 'In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words'.¹⁴⁵ Baroness Hale made similar comments regarding the nature of photographic information:

A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like.¹⁴⁶

Repeated judicial use of this maxim suggests that photographs provide more information than equivalent text, but also that they have greater impact and emotional power. This point has also been acknowledged by the ECtHR¹⁴⁷ and is replicated in other areas of law, for example contempt of court¹⁴⁸ and copyright.¹⁴⁹

142 Sontag (n 1) 87.

143 Berger, *About Looking* (n 110) 55.

144 *Douglas and Others v Hello! Ltd* [2001] QB 967 (CA), [165] (Keene LJ).

145 *Campbell* (n 14) [31].

146 *Ibid* [155]. See also *Richard* (n 70) [318]: 'Adding impact is, after all, the purpose of adding pictures to a story. That is what the BBC did, quite handsomely.'

147 The ECtHR make this point regarding audiovisual media more generally, stating in *Peck* (n 112) [62]: 'It is "commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media".'

148 'The visual image of the defendant Ward was designed to have an impact. That is why it was published.'; *AG v Associated Newspapers* [2011] EWHC 418 (Admin), [51], [41].

149 Rebecca Tushnet, 'Worth a thousand words: the images of copyright' (2012) 125(3) *Harvard Law Review* 684, 690–1, 694–5.

In *D v L* (2003) Waller LJ briefly stated the principles regarding photographs, suggesting they applied similarly to the audio-recordings of conversations which were the subject of this particular dispute. He stated:

. . . a photograph is more than the information you get from it. A court may restrain the publication of an improperly obtained photograph *even if the taker is free to describe the information which the photograph provides* or even if the information revealed by the photograph is in the public domain.¹⁵⁰

Waller LJ's comments provide further confirmation that the photographic medium per se may be a factor that determines an Article 8 violation. Yet such understandings of photographs are not unanimous. For example, in *Campbell* Lord Hoffmann recited the 'thousand words' maxim and acknowledged that photographs are 'more vivid' than words. But he underplayed the significance of such a distinction, claiming that the same principles for assessing privacy invasions applied to both: 'In my opinion a photograph is in principle information no different from any other information.'¹⁵¹ Despite this isolated claim, case law clearly indicates a judicial consensus that photographs are indeed different, and that their informational richness may pose acute privacy implications. This is arguably because photographs simultaneously provide both partial and full information; partial in that they capture only the *appearance* of *one* specific moment from a flow of events, but also full because they record that moment in a very high level of detail. Yet, intriguingly, a photograph is also '*more* than the information you get from it'.

3.1.2 PHOTOGRAPHS MAKE ONE A SPECTATOR

McLuhan categorises photography as a 'hot medium'; that is 'one that extends one single sense [in this case, vision] in "high definition"'.¹⁵² By depicting the appearances of people and events at a given moment, photographs make one a spectator. This feature of photographs was briefly outlined by Lord Walker in *Douglas*, who claimed: 'They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts.'¹⁵³ Lord Nicholls took a similar approach when *Douglas* reached the House of Lords, claiming:

Photographs are much the best way of conveying an impression of how everybody looked at a wedding. Photographs *make one a spectator* at the wedding. Information communicated in other ways, in sketches or descriptive writing or by word of mouth, cannot be so complete or accurate.¹⁵⁴

Judges here are employing the 'visual' model of photography. On this understanding, the photograph delivers detailed visual information about the captured individual to the onlooker, in effect placing them at the scene.¹⁵⁵ The act of observation plays a central role in understandings of privacy. For example, Scanlon indicates that privacy norms are concerned with not being observed, seen, kept track of and so on,¹⁵⁶ claiming 'our

150 Emphasis added. *D v L* [2003] EWCA Civ 1169, [23] (Waller LJ). Quoted in *Douglas* (n 15) [86]; *Mosley* (n 16) [18]. See also *Ferdinand* (n 107), [101].

151 *Campbell* (n 14) [72]. See also [169] (Lord Carswell).

152 Author's addition. *McLuhan* (n 110) 24. Hot media leave less 'to be filled in or completed by the audience' 24–5.

153 *Douglas* (n 15) [84]. Quoted in *Mosley* (n 15) [19]. A television programme's broadcast of the claimants' eviction was similarly held to have 'a voyeuristic quality' in *Ali v Channel 5* (n 17) [215].

154 Emphasis added. See also *Douglas* (n 16) [251] (Lord Nicholls).

155 This position is critiqued in Joel Snyder and Neil Walsh Allen, 'Photography, vision, and representation' (1975) 2(1) *Critical Inquiry* 143–69, 149, 152.

156 Thomas Scanlon, 'Thomson on privacy' (1975) 4(4) *Philosophy and Public Affairs* 315–32, 315, 316.

conventions of privacy are motivated by our interests in being free from specific offensive observations'.¹⁵⁷ Similarly Gavison, who sees privacy as control over access to ourselves, claims that an individual loses privacy when they are subjected to attention: 'Attention is a primary way of acquiring information and includes e.g. staring, listening or other observation.'¹⁵⁸ Benn also argues that a minimal right to immunity from uninvited observation is a basic feature of our conception of a person.¹⁵⁹ So, though intrusion need not occur via observation and can occur via other senses,¹⁶⁰ it is primarily understood in visual terms. This emphasis on observation is perhaps unsurprising; throughout Western history, from the Greeks to the Enlightenment, human thought and culture has privileged the sense of vision,¹⁶¹ for example via the Enlightenment's veneration of the detached empirical observation employed by the sciences.¹⁶² Yet in the context of privacy, observation raises problematic implications. This is most aptly highlighted by Foucault's seminal critique of the panoptical gaze in *Discipline and Punish*¹⁶³ in which he draws out the dominatory potential of seeing.¹⁶⁴ Foucault's suspicion of ocularcentrism recurs across a number of his works, and forms part of a tradition of twentieth-century French theory that critiqued vision as alienating and objectifying.¹⁶⁵

The objectifying nature of photography is widely acknowledged and is of particular interest to feminist writers.¹⁶⁶ Barthes pithily summarises its effect thus:

Photography transformed subject into object.¹⁶⁷

Sontag also expresses concerns about such objectifying tendencies, claiming that photographs enable others to see a person in ways that the captured individual cannot, for instance by revealing faces as 'social masks'.¹⁶⁸ Photography 'turns people into objects

157 Ibid 320.

158 Ruth Gavison, 'Privacy and the limits of law' (1980) 89(3) Yale Law Journal 421–71, 432.

159 Stanley Benn, 'Privacy, freedom and respect for persons' in Schoeman (ed) (n 92) ch 8, 224, 232. See also Moreham, whose definition of intrusion entails observation and/or visual recording, though allowance is also made for overhearing (nn 20 and 42).

160 See also Richard Parker, 'A definition of privacy' (1974) 27 Rutgers Law Review 275, 280–2.

161 An interesting historical overview of the dominance of the visual, and reasons for it, is provided by Bernard Hibbitts, 'Making sense of metaphors: visuality, aurality, and the reconfiguration of American legal discourse' (1994) 16 Cardozo Law Review 229, 245–64. See also Thomas R Flynn, 'Foucault and the eclipse of vision' in David M Levin (ed), *Modernity and the Hegemony of Vision* (University of California Press 1993) 273–86, 274–5; Martin Jay, 'In the empire of the gaze: Foucault and the denigration of vision in twentieth century French thought' in David Couzens Hoy (ed), *Foucault: A Critical Reader* (Basil Blackwell 1986) 176.

162 Hibbitts (n 161) 293–6.

163 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991).

164 Flynn (n 161) 275: 'The shift from a detached, contemplative view to a dominating gaze is essential to Foucault's conception of modernity.'

165 Jay (n 161) 180–93, 195. See also Martin Jay, 'Sartre, Merleau-Ponty and the search for a new ontology of sight' in Levin (ed) (n 161) 143–85.

166 See e.g. Naomi Wolf, *The Beauty Myth: How Images of Beauty are Used against Women* (Vintage 1991); Laura Mulvey, 'Visual pleasure and narrative cinema' in Leo Braudy and Marshall Cohen (eds), *Film Theory and Criticism: Introductory Readings* (Oxford University Press 1991) 833–44. For a feminist critique of the role of copyright law in empowering (predominantly male) authors vis à vis their recorded (predominantly female) subjects, see John Tehranian, 'Copyright's male gaze: authorship and inequality in a panoptic world' (2018) 41 Harvard Journal of Law and Gender 6–59 <<https://ssrn.com/abstract=3005920>>.

167 Barthes (n 4) 13.

168 Sontag (n 1) 59.

that can be symbolically possessed',¹⁶⁹ though the possibilities for subjects to resist and disrupt photographic objectification in specific contexts must also be acknowledged.¹⁷⁰

But just as photographic information is seen as distinct from equivalent textual information, some treat photographic seeing as fundamentally different in nature to the act of seeing in daily life, i.e. actually witnessing a scene. Numerous critics note the impact of photography on the visual senses, claiming that it changes *how* we see. For Berger, 'Photography is the process of rendering observation self-conscious.'¹⁷¹ For Sontag, photography 'changed seeing itself, by fostering the idea of seeing for seeing's sake'. The resulting observation of the photograph's audience is detached, even alienated, from the subject matter depicted.¹⁷²

Consistent with this alternative view, there has been judicial acknowledgment that viewing a photograph *is* materially different from witnessing the live scene. In *Weller v Associated News*, where the claimant sought damages for publication of photographs of his children walking on the streets of Los Angeles, Dingemans J suggested that photographic seeing entails a very specific way of viewing that distinguishes it from the observation of a bystander:

The particular importance attached to photographs in the decided cases is, in my judgment, a demonstration of the reality that there is a very relevant *difference* in the potentially intrusive effect of *what is witnessed* by a person [spectator] on the one hand, and the publication of a *permanent photographic record* on the other hand.¹⁷³

This passage highlights the key difference; photographic seeing entails the viewing of a *record*; unlike actual events, the image is fixed, infinitely reproducible and permanent. Related to this point, a further crucial distinction between regular and photographic vision is offered by Benjamin who claims photography can enlarge and capture images beyond natural optics, namely those that would not be within the capacity of ordinary sight. Additionally, photographic seeing can be differentiated by the sheer scale of the potential audience it enables. The courts do acknowledge the potential mass reach of the medium via their recognition, technically at least, of each individual act of viewing a photograph. The approach is illustrated by the Court of Appeal in *Douglas*:

Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be *a fresh intrusion of privacy when each additional viewer sees the photograph* and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it.¹⁷⁴

This proposition that each additional individual viewing creates a new, separate intrusion applies to any private information irrespective of medium.¹⁷⁵ But, by implication, each

¹⁶⁹ Ibid 14.

¹⁷⁰ Linda Mulcahy, 'Docile suffragettes? Resistance to police photography and the possibility of object–subject transformation' (2015) 23(1) *Feminist Legal Studies* 77–99.

¹⁷¹ Berger, *Understanding a Photograph* (n 110) 19.

¹⁷² Sontag (n 1) 93, 97, 99.

¹⁷³ Emphasis added. *Weller* (n 76) [63]. See also: *Murray* (n 76) [50]; *Peck* (n 112) [62] where the ECtHR stated: 'the relevant moment [of the aftermath of the applicant's suicide attempt] was viewed to an extent that far exceeded any exposure to a passer-by or to security observation'.

¹⁷⁴ *Douglas* (n 15) [105]. Quoted in *Contostavlos* (n 126) [25]. See also: *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [88] (Lord Toulson).

¹⁷⁵ *PJS* (n 175) [24]. For an analysis of this, see Rebecca Moosavian, 'Jigsaws and curiosities: the unintended consequences of misuse of private information injunctions' [2016] 21(4) *Communications Law* 104–15.

additional viewing of a private photograph remains materially different to, for example, each additional reading of text-based information. Nevertheless, this quantitative, highly atomistic, liberal conception of dissemination further conflicts with judicial reliance on the 'visual' model that equates viewing a photograph to being present at the scene.

3.1.3 THE TRUTH STATUS OF PHOTOGRAPHS

A final, crucial characteristic of the photographic medium, its capacity to verify, also becomes an issue at dissemination stage and warrants further attention. Judicial use of photographs as verifying evidence occurred with the emergence of the technology in the nineteenth century.¹⁷⁶ Numerous contemporary judicial comments continue such long-standing understandings that photographs provide evidence in a disputed story. For example, in *Campbell* Lord Hoffmann accepted that photographs in the disputed story were necessary to provide verification¹⁷⁷ and Lord Carswell deemed the accompanying photographs a 'powerful prop' to the written article.¹⁷⁸ In *Douglas* Lord Nicholls stated that photographs are more complete and accurate than other forms of information¹⁷⁹ and his fellow dissenter Lord Walker claimed:

Photographs are also regarded (despite the ample opportunities for manipulation which modern technology affords) as providing *powerful corroboration* of written reports of conduct which the person photographed might wish to deny.¹⁸⁰

The ECtHR also noted this verifying capacity of photographs in *Von Hannover (No 2)*.¹⁸¹ Despite such widespread judicial views, various essayists question the basic relation between photographs and truth, suggesting that it is more ambiguous than these judicial comments indicate. In particular, what precisely can a photograph verify? And to what extent does photography transparently record events as distinct from constructing them?¹⁸² These two issues will be discussed in turn.

Like the judges outlined above, many cultural theorists acknowledge a photograph's evidential force, albeit in qualified, ambivalent terms. Sontag speaks of 'the *presumption* of veracity that gives all photographs authority'.¹⁸³ Berger summarises the position thus:

In itself the photograph cannot lie, but, by the same token, it cannot tell the truth; or rather, the truth it does tell, the truth it can *by itself* defend, is a limited one.¹⁸⁴

176 For an excellent discussion of the history of photographs in the court room, see Jennifer Mnookin, 'The image of truth: photographic evidence and the power of analogy' (1998) 10(1) *Yale Journal of Law and Humanities* 1–74.

177 *Campbell* (n 14) [63] (Lord Hoffmann).

178 *Ibid* [165] (Lord Carswell).

179 *Douglas* (n 16) [251] (Lord Nicholls).

180 He goes on to say this is not that sort of case

∴ *ibid* [288].

181 The ECtHR upheld the German court's finding that the photographs in that article 'supported and illustrated the information being conveyed' and 'there was a sufficiently close link between the photo and the event described in the article': *Von Hannover (No 2)* (n 18) [117]. The proximity of the photograph to the relevant story of general interest was also noted as a factor in *Rothe* (n 7) [57]. See also *Couderc* (n 103) [135]. But in *Richard*, the court held that film footage of a police search of the claimant's property did not verify any useful or important aspect of the disputed story – it simply created unnecessary drama: *Richard* (n 70) [300].

182 This latter question is also an issue with legal language which I have explored elsewhere. *Moosavian* (n 36).

183 Sontag (n 1) 6.

184 Berger, *Understanding a Photograph* (n 110) 70. More generally, see also William J Mitchell, *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (MIT Press 2001) 23–49.

Berger claims this is particularly the case when photographs are used for communication purposes as distinct from official, identity functions (e.g. passports).¹⁸⁵ But what is the limited truth that photographs *can* provide? Barthes explains that the photographs can verify that at a specific point in time the subject matter captured was indeed present:

Photography never lies: or rather, it can lie as to the meaning of the thing . . . never as to its existence.¹⁸⁶

The view that photographs are weak in meaning despite their informational richness is shared by Berger. He depicts a reciprocal, symbiotic relationship between text (which photographs support and verify) and photographs (that require meaning or interpretation, often afforded by words):¹⁸⁷ 'Together the two then become very powerful; an open question appears to have been fully answered.'¹⁸⁸

The second issue of whether photography objectively records or subjectively constructs events is a longstanding debate within photography literature. One major factor influencing the view that photography objectively documents people and events is the transparency or invisibility of the medium itself.¹⁸⁹ Sontag claims that photographs seem to be miniature pieces of reality, likening them to 'a trace, something directly stencilled off the real, like a footprint or a death mask'.¹⁹⁰ And Mnookin shows that this view of photographs as direct transcripts of nature was one of two competing paradigms employed by nineteenth-century US courts to understand new photographic technology. This model understood the photograph as an unbiased mechanical witness that communicated the truth, and in doing so it minimised or overlooked the human role in the process of capture.¹⁹¹ Malkan claims that this transparency assumption continues in privacy law;¹⁹² photographs are viewed as providing 'an uncurtained window' onto the subject who is 'carelessly revealed'.¹⁹³

Despite its apparent objectivity, many cultural commentators argue that a photograph cannot be a wholly objective record; it simply represents a subjective interpretation of the world.¹⁹⁴ This is because each photograph rests upon a series of social and cultural variables. This second paradigm identified by Mnookin emphasises photographs as a form of representation, as a human construction and thus fallible; it correspondingly emphasises the various human choices involved in taking any photograph.¹⁹⁵ For example, the captured image depends upon what the individual photographer sees and chooses.¹⁹⁶ Snyder and Allen claim that photographers exercise a series of choices over matters such as equipment, camera positions and angle, how a situation is 'set up'; they

185 Berger, *Understanding a Photograph* (n 110) 71.

186 Barthes (n 4) 87. See also: 76, 82, 85. See also: Berger, *Understanding a Photograph* (n 110) 62.

187 On the need for additional explanation for images, see also Roland Barthes, *Image Music Text* (Fontana 1977), 'The photographic message' 15–31; Jessica Sibley, 'Images in/of law' (2012–2013) 57 *New York Law School Law Review* 171, 172.

188 Berger, *Understanding a Photograph* (n 110) 66, 71. This point is also made by Tushnet (n 149) 690.

189 Barthes (n 4) 5, 6. See also: Berger, *About Looking* (n 110) 52–3.

190 Sontag (n 1) 154, 4.

191 Mnookin (n 176) 14–20.

192 Malkan (n 11) 781–2.

193 *Ibid* 794–5.

194 Sontag (n 1) 6–7: 'Although there is a sense in which the camera does indeed capture reality, not just interpret it, photographs are as much an interpretation of the world as paintings and drawings are.' See also Joel Snyder, 'Picturing vision' (1980) 6(3) *Critical Inquiry* 499–526, 507–10.

195 Mnookin (n 176) 20–7.

196 Sontag (n 1) 88–9: '[P]hotographs are evidence not only of what's there but of what an individual sees, not just a record but an evaluation of the world.'

exercise judgement, informed by background knowledge and cultural taste, to select what to include and exclude.¹⁹⁷ Thus a captured object does not have one single image, but an almost infinite number because: 'The image is a crafted, not a natural, thing . . . how [an object] will be represented is neither natural nor necessary.'¹⁹⁸ Interestingly, this degree of selection and judgement exercised by the photographer is acknowledged in UK copyright law, where the making of such 'free and creative choices' is deemed to confer the originality required for copyright to subsist in a photograph.¹⁹⁹ So photographs are inevitably influenced by the wider culture in which they are taken and viewed²⁰⁰ and, in turn, come to construct the culture they become part of. Furthermore, the meaning and interpretations attributed to photographs will vary according to surrounding context and the individual onlooker's position: 'A photograph changes according to the context in which it is seen . . . As Wittgenstein argued for words, that the meaning is the use – so for each photograph.'²⁰¹

Three Article 8 cases aptly illustrate the inherent limitations of a photograph's ability to verify.²⁰² In *Mosley v News Group*, the meaning of footage of the claimant engaged in unformed sexual activities with sex workers was bitterly contested. Did these images depict disciplinary role play as the claimant contended, or, as the defendant claimed, did they reveal a sinister Nazi theme to the activities which would provide a strong public interest dimension favouring the defendant? The stills and footage were unable *in themselves* to confirm either interpretation. So ultimately, the defendant newspaper's Nazi theme allegations were only deemed unfounded at trial in light of close examination of the surrounding witness evidence.²⁰³ Similarly the parties in *Rotbe v Austria* disagreed as to the meaning of the disputed photograph which showed the applicant, a Catholic church official, kissing a student priest at a party. The applicant had claimed that the photographs could be interpreted in different ways and did not prove any homosexual activity, but merely a friendly embrace; any impression of a French kiss was 'an optical illusion'.²⁰⁴ The applicant's request to obtain expert evidence in photographic analysis was rejected as the national courts held that the judge could interpret the photographs for herself in light of surrounding evidence. This evidence included a witness who confirmed the applicant's French kissing activities at the party.²⁰⁵ In both of these cases, context confirmed (or

197 Some of these choices may not be operational at the scene but take effect in the final print. Snyder and Allen (n 155) 150–1; especially the analysis of a photograph of James Dean at 165–8.

198 Ibid 151.

199 In *Painer v Standard Verlags GmbH* [2012] ECDR 6 the CJEU held that a photographer's choices regarding e.g. background, subject's pose, lighting, framing, angle, composition and atmosphere created were sufficient to meet the 'author's own intellectual creation' test for the originality requirement for copyright protection. In *Temple Island Collections v New English Teas Ltd* [2012] EWPC 1 Birss J held that there were three aspects where there was room for originality in photographic works: (1) choices of angle, light, exposure, effects etc; (2) choices to create the scene to be captured, such as composition etc; (3) aspects deriving from a photographer being in the right place at the right time. For an interesting discussion of the challenges copyright has faced in assessing the photographer's creative choices and originality, see Justin Hughes, 'The photographer's copyright – photographs as art, photographs as database' (2012) 25(2) *Harvard Journal of Law and Technology* 339.

200 Berger, *Understanding a Photograph* (n 110) 67.

201 Sontag (n 1) 106.

202 See Mnookin's discussion of the US *Mumler* case of 1869, which involved disputed photographs of 'spirits'. Did the photographs establish evidence of the existence of spirits, or of fraud on Mumler's part (n 176) 27–40?

203 *Mosley* (n 15) [122]–[123].

204 *Rotbe* (n 7) [29], [8].

205 Ibid [12], [14], [17].

perhaps created) the meaning attributed to the photographs. A final example of context creating meaning is afforded by *Bogomolova* where the ECtHR agreed that unauthorised publication of a photograph of the applicant's son on an adoption brochure inferred he was an orphan and created a false and prejudicial impression that he had been abandoned.²⁰⁶

Elsewhere, the limitations of a photograph's accuracy are also noted in somewhat ambivalent comments by the Court of Appeal in *Douglas*. Whilst acknowledging the degree of detail a photograph might capture, it went on to state that: 'A personal photograph can portray, *not necessarily accurately*, the *personality* and the mood of the subject of the photograph.'²⁰⁷ Ultimately then, the dual nature of photographs must be acknowledged²⁰⁸ and lends weight to Barthes' claim that photography is 'a loaded evidence'.²⁰⁹ The medium *is* the message, even (or perhaps especially) in an apparently transparent one.²¹⁰

3.2 PHOTOGRAPHIC INTRUSION: COMMODIFICATION AND DIGITISATION

The preceding discussion has established that photography creates a permanent, infinitely replicable record of the individual's image that can be disseminated to the objectifying gaze of a mass audience; photography thus enables commodification of the individual's image. Amongst audiences (including judges), photographs enjoy a truth status, fostering the impression that the image is what they would have seen had they been at the scene. But the medium also leads viewers to overlook the myriad variables that gave rise to what lies within the frame and what lies beyond, and also the photograph's inability to verify the meaning of the depicted subject matter (which is reliant on surrounding culture and text etc.). It is these complexities and ambiguities of the medium that make it so distinctive and problematic in privacy terms. More generally, photography changes our visual culture by fostering seeing for its own sake and alienating audiences from the images they view. Photography enables the dissemination of a detailed record of an event that might not otherwise have been seen, even by those at the scene. Photography thus contributes to a vision-based culture that lends itself to privacy intrusion, as well as increasing practical opportunities for intrusive observation.

Courts confirm that *publication* of photographs may be particularly intrusive (even where capture might not be), and they briefly identify features of the medium to explain why. But the particular sense in which the ECtHR and English courts use the term 'intrusion' is unclear. Generally, the term is used in various shifting metaphorical senses that are difficult to pin down, including the transgression of the Article 8 right and/or behavioural boundaries, but also, on occasion, with reference to inner feelings consistent

206 *Bogomolova* (n 102) [57].

207 Emphasis added. *Douglas* (n 15) [106]. Quoted in *Contostavlos* (n 126) [25].

208 Berger, *Understanding a Photograph* (n 110) 66: 'Are the appearances which a camera transports a construction, a man-made cultural artefact, or are they, like a footprint in the sand, a trace naturally left by something that has passed? The answer is both.' Mnookin also argues that in courts photographs were treated as fulfilling both functions (verification and illustration) simultaneously: (n 176) 71.

209 Barthes (n 4) 115.

210 McLuhan (n 110) 9; 19: '[I]t is the medium that shapes and controls the scale and form of human association and action. The content or uses of such media are as diverse as they are ineffectual in shaping the form of human association.'

with the 'spiritual' metaphor, for example in *PJS*,²¹¹ *Von Hannover (No 1)*²¹² and notably *Theakston*.²¹³ More specifically, the English courts, for example in *Goodwin*²¹⁴ and *CTB*,²¹⁵ have suggested that intrusion is a component of Article 8, and have referenced Moreham's work²¹⁶ as a basis for this, though they have not elaborated or developed it further.

Despite the fact that it does not comfortably accord with the tendencies of English law, the continental personality rights tradition and the work of Goffman can offer further insights as to *why* the distinctive features of photographs are so potentially intrusive in an emotional-spiritual sense. Both emphasise the 'outer' communal engagement aspect of personality and, crucially, its close reflection of and bearing upon inner self or 'felt identity'. They show how dissemination of one's photographic image may transgress upon one's 'inner' spiritual or dignitary core and related autonomy; via publication, the photographed individual loses control of this aspect of their 'outer' face (or faces), and, by implication, their 'inner' felt identity which depends on it.

As discussed in Part 2.1, Goffman distinguished between 'inner' felt identity and multiple, shifting 'outer' selves that arise across various face-to-face social interactions (e.g. professional, familial, sexual etc.) and which are facilitated by audience segregation. Disseminated photographs can contribute to a person's outer face or faces. But Goffman noted that fame creates difficulties for audience segregation and entails less control of one's biography.²¹⁷ Photographs take interaction away from the locus of the real-life subject; instead a remote and asymmetrical interaction occurs between the viewer and the fixed image (mediated by surrounding text and culture). In this way, photographs enable one's eidolons to be subjected to public gaze in manners one may have no control over. A person's widely disseminated photographic image may take on alternative meanings which enjoy the status of 'truth', but which the subject has had no involvement in constructing. These photographs and surrounding narratives form part of the 'face' projected onto the individual, tying them to commodified, powerful and enduring images that may be at odds with, or indeed represent all too accurately, their inner felt identity. This is not just relevant to traditional reputation-based actions such as defamation,²¹⁸ but forms an integral aspect of privacy itself when understood in personality-based terms. It also becomes ever more problematic in the digital era.

Though the Article 8 cases discussed here involve traditional media publication, the principles have broader application to the digital realm where most photographic dissemination now occurs. Digital technology has effected three material changes to the creation and publication of photographs that have implications for this area of law. First, the technology enables quicker and wider dissemination, and its instant global reach may

211 See repeated references to feelings of 'intrusiveness and distress' the claimant and his family would feel: *PJS* (n 174) [35] (Lord Mance); [53], [61] (Lord Neuberger).

212 The ECtHR said tabloid photographic harassment could 'induce' a 'very strong sense of intrusion' or even 'persecution': *Von Hannover (No 1)* (n 18) [59].

213 '[P]ublication of such photographs would be particularly intrusive *into* the claimant's own individual personality.' Emphasis added. *Theakston* (n 12) [78].

214 *Goodwin v News Group* [2011] EWHC 1437 QB. Quoted in *PJS* (n 174) [58] (Lord Neuberger).

215 *CTB v News Group* [2011] EWHC 1326, [23]. Though Moreham is not specifically referenced here.

216 See discussion in Part 1.

217 Goffman, *Stigma* (n 96) 88. See also 81.

218 See e.g. Alastair Mullis and Andrew Scott, 'Reframing libel: taking (all) rights seriously and where it leads' (2012) 63(1) Northern Ireland Legal Quarterly 5–25.

be resultingly harder to limit or control in practice.²¹⁹ Second, digital photographs are highly manipulable²²⁰ via widely available editing and filter technologies; the constructed (often highly idealised and curated) nature of photographs is now a banal feature of online life and suggests greater awareness of photography's ambiguous relation to truth. Third, the digital era has witnessed a proliferation of photographic dissemination via, for example, posting on social media sites. So the privacy implications of publication are no longer restricted to public figures or elites, and most individuals have a potential stake in whether (and how) law deals with matters of information control, self-presentation and commodification more generally.²²¹

Conclusion

This article set out to ascertain *why* the courts treat photography as special and intrusive relative to other forms of information. It has come to two related conclusions; the first, about the photographic medium; and the second about the terminology of 'intrusion'. First, though any intrusion into privacy will be highly context-specific, this article has examined the distinctive properties of photography that may cause or exacerbate intrusion, though these are only accorded recognition when publication occurs. At dissemination stage, there arise significant but overlooked tensions in the medium that mean it is not *quite* what it seems. First, photographs provide full (i.e. very detailed) *and simultaneously* partial information (of mere appearances at one single moment). Second, photographs seem to make the viewer a witness at the scene despite fundamental differences between observing first-hand and via a fixed, framed image with mass reach. Third, a photograph seems to offer truth, but is also a subjective interpretation of events and lacks capacity to verify its own meaning. Though select judicial comments indicate brief, isolated acknowledgment of some of these points, the courts do not express an awareness of the inherently ambiguous, variable nature of the medium, lending weight to Sherwin's calls for a 'visual prudence in law'.²²²

Second, despite its range of meanings, 'intrusion' is not currently employed in Article 8 case law in a technical, doctrinal sense. But it is instrumental in constructing an inchoate 'inner essence' that recurs in various guises across privacy discourse as the soul or spirit, and that is represented in Article 8 case law via the continental notion of personality and the related floating signifier of dignity. Both of these concepts contain allusions to spirit, emotion and a 'sacred' inner life; they also form the crucial stated foundations for Article 8 protection. This 'inner' aspect features more explicitly in the continental tradition adopted by the ECtHR, as evidenced by its *Reklos* finding that Article 8 can provide protection for image in itself because it is a chief attribute of personality. Such influences are far weaker in English privacy law, but these non-rational traces are still subtly at play via fleeting references to dignity and references to feelings of intrusion. Ultimately, then, though contemporary Article 8 jurisprudence certainly does not go as far as to perpetuate the myth that 'photographs steal souls', it does on occasion adopt reasoning that contains echoes of it.

219 Moosavian (n 175). Yet, despite this the Supreme Court made ambiguous comments that indicated that online dissemination of photographs is less intrusive than publication via traditional media, though the precise reason for this is not entirely clear and seemed, at least partly, to be the paparazzi attention that comes with traditional media coverage; *PJS* (n 174) [31],[35],[61].

220 Mitchell (n 184). 221 Though personality rights-based protection for image should not be overstated and would not extend Article 8 protection to minor, inconsequential aspects of self-presentation or image management.

222 Richard K Sherwin, 'Visual jurisprudence' (2012–2013) 57(1) *New York Law School Law Review* 11, 38. See also Sibley (n 187).

Book Review: *Media Law* by Jacob Rowbottom*

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Anyone engaged with media law knows that it is a fast-developing and ever-changing area of scholarship and practice. Due to this almost constant evolution, coupled with its complex nature – that not only draws on different legal disciplines, but also engages arguments relating to, amongst others, media policy, philosophy, democracy and politics – it presents a challenging subject for academics, practitioners and students alike. However, media law's complexity is what makes it such a fascinating subject. Indeed, in recent years, it has given rise to a myriad of controversial issues and debate, such as the use of privacy injunctions, the conflict between media freedom and regulation, media plurality, mass leaks of government information, the harvesting of our personal data to influence how we vote, and the proliferation of fake news, filter bubbles and harmful speech online, amongst many others. Ultimately, in the past decade or so, media law has emerged from the shadows. It has developed from an esoteric and niche area of law into one that permeates every facet of our lives. A day does not seem to pass without an aspect of media law, or certainly the media's interaction with the law, rather ironically, making headlines somewhere.

For these reasons, Rowbottom's book is both welcome and timely. It is also, without doubt, a tour de force that not only significantly contributes to, but also moves forward, the media law canon. I have always been a great admirer of Rowbottom's scholarship. Without fail he manages to combine exemplary analysis with an accessible writing style. This work is no different. However, why this book is so good, and why it is set apart from other 'media law' texts is not simply down to its depth of analysis and accessibility. Rather, it comprehensively and elegantly evaluates the themes and issues running throughout the media law discipline, whereas other texts tend to approach the subject as the media's 'interaction' with discrete areas of law. Indeed, Rowbottom comments in the preface that:

The view taken in this book is that the study of media law is not simply a tour of bits of tort law, crime and regulation that impact on publishers and have little else in common. Instead, media law is developing as a discipline that has certain key themes and issues that bring increasing unity to different areas of law.

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In my view, this assessment is surely correct and is reflected in the ‘themes’ of the book. Rowbottom argues that ‘significant changes’ are taking place within our media which, rather than give rise to a demise of media power itself, represent, to a degree at least, a shift in communicative power between media institutions. Accordingly, he suggests that, while the media is just one element in a broader system of mass communication, it is, without doubt, a powerful actor that performs an important set of functions. Although he recognises that ‘no one can accurately predict what will happen’, the approach taken in the book assumes that the distinct role of the media will remain in the UK for the foreseeable future. Thus, he argues throughout the book that a primary aim for media law must be to address concerns about the power of the media and its accountability; an argument underpinned by his view that media freedom is justified by the media’s fulfilment of democratic functions that benefit the audience and public.

As Rowbottom acknowledges, the organisation of the book is different to other media law texts. For example, it features several long chapters dealing with multiple legal issues, such as defamation law and privacy considered together as ‘personal rights.’ Similarly, the law of contempt of court and reporting of court proceedings are also taken together in a chapter entitled ‘The media and the system of justice’. To my mind this is the correct way to approach media law. These topics do not exist in a vacuum. Both in scholarship and in practice they often overlap and can exist almost symbiotically. According to Rowbottom, he has grouped them in this way to draw to the reader’s attention various common issues and themes (and differences). I think he achieves this very well. The book begins by considering the concept of media freedom. This is built on in chapters 2, 3 and 4 which deal with several areas of media liability – the protection of personal rights, the administration of justice and the role of censorship. Chapter 5 departs from issues of liability to deal with the protection of the newsgathering process. Chapter 6 looks at media regulation, ownership and plurality, and chapter 7, the last substantive chapter, considers the issues posed by digital media. Rather helpfully, the conclusion discusses the key themes and trends across all the various areas of law.

Rowbottom has managed to strike a very difficult balance: this book is accessible to a wide range of audiences, yet it provides a depth of analysis and insight that will make it invaluable to media law scholars, practitioners and students. Indeed, it has quickly become a book that I turn to on a regular basis. It is also worthy of mention that its price (around £38) makes it excellent value for money, which adds to its appeal. Media law will continue to develop at pace. Thus, Rowbottom is ahead of the curve in producing this expertly written, fascinating and timely book. Consequently, it will no doubt act as a catalyst for further work and publications in this area, as well as being a valuable and well-cited resource. Thus, I will leave the final few words to Professor Gibbons who sums up this work far more eloquently than I can. In his view, and I wholeheartedly agree, it is:

. . . a lucid explanation of the most important elements of legal doctrine and democratic principle with perceptive analysis of the complexities and nuances involved in deciding a legitimate role for the media, especially in the context of a fast-changing digital environment.

LEGISLATION, TRENDS AND CASES

Trends

Problematically proactive: a summary of recent legal developments in the field of internet intermediary liability

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This short work will outline some of the European Commission's proposed changes to internet platform regulation. Specifically, this will involve detailing the Commission's proposed voluntary proactive measures for hosting platforms, the changes to the Audiovisual Media Services Directive (AVMSD) for video-sharing platforms and the implications of the proposed Copyright Directive. The work will identify a significant problem with applying voluntary proactive measures to the eCommerce Directive and suggest how this problem might be overcome.

Recent changes for hosting intermediaries

Over the past three years the European Commission has become increasingly dissatisfied with the liability framework for internet intermediaries, specifically hosting intermediaries (or hosting platforms).¹ A large part of this dissatisfaction stems from the fact that hosting platforms are under no obligation to actively seek out and remove illegal user content from their services. They must only remove this content if they have received explicit notice of its existence. Over the years, the Commission has identified that the mechanism for granting intermediaries notice, namely the notice-and-takedown system, is ineffective because it is slow and complicated, and this has resulted in illegal content remaining online for extended periods of time.²

Since 2017 the Commission has sought to encourage hosts to actively remove illegal content from their services instead of waiting to receive knowledge of it through a notice-and-takedown order.³ This active removal of content is to be achieved through platforms undertaking voluntary 'proactive measures' which involve a combination of automated identification and filtering technologies with a 'human-in-the-loop' for

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1 See Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final; Commission, 'Online Platforms and the Digital Single Market Opportunities' and Challenges for Europe' (Communication) COM (2016) 288 final; Commission, 'A Connected Digital Single Market for All' (Communication) COM (2017) 228 final; Commission, 'Tackling Illegal Content Online' (Communication) COM (2017) 555 final; Commission Recommendation C/2018/1177 of 1 March 2018 on measures to effectively tackle illegal content online [2017] OJ L63/50.

2 'A Digital Single Market Strategy for Europe', s 3.3.2 (n 1).

3 See 'Tackling Illegal Content Online' and Recommendation C/2018/1177 on measures to effectively tackle illegal content online (n 1).

oversight.⁴ These automated technologies should be able to automatically detect and remove illegal content and also prevent *ex ante* any re-uploads of the same content in future.⁵ Importantly, the Commission has been very clear that these voluntary proactive measures are to be consistent with the eCommerce Directive's no monitoring obligations, taken without prejudice to both Articles 14 and 15.⁶

The Commission has similar ideas in mind for intermediaries hosting audiovisual content. In 2016, it put forward a proposal to amend the current AVMSD (2010).⁷ One of the main changes to the Directive is that its terms will be broadened to cover 'video-sharing-platforms'; that is, intermediaries which primarily host user-generated audiovisual content.⁸ Although the Commission states that these platforms do not have editorial control over the user content they host, only having substantial control over the way this content is organised, they will still be expected to prevent adult content, such as pornography or advertisements for alcohol, from being made readily available to children.⁹ They will also be expected to prevent access to content which is hateful to minority ethnic groups, as well as content which seeks to incite violence.¹⁰

The Commission intends to achieve these measures through the introduction of flagging mechanisms which will enable users to report illegal content to the hosting platform.¹¹ The platform must then remove the reported material within a specific timeframe, the length of which is determined by the illegal nature of the content. Age verification and parental control systems are to be introduced to prevent children from accessing unsuitable content and content-rating systems are to be implemented so that unsuitable content is less likely to be viewed.¹² Platforms will also be expected to engage in voluntarily proactive content removal which is to be consistent with Articles 14 and 15 of the eCommerce Directive.¹³ Any removal mechanisms and flagging procedures are to be constructed within frameworks of self-regulation or co-regulation.¹⁴

4 'Tackling Illegal Content Online', s 3.3.2. (n 1)

5 *Ibid* s 5.

6 Regarding Article 14, '[t]he guidance in this Communication is without prejudice to EU *acquis* and relates to the activities of online platforms, and in particular hosting services provided by these platforms in the sense of Article 14 of the E-Commerce Directive, and covers all categories of illegal content while duly taking account of the fact that different types of content may require different treatment' in 'Tackling Illegal Content Online' (n 1). Regarding Article 15, specific proactive measures must be 'taken voluntarily by hosting service providers, including by using automated means in certain cases . . . without prejudice to Article 15(1) of Directive 2000/31/EC' in Recommendation C/2018/1177 on measures to effectively tackle illegal content online (n 1).

7 Directive of European Parliament and the Council 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.

8 European Parliament and Council, 'Proposal for amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM(2016) 287 final, recitals 26–8.

9 *Ibid* Article 28a(1)(a).

10 *Ibid* Article 28a(1)(b).

11 *Ibid* Article 28a(2)(b).

12 *Ibid* Articles 28a(2)(c) and (2)(d).

13 *Ibid* Recital 30.

14 See this in European Parliament, 'Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities' (COM(2016)0287 – C8-0193/2016 – 2017/0151(COD)) Recital 7a.

In June 2018, an updated draft of the Directive was released by the Commission to incorporate input from the European Parliament and the Council of Europe.¹⁵ The draft clarifies that social media platforms, although not the intended targets of the Directive, may indeed fall under the requirements of the Directive if they meet the definition of video-hosting platforms. This will be the case if they host a sufficient amount of programmes and/or user-generated content to constitute an ‘essential functionality’ of their service.¹⁶ The draft also adds incitement to terrorism to the content listed under Article 28a, to which platforms must seek to prevent user access, as well as adding terrorist incitement under an amendment to Article 6 of the AVMSD (2010).¹⁷ The Directive was slightly updated and approved by the European Parliament in October 2018 and requires only approval by the Council of European ministers before it can enter into force.¹⁸

Also in 2016, the Commission released a specific proposal for updating the copyright framework in order to account for technological developments in the digital marketplace.¹⁹ The Commission argues that hosting platforms have enabled users to easily access copyrighted content and this has subsequently led to the loss of revenue for the right-holders of that content. This has come to be known as the ‘value gap’ (although existence of this gap is contested).²⁰ The proposal states that ‘effective technologies’ are to be imposed on platforms to ensure that right-holder content hosted on their services is ‘protected’ and subject to licensing agreements.²¹ This is to be achieved through the requirement of platforms to install ‘effective content recognition technologies’ as stated in Article 13(1).²²

In July 2018, the European Parliament rejected the adoption of the Copyright Directive (although an amended version of the Directive was accepted by the European Parliament in September 2018, its adoption pending only a final plenary vote to be taken in early 2019).²³ The Directive is highly controversial, with Article 13 in particular attracting a lot of criticism from free speech advocates.²⁴ It has also received criticism from academics and members of the European Parliament on account of its inconsistency with Articles 14 and 15 of the eCommerce Directive, as well as the

15 Ibid.

16 Ibid Recital 3b.

17 Ibid Article 28a(1)(c) and Article 6(b).

18 See European Parliament press release ‘Audiovisual media: agreement reached on new media services directive’ (26 April 2018) <www.europarl.europa.eu/news/en/press-room/20180423IPR02332/audiovisual-media-agreement-reached-on-new-media-services-directive>.

19 European Parliament and Council, ‘Proposal for a Directive on copyright in the Digital Single Market’ COM (2016) 593 final.

20 There is very little empirical evidence to confirm the existence of this value gap. See Giancarlo Frosio (2016) ‘Digital piracy debunked: a short note on digital threats and intermediary liability’, *Internet Policy Review* (23 March) <<https://policyreview.info/articles/analysis/digital-piracy-debunked-short-note-digital-threats-and-intermediary-liability>>.

21 ‘Proposal for a Directive on copyright in the Digital Single Market’, recital 38 (n 19).

22 Ibid Article 13(1). For existing content recognition technologies, see YouTube’s ‘Content ID’, ‘Audible Magic’ (used by Facebook, Twitch, Soundcloud and others) and Microsoft’s ‘PhotoDNA’.

23 See <www.bbc.co.uk/news/technology-44712475> (5 July 18); <www.wired.co.uk/article/article-13-eu-copyright-directive-memes> (5 July 18); <www.independent.co.uk/life-style/gadgets-and-tech/news/european-copyright-laws-memes-link-tax-article-13-11-a8432486.html> (5 July 18).

24 Ibid.

concerns it raises for abuses of free speech under Article 11 of the Charter of Fundamental Freedoms.²⁵

Taken as a whole, it is clear that the Commission wants hosting intermediaries to undertake proactive measures in order to remove illegal content, whether that be for hate speech, incitement to terrorism or copyright, and regardless of whether that content is in the written word or video. It is, however, also clear that the Commission wants these proactive measures to be compatible with the eCommerce Directive. The main problem for the Commission is that Article 14 of the eCommerce Directive as it stands will pose significant difficulties for any platform undertaking proactive measures. These difficulties could fundamentally undermine the purpose of the protection granted to hosting platforms under Article 14. This is a problem which will now be examined.

Proactive measures and the eCommerce Directive

For hosts to avoid liability under the eCommerce Directive they must fulfil two conditions: (1) not play an active role in disseminating illegal content; and (2) quickly remove such content appearing on their services when they have direct knowledge of it.²⁶ These conditions are stated in Article 14 of the Directive and have been further clarified by the Court of Justice of the European Union (CJEU).²⁷ Playing an active role involves the host using its services to promote illegal content, either through the host's knowing participation or through negligence.²⁸ The problem with voluntary proactive measures, as the Commission has outlined them, is that hosts will not be able to claim protection under Article 14 if they try to remove content but *fail*. If they have a voluntary automated system in place for removing illegal content, and this system fails to remove some content, then the platform can be deemed to be playing an active role and be held liable under Article 14.

This is precisely what happened in the case of *Delfi AS v Estonia*.²⁹ Delfi, an online newsportal, was held liable by the European Court of Human Rights (ECtHR) for hosting user content which was defamatory and hateful. Part of the ECtHR's decision hinged on that fact that the newsportal had taken measures to prevent hateful user content appearing on its service, but its automatic filtering system had failed to filter it.³⁰

The Commission is oddly silent on this liability problem with proactive measures; not in any of its many communications is it addressed. All it argues is that, by providing general proactive measures, the hosting platform cannot be deemed to play an active role and is therefore consistent with Article 14.

25 See Christina Angelopoulos, 'On online platforms and the Commission's new Proposal for a Directive on copyright in the Digital Single Market' (6 April 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800> (6 May 2017); and European Parliament Conference, 'Better Regulation for Copyright: Academics Meet Policymakers' (6 September 2017) <https://juliareda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf>.

26 See C-236/08 *Google France SARL, Google Inc v Louis Vuitton Malletier et al* [2010] and C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011].

27 Article 14 only states that intermediaries must not have actual knowledge but the CJEU has interpreted this to mean that playing an active role is sufficient to grant knowledge, see Elconora Rosati (2016) 'Why a reform of hosting providers safe harbour is unnecessary under EU copyright law' 38(11) *European Intellectual Property Review* 668–76.

28 *L'Oréal v eBay* (n 26).

29 *Delfi AS v Estonia*, App No 64569/09 (ECtHR, 16 June 2015).

30 *Ibid* [152] [156] and [157].

[T]he mere fact that an online platform takes certain measures relating to the provision of its services in a general manner does not necessarily mean that it plays an active role in respect of the individual content items it stores and that the online platform cannot benefit from the liability exemption for that reason. In the view of the Commission, such measures can; and indeed should, also include proactive measures to detect and remove illegal content online, particularly where those measures are taken as part of the application of the terms of services of the online platform.³¹

The Commission then goes on to invite the liability problem by saying that hosts can only avoid liability if they immediately remove illegal content upon discovering it.

[T]he online platform continues to have the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness. Where it does so, the online platform continues to benefit from the liability exemption pursuant to point (b) of Article 14(1). Therefore, concerns related to losing the benefit of the liability exemption should not deter or preclude the application of the effective proactive voluntary measures that this Communication seeks to encourage.³²

So, the Commission wants hosts to undertake proactive measures voluntarily and it assures them that, if these measures are effective, then they will be able to claim the liability exemption guaranteed under Article 14. But there are good reasons to believe that using proactive removal mechanisms will lead hosts to fail to remove content.

For one, the automated filtering technologies that the Commission has advocated are expensive and time-consuming to develop. This could very well lead platforms to construct poor quality filtering systems which fail to detect content.³³ YouTube's 'Content ID' famously cost the platform around \$60 million to construct.³⁴ Although not every platform would have to deal with the same amount of content as YouTube (which in 2015 was estimated as having over 300 hours of content uploaded every minute),³⁵ it was able to construct such a system because it had the financial backing of investors which many smaller hosts will simply not be able to attract.³⁶

There are also problems with preventing the re-upload of content. Filtering mechanisms have been known to fail to identify duplicates of content which have already been filtered out by the system.³⁷ If duplicates of relatively simple content such as audio files or images are not filtered by these systems, then it is to be expected that more complex and contextually dependent content such as hate speech or incitement to

31 'Tackling Illegal Content Online', s 3.3(3.3.1.) (n 1).

32 Ibid.

33 See Evan Engstrom and Nick Feamster, 'The limits of filtering: a look at the functionality and shortcomings of content detection tools'(2017) (March) Engine <www.engine.is/the-limits-of-filtering>.

34 Ibid.

35 <www.theguardian.com/technology/2015/feb/13/youtube-10-years-old-evolution-of-online-video?CMP=fb_gu> (13 February 2015).

36 Engstrom and Feamster (n 33).

37 For problems with automated filtering see Daphne Keller, 'Problems with filters in the European Commission's platforms proposal', (Centre for Internet and Society 5 October 2017) <<http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>>.

terrorism will slip through the filters with even greater ease.³⁸ The Commission's desire for voluntary proactive measures is an invitation for platforms to lose Article 14 immunity.

Does this mean that proactive measures and Article 14 are necessarily incompatible? Maybe not. The Commission could follow the approach to hosting liability taken in the USA where hosting platforms are granted protection for 'Good Samaritan' practices under s 230 of the Communications Decency Act (CDA 230).³⁹ This enables hosts to avoid liability with 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable'.⁴⁰ The key phrase here is in *good faith*. Hosts are protected from liability if they try to remove the illegal content even if they are not able to remove it all.

If the Commission were to follow this approach it would, however, have to ensure that hosts did not engage in the over-removal of content. Under CDA 230 hosts in the USA have a tendency to remove legal content as well as illegal content through their Good Samaritan exercises.⁴¹ Content which does not abide by a host's, privately constructed, community standards is removed without the host necessarily considering its speech value. This is especially the case when content is controversial and deemed by the platform to be hateful or offensive. As providers of private services, hosts have the final word on what gets to stay on, and what gets removed from, their platforms. Unlike DMCA (Digital Millennium Copyright Act) notices for copyright, which are able to be challenged through counter-notices and the content reinstated, there is no effective counter-takedown system for content covered by CDA 230.

The problems with CDA 230 and private ordering of content could, however, be mitigated in a variety of approaches consistent with the Commission's implementation of proactive measures. There are an ever-growing number of regulatory frameworks which could curb host enthusiasm for privately enforced content removal, including self-regulation, co-regulation and meta-regulation.⁴² Self-regulation would combat private regulation of speech by requiring hosts to voluntarily draft a code of conduct which details responsible measures for removing illegal content.⁴³ The hosts would also need to construct an independent, third-party ombudsman tasked with ensuring that they abide by the code. Conformity with the code would be encouraged through disciplinary powers

38 Hate speech is something which courts themselves often find difficult to identify, see *LA v Turkey*, App No 42571/98 (ECtHR, 13 September 2005); *Lindon, Otchakovsky-Laurens and July v France*, App Nos 21279/02 and 36448/02 (ECtHR, 22 October 2007); *Féret v Belgium and Perinçek v Switzerland*, App No 27510/08 (ECtHR, 15 October 2015) in D Voorhoof and E Lievens, 'Offensive online comments, Delfi confirmed but tempered' (*Inform: The International Forum for Responsible Media Blog*, 17 February 2016) <<https://inform.org/2016/02/17/offensive-online-comments-delfi-confirmed-but-tempered-dirk-voorhoof-and-eva-lievens>>.

39 Communications Decency Act, 47 USC §230(c) (1996).

40 Ibid §230(c)(2)(A).

41 See Daphne Keller (2015) 'Empirical evidence of "over-removal" by internet companies under intermediary liability laws' (Centre for Internet and Society, 12 October) <<https://wilmap.law.stanford.edu/news/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>> (12/10/18).

42 For some different approaches to regulation, see: <<https://inform.org/2018/07/15/house-of-lords-communications-committee-inquiry-the-internet-to-regulate-or-not-to-regulate-an-overview-of-the-evidence-part-1-oscar-davies>> (15 July 2018).

43 For more on self-regulation, see D Tambini et al, 'The privatisation of censorship: self regulation and freedom of expression', in D Tambini et al, *Codifying Cyberspace: Communications Self-regulation in the Age of Internet Convergence* (Routledge 2008).

appointed to the ombudsman by the hosts themselves. These could take the form of financial penalties or other proportionate sanctions.⁴⁴

Similar to self-regulation, co-regulation is able to avoid dubious private regulation through the use of an industry-wide code of conduct and an ombudsman. However, in a co-regulatory framework the burden of regulation is shouldered by both stakeholders and government.⁴⁵ The involvement of the government may extend to the implementation of a code of conduct and ombudsman through legislation. Governmental involvement can also ensure that the ombudsman receives funding, as well as that the ombudsman is granted the necessary sanctioning powers to enforce the code.⁴⁶ This grounding in the legislative process ideally prevents the code and/or ombudsman from being overly tailored to the industry's interests.

Meta-regulation also involves governmental involvement, but in a less direct way than co-regulation. In meta-regulation, the government's role is limited to setting targets for hosts to meet by self-regulatory initiatives.⁴⁷ This means that hosting platforms could set up an ombudsman according to their own preferences, but it would have to meet regulatory targets decided by the state. Government could also ensure that users and hosts have established appeal mechanisms which could be enshrined through legislation.⁴⁸

Ultimately, the difficulty for the Commission will be in choosing a solution which is not only broadly consistent with the eCommerce Directive, but is also able to effectively prevent the distribution of illegal content. Whatever approach it ends up implementing, it is crucial that the best balance is struck between the restriction of illegal content and promotion of user free speech. This will not be an easy task and will require the engagement of academics, industry stakeholders and legislators from around the world. There is currently no clear choice; there is, however, plenty of work to be done.

44 This is the model of regulation used by many European member states for the regulation of their respective print press. There are a variety of ways of implementing such a system, see D Tambini et al, 'Reforming the PCC: lessons from abroad', (LSE Media Policy Project, *Media Policy Brief 6 – Reforming Journalism Self-Regulation*, June 2012) <www.lse.ac.uk/media@lse/documents/MPP/Policy-Brief-6-Replacing-the-PCC.pdf>.

45 Broadcasting is the most established example of a media industry operating under a co-regulatory model in Europe, see Eric Barendt et al, *Broadcasting Law and Fundamental Rights* (Oxford University Press 2013, first published 1997).

46 For application to audiovisual media, see 'Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services', recital 7a (n 14).

47 There are, however, various ways to interpret a framework of meta-regulation, see Cary Coglianese and Evan Mendelson 'Meta-regulation and self-regulation' in *Oxford Handbook of Regulation* (Oxford University Press 2010).

48 For more on meta-regulation, see Jacob Rowbottom (2018) 'If digital intermediaries are to be regulated, how should it be done?' (*LSE Media Policy Project Blog*, 16 July 2018) <<http://blogs.lse.ac.uk/mediapolicyproject/2018/07/16/if-digital-intermediaries-are-to-be-regulated-how-should-it-be-done/>>.

